

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 669
3155243

BETWEEN

SOFIA DANIELA CAMEJO
CÁCERES
Applicant

AND

MAUNGA HOREPA
CONTRACTORS LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Ramses Hunt, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 15 September 2022

Submissions received: On the day

Determination: 16 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Camejo commenced employment with the respondent (Maunga) in about May 2021 cleaning houses for Maunga's clients. There was a verbal agreement between Ms Camejo and a director of Maunga, Ms Moreira that Ms Camejo would work for 30 hours per week and have a work car to drive. There was no individual employment agreement (IEA). The relationship deteriorated.

[2] Ms Camejo became concerned she was not being given her 30 hours and from late July she was paid just over 40 hours per fortnight. In early August 2021 Ms Moreira took the car back and there was a dispute about this. Ms Camejo was sick for two days after which Ms Moreira told her she was not needed for the next two days even though Ms Camejo said she could work. Ms Camejo did not work again for Maunga. The reasons and circumstances about this are disputed. Work availability ceased due to the August 2021 level 4 COVID-19 lockdown in New Zealand (the lockdown). Ms Camejo asked for payment and again for an IEA. Maunga through its director, Ms Moreira sent a lengthy email including reference to problems with Ms Camejo's work and personal behaviour. Ms Camejo disagreed with the things raised.

[3] Maunga sent emails saying Ms Camejo had to decide if she would continue to work for Maunga, and then immediately dismissed Ms Camejo on 12 September 2021 saying the last day of employment was the 12 August 2021 when the "individual employment agreement automatically expired".

[4] Ms Camejo says she was unjustifiably dismissed for reasons that were not clear, and with no fair procedure.

[5] Ms Camejo says she was unjustifiably disadvantaged in her employment because Maunga stopped her using a work vehicle to get to and from cleaning jobs; failed to provide an IEA, time, wage and holiday records to her; did not provide her with work breaks during her shifts; told her she was not required to work amounting to an unlawful suspension; and failed to either provide work up to her agreed 30 hours or during the lockdown not paying her for these hours. She also says she had to undertake extra duties such as babysitting for Ms Moreira, cleaning her house, and listening to Ms Moreira's problems after her shifts ended.

[6] Maunga did not file a statement in reply and did not file evidence as directed. It did not participate in the investigation process in a meaningful way until what I find was likely

Ms Moreira emailed the Authority with a lengthy email (Maunga response) a short time before the investigation meeting which can be summed up as saying that:

- a. Ms Camejo was justifiably dismissed because she either abandoned her employment or was not performing in her work and was warned, or breached the IEA, or the employment was about to 'expire'.
- b. Ms Camejo was not disadvantaged in her employment because she agreed to work without breaks; was not made to do things outside of her role; was unavailable for work or agreed to work less than the minimum 30 hours per week; was not performing well in the job; and was not working as a team leader any longer therefore would not have the previously agreed use of the workplace vehicle to get to and from home to jobs or that the car was never for Ms Camejo to get to and from work or that she could have the car back if she worked extra hours.

The Authority's investigation

[7] The Authority held an investigation meeting. Ms Camejo appeared and gave evidence and answered my questions; her representative gave submissions based on a written synopsis. There was no appearance for the respondent.

[8] The Maunga response indicated that Ms Moreira would not attend any meeting due to health issues. The Authority promptly responded by saying that unless an adjournment request with supporting evidence was received from the respondent, the investigation meeting as scheduled would continue. There was no further communication from Ms Moreira or anyone representing Maunga. I am satisfied that all notices and directions have been sent to Maunga. Accordingly, the investigation meeting proceeded as scheduled without Maunga's further participation.

[9] To the extent that the Maunga response appeared relevant and could be reasonably understood I questioned Ms Camejo about its contents during the investigation meeting and have considered this material where relevant in this determination.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law and expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It does not record all evidence and submissions received.

The issues

[11] The issues are:

- a. Was Maunga justified under s 103A of the Employment Relations Act to dismiss Ms Camejo?
- b. Was Ms Camejo disadvantaged as a result of Maunga's actions during her employment?

Depending on the above:

- c. Is Maunga to pay compensation under s 123(1)(c)(i) of the Act?
- d. Is Maunga to reimburse Ms Camejo for lost wages under s123(1)(b) of the Act?
- e. Is Maunga to pay interest on any wages or holiday pay awarded to Ms Camejo?
- f. Are penalties to be ordered against Maunga and if so, should any portion be paid to Ms Camejo?
- g. Is there to be an order for costs?

Further background to the employment relationship problem

[12] The following background is the best I can ascertain from evidence before me relying on Ms Camejo's oral and written evidence, emails, and Ms Camejo's summary of text messages that she refers to in her 23 August 2021 email to Ms Moreira. Ms Camejo says the original texts are lost due to "phone issues" and she no longer has that phone. There were likely phone calls interspersed. Ms Camejo could not be clear about her memory of these discussions and Maunga did not provide clarity by not fully participating in the investigation. In terms of emails to Ms Camejo from Maunga while they do not all refer specifically to Ms Moreira as the sender and use the company name only as a sign off, I am satisfied that they

were likely sent from Ms Moreira. They all use informal language and speak as a first-person sender about matters directly relating to the working and informal relationship issues between Ms Moreira and Ms Camejo.

[13] Ms Camejo is from Uruguay and was in New Zealand on a working holiday when she answered an advertisement to work for Maunga. Ms Camejo and Ms Moreira met and discussed that there would be a minimum of 30 hours per week and that Ms Camejo would have the use of a car to get to and from work and pick up other staff. Payslips show the rate was \$22.50 per hour. Ms Camejo became concerned when her hours dropped below 30 hours per week and started asking for an IEA which was never provided.

[14] Payslips show Ms Camejo was paid on a fortnightly basis four days after the end of each fortnight of work completed with an accruing running record of 8% holiday pay on each fortnightly gross.

[15] The first three fortnightly payslips show Ms Camejo was paid 68.5 hours; 59.5 hours; and 60.25 hours. The following two fortnightly payslips show hours paid as 42 and 45.75 hours respectively.

[16] On 5 August 2021 Ms Moreira required the work car that Ms Camejo had until that time driven to and from work. This seemed to be the catalyst for a significant degree of dissatisfaction for Ms Camejo. Ms Camejo says the use of the car for getting to and from cleaning jobs all over town was a reason for her to accept work for Maunga. When Ms Moreira dropped Ms Camejo off at the end of working on 5 August 2021 Ms Camejo says she indicated she was feeling unwell.

[17] On Friday 6 August 2021 Ms Moreira texted Ms Camejo in the morning asking if she was going to work that day. Ms Camejo was sleeping because she did not have a cleaning job to do until 2.00pm. At 12.52pm Ms Camejo texted to say she was unwell and could not work. Ms Camejo did not work on Friday 6 August 2021.

[18] On Sunday 8 August 2021 Ms Camejo texted Ms Moreira to say she was unwell and could not work on Monday 9 August 2021. Later in the afternoon that day Ms Moreira texted Ms Camejo and said she was not needed to work the next two days. She gave no reason and Ms Camejo responded by saying she was able to work, then texted further saying she would need to be picked up if she was to work on Thursday because she did not have the work car.

[19] There appears to have been no further communication between the two women until Monday 16 August 2021 when Ms Moreira rang Ms Camejo at 8.45am in the morning. Ms Moreira says she rang her more than once and got no reply until the evening. It is not clear when the women then talked or communicated that day but Ms Camejo says the explanation from Ms Moreira was that she had given Ms Camejo the week off to 'recover'.

[20] Further evidence of text messaging with Ms Moreira starts from 20 August 2021 and includes Ms Camejo continuing to ask for an IEA and reflecting that Ms Moreira had said either the computer was broken or that it wasn't done yet or that she needed Ms Camejo's visa (which was provided) and then that Ms Camejo needed to provide her driver's licence. Ms Camejo replied to this request that she would do so once she was provided with an IEA. New Zealand was into another COVID-19 lockdown and Ms Camejo was also asking to be paid the government subsidy as she was without pay and had no communication from Maunga about this.

[21] On 21 August 2021 Ms Moreira emailed what can be summarised as a lengthy and at times difficult to follow email that in hard copy and with small print text stretches to almost three A4 sized pages. The email starts with:

Sofia, I really don't know what is going wrong with you. It doesn't seem to be the same Sofia that worked with me for a few months.

[22] The email included claims that Ms Moreira had indicated she wanted to leave her employment because she was no longer motivated and thought the job 'sucked'; that her performance was "changing" [with no explanation of what this change was]; that she had made herself unavailable to work, was unreliable about turning up to work and had "simply

disappeared” during the week in August which began with Ms Camejo being sick; and that Ms Camejo was actually the boss and should have been telling Ms Moreira what to do.

[23] The email also includes a tone that is quite personal and emotive: “I was trying my hardest to make you happy and satisfied. How many times have I told you: “please don’t leave me! I only have you!”; that Ms Camejo was “never happy;” Ms Moreira asks for “forgiveness” for being unwell on the job and that she tried to have an informal relationship with Ms Camejo.

[24] The email includes that the car was provided on “trust” and based on Ms Camejo being a “team leader” and not for her to get to and from work. Ms Moreira included in relation to the day in August 2021 when she took back the car:

I was going to take the work car with me you got really mad and pushed me to leave the car with you or drop you off home. You knew it was rush hour and I had 5.5 work on the other side of town. You didn’t care for a second about me, but were super mad because I wasn’t doing what you wanted me to do.

[25] The email finishes with:

I need an answer from you by Monday please. Tuesday should be our last day in lockdown, I’ll need to do the week’s schedule then. If I don’t hear from you I will assume you will no longer work with me. If that is the case, your last payment will be processed on pay day.

[26] Ms Moreira emailed Ms Camejo again on 23 August 2021 at just after 2.00pm including the following:

Today is Monday 23 August, as stated in my last email sent last Saturday, I really need to know whether or not you will continue to work with me. IN case I don’t hear from you by the end of the day, I’ll consider that you will no longer work with me.

[27] Ms Camejo replied later on 23 August 2021, she responded essentially with her version of what happened being that she always had use of the car until Ms Moreira took it off her and that Ms Moreira is the one that “disappeared” and did not offer her the work that she was available to do across the week in August that started with the two sick days (referred to above.) Ms Camejo indicated she wanted to come back to work, that she did not resign, that she was just asking for normal things (the IEA and to be paid the Covid subsidy during the lockdown). She finished by again asking to be send her IEA having waited since the start of her employment.

[28] On the 26 August 2021 Ms Camejo emailed Ms Moreira asking for her salary to be paid to her for the period 9 August to 22 August 2021, again for her IEA and for the payslip she did not have. She includes that she had not received a response to her email of 23 August 2021.

[29] Ms Moreira replied on 2 September 2021 stating that they could not work during “level 3” and proposed having a meeting to discuss what happened and “moving forward”. She included that she would bring the employment agreement to the meeting and “any other relevant documents”. Saturday mid-morning was offered as a time.

[30] On 3 September 2021 Ms Camejo replied that she wanted the missing payslip and time sheets and again asked to be paid the Covid subsidy stating she was paid 5 days with 5 still unpaid.

[31] On 4 September 2021 Ms Moreira cancelled the meeting due to her daughter’s sickness.

[32] On Wednesday 8 September 2021 Ms Moreira suggested they meet at a city mall. Later that day she emailed again asking for a phone number to contact Ms Camejo because “email isn’t very practical”. Ms Camejo’s emailed response is:

“Hi, just email. When will we start? I need to know that, because it’s supposed to be today. Can you please send me my contract by email? Also u just paid me 5 days from the subsidy, u

didn't pay me the other five days, I need the money, Let me know what you are going to do, I need to work."

Ms Camejo followed this email with another:

"Hi, I don't have car. Just let me know if u want me to work or not."

[33] Ms Moreira emailed Ms Camejo on 9 and 10 September 2021 as follows:

9 September 2021 at 7.30 am

"Ok, meet me tomorrow at [client's] at 930am. Please bring your driver's license and a copy that I can keep. I'll bring all the docs with me, we can go through it at the end of the shift."

10 September 2021 at 6.07am

"I'll wait for you at Pegasus Roundabout, at about 915am. See you there."

[34] Ms Camejo's oral evidence is that she had no transport and could not get to a meeting or to Pegasus Roundabout from where she lived. She sent an email to Ms Moreira on Friday 10 September at 11.09 am asking for her phone holder out of the vehicle because she was going away for the weekend.

[35] On Saturday 11 September 2021 at 6.45pm she again emailed Ms Moreira asking again for the Covid subsidy to be paid to her and for her employment agreement and that she could pick this up the next day. She included that "I can't go on like this, I'm asking just for normal things and things that are mine!"

[36] On 12 September 2021 Ms Moreira emailed Ms Camejo with another long discursive email that immediately dismissed her from Maunga giving a retrospective final date of employment as 5 August 2021 (the dismissal letter). Reasons for the dismissal were described as "warnings in regards to the bullying and harassment incidents, but you insisted on behaving this way"; that Ms Camejo had breached "many clauses" of her "individual employment agreement"; that Ms Camejo had been given "plenty opportunities" to improve her performance and her behaviour and that she did not take the "opportunity to fix any problem". The letter included that Ms Camejo did not turn up for work and then quotes from text that appear to come from a typical IEA clause regarding abandonment including this as a

reason to dismiss. The email included comment that no deductions from pay would be taken for Ms Camejo's "negligence and /or irresponsibility" and that the last payment processed on 26 August 2021 of \$496.80 is Ms Camejo's holiday pay.

[37] The dismissal letter ends with asking for Ms Camejo to return any property she has and that "the employer expects the employee to return a signed employment agreement within a reasonable time, a week from the day the agreement is handed over."

[38] On 12 September 2021 Ms Camejo replied saying that she had not abandoned her employment and reiterating she had not resigned. She asked again for the COVID-19 subsidy to be paid to her and asked for her personal items from the work car.

[39] On 12 September 2021 Ms Moreira replied that she could have chosen to keep the holiday pay to cover the "losses [Ms Camejo] caused" and asked when Ms Camejo was available for a meeting. The email finished by saying:

Perhaps you don't believe it, but I'm truly sorry we couldn't make it work. I do indeed appreciate your work. But to make any kind of relationship work both parties have to be willing to make it work, both parties have to compromise and constantly work on it. When one of the parties can only think of themselves and their needs it's the perfect recipe for failure.

[40] On 24 September 2021 Ms Moreira raised personal grievances with Maunga in a letter from her lawyer.

Was Maunga justified under s 103A of the Employment Relations Act to dismiss Ms Camejo?

[41] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and

whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[42] Under s 103A of the Act the following factors are considered to measure an employer's fair process leading to a decision to dismiss

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback.

Did Ms Camejo abandon her employment?

[43] If I were to find that Ms Camejo abandoned her employment, her claim to have been unjustifiably dismissed would be dismissed. However, I do not accept that Ms Camejo abandoned her employment as appears to be one of the positions taken by Maunga.

[44] I accept the submission for Ms Camejo that an employer wanting to infer that an employee has abandoned their employment did so with caution¹. There is no written clause in an IEA for Maunga to rely on despite Ms Moreira citing this to Ms Camejo in the dismissal letter of 12 September 2022. I am satisfied that Maunga did not provide an IEA or retain or supply one when asked for it by Ms Camejo. Therefore, Maunga would need to show it took reasonable steps to inquire whether its inference that Ms Camejo had abandoned her employment was what a reasonable employer could have made. I find nothing to convince me this was the case.

[45] The period to which the alleged abandonment seems to relate came before further communications including ones in September 2021 when emails between Ms Camejo and Ms Moreira discuss further employment. This shows me that even if there was some form of

¹ *E N Ramsbottom Limited v Chambers* [2000] 2 ERNZ 97 at [26]

standoff about work in in early August 2021, things had moved on after that and the parties were clearly continuing to communicate and talk about work.

[46] Accordingly, I find that in these circumstances a reasonable employer could not have inferred abandonment and I will continue to consider whether the dismissal was justified.

Was Maunga justified in dismissing Ms Camejo?

[47] I do not find that Maunga was justified in dismissing Ms Camejo for the following reasons.

[48] There is no evidence that Maunga raised performance concerns or warned about these previous to having dismissed Ms Camejo. Maunga's concerns are not specified in any detail and are inconsistent with positive comments about Ms Camejo's work in both its 23 August 2021 and the 12 September 2021 dismissal email.

[49] There is no evidence that Maunga investigated any of the issues it relies on to dismiss and it is difficult to ascertain specifically what they were. I am satisfied after hearing from Ms Camejo that she was particularly shocked by the lengthy 21 August 2021 email which I find included personalised comments about her. Ms Camejo felt it was in retaliation for her wanting an IEA and to be paid during the lockdown. I can understand why she may have formed that view.

[50] I accept the submissions for Ms Camejo that with no investigation process Ms Camejo did not get an opportunity to respond to specific discipline issues raised, have the opportunity to get support, and then have the opportunity for her employer to genuinely consider any of her feedback before making a decision to dismiss.

[51] While there are emails showing that Ms Moreira proposed meeting to sort things out this was before Maunga had communicated any issues that may result in dismissal or ending the employment relationship. The emails about meeting are brief and informal and cannot reasonably be seen as relating to a fair and reasonable discipline process.

[52] I accept the submissions on Ms Camejo's behalf that Maunga's process towards dismissal was "antithetical to how a fair and responsible employer could have acted in all the circumstances". I also find that the emails from Maunga on Friday 21 August 2021 and Monday 23 August 2021 were giving a type of ultimatum for Ms Camejo to resign which I accept had blindsided Ms Camejo who had simply been asking for entitlements such as her IEA and payment during the lockdown period. The aggressive tone of the emails, the inclusion of personalised statements and the short time from across a weekend for Ms Camejo to respond about whether she was going to continue working or not were far from what a reasonable and fair employer could do.

[53] I also note that Maunga stated a retrospective date for the last day for Ms Camejo's employment based again on what was likely a non-existent IEA expiring. This may relate to the claim of abandonment although this is only a guess and I have found Ms Camejo did not abandon her employment. Accordingly, I find that the date for the last date of employment was the dismissal letter on 11 September 2021.

[54] Accordingly, considering all the above I find that Maunga's disciplinary process was non-existent and included seeking from Ms Camejo a resignation under pressure to the extent that I find the dismissal was unjustified both substantively and procedurally. In short, I find that Maunga did not act as a reasonable employer could have done in all the circumstances at the time.

Was Ms Camejo disadvantaged as a result of the respondent's actions during the employment?

Work vehicle to get to and from cleaning jobs

[55] I accept Ms Camejo's evidence that she was employed on the basis that she would have the use of a work car and that this was important to her to get to and from cleaning jobs across town. Reading across Ms Moreira's emails and the Maunga response Ms Moreira either says the car was only if Ms Camejo was a team leader which she was not, or that the

car was taken back when Ms Camejo did not work extra hours with Ms Moreira. Neither position could be tested in evidence, and I find neither plausible against Ms Camejo's evidence that the taking of the car disadvantaged her. I find this was an unjustified action and a likely breach of the verbal agreement that was struck when Ms Camejo first agreed to work for Maunga. At the very least, if it was not agreed to at the start it could be implied by practice in that I accept Ms Camejo had been allowed to use the work car to drive herself to and from jobs and her home. This created what I accept was a significant change in Ms Camejo's ability to get to work and as such I find it disadvantaged her in her employment.

No written employment agreement

[56] Ms Camejo submits that she was disadvantaged because she was not provided with an IEA having asked for one many times since soon after she started work. While negotiating and providing an IEA are statutory obligations that an employer would struggle to justify not doing (as is what an employer needs to do to defend a claim of disadvantage) these were obligations that arose at the start of employment so as actions that disadvantaged, they may have been raised out of time. However, the actions that Ms Camejo found difficult as I understand it were when she was asking consistently for an IEA and was being given a variety of excuses. I can see from emails this was clearly important to Ms Camejo who wanted to clarify the 30 hours per week issue, and it would have helped with the car issue.

[57] To that extent I accept Maunga's responses were not justified, and Ms Camejo was disadvantaged in her employment through the continued likely anxiety about her terms and conditions that this caused to her.

Was Ms Camejo unjustly suspended so as to disadvantage her?

[58] I accept based on the largely uncontested evidence before me that Maunga likely suspended Ms Camejo when Ms Moreira told her she was not required to work for the two days after the two days she was sick. I further accept Ms Camejo's version of events in that Ms Moreira told her later in the following week that Maunga did not offer work for the rest of the week to give Ms Camejo a rest. There is no reliable evidence before me to support any

just reason for Maunga telling Ms Camejo not to come to work or not to communicate further houses to be cleaned and to provide the 30 hours of work for the week and beyond this. As already noted above, I find some likelihood that the catalyst for this situation was Ms Moreira taking back the work car from Ms Camejo at the end of the shift before Ms Camejo went off on two sick days (5 and 9 August 2021). It was immediately after this that Ms Moreira said not to work or then did not communicate further work. I am satisfied this was not an action that a reasonable employer could have made in the circumstances, and I find the situation caused Ms Camejo considerable anxiety because she was suddenly without an income.

[59] Accordingly, I am satisfied that Ms Camejo was disadvantaged in her employment through Maunga's unjustified actions of suspension without pay from 9 August 2023 to the time of the lockdown.

30 hours per week up to the lockdown

[60] I accept Ms Camejo's evidence that she was willing and able to work 30 hours per week except for the times when she was sick on 6 August and 8 August 2021 which fell at a time before she would have become eligible for sick leave under s 63(1)(a) of the Holidays Act 2003. I will return to this in considering remedies for lost wages.

[61] Ms Camejo submits that her payslips show Maunga was not providing her with 30 hours per week of work from June 2021. I do not have the benefit of timesheets to match what hours Ms Camejo worked *each* week. However, Ms Camejo's payslips show that for the first six weeks each fortnightly pay exceeded payment of 60 hours except the fortnight ending 27 June 2021 which was short by 30 minutes being 59.5 hours. Ms Camejo was then paid 42.00 hours and 45.75 hours for the next two consecutive fortnights after which she did not work again. The final payslip is consistent with a final holiday pay of 8% based on what Maunga had paid her in total gross earnings to that date (\$496.80).

[62] Accordingly, I find that Maunga's action in not providing Ms Camejo her guaranteed 30 hours per week from this time was unjustified as well as being a breach of the agreement it had with her to employ her for this number of hours each week.

30 hours per week pay during the lockdown to the dismissal on 12 September 2021

[63] Ms Camejo's agreed hours of 30 hours per week should have continued to be paid to her when she could not work due to the lockdown. Ms Camejo was consistently asking Maunga to pay her the government subsidy during the lockdown. There are numerous emails to support that she did this. I accept her evidence that these requests remained unanswered.

[64] Maunga needed to have either negotiated a variation to the agreed 30 hours per week or paid the continuing obligation to pay 30 hours per week. There is no evidence it paid Ms Camejo anything during the lockdown and no evidence it negotiated a variation to the 30 hour per week agreement. The lockdown did not suspend employment obligations in employment relationships² and Maunga appears to have taken no steps to reasonably communicate with Ms Camejo about the situation. I find that this action by Maunga was unjustified and that it caused Ms Camejo further distress because the lockdown continued on from the suspension, she continued to be left without an income to support herself during the lockdown.

[65] Accordingly, I find that Maunga's action in not paying Ms Camejo during the lockdown disadvantaged Ms Camejo in her employment.

Extra duties cleaning Ms Moreira's house and caring for her children

[66] I am not satisfied I have sufficient evidence to show how cleaning Ms Moreira's house was in itself an unjustified action resulting in disadvantage to Ms Camejo. It appears to have been a house cleaned in the process of shifts that were paid for.

[67] It has been submitted for Ms Camejo that she was disadvantaged in her employment because the employer 'instructed her to undertake babysitting' outside of her employment duties inconsistent with her employed role. I accept there were likely times that Ms Moreira

² *Gate Gourmet New Zealand Limited v Sandhu* [2020] NZEmpC 237 at [23].

wanted Ms Camejo to pick up or drop off children but as Ms Camejo confirmed in her oral evidence, Ms Moreira was always present. I find it a significant stretch for Ms Camejo to describe these extra duties as 'babysitting'. However, I find it plausible that Ms Camejo found it difficult to refuse Ms Moreira's likely requests to pick up and drop off her children in the work car. I accept Ms Camejo's evidence that she was worried she would not have a job or that she would lose the car if she refused. This fear appears to have been confirmed as genuine when Ms Moreira did eventually take back the car back for the reason Ms Moreira acknowledges in her 21 August 2021 email to Ms Camejo. Ms Moreira refers to having taken the car and says she would let Ms Camejo have the car if she agreed to extra hours which I understand were beyond the hours already worked during the day. This appears to be in the nature of an ultimatum or even a form of game playing. This supports Ms Camejo's evidence that she was concerned about challenging Ms Moreira about not wanting to transport the children in what was effectively her own time.

[68] Accordingly, I find Maunga's actions through Ms Moreira wanting her children to be picked up or dropped somewhere encroached unreasonably into Ms Camejo's non-work time, and likely took advantage of Ms Camejo's need to have transport to get to work and her need to retain her job. While Ms Moreira is not Maunga, I find it likely she was the person that Ms Camejo regarded as her 'boss' who directed her work and made decisions about it. Accordingly, I accept the requests made relating to transporting the children were unjustified and disadvantaged Ms Camejo in her employment.

[69] I am not satisfied I can find the same regarding Ms Camejo saying she had to stay back in the car after a shift to listen to Ms Moreira's problems. I do not find it easy to understand why Ms Camejo could not have politely ended the conversation on the basis of needing to get home. Standing back and considering the evidence before me I find some likelihood that unlike with the situation with the children there was some form of friendship that may have developed earlier in the relationship that meant at the time these conversations at the end of the day were happening. This ground for disadvantage does not succeed.

Non-provision of wage, time and holiday records

[70] Ms Camejo was eventually provided with payslips which give some indication of what she worked across fortnights although time sheets were not provided as requested which may have been helpful to be more accurate. To an extent a holiday record is provided in the payslips being a simply 8% accrual. I accept the submission that lack of records has impacted on Ms Camejo to bring an accurate claim and that it disadvantaged her in her employment in that it added to her anxiety during a time she was suspended and then not paid and led to her not feeling she could understand what her entitlements were.

Failure to give paid breaks

[71] Section 69ZD of the Act prescribes an employee's entitlement to rest and meal breaks. Under s 69ZD(2) provides that for a period of between 4 and 6 hours of work an employee is entitled to one paid 10 minute rest break.

[72] While the Maunga response says that Ms Camejo did not want to take breaks because she was on a 'fasting' diet, Ms Camejo denies that this was correct. I found her explanation plausible. Maunga's response about breaks supports that Maunga likely did not pay Ms Camejo for 10-minute breaks and knew through Ms Moreira that this was happening. Even if there were no statutory requirement, in the type of work described to me by Ms Camejo I find it was not justified for Maunga to expect Ms Camejo not to have breaks. I accept her evidence that she became tired and stressed in the work and that this disadvantaged Ms Camejo in her in her employment.

Is Maunga to pay compensation under s 123(1)(c)(i) of the Act?

[73] It has been submitted that this is a situation where I should consider compensation for each grievance separately. I find a global compensation is appropriate. This is because there is a reasonably short time frame from late July 2021 when the payslips support Ms Camejo's hours being reduced to the immediate unjustified dismissal on 11 September 2021. Overall, there is a consistent theme of the same impact on Ms Camejo being one of distress at how she continued during that period to be treated by Ms Moreira for Maunga during this time.

[74] I have been referred to a case where there was compensation of \$28,000.00³ as a global award in the case of an unjustified suspension followed by an unjustified dismissal. However, the facts of that case are different to the present and involved an employee of seniority and long standing who had been exited from the workplace following by a lengthy process leading to performance and discipline matters interfaced with the employee being off work due to physical injury.

[75] I have also been asked to consider Ms Camejo as a vulnerable employee in part because she was a cleaner, an occupation given special protection under the Act's provisions. This was not a restructuring situation and I found Ms Camejo well able to present herself in the investigation meeting. Her texts and emails to Ms Moreira also show a level of forthrightness. I am not satisfied that I should necessarily use a starting point of vulnerability when considering a level of compensation.

[76] It has also been openly submitted for Ms Camejo that she had issues with her health that Ms Moreira was aware of. I have no evidence of the effect of Maunga's actions on MsCamejo's medical situation other than what Ms Camejo says. However, I accept the submission for Ms Camejo that she was far from her family support in her home of Uruguay and was in New Zealand to support herself while travelling the country. She was therefore reliant on income to sustain this and as I have found above, she was let down in this regard by her employer. I further accept the evidence she provided showing the difficulties getting other employment given the COVID-19 situation at the time. I accept that the uncertainty about the continuance of her income would have been very distressing for Ms Camejo and that this was likely exacerbated by the way that Ms Moreira for Maunga responded to her including personal comments about Ms Camejo.

[77] Without going over all of her evidence I accept Ms Camejo lost sleep and was crying a lot and tired. I accept that she found Ms Moreira's behaviour towards her difficult to cope with. I find it plausible that she felt a sense of shame and worthlessness and that this experience with Maunga coloured what should have been an enjoyable working holiday in

³ *Hanif v Orora Packaging New Zealand Limited* [2022] NZERA 395

New Zealand. I also accept Ms Camejo felt devalued and demeaned when receiving excuses from Ms Moreira about not getting an IEA. More than this Ms Moreira's email dated 21 August 2021 contained what can only be described as a discursive length of accusations about Ms Camejo personally or about performance or employment issues that I am satisfied Maunga had never raised before and likely had little to back up. Ms Moreira's emails also then conversely indicate thanks for the good work that Ms Camejo did. I find that the variability of the messages she was receiving would likely have had an adverse emotional impact on Ms Camejo.

[78] I further accept the submission that Ms Moreira's communications during my investigation included her saying that participation was a "waste of time" and that this added to the sense of indignity that Ms Camejo says she feels.

[79] In these circumstances I find that a global compensation of \$22,000.00 is an appropriate order for the grievances I have found.

[80] Section 124 of the Act requires me to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievances. In the circumstances as I have outlined above, I find no reason to find that Ms Camejo contributed to the grievances that would require a reduction in the remedies I have awarded.

Is Maunga to reimburse Ms Camejo for lost earnings under s 123(1)(b) of the Act and holiday pay?

Reimbursement to Ms Camejo for lack of paid ten-minute rest breaks

[81] Ms Camejo asks to be paid for two times ten-minute breaks across 74 working days under s 69ZD (4) of the Act which relies on there being regular shifts of 6 to 8 hours. I take this to be an approximation made on Ms Camejo's behalf given the lack of time records. However, a 30-hour week could have also been 6-hour days which would invoke s 69ZD (2) being one ten-minute break in a shift of 4 to 6 hours. I make an estimation that given the nature of the work cleaning at different client houses there may well have been variable start

and finish times. Ms Camejo in her evidence refers to a day she was rostered to start at 2.00 pm for example. Accordingly, I am not satisfied I am able to find it likely that she missed out on two breaks each shift if her agreed hours were 30 hours per week or from late July actually less. I find the fairest outcome is to conclude a lesser number of days than claimed to take into account this uncertainty. I find it reasonable to calculate based on 65 days without two ten-minute breaks. This calculates as \$7.50 (twenty minutes based on the \$22.50 per hour gross rate) multiplied by 65 being \$487.50 gross.

[82] Ms Camejo asks to be reimbursed for hours lost to her as a result of not being provided with work for and or paid her agreed 30 hours per week. I find Maunga is to reimburse the following amounts taking into account a deduction for the two sick days she did not work:

- a. Payslip for fortnight 12 July 2021 to 25 July 2021 shows 42 hours paid. The shortfall to 30 hours is 18 hours at \$22.50 gross per hour. I find Maunga is to pay \$405.00 gross.
- b. Payslip for fortnight 26 July 2021 to 8 August 2021 shows 45.75 hours paid. The shortfall to 30 hours is 12.25 hours at \$22.50 gross per hour which is \$275.63 gross. To be deducted from this is \$135.00 for an approximated 6 hours for the sick day not worked⁴ on 6 August 2021. Maunga is to pay \$140.63 gross.
- c. Work not offered up to lockdown and then not paid for during lockdown being the period from 9 August 2021 to the date of dismissal on 12 September 2021 is 6 weeks of 30 hours at \$22.50 gross. This is a total of \$4,050.00 gross. To be deducted from this is \$135.00 for an approximated 6 hours for the sick day not worked⁵ on 9 August 2021. The leaves a total of \$3,915.00 gross.
- d. Maunga is to pay make a holiday pay entitlement of 8% on \$4,948.13 being \$395.85 gross.

⁴ 6 and 9 August 2021 were sick days not worked. Not entitlement to sick leave would have arisen by that time Ms Camejo not having worked six months by then. Section 63 of the Holidays Act 2003 applies.

⁵ As above.

[83] In summary Maunga is to pay Ms Camejo a total of \$4,460.63 in lost wages, together with \$487.50 for unpaid breaks being a total gross of \$4,948.13 with further 8% on this amount for holiday pay being \$395.85 gross.

Is Maunga to pay interest on any wages or holiday pay awarded to Ms Camejo?

[84] I find that interest should be paid on the total \$5,343.98 gross for unpaid breaks, wages and holiday pay. I fix that from the date of 11 September 2021 to the date of this determination.

Are penalties to be ordered against Maunga and if so, any portion paid to Ms Camejo?

[85] Ms Camejo has asked for penalties to be ordered against Maunga with a portion paid to her. These are in respect of statutory breaches for non-payment of wages, three separate penalties relating to non-provision of an IEA including that Maunga failed to bargain for an IEA, failed to retain a copy of an IEA, and failed to provide an IEA when requested. Penalties are also sought for not providing breaks under s 69ZD of the Act; and for the non-provision of time, wage and holiday records as well as the non-payment of holiday pay.

[86] Penalties for breaches of various sections of the Act open a company to liability to a maximum amount of \$20,000.00 per penalty.

[87] In deciding whether to impose a penalty, and if I decide to, I would need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court.⁶ This includes a consideration of the number and nature of the breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are ‘just in all the circumstances.’

[88] Penalties are punitive and a reason to award them is to support compliance with employment standards and not primarily to compensate employees individually. The Employment Court has observed that there can be a risk of doubling up of penalties in relation

⁶ *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].

to things that effectively arise from the same facts that give rise to the grievances claimed. Global penalties are sometimes awarded.⁷

[89] However, I am not persuaded in the first instance that penalties in this matter are appropriate. In my view the statutory breaches that Ms Camejo has identified although not condoned can be appropriately remedied by my finding that Ms Camejo has successfully shown that arrears are due for payment which have been formulated under the disadvantage grievance remedy but could also have been brought as arrears claims. While I accept that the lack of provision of records and an IEA created a problem for Ms Camejo there is a context to this matter that in my view is supported by the manner and tenor of emails from the director of Maunga both to Ms Camejo and as part of these proceedings. In making this assessment, I rely generally upon s 160 (3) of the Act.

Is there to be an order for costs?

[90] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Ms Camejo has been largely successful in her claim and for the short duration of her employment and the circumstances surrounding it she should not have been put to the cost of bringing this matter before the Authority to resolve it.

[91] The investigation meeting went into the beginning of the second half of the day. The current tariff of costs generally applied for a one-day Authority investigation meeting is \$4,500.00 and costs are discretionary and modest in this jurisdiction.

[92] Accordingly, Maunga is ordered to pay \$3,375.00 as a contribution to Ms Camejo's costs together with the filing fee of \$71.56.

Summary of Orders

[93] Maunga Horepa Contractors Limited is ordered to pay Sofia Camejo:

- a. \$4,948.13 gross under s 123(1)(b) of the Act

⁷ *Xu v McIntosh* [2004]2 ERNZ 448 at [43] – [45]

- b. \$395.85 gross for holiday entitlement under section 27(1)(b) Holidays Act 2003
- c. Interest is to be paid on the total of 5,343.98 as calculated above at a. and b. in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a term that starts on 11 September 2021 to the date of this determination
- d. \$22,000.00 compensation under s 123(1)(c) of the Act
- e. \$3,375.00 costs
- f. \$71.56 Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority