

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 534

BETWEEN TALENT PROPELLER
LIMITED 3093872
Applicant

AND YJL
Respondent

BETWEEN YJL 3129795
Applicant

AND TALENT PROPELLER
LIMITED
First Respondent

SHARON DAVIES
Second Respondent

LIANNE MASKELL
Third Respondent

BETWEEN YJL 3140141
Applicant

AND TALENT PROPELLER
LIMITED
Respondent

Member of Authority Marija Urlich

Representatives: Ashleigh Fechny, for the Applicant
Richard Upton, for the Respondents

Investigation Meeting: 20 – 23 June, 4 October and 15 November 2022 in
Auckland

Determination: 18 September 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] YJL commenced work with Talent Propeller Limited (Talent) on 4 February 2019 and worked there until 19 February 2020 when they were dismissed with immediate effect for serious misconduct following a disciplinary investigation into an allegation of falsifying their employment agreement.

[2] YJL says their dismissal was unjustified and seeks remedies including reimbursement of lost wages, benefits and compensation for humiliation and hurt feelings. YJL also seeks declaratory orders against Talent, Ms Davies and Ms Maskell for breach of their employment agreement and breach of non-publication orders made in relation to YJL's identity and these proceedings. YJL seeks an award of penalties for any found breach.

[3] Talent denies YJL's dismissal was unjustified. It says it undertook a fair investigation into an allegation of serious misconduct after which YJL was dismissed. It says the decision to dismiss was a decision a fair and reasonable employer could make in all the circumstances. Talent brings a counterclaim against YJL for breach of contract and penalties. It says YJL falsified and altered the parties' written employment agreement and then sought to rely on it, that during the course of the disciplinary investigation and subsequent produced and sought to reply on a false document and falsified their curriculum vitae.

The Authority's investigation

[4] This determination follows a number of preliminary matters which have arisen during the course of the Authority's investigation of these employment relationship problems.¹

[5] In the course of investigating this employment relationship problem the Authority heard evidence from:²

¹ *Talent Propeller Limited v YJL* [2020] NZERA 284, *UXK v Talent Propeller Limited & Ors* [2021] NZEMpC 167, *Talent Propeller Limited v YJL* [2021] NZERA 491, *Talent Propeller Limited v YJL* [2021] NZERA 575, *UXK v Talent Propeller Limited* [2022] NZEMpC 101, and *UXK v Talent Propeller Limited* [2022] NZERA 314, *UXK v Talent Propeller Limited* [2022] NZERA 115.

² Two witnesses for YJL were withdrawn during the course of the Authority's investigation.

YJL and their partner;
Sharon Davies, the owner and managing director of Talent;
Rob Davis, Talent's IT provider;
Lianne Maskill, a former employee of Talent;
Michael Beaton, managing director of a former employer of YJL; and
Kelly Common, an employee of a former employer of YJL.

[6] Various medical certificates from YJL's general practitioner, a statement dated 28 June 2022 from YJL's psychiatrist referring to a report dated 18 May 2021 and the report which concerns matters including the likely impact of identity publication on YJL and their minor dependent children have formed part of the information before the Authority. For completeness, none of this information has been filed by way of sworn affidavit.

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

[8] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three-month timeframe required by s 174C(3) of the Act.

Non-publication order

[9] YJL seeks made permanent the interim non-publication order of their name and any information likely to identify them, their personal medical information and the identities of their partner and children.³ Talent strongly opposes non-publication of YJL's identify. Talent does not oppose a permanent non-publication order of YJL's personal health information and is neutral on whether a non-publication order should be made over the identifies of YJL's partner and children.

[10] Talent opposes non-publication of YJL's identity on grounds including:

³ Ibid at [5].

- (i) YJL falsified their employment agreement with Talent to their benefit, presented to Talent a curriculum vitae which contained false representations and sought to rely on falsified information;
- (ii) in addition to what happened with Talent former employers of YJL have given evidence before the Authority that YJL failed to disclose material information during recruitment that they had been dismissed from previous employment;
- (iii) the evidence establishes YJL has been dismissed from all their other employment in New Zealand;
- (iv) that the public have a right to know what has occurred in respect of YJL's conduct consistent with the principle of open justice;
- (v) the interests of future employers of YJL must be given some weight;
- (vi) YJL's personal circumstances have improved since the May 2021 medical report and the report must be out of date and treated as historic;
- (vii) it is not clear why YJL seeks a non-publication order because they have stated in an affidavit they wish to be upfront with future employers; and
- (viii) YJL has secured employment and gave evidence to the Authority the new employer knew their work history

[11] Those grounds have been a consistent thread throughout these proceedings. The Authority has no doubt that Talent sincerely holds to its position and that it has advanced its opposition to non-publication of YJL's identity out of a genuine sense that this is the right thing to do.

[12] Though the information has not been examined, there is sufficient information before the Authority to be satisfied that YJL suffers from fragile mental health and is prone to that and has a chronic medical condition which may be exacerbated by stress. Significantly, YJL has the care of two dependent minors who have medical needs which are likely to be negatively impacted if YJL's identity is published. The consequences of publication should not be visited on them.

[13] The interim non-publication order over YJL's identity, their personal medical information and the identity of their children and partner is made permanent: clause 10(1) of the second schedule of the Employment Relations Act 2000.

Issues

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

YJL's claims (3129795 and 3140141)

- a) Was YJL unjustifiably disadvantaged in their employment by way of unlawful suspension?
- b) Was YJL unjustifiably dismissed?
- c) Is YJL entitled to a consideration of remedies sought including:
 - (i) Lost wages of \$23,750 pursuant to section 123(1)(b) of the Act?
 - (ii) Compensation of \$55,000 pursuant to section 123(1)(c)(i) of the Act?
- d) Is a bonus of \$15,000 and/or a referral fee of \$2,500 due and owing to YJL under the terms of the parties' employment agreement?
- e) Did Talent unlawfully deduct (bereavement leave) \$5,126 from YJL's wages?
- f) If so, is YJL entitled to an award of arrears for that sum?
- g) Is YJL entitled to wage arrears of \$14,423 (gross) and holiday pay calculation of \$2,789.38 (gross)?
- h) Should interest be calculated on any award of arrears?
- i) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by YJL which contributed to the circumstances which gave rise to his grievance?
- j) Have Talent and/or Ms Davies breached the employment agreement or aided and abetted breaches of the employment agreement?
- k) Have Ms Maskell, Talent and/or Ms Davies breached or aided and abetted breaches of non-publication orders?

- l) Should a compliance order be issued against Ms Maskell, Talent and Ms Davies having breached non-publication orders?

Talent's claims (3093872)

- m) Did YJL breach the employment agreement by:
 - (iii) falsifying the employment agreement;
 - (iv) falsifying the 1.13pm 11 January 2019 email;
 - (v) falsifying the 1.10pm 11 January 2019 email; and/or
 - (vi) falsifying their curriculum vitae
- n) If so, should a penalty be awarded and paid to Talent; and
- o) Is either party entitled to an award of costs?

Discussion

Personal grievances and claims of arrears (application 3140141)

- (i) *Did Talent unjustifiably suspend YJL causing them disadvantage in their employment?*

[15] The parties employment agreement provides at clause 25.8:

Suspension

25.8 The Company may suspend the Employee on full pay while investigating any alleged misconduct. The Company will consult with the Employee and consider their version of events in good faith before commencing the suspension.

[16] On Tuesday 4 February 2020 YJL emailed the operations manager at 1.16pm with a subject line 'Sick' that they were heading home. On 5 February Talent emailed asking YJL to confirm what time they had started work the previous day. The purpose was to calculate leave hours.

[17] On the morning of 10 February 2020 YJL emailed Talent regarding 6 hours of sick leave they had taken on 31 January. They raised that their sick leave did not appear to have been correctly calculated and attached for reference clause 13.3.2 of the employment agreement which provides:

The Employee is entitled to ten day's sick leave for each 12 month period of employment after the end of the six month period specified in clause 10.1 above.

[18] At 5.53pm on 10 February Ms Davies emailed YJL a letter titled "Disciplinary Meeting". The email address used was that which YJL had used to email Talent before their employment commenced. Copied into the letter was YJL's then representative and Talent's representative. The letter contained an allegation that YJL had falsified the parties' employment agreement, set out the basis of the concerns and advised the situation was so serious it was considering taking disciplinary action up to and including dismissal.

[19] In the same letter Talent proposed suspending YJL on pay while the disciplinary investigation was undertaken and advised it would consider any views and comments they might make before a final decision on suspension was made. The letter sought the feedback by 10am 11 February.

[20] Also on 10 February Talent revoked YJL's access to its computer systems.

[21] YJL provided no comment on the proposal to suspend by the 10am deadline.

[22] At 11.34am on 12 February Talent emailed YJL confirming the proposal to suspend them on full pay. The email, from Ms Davies included Talent had not received a response to the 10 February letter from YJL. The email set out matters Ms Davies had weighed in the consideration of suspending YJL, that she had decided to suspend YJL and asked YJL to confirm their attendance at the proposed meeting on Thursday 13 February. Both representatives were copied into the correspondence.

[23] Talent says its actions in suspending YJL were lawful:

- (i) the employment agreement provided for paid suspension in circumstances of a very serious nature which was the situation faced by the parties - namely an allegation YJL had falsified a document material to the parties' employment relationship;

- (ii) in such circumstances it was reasonable that Talent wished to restrict YJL's access to its systems because this was a reasonable step to protect its legitimate interests in an urgent situation;
- (iii) restricting YJL's access to its systems does not indicate the decision to suspend was predetermined because it could easily have been reinstated and reversed;
- (iv) YJL suffered no financial disadvantage during the suspension period because they were paid in full throughout;
- (v) Talent provided YJL a reasonable opportunity to provide their views on the proposed suspension;
- (vi) YJL, or their then representative, could have asked for more time to respond if they wished; and
- (vii) YJL provided no feedback on the suspension proposal.

[24] The parties' employment agreement sets out how a paid suspension might be implemented and includes a requirement to consult on any such proposal and consider any comment in good faith. In addition to the express terms and, as with any aspect of or action taken within an employment relationship, the statutory obligation of good faith must apply and be met. That obligation includes being open and communicative in establishing and maintaining a productive employment relationship.⁴

[25] The disciplinary letter containing the suspension proposal was sent outside the ordinary hours of work as described in the employment agreement (8am to 4pm).⁵ The effect of this was that YJL had 2 hours to respond to the proposal on the next working day. The timeframe for comment was unreasonably constrained. While Talent has in effect extended the proposal period by advising YJL of its decision after the deadline this was not expressly communicated to them and does not cure the unreasonable timeframe.

[26] The revocation of access to Talent's computer system indicates the decision to suspend was predetermined. The fact of revocation of access or the reasons for

⁴ Employment Relations Act 2000, s 4(1A).

⁵ Clause 9.2 of the parties' employment agreement.

revocation are not referred to in the 10 February letter. It was reasonable, coupled with receiving the disciplinary letter proposing suspension, for YJL to apprehend they had in fact been suspended when they found they were unable to log into Talent's work systems.

[27] As to the issue of urgency and risk, while it is accepted Talent was concerned by the information revealed by the examination of the employment agreement and YJL's part in the alleged falsification, the document had been in its possession throughout the employment relationship and the disciplinary allegation did not include any claim as to YJL's use of Talent's computer systems to undertake the falsification. Further, on the evidence before the Authority it appears YJL was on leave (sick or otherwise) at this time – they had not been in the office since 4 February. Given this, it could reasonably be expected that Talent would first make inquiry with YJL as to any need to access the work computer system during the proposed suspension prior to taking the step to revoke access to its systems.

[28] For these reasons the suspension was not lawful and caused disadvantage to YJL in their employment.

(ii) *Was YJL unjustifiably dismissed?*

[29] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether Talent's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in YJL being treated unfairly.⁶ The Authority's task is to examine objectively Talent's decision-making process and determine whether what it did and how it was done were steps open to a fair and reasonable employer.

[30] YJL says their dismissal was unjustified because:

(i) Talent's disciplinary investigation did not establish the employment agreement was falsified;

⁶ Employment Relations Act 2000, s 103A.

- (ii) Talent incorrectly applied to YJL an unlawful burden of proof to a criminal standard;
- (iii) Talent incorrectly considered the obligation of good faith applied when the parties entered the employment agreement;
- (iv) Talent did not review the employment agreement when it was received from YJL and this failure was not fairly considered;
- (v) the trust and confidence between the parties was not irreparably damaged; and
- (vi) Talent's actions were motivated by an ulterior motive and/or confirmation bias.

[31] As set out above the disciplinary meeting proceeded on 13 February. YJL attended with their then representative. Ms Davies attended with Talent's representative. By way of response to the allegation YJL said the changes to the employment agreement had been discussed, negotiated and agreed between them and Talent and outlined the following timeline of events in support:

- (i) on 11 January YJL emailed Ms Davies at 1.13pm (the 1.13pm email) outlining the changes they wanted;
- (ii) on 12 January at 12.15pm Ms Davies emailed YJL an employment agreement;
- (iii) YJL and Ms Davies exchanged messages by skype in which the 11 January proposed changes were discussed and agreed; and
- (iv) Ms Davies then updated the employment agreement to reflect the agreed changes and sent the revised version to YJL later that day which was duly executed and returned.

[32] YJL provided a hard copy of the 1.13pm email at the meeting. The email is a forwarded version.

[33] On 17 February YJL's then representative wrote to Talent including:

- (i) YJL was unable to recover the original of the 1.13pm email due to the effluxion of time;
- (ii) they were unable to sign into their skype account which would contain a record of the negotiation with Ms Davies where agreement was reached to increase sick leave, reduce the trial period and the restraint of trade;
- (iii) reattaching the email referred to in the 13 February meeting;
- (iv) that Ms Davies' interview notes as earlier requested had not yet been provided;
- (v) YJL confirmed they did not make any unauthorised amendments to the employment agreement as alleged; and
- (vi) both YJL and Ms Davies had indicated at the 13 February meeting the employment relationship was likely over and if that remained the case this could be the focus of the parties.

[34] Later that day Talent's representative emailed YJL's then representative summarising YJL's response to the allegations and that having investigated the explanation could not accept it for the following reasons:

- (i) Ms Davies had no recollection of the changes being raised, discussed or agreed;
- (ii) the 1.13pm email is a forwarded version and though asked, YJL had not produced an original;
- (iii) Talent had reviewed its email system and asked its IT provider to review the back-up system and no evidence of that email was found and this suggests the email does not exist and that it was falsified;
- (iv) Talent had reviewed its email system for 12 January and had its IT provider review its email backup system for that day and found no evidence that a first or second version of the employment agreement had been sent to YJL that day.

[35] YJL provided no further substantive comment.

[36] By letter dated 19 February Ms Davies wrote to YJL summarising the disciplinary process to date and advising her decision was to dismiss YJL with immediate effect. Ms Davies said she could not accept YJL's explanation for the changes in the employment agreement because:

- (i) having checked Talent's email and the backup system there are no emails to support YJL's version of events;
- (ii) the employment agreement was not provided to YJL by the stage they say they raised issues about it;
- (iii) the 1.13pm 11 January email could not be located on the Talent system by the IT team who had been asked to undertake a review and the version provided by YJL was a forwarded one and not the original;
- (iv) no other record of the written records including skype messages had been produced to support YJL's explanation; and
- (v) Ms Davies could not recall any discussions with YJL about the subject changes and some of the changes were not in Talent's interests and are matters it would not entertain.

[37] In the letter Ms Davies describes the allegation and the conclusion reached as follows:

...you may have falsified a company document, being your original employment agreement. Essentially Talent Propeller alleged that an employment agreement was sent to you, that it was then materially altered by you and then sent back to the Company. We had no recollection of you having raising any of the potential alterations to that document with me or anybody else at the company.

...

Having considered all of the above I have reached the view that you have falsified the document in question – in a number of material ways. In doing so, you have breached various obligations that you owe the company. This has completely destroyed the trust and confidence that I require in you as an employee.

[38] Implicit in Ms Davies conclusion is that YJL's actions were within the employment relationship. Given YJL did not commence work for some weeks after finalisation of the employment agreement due to visa requirements, for the subject action to be within the employment relationship YJL must have been a 'person

intending to work’ which is defined in the Act as ‘...a person who has been offered, and accepted, work as an employee’.⁷ For a person to be a ‘person intending to work’ that intention must be objectively manifested in both an offer of employment and its acceptance.⁸

[39] At 23.27 on 13 January Ms Davies emailed YJL accepting their proposal of ordinary working hours and confirming the offer of work to YJL on the following terms:

Hi [YJL]

Yes 8 to 4 would work. I will update the contract in the morning.

[40] The ‘contract’ referred to is the first proposed employment agreement sent to YJL on 12 January.

[41] At 5.32pm on 14 January YJL emailed Ms Davies accepting the offer to work on the proffered terms:

Thanks Sharon. Will sign and return once changed so I can submit application tomorrow.

[42] The parties’ intention that YJL be a person intending to work was objectively manifest by both offer and acceptance by 5.32pm on 14 January. The counterfactual of Talent seeking to revoke its offer after 5.32pm 14 January would be manifestly unjust and unlawful because the parties had agreed YJL would work for Talent and had agreed the terms and conditions on which YJL would work. On an application of orthodox principles of contractual formation, a binding and enforceable contract was formed at that point – the terms of employment were clear, they had been offered and accepted and both parties had expressed an immediate intention to be bound.

[43] At 8.06pm on 14 January Ms Davies emailed YJL “Please see updated contract attached”, attaching the employment agreement updated with the change to hours of work. None of the changes identified in Ms Davies letter 10 February 2020 are contained in the updated employment agreement.

[44] At 9.39pm on 14 January YJL emailed Ms Davies attaching a signed employment agreement, having initialled each page:

⁷ Employment Relations Act 2000, s 5.

⁸ *Tucker Wool Processors Ltd v Harrison* (1999) 3 NZLR 576 (CA) at (39).

Please see attached signed copy.

When you have a moment, please countersign and return to me with the immigration documents.

I am very excited to join the team! Insert happy dance emoji.

[45] This employment agreement contains all the changes identified in Ms Davies 10 February letter. Ms Davies' evidence was she did not review the document, her business partner signed it and filed it away.

[46] From 5.32pm on 14 January when YJL accepted work with Talent the parties were in an employment relationship. Such a relationship is governed by statutory obligations of good faith. If, as submitted on behalf of YJL, their intention in providing the signed and initialled employment agreement with changes should be assumed to be to negotiate with Talent, then consistent with and in compliance with the obligation of good faith, YJL was obliged to take reasonable steps to draw the changes to Talent's attention. Given the changes are not highlighted or identified in the document or the covering email or any of the changes identified in the 12 – 14 January negotiation email chain, YJL is unable to establish they took reasonable steps to discharge their good faith obligations.

[47] YJL says the 12 – 14 January email chain contains an additional email sent at 1.13pm on 11 January. The email expressly refers to 4 of the 7 differences to the signed and initialled employment agreement from the first proposed employment agreement and the updated employment agreement which Ms Davies identifies as matters for disciplinary investigation plus a catch all "Let me know if you remember anything else we discussed". The changes are specific changes, often a single word or numeral, to specific clauses throughout the employment agreement. The changes all benefit YJL.

[48] The 1.13pm email falls in the chain prior to the first proposed employment agreement being provided to YJL. The first proposed employment agreement contains none of the changes YJL outlines in the 1.13pm email. It is not clear how the parties could have negotiated and reached agreement on the 7 changes by 1.13pm on 11 January, particularly given they are tied to specific clauses in the proposed employment agreement, when the first proposed employment agreement was not provided to YJL until 12.25pm on 12 January and these specific issues (6-month non-solicitation, 90-day probation period with one-week notice and entitlement to bring a personal grievance, 5 days sick leave, reference to 'good faith' in clause 4(2)(a), reference to

'records' in respect of falsifying such in clause 25.6(1)), on the material before the Authority, were not drawn to YJL's attention by Talent before that date.

[49] YJL says it is more likely than not Ms Davies forgot about the negotiated changes. No compelling evidence that it is more likely than not Ms Davies forgot or is a forgetful person has been provided. On the information before the Authority of the disciplinary process that is not accepted.

[50] YJL says their dismissal was unjustified because Talent required from them proof to a criminal standard. The evidence does not support this submission. In response to YJL's explanation to the claim of falsification of the employment agreement - that the changes had been negotiated with Ms Davies over skype message, they had sent an email to Ms Davies at 1.13pm 11 January which referred to some of the changes and included a catch all reference and the updated employment agreement sent by Ms Davies contained all the agreed changes as negotiated by the parties and which YJL duly signed, initialled each page and returned for execution - Talent undertook a search of its computer system and asked its IT provider to check the backup system. It told YJL its systems contained none of the references to which YJL had referred and Ms Davies could not access the skype messages due to settings under YJL's control and provided YJL a further opportunity to comment. Having investigated YJL's explanation further it was not unreasonable for Talent to put to YJL the information it had gathered, its concerns about the explanation and provide a further opportunity for YJL to respond.

[51] YJL says a further aspect which renders Talent's finding of serious misconduct and decision to dismiss unfair and unreasonable is the trust and confidence between the parties had not been irreparably damaged. YJL says the working relationship had been constructive and productive including YJL receiving a promotion and a leadership nomination and award and Talent had overlooked significant criminal wrong doing of a co-worker in their previous employment.

[52] Notwithstanding the serious nature of the allegation is a matter that would go to the heart of the employment relationship, this submission now made on YJL's behalf is different to that made on YJL's behalf by their then representative on 17 February - that the employment relationship 'on both sides had steadily slid downhill' and suggests ending the employment relationship should be the 'focus of attention' - and contrary to YJL's conduct on 3 February when they recorded the meeting with Ms Davies without her consent. Further, YJL's evidence to the Authority included their view that the

genesis of Talent's dissatisfaction with them likely started in October 2019 when they were "victimised and treated differently" by Ms Davies. By way of example, they say finance reports were withheld from them that other staff at a similar level received. It appears, while facing the disciplinary investigation YJL was of the view the relationship was all but over and seems to seek a resolution.

[53] With respect to the claim of disparity of treatment with a co-worker with known criminal offending against a previous employer. That employee was not subject to a disciplinary investigation for falsification of a Talent work document. The disparity claim does not succeed.

[54] YJL also says their dismissal was unjustified because the investigation undertaken by Talent into the allegation was not sufficiently made clear to them for example, they say they did not know the detail of the instructions given to the IT provider to undertake a check of Talent's computer systems. On the information before the Authority the parameters of the search request were not unreasonable or unfair being the email addresses YJL and Ms Davies used to communicate with each other during the relevant period, which is undisputed on either account. Mr Davis undertook a thorough search of Talent's IT and backup systems. His evidence that an email of the type YJL relies on as the 1.13pm email was never received by Talent is accepted.

[55] Detailed argument has been made about email time stamps and differences in different email versions. It is accepted such variation can occur and may require careful analysis to resolve a dispute. In this matter however, and standing back from the time stamp detail, the totality of evidence supports the conclusions reached by Talent were those a fair and reasonable employer could have made in all the known circumstances at the time. In broad terms YJL's explanation was considered, questions were asked to better understand the sequence of events and flow of documentation between the parties, that information was shared with YJL and having identified to YJL questions about the explanation further information was invited, which was considered and a conclusion reached.

[56] YJL submits it is clear Talent predetermined the outcome of the disciplinary process and no longer wished to employ them. It is accepted the parties' employment relationship was under strain by late 2019, the issue about the bonus payment was likely to have put more strain on the relationship and the 3 February meeting involved discussion of sensitive issues however, the disciplinary investigation, unfolded from

YJL's assertion of sick leave entitlement in the employment agreement which has caused Talent to examine the written employment agreement. A disciplinary investigation was then commenced on that standalone issue.

[57] The investigation, on its face was not tainted with the other matters between the parties and the fairness and reasonableness of the process was buttressed by factors including that both YJL and Talent were represented by experienced counsel throughout, the parties met to discuss the allegation which was recorded and transcription provided to YJL, full correspondence and supporting information was exchanged and YJL was invited to comment on the outcome before the conclusions and outcome were finalised. In the absence of clear evidence, the claim of predetermination does not succeed.

[58] The ordinary meaning of falsification is the action of changing something, such as a document, in order to deceive people. The conclusion Ms Davies reached that YJL falsified the employment agreement by making changes which were not to Talent's benefit and without taking reasonable steps to draw those changes to Talent's attention was in breach of obligations YJL owed Talent were ones open to a fair and reasonable employer in all the circumstances.

In the alternative

[59] If there was some element of Talent's investigation and decision making process which could make this dismissal unjustified in all the circumstances, given YJL's found actions in making unauthorised changes to the employment agreement and seeking to enforce the benefit brought by the change, at least in respect of sick leave, it is likely the Authority would have found YJL's contribution to the circumstances giving rise to any such personal grievance to be properly assessed as in a category such as to render any remedies nugatory.

(iii) Is YJL entitled to a bonus payment?

[60] As part of the pre-employment relationship process, on 11 January Ms Davies emailed YJL including:

Our offer is a base salary of \$[...] per annum which we would be happy to review after six months of employment. **After three months – where we would expect your training to have been completed – we would put in place a bonus package for you as well.**

[61] The employment agreement did not contain a bonus clause. For completeness, clause 5.1 of the employment agreement includes bonus in the definition of remuneration.

[62] On 1 May 2019 Ms Davies emailed YJL offering them a promotion which included management of a team. Attached to the email was a position description with targets. YJL replied by email expressing enthusiasm for the offer and made a counteroffer for a pay increase and carpark. Ms Davies replied she could offer the car park but not the pay increase as YJL proposed. This appears to have been accepted by both parties and YJL commenced the new role. The bonus issue did not feature in this exchange.

[63] On 28 August Ms Davies emailed YJL and a co-worker seeking their input into a bonus plan for the team they managed. The email states the proposed bonus plan would include YJL.

[64] The discussion however developed to remove YJL from the team bonus - on 13 December YJL emailed Ms Davies “I know the team have their bonus agreement, and that you mentioned one will be put together for me separately to theirs...” and asking if she had “...given it any thought yet?”. The email then sets out matters, including anticipated personal costs relating to immigration visa applications and professional development, which YJL appears to be putting to Ms Davies as factors to consider in the development of their bonus scheme.

[65] On 20 December Ms Davies emailed YJL that the bonus letters were being prepared for the team, the “total bonus pot” amount and that it would be “...split three ways”. With respect to YJL the email includes “I also have your note about a bonus for you and yes, that will be with you today too...”. Ms Davies did not send a bonus letter to YJL.

[66] On 1 January 2020 YJL emailed Ms Davies claiming a bonus payment based on the 28 August proposed team bonus plan and a separate bonus for them. YJL included they were raising their concern directly with YJL “...rather than head to an online forum”. Ms Davies replied on 3 January that she did not appreciate receiving what could be understood as a threat to go to an online forum and no bonus document

had been proposed to YJL “to consider or partake in”, they were not included in the team bonus and if that was YJL’s view that was mistaken. The email continued that it had not been implied YJL was included in the team bonus and “...I have confirmed that there will be a bonus applicable to you in the future, but you will be presented with a document to consider and sign when that is finalised”.

[67] YJL sent Ms Davies a reply email later that evening expressing their disappointment at Ms Davies response regarding the bonus. The bonus discussions did not proceed further between the parties.

[68] The first claim of unjustified disadvantage for failure to include YJL in the team bonus cannot succeed. The totality of communications, plainly read, indicate YJL was removed from coverage of that scheme and the terms of their own bonus were never finalised.

[69] The second claim in relation to how Talent dealt with YJL in relation to a bonus also cannot succeed. While YJL’s disappointment is clear, the discussions between them and Talent had stalled and were not revived before the events which resulted in YJL’s employment ending overtook the parties. Even if the Authority could find Talent had promised to pay YJL a bonus how such a bonus might be calculated and on what terms are so uncertain as to render any such promise unenforceable for want of certainty of terms.

(iv) Is YJL entitled to a referral fee?

[70] The parties’ written employment agreement does not expressly provide for referral fee payment or a mechanism for payment of such. YJL says they are entitled to a referral fee of \$2,500 based on the employment of a person they recommended. No contractual entitlement to such a payment has been established. The claim is unsuccessful.

(v) Is YJL entitled to unlawfully deducted annual leave and bereavement leave?

[71] YJL says Talent unlawfully deducted \$5,126 of annual leave and bereavement leave.

[72] The parties' employment agreement provides for three days paid bereavement leave in the event of the death of a person in the subject category.⁹ Final pay including termination holiday pay was calculated and paid when YJL's employment ended. The basis is not established and is unsuccessful. The basis for additional claims of holiday pay and wages arrears has not been made out.

YJL's claim - breach of contract and breach of non-publication orders (application 3129795)

[73] This part of the employment relationship problem considers YJL's application seeking the following declarations:¹⁰

- (i) that Talent breached the duty of good faith and/or the express and/or implied duty of confidentiality by disclosing confidential, personal information relating to YJL's employment in circumstances likely to cause them detriment;
- (ii) that Ms Davies aided and abetted such breached as described above; and
- (iii) that Talent, Ms Davies and/or Ms Maskell breached non-publication orders.

[74] No penalties are sought in respect of the alleged breach of good faith.

[75] YJL seeks an award of penalties in respect of the alleged breaches of non-publication orders and an order for any penalty to be paid to them.

[76] The factual basis of the alleged breaches starts on 21 February 2020 when Ms Davies told Ms Maskell she was considering bringing proceedings against YJL for 'hacking' Talent's computer systems. Ms Davies says she did this because she intended to ask Ms Maskell to be a witness in those proceedings as a victim of the alleged conduct and to make her statement may be required for a police complaint. Talent lodged an application in the Authority against YJL on 26 February 2020 subsequent to which non-publication orders have been made in respect of the YJL's identity, the first of which

⁹ Clause 13.4 Bereavement Leave, parties' written employment agreement.

¹⁰ While the Authority does not have jurisdiction to issue declarations it does have jurisdiction to determine matters as described in s 161(r) Employment Relations Act 2000. This is the jurisdiction being exercised to consider this part of the claim.

was issued by the Authority on 10 March 2020.¹¹ Ms Davies and Ms Maskell said they did not discuss the matter further.

[77] In early November 2020 Ms Maskell telephoned YJL's new employer and advised them they should undertake due diligence on why YJL left their former employment. YJL was dismissed by the new employer subsequent to that contact from Ms Maskell and following a disciplinary process. Ms Maskell said in evidence she made this contact of her own volition, that no one at Talent asked her to do it or knew anything about it. She said she had no knowledge of the non-publication order in place at that time.

(i) *Breach of good faith and/or breach of confidential information and or breach of private information*

[78] YJL faces a significant jurisdictional barrier with this claim. The statutory duty of good faith applies to parties in an employment relationship and does not survive the employment relationship.¹² The parties' employment agreement, consistent with the statutory duty confines the obligation to the employment relationship.¹³ The express term of the parties' employment agreement dealing with confidential information, consistent with the common law duty, seeks to protect the employer's confidential information, as defined, during and after the employment relationship by limiting the employee's use of that information.¹⁴ The clause does not run the other way, either expressly or impliedly, to protect the employee's information.

[79] With respect to the alleged privacy information breach, the parties' agreement deals with privacy obligations in the context of the employment relationship.¹⁵ Any post employment breach would not lie within the jurisdiction of the Authority.

(ii) *Breach of non-publication orders*

[80] The claim for breach of and/or aiding and abetting a breach of the non-publication order against Ms Maskell, Ms Davies and Talent does not succeed. The starting point is the wording of the non-publications orders which relates to YJL's

¹¹ Member's Minute, 10 March 2020, application 3093872.

¹² Employment Relations Act 2000, section 4.

¹³ Clause 4 Obligations of the Relationship, parties' written employment agreement.

¹⁴ Clause 19 Confidential Information, parties' written employment agreement.

¹⁵ Clause 20 Privacy Obligations, parties' written employment agreement.

identity and the proceedings. There is insufficient evidence Ms Maskell was aware of the non-publication order which had been put in place. There is no reasonable basis for the orders sought to be made.

Talent's claim - breach of contract (application 3093872)

[81] Talent seeks findings against YJL that they have breached terms of the employment agreement in the following respects:

- (i) falsifying the parties' employment agreement;
- (ii) falsifying the email of 1.13pm 11 January 2019;
- (iii) falsifying the email 1.10pm 11 January 2019; and
- (iv) falsifying their curriculum vitae.

[82] Talent seeks an award of penalties for any found breach and an order that any penalty award is paid to it. These matters are the outstanding balance of Talent's application against YJL file number 3093872 which were not dealt with in the Authority determination *Talent Propeller Limited v YJL* [2020] NZERA 284.

- (i) *falsifying the employment agreement*

[83] Factual findings regarding YJL's falsification of the employment agreement are set out at above. Although those findings are made in the context of a s 103A analysis of Talent's actions in a disciplinary setting given the nature of the findings the Authority is satisfied YJL has falsified the employment agreement by making changes to the updated employment agreement having emailed Ms Davies that they accepted work with Talent based on the terms and conditions set out in the first proposed employment agreement and the subsequent email chain:

- a) the second proposed employment agreement sent to YJL by Ms Davies contained none of the changes identified in the disciplinary letter dated 10 February 2020 (the identified changes);
- b) YJL submitted the signed and initialled employment agreement to Ms Davies with the identified changes made;

- c) YJL did not draw Ms Davies attention to the changes to the employment agreement on submission;
- d) YJL was aware of the changes because they sought to rely on the change to the sick leave provision to their benefit in February 2020; and
- e) the evidence before the Authority is insufficient to establish Talent agreed to or was aware of the identified changes prior to 10 February 2020.

[84] The Authority is satisfied YJL falsified the employment agreement and this was a breach of obligations owed to Talent.

(ii) *falsifying the email 1.13pm 11 January 2019*

[85] Factual findings regarding the 1.13pm email 11 January 2019 are set out at above. YJL produced the email by way of explanation at the disciplinary meeting.

[86] YJL is the author of the 1.13pm email. They say it and where it sits in the email chain reflects the accurate email communications between the parties. The document produced at the disciplinary meeting was a forwarded version. Notwithstanding it being a forwarded version, in the context of the email chain within which the 1.13pm email sits, read as a whole, it reads incongruously between the two bookending emails because the email Ms Davies' sent to YJL immediately succeeding the 1.13pm email directly addresses matters raised in YJL's email sent immediately prior to the 1.13pm email but does not address the matters raised in the 1.13pm email. This is in contrast with the remainder of the email chain between YJL and Ms Davies which has a logical flow of answer and reply.

[87] Further, in the broader context of the parties' pre-contractual discussions the 1.13pm email reads incongruously because it refers to specific contractual provisions – a probation period and non-solicitation period – which at that date Talent had not proposed to YJL.

[88] Also, with respect to the parties' pre-contractual discussions there is a complete record of them but for the skype messages YJL seeks to rely on to support the 1.13pm email because YJL recorded and retained them. Access to the skype messages is no longer possible and was not possible during the disciplinary investigation because, on

YJL's account they deleted Ms Davies from their contact list and could not recall the necessary details to gain access to the account. For completeness, no claim of disadvantage can succeed from Talent not providing records for those meetings and the 3 February meeting given YJL had their own record, did not disclose that to Talent when the request was made during the course of the disciplinary meeting and there is insufficient evidence any such record was relied on by Talent in its deliberations. Likewise, having reviewed the transcript of the meeting, I am satisfied the 3 February meeting occasioned no disadvantage to YJL.

[89] It is more likely than not the YJL has falsified the 1.13pm email for the purposes providing a response to the disciplinary investigation. This was not consistent with the obligations owed under the employment agreement.

(iii) falsifying the email 1.10pm 11 January 2019

[90] This email was produced by YJL during the course of the Authority investigation of these employment relationship problems and after the parties' employment relationship had ended.

[91] There is no basis to find a breach of the employment agreement as sought.

(iv) falsifying their curriculum vitae

[92] In November 2018 YJL submitted a cover letter and curriculum vitae (the CV) for a job with Talent. The submission process was an online application. Talent says there are a number of aspects of the submitted CV which are misleading and inaccurate including the way the reasons why all the previous employment relationships in New Zealand ended are all false and inaccurate.

[93] The claim does not succeed. Talent, on its own evidence did not put much weight on the CV. During the interview process questions were asked to clarify apparent to inconsistent dates on the CV to which YJL readily responded to Talent's apparent satisfaction. No claim for actionable misrepresentation to induce the employment agreement has been made on the basis of declaration required on the application form because no such declaration was required.

Remedies

[94] YJL has established a personal grievance for unjustified disadvantage in respect of the suspension. They are entitled to a consideration of the remedies sought.

Compensation for humiliation, loss of dignity and injury to feelings

[95] YJL said they were blind-sided to find they had been locked out of remote access to Talent's systems and felt the decision to suspend had already been made and this has tainted their view of the fairness of the subsequent disciplinary process.

[96] The Authority is satisfied YJL has experienced harm in terms of section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$4,000 under section 123(1)(c)(i) is appropriate.

Contribution

[97] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[98] Talent submits any remedies awarded to YJL should be reduced by 100% due to their contribution to the circumstances of any established personal grievance including their falsification of the employment agreement.

[99] In *Maddigan v Director-General of Conservation* the court held a reduction of 50% is to be reserved for exceptional circumstances and care should be taken before imposing a reduction of 25%.¹⁶ YJL's actions in falsifying the employment agreement has no doubt contributed to the circumstances of the found personal grievance – the catalyst being their assertion of the sick leave entitlement in the written employment agreement. These are blameworthy actions for which a reduction of 50% of remedies awarded under s 123(1)(i)(c) is appropriate to reflect the contributory conduct. The reduction sought by Talent is not appropriate – it is responsible for the deficient suspension process it undertook.

¹⁶ *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

Penalties

[100] YJL has been found to have breached the parties' employment agreement in two respects - by falsifying the written employment agreement and producing a document in the disciplinary investigation for the purpose of justifying the changes to the written employment agreement which had not been agreed with Talent. Talent seeks penalties for these breaches.

[101] The maximum penalty against an individual is \$10,000 per breach.¹⁷ There are two breaches of the employment agreement. As submitted by the parties, it is appropriate to globalise the two breaches given the interrelated nature of the breaches. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.¹⁸

[102] Where a breach of an employment agreement is not a minor or technical breach, the question of whether a penalty is warranted turns to whether the conduct was deliberate or negligent, warranting the imposition of a penalty.¹⁹ The level of harm occasioned by the breach is also relevant.²⁰

[103] Penalties are warranted. It is clear from the evidence before the Authority that YJL's actions were deliberate and calculated, and sustained: YJL failed to draw to Talent's attention or seek Talent's agreement to changes they have found to have more likely than not made to the written employment agreement after agreement as to terms had been reached, sought to rely on terms in the written employment agreement which had been altered to their benefit and which were not agreed and then sought to rely on information during the course of the disciplinary investigation as evidence of agreement which has been found not to have been sent to Talent.

[104] Talent has spent a significant amount of time and resources in pursuing these matters as well as the legal cost, all of which will not be recoverable through this claim.

¹⁷ Employment Relations Act 2000, s 135.

¹⁸ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

¹⁹ See *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438 at [169]; *Xu v McIntosh* [2004] 2 ERNZ 448.

²⁰ *Xu*, *ibid*.

[105] YJL is legally aided and there is evidence before the Authority to suggest they may have financial difficulty in paying any penalty.

[106] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$5,000. YJL is ordered to pay the penalty to Talent to compensate it for the inconvenience and resources expended in pursuing this matter. The penalty is to be paid within 21 days of the date of this determination.

Outcome

[107] Talent Propeller Limited must pay YJL \$2,000.00 under s 123(1)(c)(i) within 21 days of the date of determination.

[108] YJL must pay Talent Propeller Limited a penalty of \$5,000.00 for their breaches of the employment agreement within 21 days of the date of this determination.

Costs

[109] Costs are reserved. YJL is in receipt of legal aid. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, YJL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Talent 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.

[110] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²¹

Marija Urlich
Member of the Employment Relations Authority

²¹ See www.era.govt.nz/determinations/awarding-costs-remedies.

