

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 456
3180279

BETWEEN JOANNA NIGHTINGALE
Applicant

AND NEW ZEALAND WOOL
DUMPING GROUP (2019)
LIMITED PARTNERSHIP
Respondent

Member of Authority: Rowan Anderson

Representatives: Seungmin Kang, counsel for the Applicant
David McLeod, advocate for the Respondent

Investigation Meeting: 18 and 19 April 2023 at Napier

Submissions received: At the investigation meeting

Determination: 18 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joanna Nightingale was employed by New Zealand Wool Dumping Group (2019) Limited Partnership (NZ Wool Dumping), having signed an individual employment agreement (IEA) on or about 11 January 2021. Ms Nightingale worked as a Sewer for NZ Wool Dumping at its Napier operations.

[2] On 18 November 2021 Ms Nightingale was involved in an altercation in the workplace. She says another employee, Katrina Elsworth, instigated the altercation. The incident escalated and there was also a verbal, and on one view almost physical, confrontation between Ms Nightingale and another employee, Donna Emerson. Ms Emerson is Ms Elsworth's sister. Later the same day, Ms Nightingale was subsequently suspended from her employment.

[3] Following an investigation and disciplinary process, Ms Nightingale was dismissed from her employment on 1 December 2021. Ms Nightingale claims that the events of 18 November 2021 were preceded by bullying behaviour in the workplace, including alienation by other employees, which Ms Nightingale says she raised with NZ Wool Dumping.

[4] Ms Nightingale claims that she was unjustifiably dismissed from her employment and that she was unjustifiably disadvantaged in her employment in relation to both the suspension and NZ Wool Dumping's inaction as to complaints she made about other employees. She claims that that NZ Wool Dumping breached its duty of good faith. She also claims that NZ Wool Dumping breached her employment agreement's warning procedure.

[5] Ms Nightingale claims lost wages and compensation for humiliation, loss of dignity and injury to feelings. She also seeks the imposition of penalties against NZ Wool Dumping for the alleged breaches.

[6] NZ Wool Dumping denies the claims and says that its actions, and the dismissal, were justifiable. It also denies the breaches claimed.

Issues

[7] The issues identified for investigation and determination are:

- (a) Was Ms Nightingale unjustifiably dismissed;
- (b) Was Ms Nightingale unjustifiably disadvantaged in her employment, in relation to:
 - (i) the decision of the respondent to suspend her from employment; or
 - (ii) inaction by the respondent in relation to complaints made by Ms Nightingale?;
- (c) If NZ Wool Dumping's actions were not justified (in relation to dismissal or disadvantage), what remedies should be awarded, considering:
 - (i) lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - (ii) compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?

- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Nightingale that contributed to the situation giving rise to her grievance;
- (e) Did NZ Wool Dumping breach its obligations of good faith in terms of sections 4 and/or 4A of the Act;
- (f) Did NZ Wool Dumping breach the applicant's individual employment agreement (and therefore s 134 of the Act);
- (g) Should any penalty (or penalties) be imposed upon NZ Wool Dumping; and
- (h) Should either party contribute to the costs of representation of the other party?

The Authority's Investigation

[8] In accordance with directions made, written witness statements were lodged from Ms Nightingale and Karin O'Connor, another former employee of NZ Wool Dumping, in support of Ms Nightingale's claims. The following witnesses gave evidence for NZ Wool Dumping:

- (a) Ms Emerson, sewer.
- (b) Georgina Roy, sewer.
- (c) Ms Elsworth, sewer.
- (d) Kim Baker, employee.
- (e) Robert Black, bundler.
- (f) Donna O'Connor, former manager of NZ Wool Dumping's Clive operations.

[9] All witnesses attended the investigation meeting and answered questions under oath or affirmation.

[10] A case management conference was held on 3 October 2022 at which I made timetable directions. At the case management conference, it was noted that David McLeod was involved in the workplace investigation. I advised that it was common for representatives, where they had been involved in the substantive matters, to be discouraged from both giving evidence and acting as representatives at an investigation meeting. The issue was left for the parties to consider, and I advised that, if necessary, a further case management conference would be arranged to discuss the issue once statements had been lodged.

[11] 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.

[12] The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

Background

[13] There are conflicting accounts of the incident that occurred on 18 November 2021. Ms Nightingale says that the immediate exchange was initiated by Ms Elsworth who came over to Ms Nightingale's workstation and was loud and aggressive. Ms Nightingale says that she remained calm and told her that she didn't want to speak to her. Ms Nightingale says that Ms Elsworth screamed, swore, and then 'stormed off'.

[14] On Ms Nightingale's version, Ms Emerson then became involved by screaming "leave my fucking sister alone" and by standing in front of Ms Nightingale. Ms Nightingale says that Ms Emerson approached very close to her face, and that she told Ms Emerson "get out of my face, you are trying to intimidate me". She says that Ms Emerson was spitting on her face and that further words were exchanged between the two. Ms Nightingale says that she was not following Ms Elsworth, who went outside, then the confrontation between her and Ms Emerson occurred.

[15] Ms Elsworth's evidence is that she was advising Martha Hohepa, another employee, that Mr McLeod would be in later that day to discuss an issue relating to the deduction of pay from their wages. She says that Ms Nightingale then said to her "I'm just letting you know, Trina, that you're skating on thin ice with me". After an exchange of words, Ms Elsworth says she walked away towards the smoko area. She says that Ms Nightingale then screamed at her "what's your problem now, why are you always angry?" before leaving her station to come after Ms Elsworth. She says that Ms Emerson then stood in Ms Nightingale's way.

[16] Ms Emerson said that she became involved because she was concerned that Ms Nightingale was going to harm Ms Elsworth. She says that she was concerned that Ms Nightingale might also hit her and that she was 'right in [her] face' spitting at her. Other

witnesses, in effect, verified that Ms Nightingale screamed and was aggressive but there was otherwise a divergence in the recollection of the various events.

[17] Mr Black, in response to questioning at the investigation meeting, confirmed that he was present and from what he witnessed it looked like a mutual exchange and that Ms Nightingale and Ms Emerson 'were both going at it' and that 'either one might have thrown a punch'.

[18] Donna O'Connor was made aware of the incident when she received a call from Mr Baker. She says she was informed that Ms Nightingale, Ms Elsworth and Ms Emerson were involved in an incident, and everything had 'blown up'. She then contacted Mr Harrison, former General Manager, and David McLeod, who provided employment relations services to NZ Wool Dumping, and that there was a discussion to the effect that Ms Nightingale should be removed from the workplace to keep everyone safe. She says at that time that she had no impression as to who was at fault. She then attended the workplace where Mr Baker outlined that there was an argument and that Ms Emerson had stepped in to stop Ms Nightingale from following Ms Elsworth.

[19] Later the same day, a letter was drafted and sent to Ms Nightingale asking her to attend a proposed disciplinary meeting on 23 November 2021. The letter advised that NZ Wool Dumping was concerned about the situation that occurred on 18 November 2021. The letter asserted that witnesses had been spoken to, with those witnesses suggesting that there had been a serious altercation, and that Ms Nightingale had been the aggressive party. The following concerns were raised in the letter:

- ...
1. You reportedly approached Donna Emerson, and came very close to her face and according to Donna were both aggressive and intimidating;
 2. This left donna shaken and upset;
 3. Katrina Elsworth was also nearby and according to Katrina you said to her "you think you have an army, then I have a bigger army so bring it on";
 4. Katrina took this to mean in reference to your brother whom is a Director of the Company;
 5. Katrina was very upset by your aggression and decided to take the rest of the day off work to recover....

[20] The letter advised that the matter was serious, that it might result in termination of Ms Nightingale's employment, but that no conclusions would be made until an investigation had concluded. Ms Nightingale was informed that she was welcome to

attend the proposed meeting with a support person and/or representative. The letter did not address the issue of suspension.

[21] In questioning from me, Donnor O'Connor recounted what she did after she arrived at the workplace on 18 November 2021. In doing so, she stated that she met with Ms Nightingale to talk about what had happened and that she told Ms Nightingale "you are going to have to leave site". She accepted, in questioning, that Ms Nightingale was asked to leave without seeking her views on suspension first.

[22] Donna O'Connor confirmed that she was the decision maker. She says that Mr McLeod attended the workplace and spoke to the relevant staff individually, including Ms Elsworth and Ms Emerson. She says that Mr McLeod asked each witness what had happened but that she couldn't recall any notes having been taken at the time, and that no statements other than those produced for these proceedings were taken.

[23] A meeting was convened on 23 November 2021 with Mr McLeod and Donna O'Connor attending on behalf of NZ Wool Dumping. Ms Nightingale attended along with Karin O'Connor and Ms Hohepa as her representatives and/or support persons. The Authority was provided with handwritten notes of the meeting, minutes of the meeting made by Ms McLeod, and an audio recording of the meeting.

[24] In summary terms, the meeting of 23 November 2021 involved relatively little discussion about the incident on 18 November 2021. Ms Nightingale did briefly describe some of the events and noted that the situation had gotten out of hand and that she regretted that. Ms Nightingale also raised allegations that she had been alienated in the workplace. Ms Hohepa spoke to that issue also. There was, in effect, no questioning and Ms Nightingale was not directly asked to respond to NZ Wool Dumping's concerns.

[25] Ms Hohepa also provided a written statement to NZ Wool Dumping at the meeting on 23 November 2021. In summary terms, her statement recounted that Ms Nightingale was calm in her exchange with Ms Elsworth on 18 November 2021 and that Ms Elsworth responded in a raised voice and swore.

[26] Ms Elsworth and Ms Emerson were not approached by Donna O'Connor following the meeting on 23 November 2021 with Ms Nightingale. There was no investigation into the bullying accusations, at least following the meeting on 23 November 2021.

[27] Ms Hohepa's statement goes on to say that Ms Emerson then screamed from across the room at Ms Nightingale, that Ms Nightingale went to follow Ms Elsworth to talk to her, and that Ms Emerson stood in her way. Ms Hohepa described Ms Emerson as acting aggressively first with what might be described as a mutual exchange following. She recorded that it concluded with Ms Nightingale returning to her station whilst Ms Emerson and Ms Roy leaving the premises to see Ms Elsworth who had already left.

[28] Ms Hohepa's letter concluded by recording her view that she had suffered as a result of alienation and constant manipulation to try and turn her against Ms Nightingale.

[29] Ms Nightingale was advised of NZ Wool Dumping's preliminary findings by letter dated 24 November 2021. The summary of findings as appears in that letter as follows:

- ...
1. On the morning of Thursday 18th November 2021, a decision arose between yourself and Katrina Elsworth;
 2. It appears that this discussion involved Katrina's pay for that week, and you formed the view that Katrina believed you were somehow involved in causing her to be paid less than usual;
 3. Katrina became upset through this discussion and left the building via the side door adjacent the smoking area;
 4. You attempted to follow Katrina and further engage her in discussion but Donna Emerson stood in the doorway and prevented you from following Katrina;
 5. You came very close to Donna's face and according to Donna you were both aggressive and intimidating;
 6. During the exchange with Donna you said to her "you and your little army don't scare me";
 7. You told Donna to "bring it on" and to "sit the fuck down and mind your own back yard";
 8. This left Donna shaken and upset;
 9. Katrina was very upset by your aggression and decided to take the rest of the day off work to recover;
 10. Donna was also very upset by the exchange with you.

I am deeply concerned about your description of the events of 18th November 2021, because it appears that you were indeed the aggressive party, and attempted to follow Katrina to continue the exchange with her even when she attempted to distance herself from you. Donna's actions were in support of her sister, and her stopping you from following Katrina is completely understandable.

...

This response continued with Donna, and came very close to a physical exchange.

I am satisfied that you were both aggressive and intimidating, and that there was no reasonable cause for your behaviour....

[30] The letter, after summarising NZ Wool Dumping's preliminary findings, recorded that Ms Nightingale had advised that she was the victim of systematic bullying that had commenced in June 2021. However, it also recorded NZ Wool Dumping's view that Ms Nightingale's behaviour could not be justified by what she described as alienation from the group.

[31] Mr McLeod followed up Ms Nightingale by email on 29 November 2021 noting that no response had yet been received in response to the preliminary decision. Mr McLeod also sought confirmation that Ms Nightingale's personal belongings were removed from the workplace by her. Ms Nightingale responded by email as follows on 30 November 2021:

Hi David.

Thanks for your email. Yes I did collect my belongings and I've handed my door and locker keys to Karin. I have no submission to make. However I would like to assure you during my 10 months I was employed by Northern Woolpacks I loved my work and I was only loyal and committed to it. Unfortunately soon after I was employed circumstances arose and continued to which became frustrating and stressful for me. I believe if there had been a support system in place to help me deal with these circumstances at the time they arose I'm sure I would have dealt with them differently. Thank you for giving me the opportunity to be employed by Northern Woolpacks.
Regards

[32] Ms Nightingale was dismissed from her employment by letter dated 1 December 2021. The letter was signed by Mr McLeod on behalf of NZ Wool Dumping. The dismissal letter confirmed the preliminary findings and recorded that serious damage had been done to the relationship of trust and confidence and that the final decision was that Ms Nightingale's employment was terminated. The dismissal letter did not explicitly refer to serious misconduct.

[33] Donna O'Connor said at the investigation meeting that she did not consider specifically whether the conduct amounted to misconduct or serious misconduct, but that she had determined that the matter was serious. She also said that she didn't consider issuing a warning instead, that she thought it could happen again, and that she did not consider alternatives to dismissal.

[34] The dismissal letter, in addition to restating the preliminary findings, went on to record that NZ Wool Dumping did not accept that the allegations of bullying explained

or justified Ms Nightingale's actions, and that Ms Nightingale's response was unreasonable and disproportionate.

[35] A letter raising a personal grievance with NZ Wool Dumping was sent by email on 17 January 2022.

Was Ms Nightingale unjustifiably disadvantaged in her employment?

[36] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether NZ Wool Dumping's actions, and how NZ Wool Dumping acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.¹

[37] Justification requires the consideration of both substantive and procedural fairness. The onus is on NZ Wool Dumping to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and I must also consider the requirements of good faith set out at s 4(1A) of the Act.

Suspension from employment

[38] Ms Nightingale says she was first suspended from her employment by Donna O'Connor on 18 November 2021. She submits that, based on the evidence given at the investigation meeting by Donna O'Connor, the decision to suspend was made prior to Donna O'Connor speaking to Mr McLeod and Mr Harrison. Ms Nightingale submits that the suspension was both substantively and procedurally unjustifiable.

[39] NZ Wool Dumping submits that Ms Nightingale was paid throughout the period of suspension and therefore was not disadvantaged. It also submits that Ms Nightingale was consulted with in a 'meaningful manner' prior to the decision being made and that the decision to suspend was not predetermined. It submits that Donna O'Connor believed on reasonable grounds that removing Ms Nightingale from the workplace would provide necessary separation and safety and that the alternative would have been to remove two or three other employees.

[40] Ms Nightingale's submissions referred to the relevant decision to suspend and what she says was the absence of consideration by the decision maker of alternatives to that, including suspension of other employees involved in the relevant incident

¹ Employment Relations Act 2000, s 103A.

(particularly given Ms Elsworth had since left the workplace), and to the absence of any ongoing conflict when Donna O'Connor arrived at the workplace on 18 November 2021.

[41] As to the procedure followed, Ms Nightingale submits that NZ Wool Dumping's actions were unjustifiable in that Ms Nightingale was not provided an opportunity to comment before NZ Wool Dumping reached its decision, that it did not communicate its decision in a clear manner, and that the way in which the suspension was communicated was unfair and caused upset given Ms Nightingale was at the time trying to communicate what had occurred.

[42] Donna O'Connor's evidence is that she contacted Mr McLeod after being informed of the incident, they discussed the appropriate procedure that should be followed, and that they determined Ms Nightingale should 'probably' be suspended for safety reasons and so that a meeting could be organised.

[43] Ms Elsworth had already left the premises by the time Donna O'Connor arrived at site. Donna O'Connor, in her witness statement, then said that she talked to Ms Nightingale in the front office to hear her view of the incident, that she determined that it would be best if Ms Nightingale was suspended and that she listened to Ms Nightingale's views. Donna O'Connor says she then decided to suspend Ms Nightingale pending a disciplinary investigation and informed Ms Nightingale that. This preceded Mr McLeod attending the workplace to talk to the other staff about the incident and to draft a letter recording NZ Wool Dumping's concerns.

[44] Suspension will only be justifiable where a fair process has been followed. However, suspension "must be looked at in a sensible, flexible, and a reasonable way to ascertain what are the requirements of fairness on the particular occasion and the particular surrounding circumstances".²

[45] I consider there may have been a reasonable basis on which to suspend Ms Nightingale from her employment on a temporary and limited basis to ensure the safety and health of other employees in the workplace. However, the suspension was not limited in that manner, and there was an absence of notice as to the proposed basis for the suspension and any opportunity to provide any feedback. Ms Nightingale was

² *Graham v Airways Corp of New Zealand* [2005] 1 ERNZ 381 (EmpC) referring to *Tawhiwhirangi v Attorney-General in respect of the Chief Executive, Dept of Justice* [1993] 2 ERNZ 446, at 558.

denied any meaningful opportunity to address the basis for the suspension or to provide reasons why she should not be suspended.

[46] Additionally, good faith required NZ Wool Dumping to provide relevant information to Ms Nightingale and an opportunity to respond prior to any decision being made.³ I find that that did not in fact occur, and that there was effectively no consultation whatsoever. Whilst Ms Nightingale was paid for the duration of the suspension, she was still disadvantaged, including by being excluded from the workplace.

[47] I find that NZ Wool Dumping's actions in suspending Ms Nightingale from her employment were substantively and procedurally unjustified and that Ms Nightingale was unjustifiably disadvantaged in her employment.

Inaction as to bullying complaints.

[48] Ms Nightingale submits that she was unjustifiably disadvantaged by NZ Wool Dumping's failure to address issues of alienation and lack of support at work. She says that Donna O'Connor accepted that such issues had been raised informally; that she investigated the matters herself; that she concluded there had been no alienation of Ms Nightingale; and that that was why the matter was not further investigated when raised by Ms Nightingale on 23 November 2021.

[49] NZ Wool Dumping submits that Ms Nightingale did not raise a complaint in relation to the events of July 2021 and that it cannot now be criticised for not responding. It says that Ms Nightingale was specifically asked and confirmed that she at no stage complained about bullying at work. It also submits that she knew how and who she should complain to but that she did not do so.

[50] Donna O'Connor was made aware of an issue on 13 August 2021 and says that she investigated it. NZ Wool Dumping submits that Donna O'Connor concluded that Ms Nightingale had made false accusations against Ms Roy and other staff, and that following Donna O'Connor's intervention Ms Nightingale apologised to Ms Roy. Such as any investigation may have been conducted, I do not consider it could reasonably be said to have been an investigation into the concerns raised by Ms Nightingale as to bullying behaviour and/or isolation.

³ *Sefo v Sealord Shellfish Ltd* (2008) NZELR 407 (EmpC), at [37].

[51] Ms Nightingale submits that NZ Wool Dumping did not follow a proper process; that no notes were taken relating to any investigation; that there is no evidence that Karin O'Connor or Ms Hohepa were spoken to; and that the allegations of bullying were relevant to the incident of 18 November 2021. She submits that there is no adequate explanation as to why a proper investigation was not undertaken. Ms Nightingale also submits that the absence of any 'formal' complaint prior to 23 November 2021 is explicable given the absence of any relevant policy, procedure, or complaint process.

[52] I consider Ms Nightingale was disadvantaged in her employment by a NZ Wool Dumping's failure to investigate the relevant allegations of bullying that were conveyed by Ms Nightingale at the meeting she attended on 23 November 2021. The allegations, at least generally as to the type of behaviour asserted as occurring in the workplace, were supported by two other employees, Ms Hohepa and Karin O'Connor. The matters raised were disregarded and simply not investigated. Those events were relevant to what was said by Ms Nightingale to have precipitated the incident of 18 November 2021.

[53] The incident on 18 November 2021 was arguably the exhibiting of prior workplace tensions boiling over. The matters raised by Ms Nightingale as to alleged isolation in the workplace may well have been relevant to the incident and should have been investigated. That was more so the case given the accounts that were provided by other employees effectively corroborating Ms Nightingale's concerns.

[54] The failure by NZ Wool Dumping to investigate the bullying allegations resulted in its investigation into the alleged conduct of Ms Nightingale on 18 November 2021 being insufficient and unfair. Whilst the focus of its investigation would reasonably be on the actual conduct of Ms Nightingale on 18 November 2021, it was necessary in my view that any matters raised by Ms Nightingale that might be relevant to that conduct be investigated. Absent that, it was not possible in my view for NZ Wool Dumping to fairly consider Ms Nightingale's conduct, the context in which it occurred, and what might have been significant mitigating circumstances.

[55] I find that Ms Nightingale was unjustifiably disadvantaged in her employment by NZ Wool Dumping's failure to investigate the bullying allegations raised by Ms

Nightingale. That failure, in effect, relates to the same factual matrix the procedural considerations relevant to Ms Nightingale's dismissal.

Was Ms Nightingale unjustifiably dismissed?

[56] There is no dispute as to the fact of dismissal and as such the onus turns to NZ Wool Dumping to show that the dismissal was justifiable.

[57] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether NZ Wool Dumping's actions, and how NZ Wool Dumping acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.⁴

Did NZ Wool Dumping follow a fair process?

[58] Counsel for Ms Nightingale, in submissions, referred to the relevant s 103A considerations, and additionally to a need for consideration of alternatives to dismissal by an employer.

[59] NZ Wool Dumping submits that immediate steps were taken to try and manage and respond to the situation that arose on 18 November 2021. It says that Donna O'Connor was delegated authority to deal with the situation by Mr Harrison. It submits that Ms Nightingale was afforded the opportunity to be represented, that she took that opportunity, and that she was provided a full opportunity to provide her views at a meeting held on 23 November 2021.

[60] NZ Wool Dumping also submits that Ms Nightingale was appropriately provided with an opportunity to make submissions or otherwise respond to preliminary findings reached by Donna O'Connor. It says that instead of responding, Ms Nightingale attended the workplace on the weekend of 27 and 28 November 2021 and collected her personal belongings. It submits that Donna O'Connor reasonably found that Ms Nightingale had committed serious misconduct in the form of an aggressive and unprovoked attack on Ms Elsworth and Ms Emerson.

[61] In relation to NZ Wool Dumping's actions relating to 18 November 2021, Ms Nightingale's submissions were critical of its failure to take notes at all stages of its

⁴ Employment Relations Act 2000, s 103A.

investigation and a consequential failure to raise its concerns properly with Ms Nightingale.

[62] Ms Nightingale further submits that the investigation meeting held on 23 November 2021 was conducted unfairly in that responses were not sought to specific questions. She submits that that approach led to unfair findings being made, including that the facts of the incident on 18 November 2021 were “...never really in dispute nor denied by [Ms Nightingale]”.

[63] Ms Nightingale submits that NZ Wool Dumping should have conducted further interviews with the relevant employees. She submits that she was subject to a disparity in treatment given her claims that Ms Elsworth and Ms Emerson were the aggressors and submits that no investigation at all was conducted into their conduct.

[64] Ms Nightingale also submits that the preliminary decision reached to dismiss was reached without proper consideration of the information that was available, including the statement that had been provided by Ms Hohepa. She also submits that not all of NZ Wool Dumping’s concerns were raised in the preliminary decision letter, including a concern that such an incident may happen again and that staff might otherwise leave if Ms Nightingale returned to work. A further concern raised was that the preliminary decision set out NZ Wool Dumping’s factual assessment and conclusion in a final way and that Ms Nightingale an actual and genuine opportunity to be heard.

[65] NZ Wool Dumping submits that Mr McLeod was appropriately instructed to hold initial discussions with relevant employees and to prepare correspondence to be sent to Ms Nightingale, including as to her legal rights and relevant information gathered as at that time.

[66] Donna O’Connor’s evidence is that the letter of 18 November 2021 raised concerns ‘arising directly from what the witnesses had told us’. She also says that at the meeting on 23 November 2021 Ms Nightingale had said that the situation had gotten out of hand and that she regretted that. Donna O’Connor says that she considered what Ms Nightingale had said overnight and formed the following views:⁵

- a. Joanna had verbally attacked Katrina then Donna;

⁵ Witness statement of Donna O’Connor dated 28 November 2022, at [34].

- b. There was no basis for this attack;
- c. Joanna was very confused about her relationships at work and believed that the other staff were excluding and marginalizing her;
- d. Whilst she said that she regretted the incident, Joanna took no real responsibility for her actions;
- e. Joanna told us that she believed she was helping the situation through her actions, and that she could calm Trina down through her behaviour;
- f. It was clear to me that Joanna had no awareness of the impact her behaviour had on those around her, particularly Trina in this situation;
- g. I determined that this could very well happen again;
- h. Staff might very well face further attacks and potentially leave if Joanna returned to her role...

[67] In questioning from me at the investigation meeting, Donna O'Connor said that she did not raise her concern that such an incident might occur again, and additionally that that concern was a factor in reaching her decision to dismiss Ms Nightingale. In cross examination, she said that she did not consider the absence of any warnings having been issued previously in reaching the decision to dismiss, nor did she consider alternatives to dismissal such as giving the employees a "cooling-off time", the working of different hours, or transferring employment to other sites.

[68] At the investigation meeting, the relevant employees gave conflicting versions as to the events of 18 November 2023. That is not surprising, particularly given the effluxion of time. However, the variations as to what occurred are in my view significant in terms of what could reasonably have been ascertained about the events on 18 November 2021. In effect, the investigation and collection of evidence as to the events was piecemeal. I find that the investigation was procedurally deficient in that no records were kept as to the relevant versions of the incident, that any attempt to reconcile the various versions was inevitably compromised, and that conclusions were hastily drawn without properly weighing the evidence of the relevant witnesses.

[69] The approach adopted was particularly problematic given the seriousness of the potential consequences for Ms Nightingale.

[70] There was simply no investigation into the matters raised by Ms Nightingale as to the alleged bullying said to be a precipitating issue to the incident of 24 November 2021. Ultimately, following a fair and reasonable investigation, a finding might have been made that the allegations of bullying could not be substantiated, or that even if substantiated they would not justify the later conduct of Ms Nightingale. However,

because of the insufficient investigation, I find NZ Wool Dumping did not properly consider these matters.

[71] I find that a reasonable employer could not properly assess Ms Nightingale's conduct without making reasonable enquiries into the alleged causes of the behaviour and precipitating events. Nor could a reasonable employer weigh and attribute responsibility or fault as between the employees involved without doing so.

[72] In cross-examination, Donna O'Connor accepted that Ms Hohepa's statement, provided at the meeting on 23 November 2021, supported Ms Nightingale's allegations of bullying, but said that she did not consider Ms Hohepa's statement.

[73] What I consider was required was that at least reasonable enquiries were made and documented so that a proper assessment could be made as to Ms Nightingale's conduct. This should have included a sufficient investigation as to whether there was a situation involving systematic bullying through isolation of Ms Nightingale in the workplace, an assessment of her actual conduct in context having regard to all of the circumstances, and a fair and balanced consideration of any mitigating factors.

[74] I find that the dismissal was procedurally unjustified.

Was NZ Wool Dumping's decision substantively justified?

[75] NZ Wool Dumping submits that Donna O'Connor determined that the situation on 18 November 2021 could well occur again and that she could not reasonably maintain the safety of other staff working with Ms Nightingale. That decision was based on a finding that Ms Nightingale's behaviour was serious enough to potentially destroy the necessary relationship of trust and confidence. NZ Wool Dumping otherwise submits that the decision to dismiss was attributable to serious misconduct and that on that basis the warning procedure in the IEA had no application.

[76] I have found that dismissal was procedurally unjustified, including on the basis NZ Wool Dumping did not sufficiently investigate that the allegations against Ms Nightingale. I find that the insufficiency of the investigation was such that a fair and reasonable employer, objectively, could not have dismissed Ms Nightingale. It was not an option open to NZ Wool Dumping.

[77] On any view, the incident of 24 November 2021 did not involve physical violence. It involved a single incident of alleged aggressive behaviour short of physical violence, in circumstances where another employee, albeit purporting to protect her sister, was also involved in similar behaviour. Whilst NZ Wool Dumping expressed a significant concern that the alleged behaviour might be repeated, it failed to conduct an adequate investigation into what occurred and what precipitated it. In such circumstances, a finding of serious misconduct was not open to NZ Wool Dumping.

[78] I find there was no basis on which a reasonable employer could reasonably have concluded that Ms Nightingale committed serious misconduct, nor that there had been an irreconcilable breakdown of trust and confidence.

[79] I find that the dismissal was substantively unjustifiable.

Is Ms Nightingale entitled to remedies?

Is Ms Nightingale entitled to compensation for lost wages?

[80] Ms Nightingale claims that she lost wages as a result of her personal grievance and claims a total of \$36,993.13 gross, for a period of 71 weeks from 8 December 2021. She calculated that sum taking account of the difference between what she had been earning at NZ Wool Dumping and the amount of a sickness/disability benefit she subsequently received.

[81] Ms Nightingale submits that she took steps to mitigate her loss by making application for the relevant benefit, and by seeking alternative employment with two prospective employers before her health deteriorated further.

[82] NZ Wool Dumping submits that Ms Nightingale failed to mitigate her loss by making genuine attempts to try and find alternative employment for more than a three-month period. I am not satisfied that that is the case, and so far as Ms Nightingale was unable to seek alternative work, I find that at least a significant cause for that was NZ Wool Dumping's actions relevant to her personal grievances.

[83] I consider it an appropriate award of lost wages to be 13 weeks. I decline to make an order for compensation relating to any further period on a discretionary basis.

[84] I order NZ Wool Dumping to pay Ms Nightingale, within 28 days, compensation of \$11,440 for lost wages. I calculate that sum based on her earnings of \$22.00 per hour and a 40-hour week.

Is Ms Nightingale entitled to compensation for humiliation, loss of dignity and injury to feelings?

[85] Ms Nightingale seeks compensation for humiliation, loss of dignity and injury to feelings. She seeks a total amount, that being a combined total relevant to all of her personal grievance claims, of \$25,000.

[86] Ms Nightingale submits that there was a high degree of physical, mental and financial distress that resulted from NZ Wool Dumping's actions. Further, she submits that her claim is supported by medical evidence of extreme stress and the worsening of relevant health concerns. Her evidence is that she was forced to move out of her residence at the time, that she cried a lot, that she could not sleep, and was unable to do anything all day for a period of time.

[87] Ms Nightingale gave evidence that both the suspension and dismissal caused her extreme stress. She says that was exhibited in the worsening of her physical health including as to her pre-existing asthma and COPD. Ms Nightingale provided medical records as to her attendance at doctors on 24 November 2021 and between March and June 2022. She also states that she was affected mentally and financially by the termination and that she had to rely on her son to help her financially.

[88] Ms Karin O'Connor gave evidence that she visited Ms Nightingale following the dismissal and that she observed Ms Nightingale crying and upset. Karin O'Connor says that Ms Nightingale reported to her that she had had trouble sleeping.

[89] I am satisfied that Ms Nightingale has suffered significantly as a result of NZ Wool Dumping's actions, and that she is entitled to an award of compensation. I find that both the suspension and dismissal impacted Ms Nightingale significantly.

[90] Subject to any reduction on account of contribution, I would award Ms Nightingale the sum of \$7,500 in relation to the unjustified suspension from her employment, and \$22,500 in relation to the unjustified dismissal, being a total of \$30,000.

Contribution

[91] Section 124 of the Act requires that I consider the extent to which Ms Nightingale's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.⁶

[92] Ms Nightingale submits that there was no blameworthy conduct by Ms Nightingale that contributed to the situation giving rise to her grievance. In support of this, she says that she remained clam throughout the incident that occurred on 18 November 2021, and that that was evidence by Ms Hohepa who provided a statement to that effect at the time.

[93] NZ Wool Dumping submits that Ms Nightingale's actions, if the Authority were minded to decide in her favour, contributed significantly and that a reduction of 100% would be appropriate. I do not agree, and a reduction of remedies on account of contribution is not a substitute for disciplinary action that might have reasonably been taken. However, I do find that Ms Nightingale contributed to the situation giving rise to the grievance.

[94] I accept that Ms Nightingale felt aggrieved based on her perception of other events in the workplace, including the concerns she raised at the meeting on 23 November 2023. However, she certainly in my view bears some responsibility for the incident of 18 November 2021 that gave rise to her grievances. I consider that to be the case regardless as to who initiated the confrontation or the preceding events. Ms Nightingale's actions in yelling at another employee, and in engaging in the exchange with Ms Emerson, were blameworthy.

[95] I would have ordered NZ Wool Dumping to pay compensation in the amount of \$30,000. However, I find that a 20 per cent reduction in remedies is appropriate in this case. I order that NZ Wool Dumping Group (2019) Limited Partnership make payment, within 28 days, to Ms Nightingale of \$24,000.

⁶ Employment Relations Act 2000, s 124.

Has NZ Wool Dumping breached its duty of good faith?

[96] Ms Nightingale submits that NZ Wool Dumping failed to provide her with sufficient information such as to enable her to genuinely and properly respond to the allegations made. She says that this, and other procedural failings, amounted to a breach of good faith that was serious and sustained. Ms Nightingale also refers to what she submits was an unexplained disparity in her treatment as compared to that of other employees.

[97] NZ Wool Dumping submits that its processes were not hastily convened or concluded, and that Ms Nightingale was afforded a full and unencumbered opportunity to present her views and provide feedback directly to the decision maker. It denies any breach of good faith.

[98] Whilst there were procedural failings relevant to Ms Nightingale's unjustified dismissal and disadvantage claims, I do not consider that they warrant in any way a separate penalty. I consider that the relevant procedural failings will be plainly apparent to NZ Wool Dumping, and that there are no features present that warrant the imposition of a separate penalty.

Did NZ Wool Dumping breach Ms Nightingale's IEA?

[99] Ms Nightingale submits that NZ Wool Dumping breached the terms of her IEA as to its disciplinary process and warning procedures. In summary, it is submitted that NZ Wool Dumping failed to apply the relevant warning process contained in the IEA.

[100] NZ Wool Dumping submits that Ms Nightingale's IEA did not mandate the provision of warnings in circumstances where serious misconduct had occurred. It denies breaching the IEA and s 134(1) of the Act.

[101] The relevant clause 'Discipline' is set out below:

where you may be guilty of misconduct or serious misconduct or when it has become clear that you are no longer capable of meeting our standard of workmanship or performance, the following procedure shall apply:

Warning procedure – Where your act or omission is established to be misconduct the following warning procedure is to be followed, provided that should the circumstances justify, an initial or subsequent warning may be given at any level:

First offence – we will give a verbal warning, A written record of this warning shall be kept

Second offence – A final written warning shall be given.

Third offense – Dismissal on appropriate notice

If no further concerns of allegations arise for a period of 12 months after receiving a first, or final warning, then the warning shall be treated as having lapsed.

[102] The IEA also contains a clause entitled “termination” which follows the “discipline” clause. The “termination” clause provides for termination on notice except where serious misconduct is proven. That clause directly follows the discipline clause.

[103] In relation to the alleged breach of the IEA, Ms Nightingale submits that, when read in context, NZ Wool Dumping can dismiss without notice for serious misconduct without applying the warning procedure, but that that is not what has occurred. Instead, Ms Nightingale submits that she was dismissed on one weeks’ notice and that in those circumstances her conduct cannot be said to have been serious misconduct. As such, she submits, NZ Wool Dumping were obligated to comply with the IEA and that she should have been issued a warning, and that NZ Wool Dumping therefore failed to comply with the IEA.

[104] I find that NZ Wool Dumping breached the IEA by failing to apply the warning procedure. The IEA cannot be read as mandating a warning in the event of serious misconduct. However, I have found that there was no proper basis on which a finding of serious misconduct warranting dismissal could have been made and that NZ Wool Dumping were obligated to comply with the warning procedure. It did not do so, and indeed the decision maker, whilst deciding the matter was serious and warranted dismissal, gave no consideration as to whether the conduct amounted to serious misconduct.

[105] I find that NZ Wool Dumping breached the warning procedure in the IEA.

Penalties

[106] I have determined that Ms Nightingale is entitled to a remedy in the form of compensation for her personal grievance. The Court in *Salt v Fell*⁷, following the approach in *Xu v McIntosh*⁸ declined to award penalties where a remedy had already been granted in respect of the same conduct for a personal grievance where there were

⁷ *Salt v Fell* [2006] ERNZ 499.

⁸ *Xu v McIntosh* [2004] 2 ERNZ 448.

no “special facets of the breach calling for punishment of the employer on top of compensation for the employee”.⁹

[107] As detailed above, I have found that NZ Wool Dumping’s actions in dismissing Ms Nightingale from her employment were procedurally and substantively unjustified. However, I am not satisfied that the actions of NZ Wool Dumping were such that warrant the imposition of a penalty in terms of s 4A of the Act. I also note that, had I found that such a penalty was otherwise warranted, I would have declined to order that any part of such penalty be paid to Ms Nightingale having regard to the compensation I have otherwise ordered be paid to her.

[108] I consider the breach of the IEA of a different character. I find that a penalty is appropriate in the circumstances having regard to the nature of the breach, the absence of serious misconduct, and in effect, what was a clear disregard to the terms of Ms Nightingale’s employment. Further, I consider that whilst Ms Nightingale has been awarded compensation in relation to the actions of NZ Wool Dumping, it is appropriate that a penalty be issued.

[109] It is important that parties to an employment agreement comply with its terms and. I find that in the present case, NZ Wool Dumping disregarded the warning procedure and mischaracterised Ms Nightingale’s conduct as being serious misconduct. I find that NZ Wool Dumping failed to consider the terms of the IEA and simply proceeded with the outcome it wanted. That was despite there being a clear range of outcomes short of dismissal, comprising various warnings, that were mandated by the agreed terms of employment as recorded in the IEA.

[110] Every party to an employment agreement who breaches that agreement is liable to a penalty imposed by the Authority.¹⁰ I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*¹¹ and had regard to the mandatory considerations at s 133A of the Act.

[111] The maximum penalty in this case for a single breach is \$20,000.¹² The breach relates to a single issue and there is no evidence of relevant previous conduct by NZ

⁹ Ibid, at [45].

¹⁰ Employment Relations Act 2000, s 134(1)

¹¹ [2016] NZEmpC 143.

¹² Employment Relations Act 2000, s 135(2)(b).

Wool Dumping. I consider the breach to have involved, at best for NZ Wool Dumping, a wilful disregard to the warning process and the agreed terms and conditions of Ms Nightingale's employment. There is no satisfactory evidence that NZ Wool Dumping would have difficulty paying the penalty and I am satisfied that the penalty is proportionate.

[112] I consider that a penalty is appropriate having regard to the need for specific deterrence. I find that a penalty of \$1,500 is appropriate in the circumstances, and I order that, having regard to the compensation already ordered to Ms Nightingale, the whole of that penalty be paid to the Authority.

Summary of orders

[113] New Zealand Wool Dumping Group (2019) Limited Partnership is ordered, within 28 days of the date of this determination, to make payment to Joanna Nightingale of:

- (a) the total sum of \$24,000 as compensation for humiliation, loss of dignity and injury to feelings (relating to both her unjustified disadvantage and unjustified dismissal claims); and
- (b) The sum of \$11,440 as compensation for lost wages.

[114] New Zealand Wool Dumping Group (2019) Limited Partnership is ordered, within 28 days of the date of this determination, to pay a penalty of \$1,500 to be paid into the Crown account via the Authority.

[115] I decline to issue a penalty in relation to Ms Nightingale's claims that NZ Wool Dumping breached its good faith obligations.

Costs

[116] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[117] If they are not able to do so and an Authority determination on costs is needed Ms Nightingale may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum NZ Wool Dumping would then have 14 days to lodge any

reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[118] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹³

Rowan Anderson
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.