

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 374  
3084636

BETWEEN

LEILA MCLEOD  
Applicant

AND

TOKAANU-TURANGI &  
DISTRICTS MEMORIAL  
RSA INCORPORATED  
Respondent

Member of Authority: Marija Urlich

Representatives: Adam Mapu, for the Applicant  
David McLeod, for the Respondent

Investigation Meeting: 23, 24 June 2020 and 12 April 2021

Submissions and further information received: 1 May and 29 June 2021, from the Applicant  
20, 29 April and 23 June 2021, from the Respondent

Determination: 25 August 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Leila McLeod was employed by Tokaanu-Turangi & Districts Memorial RSA Incorporated (the Club) in the position of Club Manager from 2 June 2016 until her employment ended in October 2019. In this role she managed the bar, gaming area and entertainment, managed staff and provided monthly reports to the Club's executive committee.

[2] This employment relationship problem arises from a personal grievance Ms McLeod raised concerning the conduct of a committee member towards her and the Club's attempts to implement changes in its structure which impacted on Ms McLeod's

position. She says the actions of the Club have unjustifiably disadvantaged her in her employment and resulted in her unjustified constructive dismissal. She also says the actions of the Club after her employment ended have damaged her reputation in the community and impeded her securing employment. Ms McLeod seeks remedies including reinstatement to the position from which she was dismissed, lost wages for forty-four weeks, compensatory damages for hurt feelings consequent to her disadvantage grievance and dismissal and a penalty for breach of the duty of good faith and failure to protect her safety at work and follow a problem solving procedure. She seeks special damages for legal fees incurred. She also says the following payments are due and owing - balance of final pay of \$5,120.90, alternative holiday pay of \$4,730.63, overtime hours of \$9,877.20 and holiday calculation of those sums of \$1,168.63.

[3] The Club denies Ms McLeod was unjustifiably disadvantaged or unjustifiably dismissed. It says Ms McLeod's bullying and harassment complaint was immediately dealt with and the conduct not repeated. The Club says Ms McLeod's actions led to her employment ending including making unauthorised payments to herself and seeks to recover \$8,000 of unauthorised payments, overpaid annual leave of \$8,131.47, public holiday entitlements of \$1,050.73. The Club denies any breach of the employment agreement because a formal restructure as described at clause 12 of the parties' employment agreement was not initiated.

### **The Authority's investigation**

[4] The parties filed witness statements and relevant documents in accordance with timetabling directions. The Authority heard evidence from:

- Ms McLeod,
- John Grattan,
- Sherrill Madson,
- Shona Wilkie,
- Moera Henry;
- Patricia McPherson;
- Alan Findley;
- Ken Jellyman,
- Gordon Lewis;

- Hokowhituatu McKenzie;
- John Smith; and
- Michael Wade.

[5] The investigation of Ms McLeod's application was adjourned part heard in July 2020. The adjournment was necessary when the Authority became aware related criminal proceedings were afoot. The charges against Ms McLeod were withdrawn in November 2020. The resumption of the investigation meeting was then scheduled for early March 2021 but that date was vacated due to a Covid-19 lockdown. The delays, though unavoidable, have been very unfortunate and the Authority acknowledges the impact on the parties.

[6] On 21 December 2020 Ms McLeod lodged an application for interim reinstatement. The application was unsuccessful.<sup>1</sup> For completeness I record applications to join Mr Jellyman and Mr Gordon have been withdrawn.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The employment agreement**

[8] The parties' written individual employment agreement (the IEA) includes:

3. Employer's duties

The Employer Shall:

- A. Act as a good employer in all dealings with the employee and for the purpose of this Agreement. A good employer is an employer who treats employees fairly in all aspects of their employment.
- B. In recognition of the employee being employed by a committee, provide a supervisor to act as a single point of contact in respect of all employment matters ...
- C. Provide the employee with good working conditions and all reasonable facilities to enable the employee to carry out the employee's duties properly.
- D. Use its best endeavours to provide a safe, congenial and comfortable working environment.

---

<sup>1</sup> *McLeod v Tokaanu-Turangi & Districts Memorial RSA Inc* [2021] NZERA 19.

[9] Clause 4 of the IEA provides salary is to be paid weekly and that the rate of remuneration is to be reviewed annually by 14 May and by 14 May a performance review is to be completed. Clause 5 sets out the hours of work:

- A. The Employee's normal hours of work shall be 40 per week. The Employee shall determine the hours and days of work subject to the requirements of the position.
- B. The Employer may require the Employee to work additional hours in order that the job is performed effectively. Due to the nature of the position such additional hours are included within the remuneration set out in Appendix B with a ceiling of 4 hrs per week on average. Where the average is exceeded in any quarter then time in lieu shall apply. A quarter is defined as three (3) monthly period starting from the commencement of this agreement.
- C. The employee shall be responsible for recording any overtime worked and keeping the Supervisor informed of time in lieu requirements.

[10] With respect to personal grievances and disputes clause 9 includes:

...

- B. If the employee feels there is an employment relationship problem the matter is to be raised with the supervisor. The supervisor is to bring the matter to the Club's attention and all efforts made to resolve it as soon as possible after the event.

[11] A procedure for raising a personal grievance is then outlined in clause 9 starting with raising any personal grievance with the supervisor or, if the employee wished, raising it directly with the Club.

[12] Clause 11 of the IEA deals with termination of employment and includes four weeks' notice of termination or four weeks' pay in lieu of forfeiture of notice. An employee may be dismissed summarily for serious misconduct which is defined as:

- Wilfully or repeatedly breaching the provisions of the agreement
- Convictions in a court of law of an offence involving dishonesty
- Any conduct that bring, or is likely to bring, discredit on the Association
- Wilfully disregarding the decisions, direction and or policies of the Executive
- Failing to abide by the Association's Constitution, Rules and Policies

[13] Clause 12 deals with reorganisation and redundancy and includes:

- B. The employee shall be consulted and have the opportunity to respond to the employer on any reorganisation proposal, such proposal to be notified to the employee in writing by the employer.

- C. Should reorganisation result in the creation of a new position similar to previous position the employer shall offer the employee the right to take up the new position before the position is advertised as vacant.
- D. Should reorganisation result in no similar position being created the employer shall offer the employee redundancy.
- E. It is agreed that four (4) weeks redundancy payment shall be required to be paid by the employer where the employee has been made redundant.

[14] Ms McLeod's position description, appendix "A" to the IEA, includes:

The Executive shall from time to time delegate authority to the Secretary/Manager to enable the discharge of duties without undue reference to the Executive.

[15] Appendix "C" to the IEA includes in the position purpose for Ms McLeod's role that "Contracts exceeding \$5,000 with any one organisation have prior approval of the Executive."

### **Issues**

[16] The issues requiring investigation and determination are:

- a. Did Ms McLeod suffer an unjustified disadvantage in her employment arising from the matters set out in her 19 September 2019 personal grievance?
- b. Was Ms McLeod unjustifiably constructively dismissed on 2 October 2019?
- c. In the alternative, was Ms McLeod unjustifiably dismissed on 8 October 2019?
- d. If Ms McLeod was unjustifiably disadvantaged and/or unjustifiably (constructively) dismissed, what remedies should be awarded, considering:
  - i. Lost wages under s 123(1)(b) of the Act;
  - ii. Compensation under s 123(1)(c)(i) of the Act.
- e. If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms McLeod that contributed to the situation giving rise to his grievance?

- f. Did the Club's statement dated 9 January 2020 breach any duty owed to Ms McLeod such duty surviving termination?
- g. If the Club has breached a duty owed to Ms McLeod during or after termination for which the award of a penalty is warranted?
- h. Is Ms McLeod owed arrears of wages for final pay of \$5,120.90 and/or overtime hours of \$9,877.20?
- i. Is Ms McLeod owed arrears for alternative holiday pay of \$4,730.63?
- j. Is Ms McLeod entitled to holiday pay calculation on any arrears awarded?
- k. Is the Club entitled to be reimbursed for overpaid annual leave of \$8,131.47 and public holiday entitlements of \$1,050.73?
- l. Is the Club entitled to be reimbursed \$8,000 in unauthorised payments?
- m. Should interest be calculated on any award of arrears?
- n. Should either party contribute to the costs of representation of the other party?

## **Background**

### *19 September - Ms McLeod raises a personal grievance*

[17] At a committee meeting on 19 September 2019 Ms McLeod presented a letter under her name raising a personal grievance for unjustified action causing disadvantage. The letter outlined alleged unjustified conduct of an executive member towards her and other members which she characterised as “racial discrimination, indirect bullying, weight and sexual discrimination and the stress of possibly losing my employment”. The letter included specific instances of the alleged conduct towards her, Club members and members of the wider community and stated she had raised her concerns verbally with executive members but no action had been taken. Ms McLeod stated in the letter she had tried to disregard the conduct for some time but when it was directed at other members she felt she had to take action. In the letter she said the conduct had caused her to lose confidence and she had lost trust and confidence that the executive member could represent the Club “in a non-judgmental manner”.

[18] In the letter Ms McLeod asked the Club to investigate her concerns and respond within 10 days.

[19] On 22 September the executive committee met to discuss Ms McLeod's letter. The executive member the subject of Ms McLeod's complaint was present at the meeting. The minutes record a committee member saying "it was not a personal grievance". This view is based on comments allegedly made by Ms McLeod during the 19 September meeting. The meeting agreed to appoint a mediator to try to get resolution between Ms McLeod and the executive member.

[20] On 27 September Mr Jellyman, the Club President, wrote to Ms McLeod acknowledging she had raised a personal grievance and inviting her to attend a mediation. The letter said Mr Jellyman would set up the mediation with an independent mediator which would be between Ms McLeod, the executive member and their respective support people. He said he hoped Ms McLeod would agree to go to the mediation and recorded a final warning had been issued to the member "...that any future instances of such behaviour will result in your conduct being referred to the Club's Disciplinary Committee". The warning letter is dated 20 September 2019. It appears from the letter Mr Jellyman has discussed Ms McLeod's complaint of bullying and discriminatory behaviour with the member, the member has acknowledged the behaviour and accepted the warning.

[21] There was no further discussion between the parties on this issue until a text message exchange between Mr Jellyman and Ms McLeod on the afternoon of Saturday 5 October when he asked her if she wished to continue with the mediation to which she replied "Yes". Mr Jellyman texted he would contact her further about that issue the following week but, as set out below, subsequent events took priority.

*2 October – Ms McLeod is advised of the Club review*

[22] On Wednesday 2 October, Flash Admin and Taxation Services Limited ('Flash Ltd'), a local business offering such services in the Taupo area, wrote to Mr Jellyman proposing administration services to the Club for an initial 3 month period with a specified price to commence 7 October. The letter was not unsolicited, it records the proposal was made following discussions with the Club. The services offered include

review and redevelopment of financial processes at the Club, training and support for Club staff and executive and:

- design a structure appropriate to the Club's current and future needs;
- carry out recruitment to meet the requirements on any new structure.

[23] Later that same day Mr Jellyman met with Ms McLeod and advised her her employment as Club manager was to be reviewed and gave her two options – accept a bar staff role on reduced hours or take three month's severance pay. I am satisfied Mr Jellyman initiated a discussion with Ms McLeod which resulted in an understanding that her employment would end, that she would not have to work out her notice period and she would be paid three months' usual pay. Though there was a lack of clarity about when the payment would be made the Club dismissed Ms McLeod at this meeting.

[24] Ms McLeod's evidence on this was clear and aligns with that of Mr Jellyman who included in his written witness statement dated 20 March 2020:

“She [Ms McLeod] then raised the idea of her leaving TTRAS [the Club] after the three months of the review. I asked her if she would be happy working in those circumstances to which she replied, no. I then suggested it might be an option to finish now in that case; she agreed to my suggestion.”

[25] It also aligns with the Club executive minutes of 5 October 2019:

Ken and Accountant have been through books, wants to come in and check everything is going over three-month period. He also wants to look at Review and Restructure...At 5pm had meeting with Leila. During the conversation it was explained that her position would be reviewed.

[26] With respect to how Ms McLeod could finish without working out her notice the same minutes record Flash Ltd's proposal as accepted and in answer to a question about who will run the club Mr Jellyman is minuted as saying:

Flash is going to come in and run the Club over a 3-month period. He won't be here every day, but he will look after staffing

[27] The meeting then passed a resolution for Mr Lewis and another executive member to be nominated signatories to the Club bank accounts.<sup>2</sup> Later on 2 October, at 7.23pm, Ms McLeod emailed Mr Jellyman copying in John Grattan, the Club's vice president:

---

<sup>2</sup> Gordon Lewis is the director of Flash Ltd and is known as 'Flash'.

Hi Ken

From our conversation at the Club this afternoon I am of the understanding that you want me to be demoted to bar staff for 15 – 20 hours a week or take 3 months pay and leave quietly.

Can you please confirm this as I do not want to action the 3 months' pay and then be accused of unauthorized (sic) action.

Kind regards

[28] In this email Ms McLeod seeks to confirm the terms on which her employment is to end.

*3 October*

[29] Ms McLeod did not receive a response from Mr Jellyman before taking steps to process her final pay the morning of the following day, Thursday 3 October. She attended the office, calculated her final pay and, with Mr Grattan acting in his role as co-authoriser, loaded the payments. There was an immediate payment of \$8,000 and a further payment of \$12,000 loaded for processing at a future date. Ms McLeod said the pay was automatically calculated and included pay processing for other staff. This pay processing was out of the usual cycle because, Ms McLeod and Mr Grattan said in their evidence, they were both away that weekend which is accepted.

[30] At about the same time Mr Jellyman texted Ms McLeod asking to meet that morning and that he had a letter for her. He had drafted the letter with the assistance of Mr Gordon who was to carry out the contracted work. The letter sets out the terms on which Ms McLeod's employment with the Club will end.

[31] Just after 10am Mr Jellyman arrived at the Club, spoke with Ms McLeod who was in the office with Mr Grattan, and they agreed to meet at 11am. He says he asked what Ms McLeod was doing and was told she was deleting personal emails.

[32] At the 11am meeting Ms McLeod told Mr Jellyman she had paid everyone up to Monday 7 October. He did not ask her what she meant by this. He then gave Ms McLeod the letter which set out how her employment would end including calculation of her final pay:

On the 2/10/19 at a meeting with you I laid out the intended pathway forward for the Club.

This included the probability that there would be a reduction in hours available to you and, in recognition of that change and as an option for you to consider should you not wish to accept reduced hours, an offer of compensation over and above that provided for in your Individual Employment Agreement was made. That offer was made on a without prejudice basis.

During the course of the meeting you elected to take three month's salary in settlement and leave the RSA.

The settlement figure is made up of four weeks leave in lieu of notice per your IEA and an additional 8 weeks salary as goodwill from the RSA. Any untaken annual leave entitlement will also be paid out per your IEA.

The Club will be happy to provide you with a reference should you request one.

A condition of the settlement as offered (again, on a without prejudice basis) is that you return all keys to the RSA to me personally and provide me with a list of all passwords and access codes (banking systems, Xero, etc).

Your written acknowledgement of the terms of our agreement would be appreciated.

The Club will provide you with a calculation of your final pay including settlement terms as laid out above and this will be paid out as soon as is practicable, given that the settlement of the Club's flats at Mitiotu Grove has not yet occurred.

Please direct any queries regarding this matter to me personally.

[33] Ms McLeod told him she would not sign it then, because she needed more time to think and took a copy with her. She handed over her keys and a hand written record of computer and banking codes.

[34] Mr Jellyman followed up with Ms McLeod about the letter and asked for the computer security codes which were provided, after further request, by the late afternoon of Friday 4 October. There was also an exchange between them about the Club providing Ms McLeod a reference.

[35] In the meantime Ms McLeod had sought advice about her employment situation and by letter dated 4 October her representative wrote to Mr Jellyman in his capacity as Club president raising personal grievances for unjustified actions causing disadvantage and unjustified constructive dismissal. The unjustified actions related to Ms McLeod's 19 September personal grievance. The unjustified constructive dismissal

relates to Mr Jellyman's advice to Ms McLeod that her role was to be reviewed and the offer of a bar staff role on reduced hours or three month's pay to end her employment. The letter also included:

On 3 October 2019 at 9.32am you sent a text to Leila advising that you had a letter for her.

Leila was at work processing the final pay for a staff member. At this time she reluctantly processed a partial payment as per your terms that you presented to her on 2 October. At approximately 10.30am you arrived at the RSA and advised Leila that you wished to provide her with a letter. She asked that you return at 11am, as she was busy working.

[36] The letter was sent by courier to the Club and was not received by Mr Jellyman until 9 October.

*4 October*

[37] On 4 October Ms McLeod submitted a medical certificate certifying her unfit for work for seven days from 3 October.

*5 October*

[38] On Saturday 5 October Mr Lewis was reviewing the Club's Xero ledger and found the final pays processed by Ms McLeod on 3 October. Mr Lewis drew this to Mr Jellyman's attention. The Club's view was these payments were unauthorised and a letter was drafted advising Ms McLeod she was summarily dismissed. The Club does not appear to have considered the implications of this action given it had already terminated Ms McLeod's employment.

*8 October*

[39] On Tuesday 8 October at 12.37pm Ms McLeod emailed Mr Jellyman:

If the balance of my final pay goes in tomorrow I would like to set a time with you at four or when you are finished work to give you a copy of the signed letter pick up my reference and then spend 20 to 30 minutes with you showing you passwords how to get into things and maybe doing the pays for Monday if you haven't figured that out yet.

After you completely blindsided me last week. I have been sad angry and now I'm at acceptance and I just want that part finished with so I can move on.

*9 October*

[40] On 9 October a letter dated 8 October purporting to summarily dismiss Ms McLeod for serious misconduct was hand delivered to her at her residence. Also, that day Ms McLeod's personal grievance letter for constructive dismissal was delivered to Mr Jellyman.

*Events after Ms McLeod's employment ended*

[41] About a month after Ms McLeod's employment ended at the Club she heard rumours in the community that she had been dismissed because she had stolen money from the Club.

[42] On 9 January 2020 the Club issued a notice to members setting out the Club's position in respect of Ms McLeod's dismissal. The note purports to provide members with an update as to current events. Detailed in the note are the events leading up to and including Ms McLeod's dismissal including the Club's view of the financial circumstances of the Club as to the need for restructuring, Mr Jellyman and Ms McLeod's 2 October meeting, that Ms McLeod had made unauthorised payments to herself and that this was the basis of her dismissal. The note sets out the basis of Ms McLeod's personal grievance and that the parties had attended mediation without resolution and the matter was to proceed to the Authority. Ms McLeod did not consent to this note being issued and her consent was not sought by the Club.

[43] Ms McLeod says subsequent to the note being issued her new employer removed her cashing up duties. She says this is not a coincidence and undermined her new employment.

**Discussion**

*The test for justification*

[44] When the Authority considers justification for the Club's actions and the dismissal it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of (in this case) a dismissal the Authority does not consider what it may have done in the circumstances. It is

required to consider on an objective basis whether the actions of the Club and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[45] The Club could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[46] In assessing the justifiability of a dismissal for redundancy the Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether the employer's actions were reasonable. If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.<sup>3</sup>

*Has Ms McLeod established a personal grievance for unjustified actions causing disadvantage?*

[47] The Club did not dispute the concerns raised in Ms McLeod's personal grievance letter dated 19 September 2019.

[48] Ms McLeod has established she was subject to the conduct complained of in the letter, that she had raised her concerns about the conduct with the Club before writing the 19 September letter and that the Club took no substantial action to address those concerns prior to Ms McLeod raising her personal grievance on 19 September.

[49] The conduct complained of negatively impacted on Ms McLeod's wellbeing at work and the Club's failure to take reasonable steps to stop it when it was brought to its attention was a failure of its duty to Ms McLeod to provide a safe workplace free from harassment. Ms McLeod has made out her personal grievance that she was unjustifiably disadvantaged in her employment.

[50] The Club may say Ms McLeod compromised her claim at the 19 September meeting by saying "this was not a personal grievance" as recorded in the minutes and that it has discharged its obligations to Ms McLeod in respect of the personal grievance as she wished - by raising the concerns with the executive member, issuing him with a

---

<sup>3</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

written warning and taking steps to set up a mediation between him and Ms McLeod to assist them to resolve their differences. These steps did not resolve Ms McLeod's personal grievance because the evidence is not sufficient to establish matters were settled between the parties.

[51] It is apparent the Club quickly formed the view Ms McLeod's concerns were an inter-personal matter between herself and the executive member and that the Club saw its role was to facilitate resolution of those issues. It is not apparent on the evidence that the Club, as Ms McLeod's employer, has investigated the concerns, considered whether any of its actions or inactions may have contributed to those concerns and responded to Ms McLeod. Having received notice of her personal grievance the Club was obliged to carry out such an investigation and in failing to failed in its duty to Ms McLeod.

[52] Ms McLeod has established a personal grievance for unjustified action causing disadvantage in respect of the matters raised in her 19 September letter.

*Has Ms McLeod established a personal grievance for unjustified dismissal?*

(i) *How did Ms McLeod's employment to end?*

[53] This is the first question for consideration because of the events post Ms McLeod's dismissal which led to a purported dismissal for serious misconduct on 8 October 2021. In *GFW Agri-Products v Gibson* [1995] 2 ERNZ 323 at 329 the Court of Appeal considered the question of when employment comes to an end when an employee is told their employment is to be terminated and then paid until a future date without being required to work during that period:

It is a mixed question of fact and law as to when a contract of employment comes to an end. A "payment in lieu of notice" is equivocal: *Delaney v Staples* [1992] 1 AC 687, 692. It may be that there is a summary dismissal putting an end to the employment relationship with the payment being, in effect, on account of damages for breach by failure to give proper notice. It may be on the other hand that the employment relationship continues with the payment of wages until the end of the period of notice though the employee is not required to attend for work. In the present case the company's letter of 20 December 1991 indicates there is no immediate payment of a lump sum in lieu of notice but an undertaking to pay the month's salary and holiday pay should the house be vacated prior to 10 January which was specified as the "final date of employment".

[54] This was a similar situation faced by the parties – on 2 October Mr Jellyman told Ms McLeod her employment was to end and their discussion then turned to how it would end – one month’s notice with an additional payment of two months’ usual pay. There was no other condition. This is how Ms McLeod’s employment ended, with immediate effect and the payment was to be made in lieu of working out her notice period. The details around how the payment in lieu would be made was untidy and this untidiness has caused complications for the parties.

[55] This is not a constructive dismissal - Ms McLeod was not given an option to resign or be dismissed. She was dismissed.

(ii) *Was the 2 October discussion held on a without prejudice basis?*

[56] The 3 October letter from the Club to Ms McLeod recording the discussion of the 2 October describes the offer of three month’s pay in exchange for Ms McLeod’s employment ending as having been made on a without prejudice basis. The Club is not pursuing this issue but for completeness the evidence does not support a finding that the essential elements have been met for communications to be afforded without prejudice protection.<sup>4</sup>

(iii) *Was Ms McLeod’s dismissal unjustified?*

[57] Yes. The Club sought to meet with Ms McLeod on 2 October because a review of Club management, policies and procedures was about to commence and it was likely to impact significantly on Ms McLeod’s role. This was the start of a restructuring process.

[58] The Club initiated a discussion with Ms McLeod, likely motivated by a desire to mitigate any negative impact of the restructuring on her, which has resulted in her dismissal. This dismissal was deficient in both process and substance. A fair and reasonable process could usually be expected to involve an employer putting to an effected worker a proposal that their position is no longer required and the reason why supported by relevant information. The effected worker would then be given a fair opportunity to consider the proposal and make comment. The worker’s comments would then be considered and only then would a decision on the proposal be made. If

---

<sup>4</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340.

the decision is to make the position redundant then the next question is what will happen with the employment agreement between the worker and the employer. There may be redeployment opportunities to consider or notice of dismissal may be given under the terms of the employment agreement. Indeed, under clause 12 of the IEA the parties had agreed how such a process would operate. The Club did not follow this process.

[59] Ms McLeod was not given a fair chance to comment on the proposal to restructure her position. These failures were in breach of the express terms of Ms McLeod's employment agreement, breached the s 103A justification test and breached the obligation of good faith the Club owed Ms McLeod under s 4 of the Act. The failures were not minor and were not the actions a fair and reasonable employer could have taken in all the circumstances.

## **Remedies**

[60] Ms McLeod has established personal grievances for unjustified actions and unjustified dismissal. She is entitled to a consideration of the remedies sought.

### *Reinstatement*

[61] Reinstatement is the primary remedy in proceedings for unjustified dismissal.<sup>5</sup> It must be awarded unless it is not practicable or it is unreasonable to do so.<sup>6</sup>

[62] Ms McLeod submits reinstatement is reasonable and practicable as the current Club Manager is a contractor, Ms McLeod is eligible for a gaming license, the Club has not established any reasonable basis to say there has been a breakdown of trust and confidence between the parties and to assist Ms McLeod to re-enter employment with the Club she proposes the parties agree a policy. Ms McLeod also says her family circumstances emphasise the importance of reinstatement to her and that she was a loyal employee of some years.

[63] The Club submits reinstatement would be neither practicable nor reasonable. Since Ms McLeod's employment ended the Club has undergone a restructure and change of personnel, the position she held no longer exists and has been split between two roles the combined remuneration for which are not at the level of Ms McLeod's

---

<sup>5</sup> Employment Relations Act 2000, s 123(1).

<sup>6</sup> Employment Relations Act 2000, s 125(2).

salary. The Club is doubtful Ms McLeod would be granted a gaming license. There is a complete lack of trust between the parties that cannot be restored.

[64] The availability of a vacancy is not a requirement of reinstatement.<sup>7</sup> The considerations are practicability and reasonableness. The Club is a relatively small business which no longer employs anyone in the role Ms McLeod held when her employment ended. Costs have been cut to ensure the Club's financial viability and, I accept, employment of Ms McLeod at her salary level would be a financial burden. Without a gaming license Ms McLeod cannot do her former job with the Club. She currently does not hold one and though it is accepted she expects she would be granted one on application she would need the support of the Club. On the information before the Authority, that support cannot be assumed. For these reasons I find reinstatement would not be practicable.

[65] The restructuring of the Club after Ms McLeod's dismissal has not been carried out in the face of her wish to return to her employment – she did not seek reinstatement until some fourteen months after her dismissal and the restructuring occurred. By her own admission Ms McLeod exercised poor judgement in processing her own final pay without the express authorisation of the Club president. In submissions Ms McLeod has characterised some Club members as “dangerous”, imputed their actions to service of personal agendas and that outrageous and defamatory claims have been made against her by Club representatives. The Authority is not satisfied the employment relationship can be successfully re-established. These factors make it unreasonable to order reinstatement.

[66] Ms McLeod's application for reinstatement is declined.

#### *Reimbursement of lost wages*

[67] Ms McLeod seeks reimbursement of forty-four weeks earnings as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim is one year running from the date of dismissal, 2 October 2019, until date of hearing.

[68] The difficulty with this part of her claim is Ms McLeod secured a six-month fixed term role commencing 22 October 2019 at the same salary rate. This was well

---

<sup>7</sup> *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

within the notice period for which she was entitled to payment in lieu. The link between her personal grievance for unjustified dismissal and wages lost consequent to that has been severed by this employment.

### *Compensation*

#### *(i) unjustified action*

[69] The impact of the unjustified actions of the Club in failing to address Ms McLeod's concerns about the conduct of an Executive member has, I am satisfied, had a profound and negative impact on her. These effects have been aggravated by the Club's failure to fairly investigate the complaints. I am satisfied she experienced harm under each of the heads in section 123(1)(c)(i). She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to her dismissal of \$7,000.00.

#### *(ii) unjustified dismissal*

[70] Ms McLeod was dismissed as a consequence of a poorly handled restructuring process. As the Club secretary she was privy to detailed information about the Club's finances and was aware of the difficult financial situation the Club was facing. She was also aware of the scope of the review to be undertaken by Flash Ltd and was aware, at least in the broad sense, of the concerns Mr Gordon held about the Club's financial viability. The outcome of the restructuring was the disestablishment of the Club Manager role which Ms McLeod had held. I am satisfied she was aware of, and to some degree accepted the inevitability that her position at the Club was no longer viable.

[71] Notwithstanding, it is accepted Ms McLeod felt shocked and blindsided when Mr Jellyman told her employment was to end on 2 October.

[72] Again, it is accepted the impact of the restructuring process and the consequent dismissal has had a profound and negative impact on Ms McLeod. The Authority is satisfied she experienced harm under each of the heads in section 123(1)(c)(i). She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to her dismissal of \$10,000.00.

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms McLeod that contributed to the situation giving rise to his grievance?*

[73] Ms McLeod’s representative, by letter dated 11 November 2019, stated Ms McLeod “acknowledges that paying herself (with the approval of the vice president) was premature to agreeing an exit package; however, [she] was extremely stressed at the time and considered the alternative to dismissal was not appropriate and in her distressed state made a part payment in consideration of the offer to end her employment and be compensated for it.”

[74] Having established the payments were made after she had been dismissed, the issue to decide is whether Ms McLeod’s post dismissal conduct is a relevant s 124 consideration. In *Salt v Fell* the Court of Appeal discussed the effect of after-discovered misconduct, when that misconduct could not have “contributed towards the situation that gave rise to the personal grievance” (s 124(a)).<sup>8</sup> As the employer had no awareness of that misconduct at the time of the dismissal, it could not have been part of the “situation”. However, the court noted a party should not be able to benefit from his or her own wrong and concluded at [104]:

“The subsequently discovered information could not be taken into account under s 124, but could and should have been taken into account when determining wages reimbursement and humiliation compensation under s 123.”

[75] Applying the above principles to this matter a s 124 reduction is not warranted.

*Reimbursement of costs of representation in criminal matter?*

[76] It is accepted Ms McLeod has incurred costs in respect of the criminal matter. The Club or people associated with the Club may have laid the complaint but the decision to lay and withdraw the charges was one made by the prosecuting agency which, as would be expected, the Club was not involved in.

[77] The claim for reimbursement is declined.

---

<sup>8</sup> *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155.

*Should the Authority order the Club to pay a penalty?*

[78] A penalty has been sought for breach of the employment agreement and breach of the duty of good faith. Ms McLeod has established these breaches have occurred. The duty of good faith includes parties to an employment relationship being active and constructive in establishing and maintaining an employment relationship in which parties are responsive and communicative. The Club's conduct does not meet this standard for the reasons set out above however, I decline to exercise my discretion and award a penalty because in the circumstances of this case it would not be appropriate.

[79] The claim for a penalty for breach after the end of the employment relationship does not succeed – no surviving term has been identified.

### **Was Ms McLeod over or underpaid?**

[80] The Club says Ms McLeod was overpaid and seeks orders to recover \$8,000 of unauthorised payments, overpayment of annual leave of \$8,131.47 and public holiday entitlements of \$1,050.73. Ms McLeod seeks payment of the balance of her final pay of \$5,120.90, alternative holiday pay of \$4,730.63, overtime hours of \$9,877.20 and holiday calculation on those sums of \$1,168.63.

[81] The Authority has jurisdiction under the Act for a claim for reimbursement of overpayment as an employment relationship problem within the meaning of s 161(r) of the Act.<sup>9</sup> The jurisdiction for arrears is found in s 161(1)(g) of the Act.

### *The Club's overpayment claim*

[82] I have considered the information provided and the submissions and am not satisfied there has been any overpayment or if there has been that it is an overpayment the Club is entitled to claim. With respect to the claim of overpaid annual leave entitlements the claim has been calculated on a daily basis. This is a fundamental error – annual leave is calculated as a weekly entitlement.<sup>10</sup> In the alternative any overpayment could not be claimed under s 6 of the Wages Protection Act 1983 because the circumstances for recovery under that statutory scheme cannot be met. If the Club

---

<sup>9</sup> *Foai v Air New Zealand Ltd* [2012] NZEmpC 57.

<sup>10</sup> Holidays Act 2003, s 21.

seeks to reclaim the money on the basis of restitution (though not specifically claimed) then it must establish Ms McLeod was enriched through overpayment of wages, this was gained at the Club's expense and it was unjust.<sup>11</sup> If these elements are established there are defences available to Ms McLeod which would need to be considered.

[83] With respect to the annual leave and public holiday pay entitlements there is no evidence to suggest these payments were not authorised by the Club and there is insufficient evidence to satisfy the Authority the payments were caused by an error or miscalculation. In respect of the \$8,000, it is understood the Club says Ms McLeod's conduct was so egregious that it vitiated any agreement reached with Mr Jellyman to end her employment and the terms on which it would end. Such a finding is not supported by the evidence. While it is accepted Ms McLeod's conduct in not waiting for the authorisation from Mr Jellyman was imprudent the payment is what they agreed to and indeed what was offered in the 3 October letter.

#### *Ms McLeod's arrears claim*

[84] Clause 5 of the IEA sets out the parties' agreement as to overtime – for an average of more than 44 hours per week over a quarter (three months), time in lieu would be provided and Ms McLeod was responsible for recording “any overtime worked and keeping the Supervisor informed of time in lieu requirements”. The terms of the IEA does not provide for cashing up of the banked time in lieu. In the absence of such an agreement there is no contractual basis for untaken banked time in lieu hours to be paid out at the end of employment. For this reason Ms McLeod's overtime pay claim cannot succeed.<sup>12</sup>

[85] Ms McLeod's claim for unpaid alternative holiday pay of \$4,730.63 is allowed. The Club did not challenge this claim and on the information received she is entitled to the payments sought - Ms McLeod worked on the public holidays on which the alternative holiday entitlement is based and when her employment ended she had not taken the alternative holiday.<sup>13</sup>

---

<sup>11</sup> *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 90.

<sup>12</sup> For completeness Ms McLeod's claim is not for unpaid hours at the minimum wage rate. An employee in receipt of a salary is not excluded from coverage of the Minimum Wage Act 1983: *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25.

<sup>13</sup> Holidays Act 2003, s 60.

[86] Ms McLeod is entitled to the balance of her final pay of \$5,120.90 under the terms on which her employment ended as agreed with Mr Jellyman. For the reasons set out above that agreement stands.

### **Holiday pay**

[87] Ms McLeod's final pay would have included payment for remaining annual holidays to which she was entitled plus 8% of her gross earnings since her last anniversary less any advance annual leave. The arrears awarded above would have been included in that 8% calculation. Ms McLeod is entitled to holiday pay of \$788.12.<sup>14</sup>

### **Interest**

[88] Ms McLeod is entitled to an award of interest on the total wage arrears awarded including the holiday pay component. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement which in this case arose on Ms McLeod's final day of employment when her termination pay including holiday pay was due.

[89] It is appropriate where a person has been deprived of the use of money to make an award for interest.

[90] The Club is ordered to pay interest, using the civil debt interest calculator, within 14 days of this determination, as follows:<sup>15</sup>

- (i) Interest on the sum of \$10,639.65 from 2 October 2019 until the date payment is made in full.

[91] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

---

<sup>14</sup> 8% of \$9,851.53 = \$788.12.

<sup>15</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator)

## **Summary of orders**

[92] Tokaanu-Turangi & Districts Memorial RSA Incorporated unjustifiably disadvantaged Ms McLeod in her employment and unjustifiably dismissed her. The following orders are made:

- a) Within 28 days of the date of determination is to make the following payments to Ms McLeod:
  - i) \$17,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
  - ii) arrears of wages of \$5,120.90;
  - iii) arrears of alternative holiday pay of \$4,730.63; and
  - iv) arrears of holiday pay of \$788.12.
  
- b) Within 14 days of the date of determination Tokaanu-Turangi & Districts Memorial RSA Incorporated is to calculate and pay Ms McLeod interest on wage arrears and holiday pay as awarded in paragraph [90] above.

## **Costs**

[93] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Ms McLeod is to file and serve any costs memorandum within 28 days of the date of determination and the Club may file and serve any reply memorandum within a further fourteen days.

Marija Urlich  
Member of the Employment Relations Authority