

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 457
3181519

BETWEEN KARIN O'CONNOR
 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: 20 and 21 April 2023 at Napier

Submissions received: At the investigation meeting

Determination: 18 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Karin O'Connor was employed by New Zealand Wool Dumping Group (2019) Limited Partnership (NZ Wool Dumping) as an Office Administrator at NZ Wool Dumping's Napier operations.

[2] On 24 November 2021, Karin O'Connor was involved in an incident during which she says she asked another employee, Katrina Elsworth, whether she had removed a part from an industrial sewing machine that was to be shipped to Murupara as part of a new project establishing a small sewing operation. This was followed, the same day, by a further exchange with Ms Elsworth and another employee, Georgina Roy, during which Karin O'Connor accused them of being 'liars'.

[3] On 25 November 2021 Karin O'Connor advised her sister, Donna O'Connor, also an employee of NZ Wool Dumping and its now General Manager, that she would not be at work that day. She then took some time off work on medical advice before, she says, being suspended from her employment as of 6 December 2021. She provided medical certificates covering the period of her absence.

[4] On 23 December 2021 Karin O'Connor says that she advised NZ Wool Dumping, through her representative at the time, that she intended to return to work as of 5 January 2022. She attended a meeting by audio-visual link on 5 January 2022 at which she was informed that she was not to return to work pending a further disciplinary meeting. On 14 January 2022, she was given notice that her employment was being terminated effective from 21 January 2022.

[5] Karin O'Connor raised a personal grievance with NZ Wool Dumping on 20 January 2022.

[6] Karin O'Connor claims that she was unjustifiably disadvantaged by the suspension from her employment, and that she was unjustifiably dismissed. She also claims that NZ Wool Dumping breached its duty of good faith towards her in terms of ss 4 and 4A of the Employment Relations Act 2000 (the Act), and that it breached her individual employment agreement (IEA) and therefore s 134 of the Act. Karin O'Connor seeks the imposition of penalties against NZ Wool Dumping.

[7] NZ Wool Dumping claims that its actions in suspending and dismissing Karin O'Connor were justified, and that it only suspended her from 5 January 2022. It denies any breach the Act and the IEA.

Issues

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

- (a) Was Karin O'Connor unjustifiably dismissed;
- (b) Was Karin O'Connor unjustifiably disadvantaged in her employment, in relation to the suspension from her employment by NZ Wool Dumping?;
- (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 section 123(1)(c)(i) of the Act?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Karin O'Connor 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 Karin O'Connor's IEA (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

[9] An investigation meeting was held on 20 and 21 April 2023 in Napier. Prior to the investigation meeting, and in accordance with directions issued at a case management conference on 3 October 2022, written witness statements were lodged by both parties. Karin O'Connor and Joanna Nightingale, another former employee, gave evidence in support of Karin O'Connor's claims. For NZ Wool Dumping, the following witnesses gave evidence:

- Stephen Harrison, former director and general manager.
- Donna O'Connor, general manager.
- Donna Emerson, sewer.
- Georgina Roy, sewer.
- Katrina Elsworth, sewer.
- Kim Baker, employee.
- Phillip Lawrence, contracting serviceperson.

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

[11] 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.

[12] 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.

[13] 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.

Was Karin O'Connor unjustifiably disadvantaged in her employment?

Was Karin O'Connor suspended from her employment, and if so, when?

[14] There is a dispute as to when Karin O'Connor was suspended from her employment. Karin O'Connor says that she was suspended from her employment on both 6 December 2021 and on 5 January 2022. NZ Wool Dumping denies that she was suspended on 6 December 2021, and says that the suspension from 5 January 2022 was justified.

[15] Karin O'Connor left the workplace after the incident on 24 November 2021. On the morning of 25 November 2021, she advised Donna O'Connor by text message that she would be off work for the day. Donna O'Connor responded asking "are you coming back at all". Karin O'Connor replied saying "I don't know". She recounted further exchanges with Donna O'Connor, which included Donna O'Connor advising that she didn't intend to get involved.

[16] Karin O'Connor says that she was called by Mr McLeod on or about 25 November 2021. She says that during that call Mr McLeod said words to the effect of "I hear that you are not at work". She says she then confirmed that was the case and that Mr McLeod responded with "Yes, that is a good idea. You stay away for a bit". She then says that she visited her doctor on 29 November 2021, obtaining a certificate certifying she was unable to work for the period 24 November 2021 through 10 December 2021.

[17] On 6 December 2021 Karin O'Connor exchanged text messages with Mr McLeod as follows (without correction):

Ms O'Connor Morning I won't be @ work for the next 3 days back on Thurs
9th

Mr McLeod Hi Karin.. so as explained last week, things are more complicated now than you simply arriving back.. the next step is for you, Steve and I to meet to review the actions which have led to here. If you provide me with your private email I will outline the company's concerns and establish a review process. It is essential that you do not come in to work in the meantime.. please advise David

[18] Later that day, Mr McLeod contacted Karin O'Connor by email noting several concerns relating to alleged incidents during the week of 15 November 2021 and on 24 November 2021. That letter advised that other staff had been spoken to and that there was an investigation being conducted. It requested that Karin O'Connor attend a meeting. Whilst the purpose of the meeting wasn't detailed as such, the letter was headed "disciplinary meeting". The letter did not mention suspension.

[19] On 13 December 2021, Karin O'Connor attended her doctor again who provided a certificate stating that she was "medically unfit for work ongoing from the previous certificate, for the next 3 weeks...". Her representative at the time, Ronald Jones, and Mr McLeod then, between 13 December and 20 December 2021, exchanged further correspondence as to information sought by Karin O'Connor and the investigation process.

[20] On 23 December 2021, Mr Jones advised that Karin O'Connor intended to return to work on 5 January 2022 when her sick leave was due to end. That, and the preceding correspondence, makes no mention of suspension. Indeed, Mr Jones's email of 23 December 2021 advising of her intention to return to work indicates she did not consider she was suspended from her employment on 6 December 2022. She remained on sick leave for that period and had been certified as being medically unfit for work.

[21] Mr McLeod, on 23 December 2021, responded to Mr Jones advising that:

If it is Karin's intention to return to work on Wednesday 5th January 2022, then we will need to schedule a meeting at 8am on that morning to consider if she is to be stood down in the meantime.

Karin is welcome to have you present as her representative at that meeting.

The employers significant concern is the risk Karin's continued presence in the workplace has on the staff also there. You will note from the documents supplied that staff have threatened to leave should Karin return.

[22] A meeting was held on 5 January 2022 in relation to the proposed suspension. At that meeting, Karin O'Connor was advised that she was being suspended from her employment. Whilst there was initially some confusion at the investigation meeting, Mr Harrison ultimately confirmed that he had intended to be at the meeting but was not able to and was not present at that meeting. Mr Harrison also confirmed that he had instructed Mr McLeod to suspend Karin O'Connor at the meeting. He says that decision was made because she had not yet responded to the investigation questions. He also said, at the investigation meeting, that he was not expecting any further discussion about the matter.

[23] Karin O'Connor says that she sought to return to work on two occasions, 9 December 2021, and 5 January 2022. She submitted that, regardless of the language used in the relevant communications, the substance was that she was suspended from her employment on both of those occasions. Further, she submitted that she was not afforded an opportunity to comment on any proposed suspension before being informed of it.

[24] NZ Wool Dumping submits that Karin O'Connor was not suspended on 6 December 2021 and that the text message sent to her on that day, on a reasonable interpretation, merely indicated that she should take the period of sick leave that she had notified. It says that she continued sick leave as reflected in the medical certificates, and that she was not due to return to work until 5 January 2022.

[25] In terms of 5 January 2022, Karin O'Connor accepts that the purpose of the meeting was to deal with suspension but says that it was to inform her of a decision that had already been made. She says the meeting was not convened to provide her an opportunity for consultation or comment. She also submits that her suspension was initially unpaid, albeit that was eventually rectified.

[26] NZ Wool Dumping submits that Karin O'Connor was only suspended from her employment, on pay, from 5 January 2022 at a special meeting to discuss suspension.

[27] I find that Karin O'Connor was not suspended from her employment until 5 January 2022. I consider that NZ Wool Dumping had a very firm view, prior to that

time and the relevant meeting, that she should not attend the workplace for a period of time. However, that view was expressed in the context of her having provided a medical certificate certifying that she was not fit to attend work. The coverage of the medical certificates obtained did not expire until early January 2022, that being the time at which Karin O'Connor, through Mr Jones, notified she intended to return to work.

[28] The exchanges between Mr McLeod and Mr Jones on 23 December 2022 exhibit a clear indication that NZ Wool Dumping thought it appropriate that Karin O'Connor be suspended, but that she was not at that time. Mr Jones's letter of 16 December 2021 noted that she was on sick leave and suggested that she be placed on paid suspension whilst the matter was resolved. It is also the case that no formal notification of suspension was provided until 5 January 2022.

[29] Even if I were wrong as to whether the 6 December 2021 text message amounted to notification of suspension, I do not consider any separately identifiable compensation for humiliation, loss of dignity or injury to feelings could be apportioned to that action given the evidence suggests Karin O'Connor did not consider she had been suspended at that time.

[30] There is no contention as to whether Karin O'Connor was suspended as of 5 January 2022. I find that she was not suspended from her employment prior to 5 January 2022, but that she was suspended from her employment from 5 January 2022.

Were NZ Wool Dumping's actions justified?

[31] 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

[32] 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 also the requirements of good faith set out at s 4(1A) of the Act.

¹ Employment Relations Act 2000, s 103A.

[33] Karin O'Connor says that she was unjustifiably disadvantaged in her employment having regard to NZ Wool Dumping's decision to suspend her from her employment and the procedure it used in reaching that decision. She submits that no opportunity to comment on the proposed suspension was provided, and also that the meeting on 5 January 2022 was simply to confirm the suspension, which she says was predetermined.

[34] NZ Wool Dumping denies that Karin O'Connor was unjustifiably disadvantaged. NZ Wool Dumping submits that the suspension was appropriate and justified and that Karin O'Connor was not disadvantaged because she was paid for the period of suspension. Mr Harrison's finding that it was necessary for her to be excluded from the workplace given she had not at that time responded to a series of questions put to her as part of its investigation, and that the suspension was justified on that basis.

[35] I find that there was a substantive basis for the suspension in that there were serious allegations relating to Karin O'Connor's treatment of other employees. The fact that there was an ongoing investigation, in isolation, would not in my view have established a proper basis for suspension. However, in the context of the actual allegations, Karin O'Connor's return to work had the potential to cause undue disruption to the operations whilst the investigation was completed and appropriate outcome determined. That is a position that seemed to be accepted when Mr Jones wrote to Mr McLeod on 16 December 2021 requesting that Karin O'Connor be placed on paid suspension.

[36] It was apparent that NZ Wool Dumping intended to suspend Karin O'Connor at the meeting on 5 January 2022. Mr Harrison had provided instructions to Mr McLeod to that effect, and the preceding correspondence indicates strongly held views as to its intention to suspend her. However, it is also the case that, through her representative at the time, Karin O'Connor had requested she be placed on paid suspension. NZ Wool Dumping had also provided some notice as to the basis of its concerns prior to the meeting, including as to alleged safety concerns.

[37] 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

[38] As of 23 December 2021, whilst the notice was perhaps imperfect, Karin O’Connor was on notice that NZ Wool Dumping considered she should not be permitted to return to the workplace whilst the disciplinary process was ongoing. She was advised of at least the general nature of NZ Wool Dumping’s concerns as to her proposed return to the workplace and the reasons it considered she should be suspended. She was advised of those matters through her representative approximately two weeks prior to the proposed meeting.

[39] Karin O’Connor did not provide any meaningful objection to the proposed suspension, either prior to, or at, the meeting on 5 January 2022. Her representative had requested, albeit some time prior to the meeting, that she be suspended on pay.

[40] I am satisfied that NZ Wool Dumping followed a fair, albeit imperfect, procedure in relation to the suspension. Even if I were wrong about that, I would have concluded, considering the request for paid suspension, that any defects in procedure were minor and did not result in Karin O’Connor being treated unfairly.

[41] I consider that whilst there were strong views held as to the proposed suspension, and the meeting was convened on the basis that Mr McLeod had instructions to proceed with the suspension in Mr Harrison’s absence, that the suspension was procedurally justified in all of the circumstances.

[42] I find that NZ Wool Dumping’s actions in suspending Karin O’Connor from her employment were substantively and procedurally justified and that Karin O’Connor was not unjustifiably disadvantaged in her employment.

Was Karin O’Connor unjustifiably dismissed?

[43] 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 justified.

[44] 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

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

Wool Dumping acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.³

[45] The onus is on NZ Wool Dumping to justify its actions and justification requires the consideration of both substantive and procedural fairness.

Relevant background, the investigation, and the decision to dismiss.

[46] Karin O'Connor's evidence is that she would, as part of her role, be required to contact Mr Lawrence to arrange for him to attend to repairs of the sewing machines as required. Employees would inform her when there were issues with the machines, and she would arrange for them to be fixed.

[47] Karin O'Connor recounted a meeting a week or so prior to 15 November 2021 where she brought up an issue in relation to the machines destined for Murupara suggesting that Mr Lawrence check that they were all working and ready to go. She says that Donna O'Connor took responsibility for calling Mr Lawrence and did so during a 'health and safety' meeting. Karin O'Connor's evidence is that she also recalled an instruction from Mr Harrison to the effect of "you are to ensure the machines are ready to be shipped" and says she wanted to ensure the machines were in working order.

[48] Karin O'Connor says during the week of 15 November 2021 she was approached by Ms Nightingale who explained that her machine was not working. Ms Nightingale advised that when she went to use the 'old silver' machine it too was not working. This was despite Mr Lawrence having previously checked it. Ms O'Connor says that she had seen Ms Emerson use the machine at some point prior.

[49] At the investigation meeting, Karin O'Connor explained that she wanted to 'get to the bottom of it' and investigate whether other employees had been using the machine, and if so, then why. She said in response to my questioning that she had been 'at the end of her tether', accepted that it 'probably wasn't [her] role', that she had not been asked to investigate the matter, and that she didn't trust the other employees and that that was part of her motivation.

³ Employment Relations Act 2000, s 103A.

[50] Karin O'Connor also says that she then asked the relevant employees which of them was the last to use the machine, none of them responded confirming that it was them. She then said under her breath, but loudly, 'liars' to the group. She says that she later apologised to a group of employees including Ms Emerson, Ms Hohepa, and Ms Ellsworth, after having discussed the matter with Donna O'Connor some days later.

[51] Karin O'Connor recounted the discussion she had with Donna O'Connor during which Donna said words to the effect of "you shouldn't have done that" in relation to the incident during the week of 15 November 2021. She says she was not given a formal warning in relation to that incident.

[52] In relation to the incident of 24 November 2021, Karin O'Connor says that Martha Hohepa, another sewer at the workplace, informed her that Ms Elsworth had 'tampered' with one of the machines. When she asked Ms Elsworth whether she had removed a part from the machine that she denied it. She then says she asked Ms Roy whether she had seen Ms Elsworth remove the part, and that she responded that she hadn't.

[53] Karin O'Connor acknowledged at the investigation meeting that at that point she was "pissed off" with everyone. She called Ms Hohepa to confirm what she had seen before returning to engage again with Ms Elsworth and Ms Roy.

[54] Karin O'Connor says she then returned to the production area and asked the employees again whether they were sure about not having removed the part. She then asked them whether they had 'changed their story' after she had told them that she had 'other information'. She then says that she got angry and aggressively said to Ms Roy "you're liars". Karin O'Connor did not attend work the following day.

[55] Mr Harrison says he was informed of the incident by Donna O'Connor and Mr McLeod. He spoke to Donna O'Connor at approximately 8.00am on 25 November 2021 and was advised that there had been a 'major blow up' and that Karin O'Connor was not going to attend work. He spoke to Mr McLeod on 25 November 2021, at which time he instructed Mr McLeod to investigate the matter.

[56] It is apparent that Mr McLeod discussed the events with a number of relevant employees at some stage following the incident on or about 25 November 2021. However, written accounts were not taken until 14 December 2021 from Mr Baker, Ms

Elsworth, Ms Roy and Ms Emerson. That followed a request from Karin O'Connor's representative at the time for information relevant to the investigation, including any notes and minutes from the investigation.

[57] NZ Wool Dumping sent Karin O'Connor a series of written questions on 20 December 2021. That letter also recorded that it had obtained formal statements from four staff members in response to Karin O'Connor seeking further detail about NZ Wool Dumping's concerns. The letter asked her to respond to the questions at a meeting on a date to be arranged and advised that company considered the matter as potentially serious, and one that could result in termination of employment.

[58] A meeting took place on 10 January 2022 at which Karin O'Connor provided responses to the questions. Notably, she responded to the effect that she did say the words "you're fucking liars" in relation to the incident during the week of 15 November 2021, that she did not abuse Ms Roy on 18 November 2021, and that she called Ms Roy and Ms Elsworth 'liars' on 24 November 2021.

[59] On 12 January 2022 a letter recording NZ Wool Dumping's preliminary decision to terminate Karin O'Connor's employment was sent to her. The letter stated that the author, Mr McLeod, was satisfied that Karin O'Connor's actions were "unwarranted, offensive and abusive, and that there was no reasonable justification for [her] behaviour". The letter also advised that the preliminary decision was not a fully concluded view and that the author remained open to any further responses to be provided by 14 January 2022. NZ Wool Dumping maintain that Mr Harrison was the decision maker despite him not being the signatory on that correspondence.

[60] The letter containing the preliminary decision focused on the events of 24 November 2021. It raised a number of matters, apparently for the first time, including that Karin O'Connor had:

- (a) been acting outside of her role and responsibility's when questioning the employees;
- (b) inappropriately relied on the statement of another employee who was "similarly and obviously" impacted by the termination of another employee; and
- (c) specifically been warned about calling employees 'liars' previously.

[61] On 12 January 2022, Mr McLeod emailed Ms O'Connor's representative at the time, Ronald Jones, attaching the letter and noting that he was looking forward to a response. Karin O'Connor was copied into that email. On 13 January 2022 Mr Jones responded as follows:

Hi David,

Apologies for the later reply. My instructions are that the letter is a fair representation of what happened at the meeting and that Karin has no further comment to make. We will just wait to see the final outcome....

[62] Somewhat curiously, given she was copied into the initial email from Mr McLeod, Karin O'Connor was not copied into the above response. Her evidence was that she did not provide instructions or approval to Mr Jones to send the response. She also said that she believed that NZ Wool Dumping had predetermined its decision and that they were not going to change their mind.

[63] NZ Wool Dumping's final decision was communicated by letter dated 14 January 2022.

Did NZ Wool Dumping follow a fair process?

[64] Counsel for Karin O'Connor, in submissions, referred to the procedural requirements at s 103A of the Act and additionally to the consideration of alternatives to dismissal by an employer. In summary, Karin O'Connor submits that NZ Wool Dumping's actions, and how it acted, were not what a fair and reasonable employer could have done in all of the circumstances at the time of the dismissal, because:

- (a) there was an inappropriate delegation of NZ Wool Dumping's investigation evidenced by an absence of specific instructions being provided by the decision-maker. Draft documents were not provided to the decision-maker prior to decisions being communicated and there was uncertainty as to who the true decision-maker actually was;
- (b) NZ Wool Dumping did not raise all of its relevant concerns with Karin O'Connor, including some that were taken into account in the decision to dismiss her from her employment. Karin O'Connor submits that this included an allegation that she had been acting outside of her authority when enquiring into the alleged interference with the sewing machine, a suggestion that a relevant witness to events was motivated by the dismissal

of Ms Nightingale, and an alleged warning said to have been issued on or about 15 November 2021;

- (c) NZ Wool Dumping's decision to dismiss was, in part, based on a threat by three other employees to leave the business without any apparent attempts to dissuade those employees from taking that position; and
- (d) NZ Wool Dumping failed to appropriately consider alternatives to dismissal, including the issuing of a warning or consideration of alternative working arrangements.

[65] NZ Wool Dumping submits that it appropriately took steps to investigate the incident of 24 November 2021; that Mr Harrison took the role of decision maker given a clear conflict of interest in relation to Donna O'Connor; that appropriate arrangements were made for the taking of witness statements; that Karin O'Connor was provided relevant information including those statements; that Karin O'Connor was represented in the disciplinary process; and that it provided Karin O'Connor ample time to consider and respond to the questions it asked of her.

[66] NZ Wool Dumping submits that before making the final decision to dismiss, Karin O'Connor was, through her representative, provided an opportunity to comment on its preliminary findings. It submits that the decision to dismiss was reached on the basis that she had committed serious misconduct and that serious damage had been done to the necessary relationship of trust and confidence. In reaching that position, NZ Wool Dumping concluded that Karin O'Connor's actions on 24 November 2021 towards Ms Roy, Ms Elsworth and Ms Emmerson, amounted to an unprovoked and aggressive attack.

[67] The investigation conducted in relation to the events of 24 November 2021 was imperfect. No written account of the events was obtained from the relevant witnesses at the time or within a reasonable time of the incident. In one sense, that imperfection was largely inconsequential given Karin O'Connor's response to the questions later provided. However, I consider that the procedural problems with the investigation ran deeper and included a problematic approach to the provision of information to the relevant decision maker, Mr Harrison.

[68] Mr Harrison, in questioning from me, stated that he had not seen the statements that were ultimately taken from the relevant employees. Whilst I do not doubt that Mr

McLeod verbally provided relevant information to Mr Harrison, such an approach was in my view undesirable in light of Mr Harrison's role. As an example, one of the issues relied upon by NZ Wool Dumping was a threat that other employees might leave should Karin O'Connor return to work. Mr Harrison's evidence in questioning was that that was only a minor factor despite it being repeatedly referred to in the relevant correspondence.

[69] The manner in which the investigation and disciplinary process was conducted had the effect of removing Mr Harrison, the decision maker, too far from necessary and relevant detail. I find this included ultimately a failure to properly inform himself as to the purported views of other employees in relation to a potential return to work by Karin O'Connor. Such as those views were provided, they were relayed by Mr McLeod based on statements made in November or December of 2021, that being some significant time prior to the dismissal. It is also the case that Mr Harrison, when giving evidence, ascribed much less weight to the views of the other employees than suggested in the relevant correspondence.

[70] No witness statements were taken at the time, no investigation report was produced, and I find that NZ Wool Dumping failed to satisfactorily investigate the allegations before dismissing Karin O'Conner. Whilst Mr Harrison says that he was 'fully briefed', I consider the investigation and provision of information was insufficient to provide Mr Harrison a proper basis on which he could have satisfied himself that serious misconduct had been committed.

[71] I am also not satisfied that NZ Wool Dumping's actions were reasonable having regard to its failure to consider alternatives to dismissal. Mr Harrison gave evidence that he considers the matter went too far for a warning, whilst also noting that Karin O'Connor was otherwise a good employee. There were clearly alternatives available that were not considered, at least sufficiently. I am not satisfied that any meaningful consideration was had in relation to other potentially reasonable outcomes at the time. As detailed elsewhere in this determination, I find that NZ Wool Dumping were obligated to comply with a provision in Karin O'Connor's IEA concerning a warning procedure.

[72] In addition, it is apparent that NZ Wool Dumping took into account that Karin O'Connor had previously been warned about similar conduct, relating to the earlier

incident during the week of 15 November 2021. However, there was no formal warning issued, nor was any disciplinary procedure followed. In that context, I find the purported warning should not have been taken into account.

[73] I do not consider there is any basis for criticism of NZ Wool Dumping in terms of its reliance on Mr Jones's email response to the preliminary decision letter. It purported to convey instructions received from Ms O'Connor. She had, at the very least, been sent a copy of the relevant correspondence having been copied into Mr McLeod's email of 12 January 2022. Mr Jones's reply was sent approximately 28 hours after that email was sent. There is no evidence to suggest that Karin O'Connor wanted to provide any response despite having been given an opportunity to do so.

[74] I find that the investigation conducted was insufficient and that NZ Wool Dumping failed to appropriately consider alternatives to dismissal.

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

Was NZ Wool Dumping's decision substantively justified?

[76] NZ Wool Dumping submits that Karin O'Connor's actions on 24 November 2021 were abusive, and that in any event it was not her role to question staff in the manner she did. It also submits that Karin O'Connor's actions on 24 November 2021 were motivated by other events, including other issues in the workplace involving Ms Nightingale and other employees.

[77] Karin O'Connor says that her actions were justified in that she was assigned responsibility for ensuring the machines were in good order and that the employees had lied to her. I do not accept that that was the case and I find that her position was misguided.

[78] NZ Wool Dumping submits that it lost trust and confidence in Karin O'Connor having regard to her actions and the responses she provided to the allegations. I find there was sufficient evidence available at the time to establish that she had unreasonably, and without authority, taken it on her own back to question other employees and to inappropriately confront them and call them 'liars'. Significantly, at the meeting on 10 January 2022, where she responded to NZ Wool Dumping's questions, Karin O'Connor maintained that her actions were justified because the staff had lied and that she had nothing to apologise for.

[79] Whilst Karin O'Connor's conduct was problematic, I do not accept that her actions amounted to serious misconduct warranting summary dismissal. Nor do I, having regard to all of the information that was available at the time, consider that dismissal would otherwise have been open to a fair and reasonable employer. The alleged conduct simply did not rise to the level of serious misconduct and so far as NZ Wool Dumping assert that trust and confidence was lost, I find that position to be without reasonable foundation.

[80] Even if the actions of NZ Wool Dumping had been procedurally justified, noting I have found they were not, I conclude that, on an objective basis, a fair and reasonable employer could not have concluded that Karin O'Connor's actions amounted to misconduct of sufficient gravity such as to deeply impair or destroy trust and confidence such as might warrant dismissal.

[81] I find that the decision to dismiss was substantively unjustified.

Is Karin O'Connor entitled to remedies?

Is Karin O'Connor entitled to compensation for lost wages?

[82] Karin O'Connor claims \$22,961.40 (gross) for a period of 55 weeks from the dismissal as lost wages. That amount is calculated by her based on her wage of \$26.50, the average hours of work per week per week of 29.30, and by deducting a weekly benefit of \$358.97.

[83] NZ Wool Dumping submits that Karin O'Connor has not discharged her obligation to mitigate her loss through making genuine attempts to secure alternative employment. It says that she did not make any attempt to find alternative employment until at least August 2022 and that no lost wages are therefore claimable.

[84] Karin O'Connor submits that she could not take steps to find alternative work following her dismissal due to stress, depression, and anxiety. She remained in receipt of a weekly benefit on the basis that she was sick and could not work. Karin O'Connor did detail some steps taken from mid-2022 to obtain alternative employment, including through Work and Income New Zealand. She also gave evidence that she provided her phone number at an Op Shop in Taradale.

[85] I am satisfied that Karin O'Connor lost wages as a result of the grievance. However, I am not satisfied that she was unable to work for an extended period on account of the actions of NZ Wool Dumping. I do not doubt that she suffered genuine medical issues. However, I am not satisfied that those medical issues resulted from, or were exacerbated by, NZ Wool Dumping's actions.

[86] I am also not satisfied that Karin O'Connor took genuine or reasonable steps to mitigate her loss. It may be that she was unable to do so. However, to the extent that is correct, I do not consider that was a consequence of her grievance.

[87] I consider it appropriate to make an award of compensation for lost wages for a total period of four weeks. I have calculated this sum on the basis that Karin O'Connor was paid \$26.50 per hour and worked an average of 29.30 hours per week. Such that there may be any issue as to income support provided to her, I consider that a matter for her and the relevant agency to resolve if necessary.

[88] I order NZ Wool Dumping to pay Karin O'Connor, within 28 days, compensation of \$3,105.80 for lost wages.

Is Karin O'Connor entitled to compensation for humiliation, loss of dignity and injury to feelings?

[89] Karin O'Connor seeks a total sum, that being a global sum for both unjustified dismissal and disadvantage, of \$25,000 as compensation for humiliation, loss of dignity and injury to feelings. In doing so, she submits that she suffered a high degree of physical, mental and financial distress.

[90] Karin O'Connor detailed depression and anxiety which required regular medical attention, sleep issues, a loss of appetite and isolating herself from outside connection during an approximate 8-month period. She also provided a letter from a counsellor dated 23 September 2022 recording observations from consultations in August and September of 2022. Whilst the letter details Karin O'Connor as having certain medical issues, and the causes for those issues as reported by her, I have some difficulty with the evidence.

[91] First, the letter was provided absent any witness statement being provided or the authors attendance at the investigation meeting. Second, the timing of the relevant consultations, occurring in August and September of 2022 are some significant period

following the dismissal. Little can be made of the letter other than that contains a record of what Karin O'Connor, in relatively general terms, told the counsellor she perceived the cause of her issues to be. The weight I do give to the letter is confined to being a record of what Karin O'Connor reported in August and September of 2022.

[92] I am also not satisfied that the impacts claimed relate exclusively, or even predominantly, to the suspension or dismissal. Karin O'Connor, including having regard to her actions leading to the dismissal, was affected by other matters. Such as the claims are made based on her medical conditions, it is also apparent that Karin O'Connor was impacted prior to either the suspension or dismissal from her employment. That involved her taking a considerable period off work on medical grounds.

[93] I am not satisfied that the actions of NZ Wool Dumping were causative the humiliation, loss of dignity, and injury to feelings, to the extent claimed by Karin O'Connor. I accept that the dismissal impacted her, but I am not satisfied that the claimed impact is primarily attributable to that or NZ Wool Dumping's actions. Indeed, I find that the impacts relate to the workplace issues more broadly and the incident on 24 November 2021, in relation to which I have found Ms O'Connor had some fault.

[94] I would, subject to any reduction on account of contribution, have ordered NZ Wool Dumping to pay Karin O'Connor compensation of \$13,500 in relation to the dismissal, subject to any reduction on account of contribution.

Contribution

[95] Section 124 of the Act requires that I consider the extent to which Karin O'Connor'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.⁴

[96] NZ Wool Dumping submits that Karin O'Connor's contribution is "very high and would be at 100%". Karin O'Connor submits that whilst her conduct on 24 November 2021 in calling Ms Elsworth and Ms Roy 'liars' might in isolation be seen as blameworthy, it was otherwise explicable given the context. I disagree.

⁴ Employment Relations Act 2000, s 124.

[97] Karin O'Connor's actions were inappropriate and are not excusable on the basis that she purports to have been carrying out a task assigned by Mr Harrison. Even had she been tasked with investigating the matters in question, which she was not, she was in no way entitled to call the employees 'liars'. Doing so was clearly inappropriate. Her largely unrepentant attitude exacerbated the matter.

[98] I consider that a 20 per cent reduction to the compensation I would otherwise have ordered for humiliation, loss of dignity, and injury to feelings is appropriate on account of Karin O'Connor's blameworthy conduct. I do not consider Karin O'Connor's actions warrant a reduction in the compensation for lost wages I have ordered be paid. As such, I order that NZ Wool Dumping make payment to Ms O'Connor of:

- (a) the total sum of \$10,800 as compensation for humiliation, loss of dignity and injury to feelings; and
- (b) \$3,105.80 for lost wages.

Did NZ Wool Dumping breach its good faith obligations?

[99] Karin O'Connor submits that the breaches alleged, both as to good faith and her IEA, relate to the same factual circumstances as her personal grievances. Her submissions as to good faith briefly address what are alleged to have been a serious and sustained breach of NZ Wool Dumping's duties in relation to the process followed as to both the suspension and dismissal. She submits that a penalty is warranted on the basis that there is a need for general and specific deterrence.

[100] NZ Wool Dumping submits that its processes were not hastily convened or concluded, and that Karin O'Connor had a full and unencumbered opportunity to respond to the decision maker.

[101] Whilst there were procedural failings relevant to Karin O'Connor's unjustified dismissal claim, I do not consider that they warrant a finding the NZ Wool Dumping breached its duty of good faith such as a penalty is warranted. I consider that the relevant procedural failings will be plainly apparent to NZ Wool Dumping, and that there are no particular features present that warrant the imposition of a separate penalty.

Did NZ Wool Dumping breach Karin O'Connor's IEA?

[102] Karin O'Connor submitted 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.

[103] NZ Wool Dumping submitted that the 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.

[104] 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 offence – 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.

[105] 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.

[106] The IEA cannot be read as mandating a warning in the event of serious misconduct. However, I have found that Karin O'Connor's actions did not amount to serious misconduct warranting summary dismissal. I find that NZ Wool Dumping breached the warning procedure in the IEA.

Penalties

[107] I have determined that Karin O'Connor is entitled to a remedy in the form of compensation for her personal grievance. The Court in *Salt v Fell*⁵, following the

⁵ *Salt v Fell* [2006] ERNZ 499.

approach in *Xu v McIntosh*⁶ declined to award penalties where a remedy had already been granted in respect of the same conduct for a personal grievance where there were no “special facets of the breach calling for punishment of the employer on top of compensation for the employee”.⁷

[108] As detailed above, I have found that NZ Wool Dumping actions in dismissing Karin O’Connor 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 Karin O’Connor having regard to the compensation I have otherwise ordered be paid to her.

[109] 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 Karin O’Connor’s employment. Further, I consider that whilst Karin O’Connor has been awarded compensation in relation to the actions of NZ Wool Dumping, it is appropriate that a penalty be issued.

[110] It is important that parties to an IEA comply with their obligations. In the present case, NZ Wool Dumping disregarded the warning procedure and mischaracterised Karin O’Connor’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.

[111] Every party to an employment agreement who breaches that agreement is liable to a penalty imposed by the Authority.⁸ I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*⁹ and had regard to the mandatory considerations at s 133A of the Act.

⁶ *Xu v McIntosh* [2004] 2 ERNZ 448.

⁷ *Ibid.*, at [45].

⁸ Employment Relations Act 2000, s 134(1)

⁹ [2016] NZEmpC 143.

[112] The maximum penalty in this case for a single breach is \$20,000.¹⁰ The breach relates to a single issue and there is no evidence of relevant previous conduct by NZ 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 Karin O'Connor'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 appropriate and proportionate having regard to the need for specific deterrence.

[113] I order that NZ Wool Dumping, within 28 days, pay a penalty of \$1,500. I order that, having regard to the compensation already ordered to Karin O'Connor, the whole of that penalty be paid to the Authority.

Summary of orders

[114] New Zealand Wool Dumping Group (2019) Limited Partnership is ordered, within 28 days of the date of this determination, to make payment to Karin O'Connor of:

- (a) the total sum of \$10,800 as compensation for humiliation, loss of dignity and injury to feelings relating to her claim of unjustified dismissal; and
- (b) The sum of \$3,105.80 as compensation for lost wages.

[115] 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.

[116] Karin O'Connor's claim of unjustified disadvantage is unsuccessful.

[117] I decline to issue a penalty in relation to Karin O'Connor's claims that NZ Wool Dumping breached its good faith obligations.

Costs

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

[119] If they are not able to do so and an Authority determination on costs is needed Karin O'Connor may lodge, and then should serve, a memorandum on costs within 14

¹⁰ Employment Relations Act 2000, s 135(2)(b).

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.

[120] 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.¹¹

Rowan Anderson
Member of the Employment Relations Authority

¹¹ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.