Attention is drawn to the order for non-publication at paragraph [103] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 326
3245939

	BETWEEN	STEVE BANCROFT Applicant
	AND	ALPINE EXPORT NZ LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Christie McGregor, counsel for the Applicant Wendy Macphail, advocate for the Respondent
Investigation Meeting:	27 and 28 February 2024 in Tauranga and by AVL
Submissions and further information:	Up to 7 March 2024
Determination:	5 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Steve Bancroft was employed by Alpine Export NZ Limited (Alpine) in April 2022 as Quality and Compliance Manager, before being given additional responsibilities to manage Alpine's factory and warehouse in June 2022. Mr Bancroft's employment with Alpine ended when he resigned in May 2023, following a process where Alpine's General Manager Natalie Rothburg had raised allegations with Mr Bancroft in November 2022 and then suspended Mr Bancroft.

[2] Following an investigation and disciplinary process in November 2023 Alpine issued Mr Bancroft with a final written warning which specified a number of conditions (described by Alpine as "restrictions attached"). At that time Mr Bancroft was off work following surgery and he never returned to work.

[3] Mr Bancroft claims that Alpine unjustifiably disadvantaged him through its suspension, investigation and the outcome of the disciplinary process, that he was unjustifiably constructively dismissed and that Alpine breached its good faith obligations in dealing with him during the investigation and disciplinary processes.

[4] Alpine considers that its actions were justified and says that it had good reasons to issues the final written warning with restrictions attached, that it has acted in good faith and that it did not constructively dismiss Mr Bancroft.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged for Mr Bancroft by himself, his wife Jeanette Bancroft, Clayton Mitchell and Karll Radonich (a former employee of Alpine). For Alpine, written witness statements were lodged from Ms Rothburg, Neville Buckley (currently Engineering and Auditing Manager), Sue French (Shipping Manager), Mandeep Singh (Finished Goods Manager), Lovejeet Singh (former Quality Control Supervisor), Kulwinder Bajwa (former factory worker) and Ajay Jeria (Ops Manager).

[6] Witnesses answered questions, under oath or affirmation, from me and from counsel for the parties' representatives, with the exception of Mr Radonich and Ms French, who I excused from appearing. Mr Bajwa appeared by AVL as he was overseas at the time of the investigation meeting.[1] The parties' representatives also provided written submissions and further information as directed by me, following the investigation meeting. I was also provided with recordings of three meetings that occurred between Mr Bancroft and Ms Rothburg during Alpine's investigation and disciplinary process, which were also attended by Mr Mitchell as Mr Bancroft's support person, and transcripts of those meetings.

[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

[1] By agreement with the parties' representatives, Mr Jeria provided informal translation assistance during Mr Bajwa's evidence.

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

(a) Was Mr Bancroft unjustifiably disadvantaged by Alpine in relation to suspension, investigation process or outcomes of the disciplinary process?

(b) Was Mr Bancroft unjustifiably constructively dismissed by Alpine?

(c) Did Alpine breach its good faith obligations in its dealings with Mr Bancroft, with regards to its investigation and disciplinary process?

(d) If Alpine's actions were not justified (in relation to disadvantaging or dismissing Mr Bancroft) or Alpine breached its good faith obligations, what remedies should be awarded, considering:

(i) Lost wages and arrears of wages, including Kiwisaver contributions, under s 123(1)(b) and s 131 of the Act;

(ii) Compensation under s 123(1)(c)(i) of the Act; and

(iii) Penalties under s 133 of the Act?

(e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Bancroft that contributed to the situation giving rise to his grievances?

(f) Should non-publication orders be made under cl 10 of sch 2 of the Act?

(g) Should either party contribute to the costs of representation of the other party?

[9] Submissions for Mr Bancroft also raised a number of matters related to alleged breaches of ss 58 to 60 and 88 to 90 of the Health and Safety at Work Act 2015, and s 110A of the Act. Those submissions said that these issues could be addressed even though they had not been expressly pleaded, by virtue of cl 1 of sch 2 of the Act. As these matters were first raised in submissions, I do not consider that they can be considered further as stand-alone issues, as they have been raised outside the timeframes required under s 114 of the Act and no application for leave to raise a grievance in relation to those matters outside those timeframes has been made.

Documentary evidence establishes a number of facts relevant to the above issues

[10] The evidence provided by the parties, including in the common bundle of documents, and submissions establish a number of agreed factual matters which enable

this determination to focus on a smaller number of disputed facts and the application of the law to those facts. More specifically, the agreed facts enable a focus on whether Alpine's actions were justified and whether its actions were such that Mr Bancroft's claim of unjustified constructive dismissal is established.

[11] The facts which were not in dispute are:

(a) Mr Bancroft was employed by Alpine as Quality & Compliance Manager, with an individual employment agreement (IEA) signed and effective 26 April 2022 with remuneration of $95,000 per annum;

(b) A variation to Mr Bancroft's IEA was signed on 22 June 2022, which increased his remuneration to $105,000 with monthly performance payments of $1,250 and said under "Change in Duties" that "Change to Overall manager for Alpine factory/Warehouse.". This variation was characterised by Mr Bancroft as promotion to a new role, while Alpine viewed it is an addition to his responsibilities;

(c) Ms Rothburg informally raised concerns with Mr Bancroft and recorded in an email on 19 October 2022 that those concerns followed staff complaints. That email went on to say "Whilst these first two meetings have been informal, by necessity, if it happens again, we will need make [sic] them formal because we will not tolerate this type of rude behaviour in our company";

(d) Mr Buckley raised a concern with Ms Rothburg on 1 November 2022 about Mr Bancroft's management of staff, with a number of allegations about not hiring a non-English speaker and related matters;

(e) Ms Rothburg met with Mr Bancroft on 2 November 2022 where she advised him of the allegations against him and then suspended him, followed by a letter from Ms Rothburg on 3 November 2022 recording what had been discussed at that meeting including her decision to suspend Mr Bancroft. A subsequent letter on 9 November 2022 raised a further allegation;

(f) Mr Bancroft, supported by Mr Mitchell, met with Ms Rothburg on 10 November 2022 for Mr Bancroft to respond to the allegations, with Mr Bancroft subsequently providing a written statement;

(g) Ms Rothburg on 11 November 2022 deferred a subsequent meeting from 14 to 21 November 2022 to allow for further investigation and during the

intervening period obtained further evidence from a number of other witnesses, some of which was relevant to the allegations being investigated;

(h) Ms Rothburg emailed Mr Bancroft a 14-page letter on 17 November containing her preliminary findings with an opportunity to provide comments by the following day. Mr Bancroft did not make any written comments in response;

(i) Mr Bancroft, supported by Mr Mitchell, met with Ms Rothburg on 21 November 2022 for Ms Rothburg to inform Mr Bancroft of what she was considering in relation to her findings and to provide an opportunity for comment. At this meeting Ms Rothburg said the allegations were largely upheld and introduced the proposal that Mr Bancroft be issued a final written warning (FWW) with restrictions attached, also advising Mr Bancroft that she had been considering dismissal for serious misconduct. Ms Rothburg confirmed this by letter the same day, with a meeting to confirm the decision scheduled for 23 November 2022;

(j) Mr Bancroft had surgery on his shoulder on 22 November 2022 and advised that he could not attend the scheduled meeting on 23 November 2022. In response Ms Rothburg advised that by a letter on 22 November 2022 that the decision meeting was deferred to 24 November 2022 and if Mr Bancroft was unable to attend, she would provide her decision by email on 24 November 2022. On 24 November 2022 Mr Bancroft advised he had been released from hospital but was unavailable until at least Monday 28 November 2022;

(k) Ms Rothburg issued Mr Bancroft with the FWW with restrictions on 25 November 2022;

(l) Mr Bancroft did not return to work, with his first personal grievances of unjustified disadvantages and breaches of good faith raised on 26 January 2023 related to the suspension and FWW. Discussions over the next three months related to whether Mr Bancroft would return to work, with a number of changes being proposed to the FWW or restrictions attached to it by Alpine. Mediation occurred on 3 April 2023 but did not resolve the matters between Mr Bancroft and Alpine; and

(m) Mr Bancroft resigned on 6 April 2023, effective 18 May 2023, and subsequently raised a personal grievance for unjustified constructive dismissal on 11 May 2023.

Was Mr Bancroft unjustifiably disadvantaged by Alpine in relation to suspension, investigation process or outcomes of the disciplinary process?

Relevant law

[12] For Mr Bancroft's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires that:

a. Mr Bancroft's employment, or one or more conditions of his employment, was (in this case, as Mr Bancroft's employment has since ended) affected to his disadvantage; and
b. This was due to some unjustifiable action by Alpine.

[13] In assessing this, I must apply the test of justification under s 103A of the Act, being whether Alpine's actions, and how Alpine acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[14] In reaching my conclusions about Mr Bancroft's unjustified disadvantage claims, s 103A(3) requires that I consider:

a. having regard to the resources available to it, did Alpine sufficiently investigate before taking action?
b. did Alpine raise concerns that it had with Mr Bancroft before taking action?
c. did Mr Bancroft have a reasonable opportunity to respond? and
d. did Alpine genuinely consider Mr Bancroft's explanation or comments?

[15] I may also take into account any other factors I think are appropriate under s 103A(4). I must not determine an action to be unjustifiable where there were defects in Alpine's process that were minor and did not result in Mr Bancroft being treated unfairly under s 103A(5).

Submissions of the parties – suspension

[16] Submissions for Mr Bancroft were that his suspension was unjustified as he was invited to the meeting of 2 November 2022 without notice or the ability to seek legal advice and without details of the allegations that were said to justify suspension. Further it was said that when Mr Bancroft responded to the allegations and proposed suspension, Ms Rothburg advised that she had already considered that and determined that suspension was appropriate.

[17] It was acknowledged that Alpine had a contractual right to suspend Mr Bancroft under cl 27.1 of his IEA "when his/her safety and/or the safety of others is/are at risk". The grounds for invoking this clause were said to not be made out with submissions that "there was no suggestion that [Mr Bancroft] would interfere with the investigation, and no imminent threat to health and safety".

[18] In combination, it was submitted for Mr Bancroft that Alpine had not met the requirements of s 103A(3).

[19] Submissions for Alpine referred to cl 27.1 of Mr Bancroft's IEA, saying that Ms Rothburg "considered it was foreseeable the Indian staff may be distracted if [Mr Bancroft] remained at work during the investigation" and that this was a health and safety risk or may result in production issues, and that "those staff may be less likely to disclose information if Mr Bancroft remained at work".

[20] Alpine acknowledged that Ms Rothburg had discussed with Ms O'Brien, notetaker for the meeting, likely responses from Mr Bancroft to the allegations and proposal to suspend him prior to meeting with him. It said that she had not however predetermined the outcome of the proposal to suspend.

Mr Bancroft was unjustifiably suspended

[21] Having reviewed the transcript provided of the meeting on 2 November 2022, which was confirmed by Ms Rothburg to be an accurate record of that meeting. and her letter to Mr Bancroft of 3 November 2022 confirming the allegations and suspension, I find that Alpine's actions in suspending Mr Bancroft were unjustified for the following reason.

[22] Ms Rothburg said that she had taken advice from Ms Mcphail, who is available to provide HR support to Alpine, as the allegations that had been raised were seen to be a serious issue. She had arranged for witness statements to be gathered from Mr Buckley, Mr Bajwa and Mr Jeria, and had sat in on Mr Buckley's interview of Mr Bajwa, which led to him being offered a position. Ms Rothburg was well prepared for the meeting with Mr Bancroft and had notes from Ms Mcphail that she used to raise the allegations, including allegations that Mr Bancroft had breached various provisions of the Act, the HSWA and his employment agreement. These aspects of Alpine's process were fair and reasonable, as was the fact that he was paid during the suspension.

[23] What I consider was not fair and reasonable was the fact that Ms Rothburg did not advise Mr Bancroft of the purpose of the meeting, which meant he had no real opportunity to consider if he wished to have a support person present or take advice, before responding to the proposal that he be suspended. Ms Rothburg also moved swiftly through the process of considering Mr Bancroft's response, which was that he acknowledged some factual aspects of events but disputed other aspects. Ms Rothburg acknowledged that there was no break for her to consider Mr Bancroft's response. While she says that this was because she had considered his response as a possibility in advance, I do not consider that the transcript shows this or that she clearly explained this to Mr Bancroft.

[24] I consider that Ms Rothburg's actions in this respect were predetermined and that find that she, as Alpine's decision maker, did not genuinely consider Mr Bancroft's response. I do not consider that this was a minor procedural defect and find that this means that Mr Bancroft's suspension amounts to an unjustified disadvantage.

[25] I also have a concern that the contractual grounds to invoke the suspension clause under Mr Bancroft's IEA (cl 27.1) may not have been clearly engaged. The full clause reads as follows:

> Where circumstances warrant it, the Employer has the discretion to temporarily suspend the Employee from his/her duties prior to a full investigation of the allegations surrounding the circumstances involving the Employee's conduct. **The company may elect to suspend the Employee when his/her safety and/or the safety of others is/are at risk.** [emphasis added]

[26] I do not consider that Ms Rothburg was clear about how there was a risk to either Mr Bancroft or more likely other staff if he was not suspended during the investigation of the allegations. While she referred to the possibility of psychological distress, I consider that this was not clearly established and there is a blurring of the reasons for the suspension, given Alpine's submissions referred also to the possibility that there may have been production issues if Mr Bancroft was not suspended. While there is also reference in submissions to the possibility that staff may have been less likely to disclose issues and Mr Bancroft was directed not to discuss the issue with staff, specifically those who had made complaints, it was not clear that this was the primary reason for the suspension and it is not expressly provided for in the suspension clause.

[27] Finally, I have some concerns that while Ms Rothburg said she interviewed Mr Buckley, Mandeep Singh, Lovejeet Singh, Mr Bajwa, Mr Jeria and one other staff

member, from whom a witness statement was not provided, during the period that Mr Bancroft was suspended there were no records kept of those interviews. Given Ms Rothburg said she was taking advice through-out this process from Ms Mcphail, I would have expected there to be records of those interviews and for those records to be disclosed to Mr Bancroft and his representatives. While email complaints were provided from Mr Buckley, Mr Bajwa and Mr Jeria those had all been collected prior to the meeting when Mr Bancroft was suspended and are not documentary support for there having been further interviews once Mr Bancroft had been suspended.

Submissions of the parties – investigation process and outcomes of disciplinary process

[28] Submissions for Mr Bancroft were that the investigation process was unjustified, in addition to his concerns about the suspension, as:

(a) there was a breach of natural justice with Ms Rothburg acting as complainant, investigation, decision maker and witness;

(b) additional allegations were unreasonably raised during the investigation process, including sourcing allegations in a "scattergun way";

(c) there was a blurring of disciplinary and performance concerns;

(d) relevant information was not disclosed when requested;

(e) insufficient time was provided to seek advice when the proposal for a FWW with restrictions was raised late in the disciplinary process, particularly when Alpine knew Mr Bancroft was in hospital recovering from surgery;

(f) there was a lack of substantive justification for conclusions that Alpine reached; and

(g) there was no contractual right to demote Mr Bancroft or reduce his pay, meaning those changes were unilateral variations to his employment agreement imposed as a disciplinary outcome and not properly raised as an alternative to summary dismissal.

[29] Submissions for Alpine were that "it had a good reason to issue the [FWW] and the restrictions, as it had received complaints from staff members that [Mr Bancroft] was treating staff differently based on their ethnicity". Those submissions also said that:

(a) Alpine's investigation was fair and reasonable, and its actions were substantively and procedurally justified, including meeting all of the requirements of s 103A(3) to investigate the allegations and raise

concerns with Mr Bancroft, provide him with preliminary findings and advising him of the proposed response (being the FWW with restrictions) and opportunities to comment and respond before decisions were made;

(b) the FWW and restrictions were proportionate to Mr Bancroft's misconduct;

(c) any defects in Alpine's process (which it denied there were) were minor and did not result in Mr Bancroft being treated unfairly; and

(d) Alpine "did not breach [Mr Bancroft's] employment agreement, as it acted in good faith and in accordance with the terms and conditions of the agreement, which allowed it to vary [Mr Bancroft's] duties, to monitor and review his performance, and to take disciplinary action if necessary.

Mr Bancroft was unjustifiably disadvantaged by the investigation process and outcomes of the disciplinary process

[30] While there were some fair and reasonable aspects to Alpine's investigation process, I find that other elements mean that Mr Bancroft was unjustifiably disadvantaged by it. I further find that Alpine's imposition of a FWW and more specifically the restrictions that it imposed were not the actions of a fair and reasonable employer and represented a unilateral variation of Mr Bancroft's IEA, that was not implemented in a procedurally fair manner nor was it consistent with the terms of Mr Bancroft's IEA. My reasons for these findings follow.

[31] I consider that Alpine's process in raising and in investigating the allegations, including providing preliminary findings, was in the following aspects fair to Mr Bancroft. He was provided allegations in writing, the allegations were investigated, meetings were held to hear his response to the allegations, preliminary findings were presented with a meeting to respond, and he had an opportunity to respond, including providing a written response. While Mr Bancroft sought to present his response in full at the start of the meeting on 10 November 2022, I do not consider that Ms Rothburg's choice to not allow this and to ask pre-prepared questions of Mr Bancroft, then provide him with an opportunity for further comment, was unfair or unreasonable.

[32] I decline to make a finding that Alpine's process was not that of a fair and reasonable employer in relation to Ms Rothburg's soliciting of additional allegations that were insufficiently related to the original complaint. One of those allegations was

that Mr Bancroft had not told the truth to Mr Buckley about the number of times he met with Ms Rothburg during a period when Mr Buckley was on leave, said to amount to serious misconduct. I consider that could, at most, be a minor defect in process, as Mr Bancroft had an opportunity to respond to the allegation and to present a different view of what had been said, which he did.

[33] The other complaints that were collected by Ms Rothburg were about Mr Bancroft being rude to an IT provider and related to a historical and unrelated concern that Mr Jeria had over not being communicated with by Mr Bancroft about a production issue. Submissions were that Ms Rothburg was seeking out further allegations in a scattergun manner, analogous to behaviour that was found by the Court to be unjustified in *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson*.[2] These allegations did not appear to be advanced by Alpine and Ms Rothburg said that the IT provider contacted her to complain about Mr Bancroft rather than her soliciting that complaint. While creating some doubt about whether there were improper motives in Ms Rothburg collecting these complaints, I consider this situation is distinguishable as the complaints did not appear to be advanced in this case.

[34] The main reason that I consider Alpine's actions were not those of a fair and reasonable employer is that I do not accept it had the right to demote Mr Bancroft or reduce his pay in the way that it did. This proposal was raised first at the meeting on 21 November 2022. While Ms Rothburg said that she was proposing this in place of dismissal, I do not consider that the process of raising this approach was fair or reasonable for a number of reasons.

[35] First, while submissions for Alpine were that there was no demotion, this was not consistent with evidence from its witnesses. The letter of 21 November 2022 from Ms Rothburg setting out the restrictions described the change to Mr Bancroft's duties as:

> Your role will revert to Quality and Compliance Manager. [Mr Buckley] will take over the role of Factory/Warehouse Manager, including all HR matters …

[36] Ms Rothburg in evidence at the investigation meeting said that Mr Bancroft's role went back to being Quality and Compliance Manager, which she accepted involved changes to his terms and conditions of employment. She considered that his IEA

[2] *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920.

permitted changes to the scope of his role and given the nature of complaints it was no longer appropriate to have staff report to him. I find that Alpine's intention was to change Mr Bancroft's role by removing responsibilities from him, which I consider was in fact a demotion, notwithstanding that his job title was not changed by the written variation to his IEA. He had been given additional responsibilities, which were taken off him as a disciplinary sanction, which I consider is clearly a demotion.

[37] Second, I do not accept that there is a contractual provision in Mr Bancroft's IEA that would enable Alpine to either demote him or impose a reduction in pay as a disciplinary outcome. Alpine's submissions at paragraph [29](d) above appeared to be a reference to clause 2.3 of Mr Bancroft's IEA, which says:

> To ensure the continued operation of the business, the Employee in consultation with the employer may be assigned reasonable alternative/additional duties by the Employer from time to time when business requirements dictate.

[38] Ms Rothburg was also referred during questions at the investigation meeting to cl 6.3 of Mr Bancroft's IEA, which says:

> It is recognised the remuneration rate is related to work performance of the Employee. Such remuneration may be altered after negotiation with the Employee if his/her work performance is not up to standard over a continuous period of time.

[39] Ms Rothberg's letter to Mr Bancroft of 22 November 2022 referred to these clauses, amongst others. Although not explicitly stated, the inference was that all of the clauses referred to supported Ms Rothberg's proposed actions.

[40] I find that Alpine did not have the contractual ability to demote Mr Bancroft or reduce his pay based on the clauses that Ms Rothberg referred to. While cl 6.3 would enable Alpine to negotiate over changes to pay following a process of performance issues being raised and there being no improvement in performance, I do not consider that is what happened here. Neither do I consider that cl 2.3 is broad enough to encompass a demotion and, even if I considered it could be used for that purpose, I would have been unlikely to have found Alpine had undertaken sufficient process to invoke this ability.

[41] While Ms Rothburg claimed that she was trying to negotiate over the restrictions, I do not accept that proposing the demotion and pay decrease in the way she did, as a restriction attached to a FWW, can be viewed as genuine negotiations nor do I consider they were the actions of a fair and reasonable employer. As Mr Bancroft

was in hospital and then recuperating from surgery, I do not consider there was sufficient time for him to respond to the proposal before Ms Rothburg confirmed Alpine was implementing it.

[42] I have also considered whether Alpine's actions could be considered fair and reasonable in the manner described by the Employment Court in *Secretary for Justice v Dodd* [2010] NZEMPC 84, where the Court said:[3] [119]

> … the ultimate test of justification for unjustified disadvantage in employment is not whether a sanction less than dismissal is mandated contractually. Rather, it is whether what was done was, in all the circumstances of the case at the time, what a fair and reasonable employer would have done; s 103 A. So, even if, unlike the position in this case, a collective agreement, an individual employment agreement, or an employer's policies do not address explicitly an outcome for misconduct such as temporary demotion, the Authority or the Court may nevertheless, in an appropriate case, determine that to have been a fair and reasonable disadvantage to an employee in his or her employment and therefore justified.

[43] I do not consider that this is a situation where Alpine's actions can be considered fair and reasonable in the way envisaged by the Court in *Secretary for Justice v Dodd*. My reasons for this are the same as those referred to in paragraph [41] above, being that I do not consider Alpine's actions were a genuine negotiation for changes to Mr Bancroft's terms and conditions. Further I do not consider that a fair and reasonable employer would have imposed those changes when it was aware Mr Bancroft was in hospital and recuperating from surgery.

[44] At a minimum a fair and reasonable employer in that circumstances would have allowed Mr Bancroft time to obtain advice and respond to its proposal. Ms Rothburg had presented that proposal for the first time on 21 November 2022. Mr Bancroft advised on 22 November 2022 that the hospital would not be releasing him in time for a scheduled follow-up meeting with Ms Rothburg on 23 November 2022, where he had been due to provide a response. Ms Rothburg had rescheduled the follow-up meeting for 24 November 2022 in response, noting that she would provide her decision on that day if Mr Bancroft had not responded in order to "avoid protracting this matter further".

[45] When Mr Bancroft then advised he was unable to meet on 24 November 2022 due to recuperation, including the impacts of medication, Ms Rothburg acknowledged he was unavailable and would "seek guidance and I'll come back to you". Her next step was to issue the FWW with restrictions attached. I do not consider that to be the actions

[3] *Secretary for Justice v Dodd* [2010] NZEMPC 84 at [119].

of a fair and reasonable employer, applying s 103A of the Act. While Ms Rothburg may have wanted to bring this matter to a conclusion, I consider in the circumstances a fair and reasonable employer would have allowed more time for Mr Bancroft to seek advice and present a response to Alpine's proposal.

[46] I find that Alpine's actions in both proposing and then implementing the restrictions attached to the FWW, particularly demoting Mr Bancroft and reducing his pay, amounts to an unjustified disadvantage. While Alpine walked back from those actions, it took some time and the involvement of legal representatives for Mr Bancroft before that happened and this does not cure the disadvantage to Mr Bancroft. I consider Alpine's actions in this regard are sufficient to entitle Mr Bancroft to consideration of remedies for this claim of unjustified disadvantage.

[47] Having reached this view, I do not consider I need to make a finding of whether Ms Rothburg's actions making assertions of fact in raising the allegation that Mr Bancroft had lied to her was inappropriate and meant that she was acting as complainant, investigator, decision maker and witness. Neither do I consider I need to determine whether Alpine could characterise Mr Bancroft's actions as serious misconduct.

[48] I do however have concerns about Alpine's actions in both of these respects, including that Alpine may not have sufficiently considered Mr Bancroft's response that he had not in fact declined to employ Mr Bajia and that Alpine's policies were not sufficiently clear about what standards of English were acceptable. I also have concerns that Alpine relied on Mr Bancroft having allegedly changed Alpine's English language requirements without consulting Ms Rothburg to justify its disciplinary actions, yet Ms Rothburg said it took a week or two before she told Alpine's supervisors that there had been no changes and that they should reassure Alpine's staff of that. This appears incongruous to me, especially given Ms Rothburg's concerns that staff may be distracted if Mr Bancroft was not suspended, suggesting a high degree of concern about the perceived change of policy.

Was Mr Bancroft unjustifiably constructively dismissed by Alpine?

[49] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Mr Bancroft claims that he was constructively dismissed as

a result of breaches of duty by Alpine, related to its actions through the investigation and disciplinary process, the outcomes it imposed through the FWW including the restrictions attached to it (particularly demotion and unilateral reduction of pay) and its actions following the FWW.

The legal approach to a constructive dismissal

[50] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated that:[4]

> There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. …
>
> It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[51] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:[5]

(a) Where the employee is given a choice of resignation or dismissal;

(b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(c) Where a breach of duty by the employer leads a worker to resign.

[52] Submissions for Mr Bancroft were primarily focussed on the third situation described by the Court of Appeal in *Woolworths*, being that breaches of duty by Alpine led him to resign.

[53] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.[6] In determining that all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach

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[4] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.
[5] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.
[6] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[54] Mr Bancroft has the burden of establishing that the resignation was a dismissal.

Submissions of the parties

[55] Submissions for Mr Bancroft were that he has been "subjected to a barrage of unreasonable and unjustified actions" and that Alpine has "conducted itself in a manner which was likely to seriously damage the relationship of trust and confidence". The facts said to support Mr Bancroft's claim he was unjustifiably constructively dismissed overlapped with those related to his being unjustifiably disadvantaged, particularly in relation to the manner in which concerns were raised with him and his being unilaterally demoted and having his pay reduced.

[56] Those submissions referred to the Labour Court judgment in *Salmond Smith Biolab Ltd, Salmond Laboratories Division v NZ (with exceptions) Food & Chemical etc Union* [1989] 2 NZILR 939 where it was said:[7]

> … there may be situations in which a demotion could amount to a constructive dismissal, especially where a reduction in pay is involved. A demotion is an attempt unilaterally to vary the contract and amounts to a clear indication by the employer that it will no longer be bound by the terms or all the terms of the contract between the parties. As such, it is an anticipatory breach which, if sufficiently serious in its effect on the contract, may entitle the employee to terminate the contract and to treat that termination as a dismissal.

[57] Submissions for Mr Bancroft went on to acknowledge "[t]here is limited case law on demotion, and appears decided based on whether there is a contractual right and whether it was justified in the circumstance". It was further said that in these circumstances Mr Bancroft "found the situation with his employment untenable" and that "it was reasonably foreseeable that [he] would not be prepared to accept the demotion".

[58] Submissions for Alpine were that "it did not act in a way that indicate that it no longer intended to be bound by the agreement, as it valued [Mr Bancroft's] contribution and wanted him to succeed in his role. Quality and Compliance tasks are vital to Alpine". Alpine also said that "it did not act in a way such that a reasonable person in [Mr Bancroft's] position would have felt that they had no choice but to resign",

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[7] *Salmond Smith Biolab Ltd, Salmond Laboratories Division v NZ (with exceptions) Food & Chemical etc Union* [1989] 2 NZILR 939 at 946.

describing a number of steps that it took or offered including removing the FWW and returning his title and pay to what they had been before the FWW. Alpine also said that Mr Bancroft's "resignation was voluntary and unreasonable, as he did not tell Alpine what they needed to do to assist him to return to the workplace, despite their requests to do so, and there was a role waiting for him to return to with the same remuneration he was on previously".

Mr Bancroft was unjustifiably constructively dismissed due to Alpine's failure to fully respond to his concerns and claims

[59] There is substantial overlap between Mr Bancroft's unjustified disadvantage and unjustified constructive dismissal claims, and the submissions for Mr Bancroft and Alpine on these claims. The key question I need to determine in relation to the unjustified constructive dismissal claim is whether Alpine's breach of duty was of sufficient seriousness to make resignation reasonably foreseeable.

[60] I find that Alpine's breach was of sufficient seriousness. While Alpine may have walked back from its unilateral reduction of pay and offered to reinstate Mr Bancroft's job title, as well as offering to inform staff that he was returning to work following shoulder surgery, it insisted on maintaining a reduction in his duties including the removal of HR responsibilities and ongoing daily mentoring from Mr Buckley. I find that the retention of those conditions meant that Alpine maintained elements of the demotion that I have found above at paragraphs [30] to [48] was unjustified and as a consequence Mr Bancroft was entitled to treat Alpine's actions as repudiatory.

[61] Alpine's position is that it was attempting to ascertain what conditions Mr Bancroft would return to work under. Correspondence in relation to this occurred through representatives, with multiple letters exchanged between Ms Mcphail and Jennifer Steele, then counsel for Mr Bancroft on 26 January, 2, 9, 10, 13, 14, 15 and 20 February, 6, 7, 11 and 17 March, 3 and 6 April 2023.

[62] During this process Alpine were expressly put on notice on 6 March 2023 that if it did not adequately address his concerns about the demotion / change to his position, reduction in pay and retention of a written warning, then he would have no choice but to resign and raise a constructive dismissal claim. While further concessions were made by Alpine following that, these were insufficient to satisfy Mr Bancroft as they did not address the change to his duties. Neither did they address his claims for compensation

for the hurt and humiliation caused to him as well as a contribution to the costs he had incurred, due to the range of grievances that he had raised.

[63] Alpine appeared to be focussed during this correspondence on what it considered was Mr Bancroft's lack of communication, as well as seeking information on legal costs which Mr Bancroft's counsel chose to not provide, saying it was not required for an offer to settle those claims to be made. While this may have frustrated Alpine, I consider that it failed to act as a fair and reasonable employer in not responding to all of Mr Bancroft's concerns and his resignation was entirely foreseeable.

Did Alpine breach its good faith obligations in its dealings with Mr Bancroft, with regards to its investigation and disciplinary process?

Relevant law

[64] Breaches of the duty of good faith under s 4(1) of the Act can lead to penalties if the test in s 4A of the Act is met. Relevant provisions of ss 4(1) and 4A are:

> **4 Parties to employment relationship to deal with each other in good faith**
> (1A) The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.
>
> **4A Penalty for certain breaches of duty of good faith**
> A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—
> (a) the failure was deliberate, serious, and sustained; or
> (b) the failure was intended to— …
> (ii) undermine an individual employment agreement or a collective agreement; or
> (iii) undermine an employment relationship; or …

[65] The threshold for a penalty to be imposed has been considered in a range of case law, including by the Employment Court in *Pyne v Invacare New Zealand Ltd*, where it was held that:[8]

[8] *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179 at [55] and [57].

> Not every breach of good faith will warrant the imposition of a penalty, as s 4A makes clear. Rather, the Act requires a stepped approach: was there a breach of good faith? If so, a penalty should be awarded where that breach was "deliberate, serious and sustained" or if the breach was intended to undermine an employment relationship or if any other matters listed in s 4A(b) apply. The next question is what quantum should be imposed and should the whole or part of the penalty be directed to be paid to the employee.
>
> … Parliament has conferred a broad discretion on the Court to impose penalties for breaches of good faith in circumstances where the established breach was deliberate, serious and sustained, or where the breach was intended to undermine an employment relationship. In other words, the provision is focussed on instances in which the obligation of good faith has not been met, marking out certain types of breaches of good faith listed in s 4A. Egregious bad faith is not the stated threshold.

Submissions of the parties

[66] Submissions for Mr Bancroft were that Alpine had conducted a number of serious breaches of the duty of good faith in ss 4(1A)(b) and 4(1A)(c) of the Act, in relation to Alpine's actions in suspending Mr Bancroft, through the investigation process and in relation to the outcome imposed. Those submissions said that:

> …[Alpine's] failings were deliberate and occurred over an extended period of time. Those breaches were intended to undermine the employment relationship, and resulted in the destruction of trust and confidence vital to the employment relationship.

[67] Submissions for Alpine, referring to its statement in reply, were that it had "participated actively and constructively during the disciplinary process". It also said that Mr Bancroft had "used stonewalling tactics and breached [his] good faith obligations by deliberately trying to frustrate the disciplinary process. [He] did not keep in touch with [Alpine] during the process, and ACC also had difficulty contacting him".

Breaches of good faith on the part of both parties mean that no penalties are warranted

[68] While I consider that there were breaches of good faith by Alpine, in relation to its actions through the process of suspending Mr Bancroft, through the investigation process and in relation to the outcome imposed, I also consider that he has not been active and constructive, and responsive and communicative with Alpine.

[69] The circumstances which could have warranted a finding of breaches of good faith by Alpine overlap with those which resulting in findings that it has unjustifiably disadvantaged and unjustifiably constructively dismissed Mr Bancroft, as discussed in paragraphs [30] to [48] and [59] to [63] above. Elements of Alpine's failings were deliberate, serious and sustained, particularly in relation to its insistence that it had the

contractual ability to demote Mr Bancroft and reduce his pay, and also were arguably intended to undermine Mr Bancroft's IEA and his employment relationship.

[70] Mr Bancroft was not active and constructive, and responsive and communicative with Alpine in relation to his surgery, recuperation, ongoing medical certificates and subsequent ability to return to work. Mr Bancroft sent a medical certificate in mid-January 2023 a number of days after it was received by him and was then unable to be contacted by a physiotherapist to discuss a return-to-work plan. At that stage Alpine understood Mr Bancroft was recovering from shoulder surgery only, whereas he subsequently disclosed that he was also being treated for stress and anxiety associated with the suspension, investigation process and outcome of the disciplinary process. The full circumstances of Mr Bancroft's absence from work came to light once discussions about Mr Bancroft's grievances and his potential return to work were being handled between Ms Mcphail and Ms Steele.

[71] Both parties also arguably breached their duties of good faith by recording various meetings without consent of others. The conduct of Alpine in describing Mr Bancroft's actions re recordings as dishonest and misleading, while failing to disclose its own recordings is concerning. As submissions for Mr Bancroft raised this issue in relation to compensation for hurt and humiliation, I have chosen to address it further there at paragraphs [90] and [91] below rather than as a breach of good faith.

[72] I consider both parties have not acted fully in accordance with their reciprocal duties of good faith to be active and constructive, and responsive and communicative with each other. Given this I decline to impose penalties.

What remedies should be awarded to Mr Bancroft?

[73] Having determined that Mr Bancroft was unjustifiably disadvantaged and unjustifiably constructively dismissed, I consider below what remedies should follow.

Lost wages

[74] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost should I find that Mr Bancroft has established a personal grievance

and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[75] Mr Bancroft sought compensation for actual loss from the date of his demotion on 25 November 2022 until the date of determination. While acknowledging that he was received payments from ACC from 22 November 2022 until 26 April 2023, he says that he should either be fully compensated for that period and then responsible for any repayments to ACC or at minimum receive at least the shortfall between ACC payments and his full remuneration for that period. He also acknowledged doing some work on his orchard, but said that this was normal activity that would have fitted around other work commitments.

[76] Mr Bancroft gave evidence that he felt unable to apply for other roles until October 2023 due to the impacts that the allegations had on him and the loss of confidence that he suffered. Medical records were disclosed that supported Mr Bancroft being treated for stress, anxiety and sleep problems related to workplace issues, separate to recovery from his shoulder surgery, from November 2022 to March 2023. Mr Bancroft, his wife and Mr Mitchell all provided evidence of Mr Bancroft being withdrawn from late 2022 through a period of up to twelve months, where he restricted activities including very limited contact with friends and reduced engagement in family activities.

[77] Mr Bancroft said that he looked at a significant number of roles and when he was ready to apply for new roles was successful in obtaining the first role he applied for, which he is currently happy in.

[78] Alpine submitted that Mr Bancroft did not take steps to mitigate his losses and that his role would likely have been disestablished when Alpine moved its factory and warehouse to Palmerston North. While Alpine submitted this occurred in October 2022, this appeared to be an error, with Lovejeet Singh's witness statement referring to his employment ending due to the relocation of the factory in November 2023. Alpine also submitted that Mr Bancroft would have benefited financially from work on his blueberry farm and said "the period from November 2022 through to October 2023 when [Mr Bancroft] had the opportunity to spend time with his family and to work on his blueberry farm, should not be at Alpine's expense".

[79] I find Mr Bancroft's lost remuneration is attributable to his personal grievance of unjustified constructive dismissal. I consider it appropriate to order lost wages from the point when Mr Bancroft resigned being 6 April 2023. Prior to this he had been on ACC and I do not consider he lost any remuneration as a result of that, which can be attributed to his grievances. Initially he was suspended on full pay, so lost no remuneration, and then he was on sick leave for his operation, followed by ACC. I consider his absence from work during that time period was due to recuperation from surgery and no evidence or submissions were provided that he was not paid on ACC up until 6 April 2023.

[80] I consider Mr Bancroft's circumstances have some similarity to those in *Maddigan v Director-General of Conservation*. The similarity relates to the fact that Mr Bancroft's resignation occurred in:[9]

> … circumstances [Mr Maddigan] struggled to understand and following a process which was flawed. He was negatively impacted by the dismissal, and it would have taken him time to find his feet. I conclude that while it is true that Mr Maddigan was inactive on the job-seeking front in the period following dismissal, this was reasonable in the particular circumstances.

[81] The question that then follows is should I exercise my discretion under s 128(3) of the Act to award more than three months' lost wages. Mr Bancroft said that he started a new role on 9 October 2023, which is only a number of days more than six months after I have found the calculation of lost wages should commence. This means I do not need to consider whether his employment would have continued once Alpine's plant had moved, as he is not claiming lost wages after that point.

[82] The Court of Appeal has emphasised that moderation is required when exercising the Authority's discretion to give an increased award for lost remuneration.[10] Mr Bancroft, his wife and Mr Mitchell all described impacts on Mr Bancroft which mean I consider it appropriate to exercise my discretion under s 128(3) to award lost wages of more than three months, however, the principle of moderation means I do not consider full loss of approximately six months would be appropriate.

[83] I consider that it is reasonable to exercise my discretion under s 128(3) to award lost wages in the amount of four months' salary. Alpine are to calculate this amount and pay it to Mr Bancroft within 28 days of the date of this determination.

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[9] *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [66].
[10] *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [36].

Compensation under s 123(1)(c)(i) of the Act

[84] Submissions for Mr Bancroft were that a global sum of compensation in excess of $60,000 was appropriate, with reference to the Court's approach to bands for compensation, with the inference that Mr Bancroft should be compensated for multiple claims of mid-range impact or an overall claim of high-range impact.

[85] These submissions also suggested that post-employment conduct of Alpine and its witnesses should be taken into account, particularly in relation to raising irrelevant claims about Mr Bancroft and Mr Mitchell's historical criminal convictions and suggesting that there was a connection to Mr Bancroft's mental health concerns.

[86] In addition, Alpine's conduct in seeking to have Mr Bancroft's recordings struck out on the basis of privacy and good faith breaches, while failing to disclose that Alpine had also made recordings, was said to be relevant post-employment conduct that exacerbated the harm to Mr Bancroft.

[87] Alpine submitted that:

> any claim [Mr Bancroft] alleges he has for hurt and humiliation lack merit as: all the meetings between Alpine and [Mr Bancroft] were undertaken when staff were not in the office; that when staff asked about [Mr Bancroft's] absence they were informed [he] was recuperating from a shoulder injury; that [Mr Bancroft] did not raise concerns as they arose when required to do so allowing Alpine to address his concerns; [Mr Bancroft] did not take up the offer of EAP counselling; and the medical certificates provided to the Company do not state hurt and humiliation.

[88] I have considered other Authority determinations where relatively significant levels of harm were claimed and the evidence presented for Mr Bancroft including supporting medical evidence. I consider that in this case $25,000 compensation under s 123(1)(c)(i) of the Act is appropriate.

[89] In reaching this view I do not accept the submissions for Alpine that Mr Bancroft's claims lack merit, although I do acknowledge it appeared that it did attempt to maintain Mr Bancroft's privacy by holding meetings when other staff were not present and have no reason to doubt its submissions that other staff were informed that Mr Bancroft was absent due to recuperate from his shoulder injury or service. These positive actions do not diminish the impact on Mr Bancroft of the matters where I have found Alpine acted unjustifiably, for which he is entitled to be compensated.

[90] In this case I considered but decline to award compensation (or increase the amount of globalised compensation) due to Alpine's post-employment conduct. While that conduct concerned me and there are some Court judgments which have supported taking post-employment conduct into account[11], more recently the Court has called that approach into question in *Richora Group Ltd v Cheng*. In that case the Court said:[12]

> … the required link is between the grievance and the loss; and if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123, however egregious the ex-employer's subsequent conduct might be. The position can be contrasted with, for example, subsequently developing and/or long term non-monetary losses sustained by the employee as a result of the grievance (such as post-traumatic stress disorder). And while it is well established that damage to reputation may be taken into account in considering the extent of harm to an employee, that too is damage caused by the grievance itself (unjustified termination of employment and, for example, the way in which it was carried out). As the Court of Appeal emphasised in *Paykel v Ahlfield*:
>
> > "The payment contemplated is compensation for *the effects* on the employee *of the grievance*, and it is not intended to be a penalty imposed on the employer to indicate the [Court's] disapproval of the employer's conduct."
>
> [emphasis in original, citations omitted]

[91] In this case, I am not convinced that the post-employment conduct of Alpine is sufficiently connected to the grievances Mr Bancroft has established.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Bancroft that contributed to the situation giving rise to his grievances?

[92] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Bancroft that contributed to the situation giving rise to his grievances. I can see no reason to do so. Mr Bancroft was not responsible for Alpine's failings in relation to suspending him, the unjustified nature of its investigation process and the outcome it imposed, or its actions that led to his resignation and raising of an unjustified constructive dismissal claim.

Should non-publication orders be made under cl 10 of sch 2 of the Act?

[93] At the investigation meeting counsel for Mr Bancroft indicated that non-publication orders would be sought. I directed that the basis for this request be addressed in submissions and encouraged early advice from counsel for Mr Bancroft

[11] For example, *Sisson t/a Edgeware Law v Lewis* [2004] 1 ERNZ 200 at [75].
[12] *Richora Group Ltd v Cheng* [2108] NZEmpC 113 at [48].

on the nature of non-publication orders that would be sought, due to the fact the representatives had agreed to concurrent filing of submissions.

[94] Mr Bancroft sought non-publication orders over his name and those of his witnesses "due to the risk of reputational damage that could arise if their names were to be published and the detrimental effects on the parties having their name published, including from an employment and business perspective". There was no objection to the publication of Alpine's name "due to the potential public interest in the matter".

[95] No submissions were received on this matter from Alpine.

Relevant law

[96] The leading Supreme Court decision on non-publication is *Erceg v Erceg*, which stated that non-publication must be "necessary to secure the proper administration of justice", which was to be construed broadly.[13] Mere embarrassment or concern about unwelcome publicity by a party seeking a non-publication order would be insufficient to meet the high standard that was required.[14]

[97] The Employment Court has subsequently considered the position in relation to the Authority's power to order non-publication in *Crimson Consulting Ltd and Unitutor Ltd v Berry*, where it held:[15]

> In short, an applicant for a non-publication order under the Act is not required to establish exceptional circumstances, though the standard for departing from the principle that justice should be administered openly is high. The party seeking such an order must show specific adverse consequences which would justify a departure from the fundamental rule. A case-specific balancing of the competing factors is required. The position may be different at the interim stage.

Analysis

[98] I do not consider that Mr Bancroft has met the high threshold to warrant the issuing of a non-publication order. The risks of reputational damage raised were general only and while I accept Mr Bancroft's evidence that the allegations against him have caused him distress, I have neither found that he behaved in the way alleged or did not. While I have signalled my concerns about the Alpine's raising of Mr Bancroft and Mr Mitchell's historical criminal convictions, these are matters that are of public record

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[13] *Erceg v Erceg* [2016] NZSC 135 at [13].
[14] Ibid.
[15] *Crimson Consulting Ltd and Unitutor Ltd v Berry* [2017] NZEmpC 94 at [96].

and I do not consider it appropriate to weight those aspects in determining whether non-publication is appropriate.

[99] I therefore decline to make the permanent non-publication orders requested on behalf of Mr Bancroft and his witnesses. I do, however, make an interim order prohibiting the publication of the names of Mr Bancroft and his witnesses for a period of 28 days from the date of this determination at paragraph [103] below.

Summary of outcome

[100] I have found:

a. Steve Bancroft was unjustifiably suspended by Alpine Export NZ Limited (Alpine);
b. Mr Bancroft was unjustifiably disadvantaged by Alpine's investigation process and the outcomes of the disciplinary process;
c. Mr Bancroft was unjustifiably constructively dismissed due to Alpine's failure to fully respond to his concerns and claims; and
d. Breaches of good faith on the part of both parties mean that no penalties are warranted.

Orders

[101] For the above reasons I order Alpine Export NZ Limited (Alpine):

a. Pay Steve Bancroft lost wages in the amount of four months' salary (less PAYE); and
b. Pay Mr Bancroft $25,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[102] Alpine are to pay these amounts to Mr Bancroft within 28 days of the date of this determination.

[103] Under clause 10 of Schedule 2 of the Act I make an interim non-publication order over the names of Mr Bancroft and his witnesses for a period of 28 days from the date of this determination. At the end of the 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication.

Costs

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

[105] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Bancroft may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Alpine will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[106] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors require an adjustment upwards or downwards.[16]

[107] As the investigation meeting for this matter took most of two full days, my preliminary view is that the notional daily rate for two days is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

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