

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 107  
3109834

BETWEEN TOMISLAV KALIC  
Applicant

AND MANUKA HEALTH NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Allan Halse, advocate for the Applicants  
Geoff Bevan, counsel for the Respondent

Investigation Meeting: 20 – 21 September 2023 in Auckland

Submissions and further information received: 20 October and 24 November 2023, from the Applicant  
7 November 2023, from the Respondent

Determination: 26 February 2024

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Kalic was employed as a beekeeper by Manuka Health New Zealand Limited (MHNZL) from 29 July 2019 until his resignation on 1 December 2019 effective 28 December. This was the second period of his employment with MHNZL. He was first employed from August 2015 until 15 April 2019 when his employment ended by way of redundancy.

[2] Mr Kalic says he was unjustifiably disadvantaged and unjustifiably dismissed from his employment. He seeks remedies of compensatory damages of \$50,000, special damages of immigration consultancy fees and a contribution to costs of professional representation.

[3] MHNZL denies it has unjustifiably disadvantaged Mr Kalic in his employment or that he was unjustifiably constructively dismissed. It says no remedies should be awarded in his favour. MHNZL says it worked hard to support Mr Kalic in his

employment, took his concerns about workplace bullying seriously including undertaking a thorough investigation and that Mr Kalic resigned from his employment and worked out his notice period after securing new employment.

[4] MHNZL is a commercial producer and processor of high-quality honey and honey products. It employs beekeepers, of which Mr Kalic was one, to undertake hive management and monitor bee health with a primary focus on honey production. The work of a beekeeper has a seasonal rhythm and at times requires long hours of intense physical work transporting beehives and harvesting honey. Beekeepers work in small teams often working in remote, forested areas.

[5] Mr Kalic is a qualified beekeeper of many years' experience. He was recruited from overseas by MHNZL. In accepting employment with MHNZL Mr Kalic intended to settle in New Zealand with his family. To that end in 2019 he was in the process of applying for permanent residency. MHNZL was aware of this and had supported Mr Kalic's application for a work visa.

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

[6] This determination follows determinations of preliminary matters which have arisen during the course of the investigation of this employment relationship problem.<sup>1</sup>

[7] In determining this employment relationship problem the Authority heard evidence from:

Mr Kalic;

Bojan Kostic (by audio-visual link), a beekeeper who worked with Mr Kalic;

Mr Blignaut (by audio-visual link), who at the time of the relevant events was MHNZL's regional manager and to whom Mr Kalic reported;

David Campbell, MHNZL's general manager; and

Sam Denz, MHNZL's human resource manager.

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<sup>1</sup> *Kalic & Kostic v Manuka Health New Zealand Limited* [2021] NZERA 26; *Kalic & Kostic v Manuka Health New Zealand Limited* [2023] NZERA 26.

[8] The Authority investigation was assisted by an interpreter of the Serbian language. 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.

### **Issues**

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

- a) Was Mr Kalic unjustifiably disadvantaged in his employment by matters including MHNZL's failure to fairly and reasonably investigate allegations of bullying?
- b) Was Mr Kalic unjustifiably constructively dismissed?
- c) If so, is Mr Kalic entitled to a consideration of remedies sought including:
  - a. Reimbursement of lost wages; and
  - b. Compensation from \$50,000 under s 123(1)(c)(i) of the Act.
- d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Kalic which contributed to the circumstances which gave rise to his grievance?
- e) Did MHNZL's actions breach s 4 and s 110A(1)(c) of the Employment Relations Act 2000?
- f) Is either party entitled to an award of costs?

### **The parties' employment agreement**

[10] Mr Kalic's reemployment with MHNZL in July 2019 was subject to terms agreed by the parties and recorded in a record of settlement certified by a mediator on 7 June. The record of settlement included:

- (i) Mr Kalic's work reinstatement date of 29 July 2019;

- (ii) he would remain on leave without pay from 29 July until he commenced work on 19 August and that date would be his first day of work;
- (iii) his place of work was to be Kerikeri;
- (iv) his entitlement to pay would start from the first day of work and he would be entitled to statutory sick and bereavement leave;
- (v) he had no entitlement to any payment for the period prior to the first day of work;
- (vi) he agreed from the first day of work to work positively and productively and comply with all reasonable work instructions and MHNZL may take justified disciplinary action if he failed to comply with his employment obligations; and
- (vii) the terms and conditions of the parties' employment agreement were to be those in place immediately prior to his dismissal by reason of redundancy and in the event of any inconsistency between the record of settlement and those terms and conditions the record of settlement would prevail.

[11] The employment agreement referred to in the record of settlement is dated 25 January 2018. Relevant to this determination is the following clause:<sup>2</sup>

## **11. General Health and Safety Obligations**

11.1 Both the Employer and the Employee shall comply with their obligations under the Health and Safety in Employment Act 1992. This includes the Employer taking all practicable steps to provide the Employee with a healthy and safe working environment.

11.2 The Employee shall comply with all directions and instructions from the Employer regarding health and safety.

11.3 The Employee must at all times work in a safe manner, use work equipment in a safe manner and always wear the appropriate supplied health and safety equipment and shall also take all reasonable steps to ensure that in the performance of their employment the Employee does not undermine their own health and safety or the health and safety of any other person.

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<sup>2</sup> At the time the parties entered the employment agreement the Health and Safety at Work Act 2015 had replaced the 1992 legislation. Nothing turns on the repealed legislation being referred to.

11.4 Any accident, potential accident, hazard and potential hazard, however minor, must be reported immediately to the appropriate person.

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## Workplace bullying

[12] Mr Kalic has raised a claim of workplace bullying and says MHNZL failed to fairly investigate his complaint. Following is the definition of workplace bullying contain on the WorkSafe NZ website:

**Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.**

- > **Repeated** behaviour is persistent (occurs more than once) and can involve a range of actions over time.
- > **Unreasonable** behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.
- > Bullying may also include harassment, discrimination or violence (see Section 4 of this guide for how these are dealt with).

**Note:** The bullying definition is adapted from Safe Work Australia's definition.

**Workplace bullying is not:**

- > one-off or occasional instances of forgetfulness, rudeness or tactlessness
- > setting high performance standards
- > constructive feedback and legitimate advice or peer review
- > a manager requiring reasonable verbal or written work instructions to be carried out
- > warning or disciplining workers in line with the business or undertaking's code of conduct
- > a single incident of unreasonable behaviour
- > reasonable management actions delivered in a reasonable way
- > differences in opinion or personality clashes that do not escalate into bullying, harassment or violence.

[13] This definition is a useful guide to assess this aspect of the claim before the Authority.

## Background

*Mr Kalic is reemployed by MHNZL*

[14] On 31 May, a day after Mr Kalic signed the record of settlement and submitted it to the mediator, he queried with his representative if his employment would be considered continuous and if he would be paid for the month between his last day of employment (15 April) and when he left New Zealand for a holiday on 15 May. These queries were forwarded to MHNZL for consideration. On 7 June MHNZL's representative replied that the company did not agree to amend the record of settlement and proposed:

The company wants to be reasonable but it does have some genuine concerns about how the reintegration is going to proceed. As a compromise the company is willing to review the situation in or around February 2020. If Tomislav's attitude and performance have been satisfactory to the company (in MHNZL's reasonable discretion) the company would be willing to agree to treat his

employment as continuous (it would provide Tomislav with confirmation of this, at the time).

The company considers this approach strikes a reasonable balance between both parties' interests.

[15] This appears to have been accepted by Mr Kalic because the terms of the record of settlement subsequently executed was unchanged from when Mr Kalic signed and submitted the document to the mediator. The circumstances under which Mr Kalic was resuming his employment with MHNZL included that his employment was not continuous, consideration of the request for it to be treated as continuous would be held over until February 2020 and MHNZL had concerns about how he would reintegrate into the business.

[16] Notwithstanding his apparent acceptance of the terms and expectations of his reemployment Mr Kalic said in evidence to the Authority that he was nervous returning to work and felt his immigration status was being held over him by MHNZL. He accepted to the Authority on his return to work he adopted a somewhat defensive attitude in his dealings with MHNZL.

*MHNZL proposes a new employment agreement*

[17] In early September Mr Kalic contacted his representative, Mr Halse advising he was concerned about a new individual employment agreement MHNZL had proposed for all staff. Mr Halse and Ms Denz then exchanged correspondence concerning the proposed IEA. On 10 September Mr Halse raised in broad terms Mr Kalic's concern that the proposed IEA was different to his current IEA and he was concerned he may lose entitlements including sick leave. By reply dated 11 September Ms Denz explained the new IEA was intended to replace the timebank system with payment for every hour worked per fortnight and was meant to have been explained and agreed with employees including Mr Kalic. She also wrote he was entitled to 5 days sick leave from commencement of his employment which she would ensure occurred.

[18] Also on 11 September Ms Denz wrote to Mr Campbell, who was in Kerikeri that week, and asked him to go through the IEA consultation document with Mr Kalic because she was concerned he may not have had the differences explained to him. She also asked Mr Campbell to ensure Mr Kostic understood the proposed IEA. She concluded the email to Mr Campbell that she would send the new IEA to Mr Halse and advise him they were happy to discuss it with him.

[19] Mr Campbell met with Mr Kalic on 12 September. He spoke with him about the IEA. He also raised a concern about sexist language and attitudes attributed Mr Kalic and made it clear to him that such language and attitudes were not acceptable in the workplace. It is accepted Mr Campbell raised this issue with Mr Kalic in the context of MHNZL's wish to successfully reintegrate him into the business. To the Authority, Mr Kalic did not dispute the inappropriateness of the language or attitudes used or that Mr Campbell has raised the issue with him. His subsequent report to Mr Halse that Mr Campbell said he was causing trouble is likely a misunderstanding of Mr Campbell's attempt to emphasize the terms on which Mr Kalic was returning to work for MHNZL.

[20] Neither Ms Denz's email nor the meeting with Mr Campbell allayed Mr Kalic's concerns about the proposed IEA. On his behalf Mr Halse wrote to counsel for MHNZL on 21 September seeking an IEA for Mr Kalic which reflected his prior employment, reinstated his sick leave balance and complied with his visa application by specifying the place of his employment. The correspondence also raised a concern that Mr Campbell had asked Mr Kalic why he had spoken to Mr Halse about the issue and "caused trouble" and queried the inclusion in the IEA of a 90-day probationary period. The correspondence asked for a new IEA to be provided.

[21] Also on 21 September Mr Halse wrote to Ms Denz about Mr Kostic's concerns about the proposed IEA. MHNZL accepts the inclusion of a probationary period clause in the proposed IEA presented to Mr Kalic (and Mr Kostic) was a mistake and they should not have been included for any existing employees. On having her attention drawn to the mistake by Mr Halse's email of 21 September she rang him and said it was an error. On 24 September Ms Denz sent a new proposed IEA to Mr Halse for Mr Kostic with the probationary period clause removed. A corrected proposed IEA was not sent to Mr Halse for Mr Kalic.

[22] MHNZL did not resolve the error in the proposed IEA directly with Mr Kalic. The error was not acknowledged directly with him and he was not provided an amended version. Mr Kalic said in evidence this unresolved issue was the start of the bullying. Although he did not sign it the proposed new IEA was a significant issue for Mr Kalic. He was preparing to apply for permanent residence in April 2020 for which the length of his employment with MHNZL was relevant feature. He said he felt in being offered an IEA with different conditions including the probationary period clause MHNZL was seeking to undermine his immigration status and intention to apply for residence.

*9 October – Mr Kalic is invited to a disciplinary meeting regarding the smoker and hive sponge event*

[23] On 9 October Mr Kalic was given a letter inviting him to a disciplinary meeting to discuss incidents alleged to have occurred on 3 October. The alleged incidents outlined in the letter were that he had left a smoker in the forest, a potentially significant fire risk and failed to remove sponges from 10 hives which could have caused a loss of bees with a consequent impact on production. The letter contained detail of the allegations, the reason MHNZL considered the issues serious and sought to put the events in the context of the parties rebuilding the employment relationship following Mr Kalic's return to work. The letter was frank that MHNZL held a concern Mr Kalic was not complying with the obligations which had been agreed on his return to work including that he work positively and productively and comply with all reasonable work instructions. The letter also raised a concern about Mr Kalic's physical fitness to perform the work. He was encouraged to bring a support person or representative to the meeting and advised he was entitled to get independent advice. The letter was not sent or copied to Mr Halse.

[24] The meeting proceeded on 14 October. Mr Kalic attended with a co-worker as his support person having tried unsuccessfully to contact Mr Halse. Mr Campbell and Mr Blignaut were present for MHNZL. Mr Kalic denied he was at fault for the allegations concerning the smoker or the sponges, that he was an experienced beekeeper with four years working with MHNZL who took health and safety seriously citing his recent raising of a concern about an unsafe trailer the previous week. He suggested Mr Campbell and Mr Blignaut wanted to blame him, when there were other people involved in the incidents because they wanted to dismiss him. The meeting ended with MHNZL advising the next steps were that it would review the findings, clarify some details with one of the co-workers present at the alleged events and decide the outcome of the disciplinary process. Mr Kalic was advised he would be told when they were to meet next. Detailed notes of the meeting were taken.

[25] MHNZL undertook further investigation. On 14 October Mr Campbell and Mr Blignaut met with one of the team members who worked with Mr Kalic when the alleged incidents took place and questioned him on details of the allegations. On 16 October Mr Campbell met with the other team member present at those shifts on 16

October and put questions to him about the alleged events. Detailed notes of the meetings were taken.

[26] On 15 October Mr Halse wrote to Ms Denz – he was concerned MHNZL had engaged directly with Mr Kalic when it was aware he was his representative and had recently raised concerns about his treatment since his return to work, asked for the information supporting the disciplinary investigation to be sent to him and proposed a meeting date. By reply Ms Denz advised Mr Kalic “had been represented” at the meeting and that the meeting had been held.

[27] On 16 October counsel for MHNZL followed up Ms Denz’s email to Mr Halse, writing to him that MHNZL had intended to contact him about serious concerns it held about Mr Kalic’s work performance and attitude since his return, it wished to constructively address the issues and suggested the parties attend mediation. Attached to the letter were MHNZL’s notes of the disciplinary meeting and subsequent investigation meetings. An offer was made to meet in person or by telephone. The letter continued that a further letter raising matters of a disciplinary nature for Mr Kalic’s comment would be sent soon and it was hoped those matters could be discussed at the next meeting subject to Mr Halse’s view. Those matters concerned events on 10 and 11 October which were characterised as a failure to follow directions. The letter sought more information in respect of the personal grievance and reiterated MHNZL wished to work constructively with Mr Kalic to resolve the situation.

[28] On 18 October MHNZL wrote to Mr Halse through counsel setting out its preliminary findings about the smoker and hive sponge incidents. The letter reiterated the importance of Mr Kalic’s health and safety at work and referred to MHNZL’s concerns about Mr Kalic’s ability to meet the physical demands of the role. Mr Kalic’s reporting of the unsafe trailer was acknowledged and he was asked to report any such future issue immediately to his manager. The letter advised MHNZL’s preliminary findings were the incidents were serious and had happened because Mr Kalic had failed to take appropriate care. His comment was sought by 25 October which could be in a meeting if he wished. The letter indicated a written warning was a likely outcome of any disciplinary action.

[29] By email dated 22 October Mr Halse advised the disciplinary process would have to be run again because he had not been contacted as Mr Kalic’s representative and the failure amounted to a breach of good faith, Mr Kalic and others had verified he

(Mr Kalic) was being victimised by Mr Blignaut and Mr Campbell and he was being blamed for the failures of a team of four, queried the team leader's responsibility in the situation, that the health issue had been blown out of proportion and Mr Kalic's work place had become extremely dangerous because the trailer had been sabotaged and he was now having to check it was safe before use. The letter ended with a request that MHNZL advise how it intends to make the workplace safe.

[30] By reply counsel for MHNZL wrote to Mr Halse the company was eager to get the employment relationship back on track but the recent issues between the parties were serious and warranted Mr Campbell's involvement. To that end Mr Halse was invited to provide further information relevant to the assessment of the disciplinary issues (smoker and hive sponges), requested information that MHNZL knew Mr Halse was representing Mr Kalic in all matters and confirmed information about further concerns about Mr Kalic's employment would be provided shortly. Information to support Mr Kalic's serious allegation that the trailer was sabotaged was also sought. The letter concluded that MHNZL did not at that stage accept the workplace was unsafe for Mr Kalic, recognised there were obvious difficulties between Mr Kalic and his managers and was open to any constructive suggestions.

[31] On 23 October Mr Campbell met with one of Mr Kalic's team members about events on the evening of 10 October involving Mr Kalic's work performance.

*24 October – Mr Kalic is invited to a disciplinary meeting regarding events on the evenings of 10 and 11 October*

[32] On 24 October MHNZL wrote to Mr Kalic by Mr Halse inviting him to a disciplinary meeting on 31 October to discuss events on the evening of 10 and 11 October which it was alleged arose from Mr Kalic's failure to follow instructions which led to unnecessary additional hours, effort and cost. Supporting information was provided including a summary of concerns by Mr Blignaut, maps identifying the work areas involved, interview notes of the 23 October meeting, instruction sheet and relevant extracts from a travel activity report of the vehicle involved.

[33] On 30 and 31 October the representatives exchanged correspondence regarding where and when the proposed disciplinary meeting would be held. Mr Halse raised serious concerns about MHNZL's approach and characterised the situation as "one of the most blatant bullying cases of a skilled migrant CultureSafe NZ Ltd ha[d] come

across”. Counsel for MHNZL asked for specific reasons why such a claim would be made.

[34] On 1 November Mr Campbell and Ms Denz met with Mr Kalic and Mr Halse. The first issue discussed was the smoker and hive sponges. Mr Halse raised the concern the first meeting had not involved him, that Mr Kalic felt bullied and treated badly, other people said he was being picked on and he was concerned about the safety of the vehicles he was using. Mr Campbell detailed the investigation MHNZL had undertaken into the trailer and no tampering had been found. Mr Kalic restated he did not leave the smoker in the forest and the whole team was responsible for the hive sponges being removed. The meeting then turned to the events of 10 and 11 October. The focus was on the events on 10 October - Mr Campbell advised at the meeting the 11 October matters would not be taken any further because Mr Kalic’s explanation was accepted. Mr Kalic was unable to recall what he did in the subject 3-hour period on 10 October but insisted he did work.

*12 November – MHNZL writes to Mr Kalic with outcome of first disciplinary matters, comments about the bullying allegations and preliminary view on second disciplinary matters*

[35] On 12 November Mr Campbell wrote to Mr Kalic care of Mr Halse with the outcome of the disciplinary investigation into the hive sponge and smoker issue and the events of 10 October. Mr Kalic was found responsible for the failure and issued a written warning for the smoker and hive sponge incidents to remain on his file for one year. The letter stated the bullying allegations against Mr Blignaut were not accepted but that the warning would be reviewed if the allegations were substantiated in the future. In response to the personal grievance raised about Mr Halse not being involved in the 14 October meeting and that in the absence of information he was Mr Kalic’s representative for disciplinary matters the claim was not accepted.

[36] The letter went on to confirm MHNZL had concerns about Mr Kalic’s attitude and work ethic and for those reasons his performance was being monitored. This was not, the letter stated bullying or unfair treatment but if Mr Kalic had further relevant information to support this concern he should provide it by 19 November and if provided an investigation would be undertaken. With respect to the 10 October incident, the letter advised the matter was serious, the disciplinary outcome could be dismissal on which Mr Kalic’s comment was sought

[37] On 22 November, counsel for MHNZL wrote to Mr Halse confirming no further information had been received from Mr Kalic within the 19 November timeframe and, due to the potentially serious outcome of the disciplinary matter extended the timeframe for providing any further information to 27 November. The letter included a copy had been sent directly to Mr Kalic to ensure he was aware of the timeframe.

[38] Mr Kalic had secured new employment in his field which he started on 1 January 2020. He told the Authority he started looking for another job in mid-October soon after a co-worker left MHNZL and tendered his resignation on 1 December after he had secured the necessary amendment to his work visa. His resignation letter included he was giving four weeks' notice, as required under his employment agreement and his last day of employment would be 29 December but that he would be prepared to leave "at the earliest convenience". The parties negotiated an early leaving date.

[39] On 2 December Mr Halse wrote to counsel for MHNZL raising a personal grievance for unjustified constructive dismissal. Subsequent correspondence set out the detailed basis for the grievance and MHNZL's response.

## **Discussion**

### *Did MHNZL unjustifiably disadvantage Mr Kalic in his employment?*

[40] Mr Kalic says he was unjustifiably disadvantaged in his employment as a result of MHNZL's actions including failing to investigate fully and fairly allegations of bullying and/or failing to contact Mr Halse directly in relation to the disciplinary investigation meeting which took place on 14 October.

#### *(i) The test for justification*

[41] Section 103A of the Act sets out the test for assessing whether an action including dismissal was justifiable. It requires an objective assessment of whether the employer's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the action and/or 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 Mr Kalic being treated unfairly.<sup>3</sup> The Authority's task

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<sup>3</sup> Section 103A Employment Relations Act 2000.

is to examine objectively the decision-making process and determine whether what MHNZL did and how it was done were steps open to a fair and reasonable employer.

(ii) *Did MHNZL unfairly and unreasonably fail to include Mr Halse in the first disciplinary investigation meeting?*

[42] When Mr Kalic received the 9 October letter, he tried to but was unable to contact Mr Halse in time for the meeting. He attended the meeting with a support person. Mr Halse was subsequently involved with all aspects of the ongoing investigation. Mr Kalic submits because Mr Halse had very recently engaged with Ms Denz and counsel for MHNZL regarding the proposed IEA it ought to have contacted him about the disciplinary matter.

[43] While it is accepted Mr Halse was representing Mr Kalic in relation to the proposed IEA he had not provided MHNZL with an unequivocal authority to represent him in any matter. It is unfortunate Mr Kalic was unable to contact Mr Halse prior to the 14 October meeting but MHNZL did not or could not reasonably have known that and Mr Kalic could have told MHNZL this and have sought to adjourn the meeting pending contact with Mr Halse. Further, Mr Halse was subsequently effectively engaged in representing Mr Kalic in the ongoing investigation. This part of the claim does not succeed.

(iii) *Did MHNZL respond fairly and reasonably to the trailer sabotage claim?*

[44] This is a serious claim. MHNZL was entitled to ask Mr Kalic to provide information in support of the claim. Notwithstanding, MHNZL took the issue seriously – it had the trailer inspected, shared the outcome of the inspection with Mr Kalic, discussed with him the risks of overtightening wheel nuts and reiterated how to raise health and safety concerns about equipment. This part of the claim does not succeed.

(iv) *Did MHNZL fail to fairly and reasonably investigate Mr Kalic's claim of unfair treatment and bullying?*

[45] The genesis of this concern held by Mr Kalic is the terms on which he was reengaged which included MHNZL held concerns about his ability to work positively and productively and comply with reasonable work instructions. This is because the disciplinary investigation MHNZL undertook and its response to his claims of bullying

and unfair treatment were inexorably linked to this fundamental concern as evidenced by MHNZL's repeated contextualising of the disciplinary matters raised with Mr Kalic in the record of settlement concern.

[46] How then did MHNZL's concern manifest in the employment relationship? In MHNZL's 12 November letter it states Mr Kalic's work had been monitored since his return. The fact his work was being monitored, or how it had been monitored was not discussed with or made clear with him. While he could expect to be managed when he returned to work, he could not reasonably be expected to understand he would be monitored without that being made clear.

[47] Parties to an employment relationship must deal with each other in good faith and be active and constructive in establishing and maintaining a productive employment relationship including being responsive and communicative.<sup>4</sup> In failing to make clear to Mr Kalic the fact and how he was being monitored from the outset of his employment MHNZL has failed the duty owed to Mr Kalic to be active and constructive in establishing and maintaining the employment relationship. If it had done so, the disciplinary investigations may have been avoided, at least initially, because Mr Kalic would have been engaged in a process where he knew clearly what was expected of him on a day-to-day basis, how he could comply with those expectations and when he fell short, he would be supported to meet expectations. This aspect of Mr Kalic's claim is successful.

(v) *Was Mr Kalic unjustifiably disadvantaged in his employment because English is not his first language?*

[48] This claim could succeed if there was evidence MHNZL had taken advantage to Mr Kalic's detriment that he is not a first language English speaker. There is however no evidence to support such a conclusion. Mr Kalic was supported and represented at during all the disciplinary meetings. Communications were written or recorded in writing. Significant time was provided for written responses to be provided. Evidence before the Authority suggests MHNZL was generally cognisant of the issue and accommodated communicating in employees' first languages where possible. Mr Kalic

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<sup>4</sup> Employment Relations Act 2000, section 4.

did not raise this issue as a significant feature of the process. This part of the claim does not succeed.

*Was Mr Kalic unjustifiably constructively dismissed?*

[49] An employee may be constructively dismissed by his employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.<sup>5</sup>

[50] Mr Kalic says the conditions placed on his return to work with MHNZL put him on the back foot from the outset and the pressure he was placed under after his return to work shows MHNZL conducted itself in a manner that had a deliberate and dominate purpose of coercing him to resign. Alternatively, he submits the third category applies and it was MHNZL's breaches of duty that caused him to resignation.

*Course of conduct*

[51] The course of conduct allegation is a serious one and could be expected to be supported by evidence of equally probative value. There is no direct evidence of such an intention. The elements Mr Kalic submits add up to and indicate such an intention do not support the claim MHNZL conducted itself in a manner designed to coerce his resignation. Those elements are:

- (i) the concerns MHNZL held and expressed regarding his re-employment from the outset;
- (ii) its holding-over him its reconsideration of the continuation of his employment;

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<sup>5</sup> [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

- (iii) MHNZL's knowledge that he was a migrant worker whose intention was to apply for residence reliant on his continued employment with it for the required period;
- (iv) the proposed IEA, how it was provided to him and MHNZL's failure to address his concerns about it;
- (v) the unreasonable monitoring of his conduct;
- (vi) its unreasonable exclusion of his representative from the first disciplinary meeting; and
- (vii) its failure to investigate fairly his concerns about his treatment at work including bullying and unfair treatment.

[52] MHNZL would not have reemployed Mr Kalic if it did not wish to work with him and though I have found the management of Mr Kalic's performance fell short it does not follow the matters which were drawn to his attention were not serious or not matters for which he needed to account. MHNZL's handling of the proposed IEA, though untidy, was an admitted error which was communicated to his representative. Mr Halse not being involved in the first disciplinary meeting is dealt with above and has not been found to be unjustified. The investigation of most of Mr Kalic's concerns were still open when he resigned as was the opportunity to provide further information which he did not take up. Cumulatively, these elements do not support a finding MHNZL was set on a course of conduct to coerce his resignation.

#### *Breach of duty*

[53] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.<sup>6</sup>

- (i) *Did MHNZL breach the terms of the employment agreement causing Mr Kalic to resign?*

[54] MHNZL has been found to have unjustifiably disadvantaged Mr Kalic because it failed to put in place a fair and reasonable system to support him when he returned to work. It does not necessarily follow that the disciplinary investigation process MHNZL

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<sup>6</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

adopted was in breach of the employment agreement. That said Mr Kalic apprehended his work performance was under scrutiny and because he did not know he was being monitored or how he was being monitored he understood this as ‘nit picking’, bullying and unfair treatment. He raised these concerns with MHNZL who investigated them and was still investigating them when he resigned.

(ii) *If so, was Mr Kalic’s resignation reasonably foreseeable given the nature of the breaches?*

[55] While it is clear from the fulsome communications between the parties that Mr Kalic had serious concerns about his treatment at work he cooperated with the disciplinary investigation process MHNZL conducted and the parties were engaged in a detailed examination of the workplace events. That the outcome of at least some of those events (for example the written warning for the smoker and hive sponge incidents) was disputed or likely to be disputed by Mr Kalic does not mean MHNZL was in continued fundamental breach of the employment agreement or was evidence it did not intend to be bound by the terms of the parties’ employment agreement. When Mr Campbell wrote to Mr Kalic on 12 November the bullying allegations and 11 October issue were still under investigation and Mr Kalic was provided an opportunity to provide further comments and information. Mr Kalic did not provide a reply. His next communication was his resignation on notice with a request to leave early if possible. Having made the decision to resign when he secured new employment does not make his resignation an unjustified constructive dismissal because, though I accept the circumstances were difficult and stressful, his resignation was not a foreseeable consequence of any breach of duty by MHNZL.

#### *Breach of s 110A(1)(c)*

[56] This claim does not succeed. Mr Kalic raised health and safety issues including about the trailer and his treatment at work which were investigated and considered by MHNZL including it asking him to provide further and specific information. The evidence does not support a finding it prevented him or sought to prevent him taking reasonable steps to raise an issue or concern about health and safety.

*Special damages – immigration consultancy fees*

[57] Even if Mr Kalic had established this loss arising from MHNZL's breach of duty the special damages claim would not be allowed because the claim was not quantified and no specific information was provided to support a finding Mr Kalic had incurred such fees as a consequence of MHNZL's breach of duty.

**Remedies**

[58] Mr Kalic has established a personal grievance for unjustified disadvantage. He is entitled to a consideration of the remedies sought.

*Compensation for humiliation, loss of dignity and injury to feelings*

[59] The circumstances of Mr Kalic's personal grievance for unjustified disadvantage arise from MHNZL's failure to communicate clearly with him how it would monitor his conduct at work and the consequences of that failure. He gave evidence of the stress and pressure he experienced during his employment. The Authority is satisfied Mr Kalic has experienced harm under each of the headings in 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 \$18,000 under section 123(1)(c)(i) is appropriate.

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

[60] No deduction from the remedies awarded is to be made under s 124 of the Act. While Mr Kalic, on his evidence, adopted a defensive position with respect to MHNZL's management of him, he was not responsible for how he was managed or MHNZL's failure to communicate with him about that.

**Summary**

[61] Manuka Health New Zealand Limited must pay Tomislav Kalic \$18,000 within 28 days of the date of determination.

## Costs

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

[63] If they are not able to do so and an Authority determination on costs is needed Mr Kalic may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MHNZL 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.

[64] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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.<sup>7</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>7</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).