IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 401
3241039

BETWEEN	ADELE ROSS Applicant
AND	S & D DECORATORS LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Rachel Rolston and Warwick Reid, advocate for the Applicant Josh Speck, for the Respondent
Investigation Meeting:	15 March 2024 at Tauranga
Submissions and further information:	Up to 18 April 2024
Determination:	4 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Adele Ross performed work for S & D Decorators Limited (S&D) initially as a sub-contractor in late 2022 before entering an employment arrangement with S&D in January 2023. Issues arose early in the employment relationship with disagreements about the quality of Ms Ross' work and whether leave had been approved in late-February, followed by Ms Ross taking "medical leave". Ms Ross' employment ended in disputed circumstances in March 2023. Ms Ross claims she was unjustifiably disadvantaged and unjustifiably dismissed by S&D.

[2] S&D's response is Ms Ross' performance was not satisfactory once she became an employee and it acted reasonably in dealing with her throughout her employment

and as it ended. S&D alleged Ms Ross' performance had financially impacted on it, with its submissions seeking remedies against Ms Ross.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged for Ms Ross, and for S&D a combined response statement was provided including evidence from its two directors and shareholders, Josh Speck and Jillian Speck.

[4] All witnesses answered questions under affirmation from me and from the representative for Ms Ross. The Specks represented themselves at the investigation meeting and provided their evidence on a combined basis. They also both asked questions of Ms Ross. Mr Reid handed up written submissions at the conclusion of the investigation meeting, with representatives for both parties also providing written submissions and further information following the investigation meeting.

[5] 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.

The issues

[6] The issues requiring investigation and determination were:

(a) Was Ms Ross unjustifiably disadvantaged or unjustifiably dismissed (either actually or constructively) by S&D?

(b) If S&D's actions were not justified (in relation to disadvantaging or dismissing Ms Ross), what remedies should be awarded, considering:

(i) Lost wages and arrears of wages, including Kiwisaver contribution and unpaid annual holiday pay (subject to evidence of mitigation of Ms Ross' losses); and

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

(c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Ross that contributed to the situation giving rise to her grievance?

(d) Should either party contribute to the costs of representation of the other party.

[7] At the investigation meeting it was clarified that Ms Ross' claim of unjustified disadvantage was an alternative to her claim of unjustified dismissal, related to S&D's communication that Ms Ross had failed a performance review which made her employment less secure.

[8] Submissions for Ms Ross asserted she was dismissed by way of an email communication from Mrs Speck on 1 March 2023. I have treated this as a clarification of the issues to be investigated such that Ms Ross' claim was first she had been unjustifiably dismissed, then in the alternative she had been unjustifiably constructively dismissed, as both terms were referred to in submissions for Ms Ross.

[9] In addition to the above issues when S&D lodged submissions following the investigation meeting it sought remedies against Ms Ross. These remedies were sought based on alleged breaches of duty of care by Ms Ross when she was both a sub-contractor to and employed by S&D, and included the costs of alleged remedial work, legal costs, costs of the Specks' time to represent themselves and damages.

[10] I am unable to consider the remedies sought by S&D as they mainly relate to claims arising from a sub-contracting relationship, which the Authority does not have jurisdiction under the Act to consider, and any employment-based claims were not raised correctly as counterclaims under the Act. In addition there would be an inherent lack of fairness in allowing new claims to be raised after the investigation meeting and I decline to consider this further.

Was Ms Ross unjustifiably disadvantaged or unjustifiably dismissed by S&D?

[11] For reasons that will become apparent this determination addresses Ms Ross' claim to have been unjustifiably dismissed (actually or constructively) first. As noted above at paragraph [7] it was clarified the claim of unjustified disadvantage was an alternative to the claim of unjustified dismissal. Ms Ross' claims relied on an overlapping factual matrix, so I consider it appropriate to start with the more significant claim she had been unjustifiably dismissed, followed if necessary by her claim she had been unjustifiably constructively dismissed, then her claim to have been unjustifiably disadvantaged.

[12] Submissions for Ms Ross were not clear whether she was claiming to have been unjustifiably dismissed or unjustifiably constructively dismissed. While read in totality I consider those submissions were more supportive of a claim Ms Ross was

unjustifiably constructively dismissed, I have still chosen to start with considering a claim of unjustified dismissal for reasons that will become apparent.

Test of justification

[13] In assessing Ms Ross' claim she was unjustifiably dismissed (actually or constructively) I must apply the test of justification under s 103A of the Act, being whether S&D's actions, and how S&D 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 Ms Ross' claim, s 103A(3) requires I consider:

a. having regard to the resources available to it, did S&D sufficiently investigate before taking action;
b. did S&D raise concerns that it had with Ms Ross before taking action;
c. did Ms Ross have a reasonable opportunity to respond; and
d. did S&D genuinely consider Ms Ross' explanation or comments.

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

The legal approach to a constructive dismissal

[16] 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 Ms Ross claims she was constructively dismissed through an email from Mrs Speck which requested Ms Ross hand in her resignation effective immediately (discussed further, along with Ms Ross' response, in paragraphs [22] and [23] below).

[17] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated:[1]

> 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. …In both actual and constructive dismissals there is an

[1] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

> employer's intent to terminate or repudiate the existing contract. In actual dismissal there is an express termination whereas in constructive dismissal there is conduct repudiating the existing arrangements or "sending apart". 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.

[18] 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:[2]

(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.

[19] Submissions for Ms Ross did not expressly state which of these situations were relied on, though I infer it was either the first or the third situation described by the Court of Appeal in *Woolworths*, being either Ms Ross was given a choice between resignation or dismissal, or that breaches of duty by S&D led her to resign.

[20] 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.[3] 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 of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[21] If necessary for the purposes of this determination (ie should I determine Ms Ross was not actually dismissed and then move to considering whether she was unjustifiably constructively dismissed), Ms Ross would have the burden of establishing her resignation was a dismissal.

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[2] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

[3] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

Emails said to amount to dismissal by S&D and response from Ms Ross

[22] Submissions for Ms Ross said she was dismissed by an email from Mrs Speck on 1 March 2003, which included the following comments:

a. Ms Ross was on "performance review" which she had not participated in appropriately and therefore had failed;
b. Ms Ross' performance had declined since starting full time employment;
c. Under her contract Ms Ross was asked "to hand in your resignation effective immediately as you have not acted in the best interest of our company";
d. "Moving forward. Final remuneration will be calculated and paid within 2 weeks of you handing in your resignation which will be on 15th March 2023"; and
e. After discussing return of equipment and a potential deduction from final pay, the email concluded "All the best for your future".

[23] Ms Ross responded to Mrs Speck by email the following day:

a. Ms Ross disputed she had been formally notified of a performance review or invited to a meeting for that purpose, and said she had not been given details of any performance shortcomings or opportunity to comment prior to being told she had failed the performance review;
b. She referred to being on "medical leave" for two weeks under a medical certificate which had been provided on 28 February 2023;
c. While claiming she had not resigned and had no intention to do so, she considered she had been dismissed by Mrs Speck's actions and was raising personal grievances of unjustified disadvantage and unjustified dismissal; and
d. She sought various remedies but expressly did not seek reinstatement "due to the damage caused by you to the working relationship". The email concluded by inviting S&D to attend mediation to address her grievances.

Submissions of the parties

[24] Submissions for Ms Ross referred to the Court of Appeal judgment in *Wellington Clerical Union v Greenwich*, amongst other cases, and said Mrs Speck's email was:

> a clear example of a *"sending away"* within the meaning of that term used in dismissal cases. The applicant was asked to hand in her resignation immediately. She was told her final remuneration would be calculated and paid within two weeks. … She was told *"all the best for your future"*.

[25] S&D's submissions focussed on the Specks' view Ms Ross had misled them and said that they had offered a performance review to attempt to "revert performance to start of subcontract work". S&D also said Ms Ross had not accepted accountability for her own actions, had been negligent in her duties, had not been responsible for her workmanship and as a consequence S&D had lost its main source of income and had been significantly financially impacted, leading to S&D's belated claim for remedies against Ms Ross.

Ms Ross was dismissed by S&D

[26] I find Ms Ross was actually dismissed by S&D by Mrs Speck's email of 1 March 2023, taking into account Ms Ross' response and S&D's actions leading up to that email and subsequently, for the reasons that follow.

[27] The Specks said S&D was a newly formed company, having previously been contractors themselves, looking to take on opportunities to provide painting services under a contract they had obtained. Mr Speck has more than 25 years' experience as a painter and Mrs Speck has a range of experience, including in admin roles and healthcare. Mrs Speck said S&D had some support through a small business workshop, she had done some research on employment matters and had been supported to develop the employment agreement offered to Ms Ross. It was apparent from the Specks evidence they had not encountered a situation involving alleged poor performance by an employee previously.

[28] Mr Speck said at the investigation meeting that the Specks had sought legal advice on what to do following Mrs Speck's email of 1 March 2023 and Ms Ross' response of 2 March 2023, as they hadn't received her resignation. He said they were told to politely ask Ms Ross if she would come back to work, they wanted her to "come back as she was when sub-contracting" and S&D were "just trying to get her to pull her head in". Mr Speck also said there were numerous issues where he had concerns about the quality of Ms Ross' workmanship, which he raised verbally with her in line with how issues were raised in a painting business. While he also said Ms Ross had asked for issues to be put in writing and he agreed to a meeting about the issues, they "didn't

get round to it" (being having the meeting). He did however provide Ms Ross with an extract from her employment agreement with asterisks noting the parts of her duties where he did not think she was meeting expectations.

[29] Ms Ross acknowledged being provided the extract from her employment agreement with asterisks, but said she asked for a written explanation of what that meant, which S&D refused to provide. She also said she was not provided with a written explanation of what was intended from the proposed performance review or when it would be and claimed when issues were raised with her informally, she rectified those.

[30] Mrs Speck said Ms Ross had requested verbally several times to revert to a sub-contracting arrangement, which Ms Ross denied. Mrs Speck also said she had taken verbal advice on how to respond to the issues S&D had with Ms Ross and it was suggested a performance review be held with Ms Ross. There were no records of the advice Mrs Speck received, of specific issues being raised in writing with Ms Ross or of Ms Ross having requested a return to a sub-contracting arrangement.

[31] Mr Speck also said because Ms Ross' workmanship was unacceptable, if she wanted to go back to sub-contracting that was her choice, but S&D would not have any sub-contracting work for her.

[32] Following the investigation meeting S&D provided details of corrective action reports (CARs) it had received from its clients and needed to rectify, which it said was evidence of Ms Ross' poor workmanship. Ms Ross' comments in response were that these jobs were from when she was a sub-contractor or had not been raised with her at the time. S&D's response acknowledged some of the CARs were from when Ms Ross was a sub-contractor and that other CARs were rectified by Mr Speck or other workers as Ms Ross was on leave when it received the CARs and it needed to action the issues quickly. No evidence was provided of any of the CARs being raised with Ms Ross at the time they were received.

[33] An extract from S&D's reply submissions is illustrative of the Speck's thinking at the time:

> She was notified after we heard back from our lawyers, but she was adamant that she was terminated and refused to make dialogue about coming back to work to fix her touch ups. Even worse because these were her jobs when she was a subcontractor, and she was refusing to come back to rectify her subcontracting work.

> … we wanted her to revert to the very start of our working relationship with her, which was around October/November 2022. This was when Ray [a client's contract manager] praised [Ms Ross] for being an excellent worker, but we started having consistent problems at the end of January 2023 when she already started her new contract.

[34] A complicating feature of the factual matrix at this time was Ms Ross' requests to take leave after about a month as an employee to attend a festival (one week) and a wedding (one day). Mr Speck was adamant a week's leave for the festival was not acceptable because Ms Ross had no leave and had only just started work as an employee, although he was willing to grant a day's unpaid leave for the wedding. Ms Ross thought unpaid leave was agreed for both so long as she had completed her assigned work, although there was no documentation to confirm this agreement. When Ms Ross insisted on taking leave for the festival, Mrs Speck acquiesced reluctantly. Emails between Ms Ross and Mrs Speck supported an acceptance by S&D that Ms Ross could take unpaid leave so long as all scheduled work had been completed.

[35] I consider this disagreement about Ms Ross' leave was part of the factual matrix contributing to the Speck's actions in relation to raising concerns about the quality of Ms Ross' work and Mr Speck's view she needed to "pull her head in". Both Mr and Mrs Speck said Ms Ross was disrespectful through this process and was taking too long on some jobs, although Ms Ross maintained she was "completing jobs in a professional and timely manner" and "as far as [she was] aware clients were happy".

[36] I am not satisfied there was a clear meeting of minds over whether Ms Ross could take leave prior to the entering of her employment agreement. No documentary proof was available to support Ms Ross' assertions leave had been agreed and I consider it more likely than not she conflated her ability to accept contracts as offered when a sub-contractor with a "right" to take leave when she wanted, so long as she had completed contracts she had accepted or work she had been allocated.

[37] S&D could reasonably have declined a request for paid annual leave had one been made. Notwithstanding that, once Mrs Speck acquiesced to Ms Ross' insistence on taking unpaid leave, S&D should not have taken into account its dissatisfaction about the leave issue when considering potential performance issues about the quality of Ms Ross' work. Regrettably, I consider S&D's actions were coloured by its dissatisfaction about Ms Ross' insistence on taking leave. To the extent Ms Ross did not act fully consistent with the duty of good faith in relation to insisting on taking leave, I consider

that does not excuse S&D's actions, although it may be relevant to contribution in relation to any remedies Ms Ross is entitled to.

[38] I find S&D raised performance concerns verbally with Ms Ross, as evidenced by her comments that when issues were raised with her informally, she addressed them. Ms Ross believed that those issues had been resolved.

[39] Where S&D fell short in both a procedural and substantive sense was when it attempted to escalate issues, culminating in the email Mrs Speck sent to Ms Ross on 1 March 2023. While S&D may have considered it had put Ms Ross on notice it was concerned with her performance when Mr Speck provided her the extract from her contract with asterisks, I do not consider this sufficient to put Ms Ross on notice of the specific concerns S&D had with her performance. S&D also said there was a verbal agreement to a performance review meeting on 1 March 2023, which Ms Ross denied. I do not consider sufficient evidence was provided for me to find such a meeting was agreed to and there certainly was no documented proof of this.

[40] In any event, S&D was aware Ms Ross was on sick leave (although she had no entitlement to paid sick leave at the time) when it told her she had failed a performance review. I am not satisfied Ms Ross was given adequate notice of a performance review at a time when she could reasonably attend and she certainly was not provided with an opportunity to comment on the concerns S&D had prior to it reaching the view she had failed the performance review.

[41] I find Ms Ross was entitled to treat Mrs Speck's email as a dismissal, given the email advised Ms Ross had failed the performance review, her resignation was requested, her final pay would be made within two weeks of her resignation with a specified date and concluded "All the best for your future". I consider the combined contents of Mrs Speck's email were sufficient to amount to a dismissal and Ms Ross was entitled to advise she was treating the email as such.

[42] I have considered both the resources available to S&D in relation to the investigation of its concerns and whether the defects in S&D's process were minor and did not result in Ms Ross being treated unfairly. While I acknowledge S&D was a small employer, Mrs Speck said she took advice over how to approach its concerns and I do not consider its investigation process was sufficient. I also do not consider the defects

in its process were minor and consider those defects resulted in Ms Ross being treated unfairly.

[43] For completeness, if I had not found Ms Ross had been actually dismissed by S&D, I would have found she had been constructively dismissed, as I consider Mrs Speck's email of 1 March 2023 both was an ultimatum requiring that Ms Ross resign (a sending away) and entailed a breach of S&D's duties to Ms Ross in advising she had failed her performance review. I would have found it both reasonable that Ms Ross, had she in fact resigned, could claim that to be a constructive dismissal and foreseeable that Ms Ross would have resigned in the circumstances.

[44] I acknowledge S&D, in the weeks following and after taking legal advice in response to Ms Ross' raising of a personal grievance, claimed Ms Ross had not resigned and had not been dismissed, and requested that she return to work a number of times. S&D were expecting Ms Ross to do so at a reduced pay rate to reflect its view she was on a performance review, with its statement in reply saying this was permitted under Ms Ross' employment agreement. In response to questions at the investigation meeting the Specks claimed this was permitted by the employment agreement and had been agreed to by Ms Ross, which she denied. S&D could not identify where the asserted ability to reduce Ms Ross' pay was in her employment agreement and I do not consider that ability was present in the employment agreement, absent agreement in writing.

[45] I consider that claiming Ms Ross had not been dismissed after sending Ms Ross the email requesting her resignation and setting out how she would receive her final pay was too little, too late on the part of S&D to rectify the situation. I do not consider that sufficient steps were taken by S&D to withdraw or undo the impact of that email and requiring that Ms Ross resign or return to work on a reduced pay rate in the absence of a contractual provision permitting such a pay reduction reinforces the impact of the earlier email.

[46] In response to a question from me at the investigation meeting Mrs Speck said that she thought a constructive dismissal was a situation where an employer constructively tells an employee what is wrong and if they don't change you can terminate their employment. While I had no evidence that Mrs Speck had advice on what the legal approach to a constructive dismissal is (summarised at paragraphs [16] to [21] above), her understanding of what a constructive dismissal is was incorrect. I

reiterate that I consider that if I had not found Ms Ross had been actually dismissed by S&D, I would have found she had been constructively dismissed.

What remedies should be awarded to Ms Ross in relation to her unjustified dismissal?

[47] Having determined Ms Ross was unjustifiably dismissed, I need to consider what remedies should follow. Ms Ross has sought unpaid wages for adjustments to her pay and unpaid overtime, unpaid holiday pay and Kiwisaver employer contributions, lost wages under s 123(1)(b) of the Act and associated benefits on those lost wages, and compensation for hurt and humiliation under s 123(1)(c)(i) of the Act.

[48] Ms Ross' first claim for unpaid wages related to adjustments to her pay related to S&D reducing her pay in the weeks ending 14 February 2023 and 28 February 2023 by a combined amount of $742.50. Ms Ross said she did not understand why her pay had been reduced for those periods. S&D did not present compelling evidence about why payment amounts were being changed, with Mrs Speck saying this what the payroll app she was using calculated.

[49] I find S&D has provided no reason justifying its reduction of Ms Ross' gross pay for the week ending 14 February 2023 and order it pay her the amount her gross pay was reduced for that week under s131 of the Act being $337.50.

[50] Ms Ross' pay rate was also adjusted for the week ending 28 February 2023 and she was not paid for her contractually guaranteed hours. The timesheet provided showed she only claimed for 10 hours of work on the Monday. This was the week where Ms Ross took unpaid leave to go to a festival and while she may have worked additional hours on the Tuesday, I am not convinced based on the evidence presented she was underpaid for this week and no order is made.

[51] Ms Ross' second claim was for underpaid overtime for the week ending 19 February 2023 and for 20 February 2023. She claimed initially for 75.5 hours however following the investigation meeting her claim was reduced to 38 hours, as the claim included 37.5 hours which she was paid for. Ms Ross said it was agreed she would be paid for extra hours worked. Email evidence from when Ms Ross and Mrs Speck were negotiating the employment agreement supported additional payments were agreed to be paid only for any hours worked above 45 hours per week. S&D also said there was

no specific agreement Ms Ross would work overtime and the work she did should not have taken as long as she was claiming.

[52] I find based on Ms Ross' timesheets she worked 65.5 hours in the week ending 19 February 2023[4], being 20.5 hours above the threshold for overtime of 45 hours per week agreed in negotiations for her employment agreement. I consider it more likely than not Ms Ross and S&D agreed she would work extra hours prior to taking unpaid leave in the following week, which was reflected in the timesheets she submitted. I order that S&D pay Ms Ross for unpaid overtime in the amount of $922.50 under s 131 of the Act, being 20.5 hours at an hourly rate of $45 per hour.

[53] Ms Ross also raised a claim for unpaid Kiwisaver contributions, initially seeking both employee and employer contributions. This claim was modified at the investigation meeting to be for a 3% employer contribution only in recognition that the employee contribution would have needed to be deducted from gross wages. Ms Ross said she signed and returned a Kiwisaver deduction form. Mr and Mrs Speck say Ms Ross verbally told them she did not want Kiwisaver deductions made, although acknowledged she did not return a form opting-out. Ms Ross' employment agreement said Kiwisaver deductions would be made and then provided for an employee to opt-out, although did not specify how that needed to occur.

[54] In the absence of evidence to the contrary I am not satisfied Ms Ross unequivocally opted-out from Kiwisaver as an employee. I find Ms Ross is entitled to Kiwisaver employer contributions as compensation for a lost benefit under s 123(1)(c)(ii) of the Act in the amount of $175.16 being 3% of gross earnings received of $5,838.75.[5]

[55] Ms Ross also claimed for holiday pay of 8% on gross earnings received and amounts ordered to be paid to her under this determination. Her payslips show no evidence of holiday pay being paid and there was no suggestion from S&D this amount had been paid. S&D is ordered to pay Ms Ross $467.10 for unpaid annual holiday pay under s 23 of the Holidays Act 2003.[6]

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[4] While this date is different to the time periods referred to in Ms Ross' witness statement, I consider the correct date based on timesheets was 19 February 2023.
[5] This amount being Ms Ross' gross earnings from S&D in her IRD records.
[6] Calculated as 8% of gross earnings of $5,838.75.

[56] Ms Ross claimed lost wages for a period of 11 weeks less earnings from other employment which she obtained, albeit at a lower pay rate. She said she did not obtain work as a painter during this time due to the restraint terms in her employment agreement, which she understood to be for three months in the Bay of Plenty region. She provided evidence of earnings from two other jobs during that time, which I consider shows reasonable efforts to obtain alternative work. I find Ms Ross is entitled to lost wages for the period of 11 weeks (being $18,562.50)[7] less earnings received from alternative work of $12,681.36. S&D are ordered to pay Ms Ross $5,881.14 as lost wages under s 123(1)(b) of the Act.

[57] Annual holiday pay of 8% and Kiwisaver employer contributions of 3% were also claimed on any amounts ordered under this determination. That is appropriate. I calculate the total amount of gross unpaid wages and lost wages under paragraphs [49], [52] and [56] as $7,141.14. Based on this amount a further S&D are ordered to pay Ms Ross a further $571.29 for annual holiday pay and $214.23 for Kiwisaver employer contributions.[8]

[58] Ms Ross sought compensation of $15,000 for hurt and humiliation under s 123(1)(c)(i) of the Act. Ms Ross' evidence of impact described being stressed and not valued due to how she was treated by S&D.

[59] Based on Ms Ross' limited evidence of the impacts of S&D's actions on her related to her dismissal, taking into account comparable cases and the short duration of her employment with S&D, I consider compensation of $5,000 under s 123(1)(c)(i) of the Act is appropriate, before considering contribution.

Contribution

[60] Section 124 of the Act requires I consider the extent to what, if any, Ms Ross' actions contributed to the situation that gave rise to her personal grievance and assess whether any remedies should be reduced.

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[7] While Ms Ross' claim was for the 13 weeks following her alleged dismissal, she did not claim lost wages for the first two weeks when she was unable to work having provided a medical certificate, referred to in her evidence as medical leave. As she did not claim for those two weeks and did not have an entitlement to paid sick leave, no award of lost wages is made for those two weeks.

[8] Calculated as 8% and 3% of $7,141.14 respectively.

[61] Submissions for Ms Ross said “the allegations of poor performance do not amount to morally culpable conduct giving rise to significant contribution”. No submissions on contribution were made by S&D.

[62] I consider Ms Ross contributed to some degree to the events that led to the breakdown of the employment relationship between her and the Specks, particularly in relation to her insistence on taking leave very shortly after starting employment with S&D. Ms Ross’ actions were not fully in good faith in terms of considering the workload S&D were facing and the impact her insistence on taking leave would have on the Specks and S&D’s other employee. Good faith is a two-way obligation where both an employee and employer are required “to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative” (s 4(1A)(b) of the Act). Ms’ Ross’ contribution to the breakdown of the employment relationship warrants some reduction of remedies. I consider a reduction of 10% appropriate.

[63] I considered also whether Ms Ross’ acknowledgement of performance concerns being raised with her informally should be taken into account in relation to further reductions in remedies. I do not make any reduction for this point, as I consider her actions in requesting further details were reasonable and she was not responsible for S&D’s response being to request she resign, which I have found combined with other elements of its communications to her amounted to an unjustified dismissal.

Summary of outcome

[64] I have found:

a. Adele Ross was entitled to treat S & D Decorators Limited’s (S&D) email to her of 1 March 2023 as a dismissal;

b. While S&D raised performance concerns verbally with Ms Ross, it had not sufficiently progressed those concerns with her or given her an opportunity to comment or address its concerns, when it advised her she had failed a performance review and demanded her resignation;

c. S&D’s procedural failings in raising issues with Ms Ross were not minor and were such her dismissal was unjustified;

d. S&D has not provided any reason to justify reductions in Ms Ross’ pay, non-payment of overtime or evidence she opted out of Kiwisaver contributions;

e. Ms Ross contributed to some degree to the events that led to the breakdown of the employment relationship between her and S&D (or Mr and Mrs Speck), meaning a reduction in compensation for hurt and humiliation is appropriate under s 124 of the Employment Relations Act 2000 (the Act); and
f. The remedies sought by S&D cannot be considered as they mainly relate to claims arising from a sub-contracting relationship, which the Authority does not have jurisdiction under the Act to consider, and any employment-based claims were not raised correctly as counterclaims under the Act.

Orders

[65] For the above reasons I order S&D to pay Ms Ross within 28 days of the date of this determination:

a. Arrears of wages of $337.50 under s131 of the Act;
b. Unpaid overtime in the amount of $922.50 under s 131 of the Act;
c. Compensation for a lost benefit for unpaid Kiwisaver employer contributions of $175.16 under s 123(1)(c)(ii) of the Act;
d. Unpaid annual holiday pay of $467.10 under s 23 of the Holidays Act 2003;
e. Compensation for lost wages of $5,881.14 under s 123(1)(b) of the Act;
f. A further $571.29 for annual holiday pay and $214.23 for Kiwisaver employer contributions on the above awards of arrears of wages, unpaid overtime and compensation for lost wages (under sub-paragraphs a, b and e); and
g. Compensation for hurt and humiliation of $4,500 under s 123(1)(c)(i) of the Act (being $5,000 reduced by 10% to reflect contribution under s 124 of the Act).

Costs

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

[67] If the parties are unable to resolve costs and an Authority determination on costs is needed Ms Ross 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

S&D 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.

[68] 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.[9]

[69] As the investigation meeting for this matter finished mid-afternoon, my preliminary view is that the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

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