

Attention is drawn to the order prohibiting publication of certain information (refer paragraph 7)

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 446
3236459

	BETWEEN	TELISA JACOBSEN Applicant
	AND	RAUKURA HAUORA O TAINUI TRUST Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Bridget Smith, counsel for the Applicant Scott McKenna, counsel for the Respondent	
Investigation Meeting:	28 and 29 May 2024 in Auckland	
Submissions and/or further evidence	29 May 2024 from the Applicant 29 May 2024 from the Respondent	
Determination:	25 July 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Telisa Jacobsen, claims that she was constructively dismissed and unjustifiably disadvantaged by the Respondent, Raukura Hauora O Tainui Trust (RHOT).

[2] RHOT denies that Ms Jacobsen was either constructively dismissed or unjustifiably disadvantaged, and claims that she voluntarily resigned whilst on paid suspension.

The Authority's investigation

[3] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Ms Jacobsen, and from Terina Moke, former Chief Executive Officer (CEO), Karissa Ramjee, former Senior People, Culture and Capability Advisor, and Penikera Taranaki, former employee.

[4] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Alex Hope, former RHOT Board Member, and Korina Burne-Vaughan, Board Chair of RHOT.

[5] I received written and oral submissions from Ms Smith, counsel for Ms Jacobsen, and Mr McKenna, counsel for RHOT. Whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[6] 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.

Prohibition on publication

[7] **I order that the names of two former employees and the GM Operations, and any information which may lead to their identification, is subject to a permanent non-publication order and not to be published. They will be referred as Mr B, Ms F, and Mr D, letters bearing no relationship to their actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Issues

[8] The issues requiring investigation are whether or not Ms Jacobsen was:

- Constructively dismissed by RHOT
- Unjustifiably disadvantaged by being suspended from her employment on 9 March 2023

Background

[9] RHOT is a Māori health organisation in the Waikato and South Auckland regions, providing services including community services and medical clinics. There is a Board of Trustees (the Board) which oversees governance. On occasion and at need, a Trustee may act in an operational role.

[10] Ms Jacobsen was appointed in March 2020, initially as a contractor to work with the new CEO, Ms Moke. She was subsequently appointed to the position of General Manager People, Culture and Capability, in October 2020

[11] Ms Moke's appointment came after a period of unrest in RHOT which had resulted in a poor workplace culture. Ms Jacobsen was engaged to assist Ms Moke with some of the

historical issues, to support her with a restructure and to provide her with Human Resources (HR) advice.

Issues prior to March 2023

[12] The Senior Leadership team during 2022 comprised four senior managers: Mr B, Mr D, Ms Moke and Ms Jacobsen.

[13] During 2022 and early 2023, Mr B and Mr D, both raised formal complaints concerning Ms Moke. RHOT commenced an investigation process into the allegations, appointing an independent investigator. Ms Jacobsen was interviewed as a witness as part of that investigation.

[14] Ms Jacobsen was requested, and agreed, to act as Acting CEO during July and August 2022 when Ms Moke was absent on a period of special leave. Mr Hope, was appointed by the Board to act as an intermediary between Ms Jacobsen and Mr D. Ms Jacobsen said her understanding was that this was at the request of Mr B and Mr D.

[15] Ms Jacobsen said that during her period as Acting CEO she raised complaints about Mr B, and Mr D, however she had no response from Mr Hope about her complaints.

[16] On 12 September 2022 Mr Jacobsen advised the Board of her intention to stand down from the Acting CEO position, and returned to her role as General Manager People, Culture and Capability.

[17] On 17 October 2022 Mr B resigned and raised a formal complaint about Ms Jacobsen which contained a concern about a culture of bullying and mismanagement orchestrated by Ms Moke and Ms Jacobsen.

[18] Mr Hope said the Board was very concerned about the complaint, but at that time there was an investigation in progress into a bullying complaint by Mr B against Ms Moke, and it was decided to await the outcome of that investigation before further action on the complaint against Ms Jacobsen was considered. Ms Jacobsen was not informed about the complaint.

Complaints January to February 2023

[19] On 19 January 2023 Ms Jacobsen forwarded to Ms Moke an email she had sent to Mr D. In the email Ms Jacobsen had told Mr D that she believed his feedback on an issue was not agreed and was “totally without truthful evidence.” She also stated that she had: “no trust and confidence in you as a manager and a fellow member of the Senior Leadership Team.”

[20] On 20 January 2023 Mr Hope said he was among the recipients of an email which contained a complaint from an employee, Ms F, who had resigned the same day. The email cited a number of adverse behaviours the employee stated she had witnessed from Ms Moke and Ms Jacobsen, and concerned what Ms F described as “disgusting behaviour”.

[21] Mr Hope said the Board was very concerned about the complaint and engaged lawyers to meet with Ms F and gain specific details, however due to Ms F’s personal circumstances, that matter was not concluded.

[22] On 16 February 2023 Mr Hope said the Board received a letter of complaint from Mr D in which he made a number of comments about processes he claimed had not been managed appropriately by Ms Jacobsen. The Board had been particularly concerned about the complaint because Ms Jacobsen was in charge of HR.

[23] On 27 February 2023 Ms Jacobsen sent Ms Moke a further email of complaint about Mr D which was copied to Ms Burne-Vaughan. In the email Ms Jacobsen reiterated her lack of trust and confidence in Mr D and stated:

I would like to bring this matter to your attention and have it reviewed. I am comfortable with you treating this as a complaint.

[24] Ms Jacobsen said this complaint was not acknowledged or responded to by either Ms Burne-Vaughan or the Board.

[25] On 26 February 2023 Mr Hope received an email from Mr D forwarding a copy of the earlier complaint about him which Ms Jacobsen had sent to Ms Moke on 19 January 2024.

[26] Ms Burne-Vaughan said the Board had expected Ms Moke to investigate the complaint from Ms Jacobsen and report back to the Board. As a result no action had been taken by the Board itself into the complaint.

Events March 2023

[27] On 2 March 2023 Ms Jacobsen came across some emails between Mr B, Mr D, Mr Hope, and Ms Burne-Vaughan. Ms Jacobsen said she had raised a number of concerns about Mr B prior to his employment at RHOT ending, and he had sent this to Mr Hope and Ms Burne-Vaughan, copying in Mr D and Ms F, a former employee.

[28] Ms Jacobsen said she had been upset and disappointed because despite multiple meetings with Mr Hope and Ms Burne-Vaughan, they had not informed her of the emails.

Complaint 3 March 2023

[29] On Friday 3 March 2023 Ms Jacobsen received an email from the Board lawyers advising her it had received a complaint from Mr D about her, alleging bullying, harassment, and undermining of him in his position.

[30] The email advised that an independent investigator would be appointed to carry out an investigation into the allegations, and stated:

7. Section 42 of your Employment Agreement gives the Board the right to place you on suspension while a disciplinary investigation is underway.
8. Now that there is an allegation against you of conduct that may constitute bullying and harassment, the Board considers it appropriate to consider whether suspension is justified in these circumstances.
9. We propose a meeting at 2.00 pm on Monday (8 March 2023) for the board to hear your feedback and thoughts on a possible period of suspension.

[31] Ms Jacobsen said the email was sent at 4.55 p.m. on a Friday and she believed it was unreasonable for the Board to expect her to attend a meeting on Monday in the Waikato region when she was based in the South Auckland region.

Response email 6 March 2023

[32] Ms Jacobsen responded by email on Monday 6 March 2023 stating that the request to meet that day was unreasonable and requesting more time to seek legal representation. She stated that she believed the claims were unreasonable and suspension not warranted.

[33] Ms Jacobsen also raised formal complaints about Mr Hope and Ms Burne-Vaughan stating that she believed there had been “obvious colluding on their part and deliberate mismanagement of complaints from all parties.” Ms Jacobsen stated:

The complaints I have raised over several months on behalf of myself and others have never been acknowledged or responded to. I received one response from Mr Hope five months after raising a complaint regarding Mr B’s conduct. ...

There has been little to no communication, genuine action, engagement with me and others, and no support offered. The lack of acknowledgement and due process concerns me and demonstrates bias and predetermination in favour of [Mr D], [Ms F], and [Mr B].

[34] Ms Jacobsen referred to being shocked to see a formal complaint against her raised by Mr B five months earlier, and after he had left the employment of RHOT. This had been acknowledged by Ms Burne-Vaughan as a complaint, but had not been notified to her, nor had she been given an opportunity to respond to it.

[35] Ms Jacobsen concluded her letter dated 6 March 2023 by stating that she was prepared to meet with members of the Board other than Mr Hope and Ms Burne-Vaughan.

RHOT letter 7 March 2023

[36] On 7 March 2023 the Board emailed Ms Jacobson inviting her to attend a meeting, and provide her feedback to the proposal of suspension the following day, 8 March 2023. That same day, 7 March 2023, Ms Jacobsen engaged legal counsel.

Response on behalf of Ms Jacobson 8 March 2023

[37] On 8 March 2023 Ms Smith, acting on Ms Jacobsen's instructions, wrote to the Board setting out a written response to the proposal to suspend Ms Jacobsen, submitting that there was no basis for the Board to consider suspension and setting out the grounds supporting that response. Specifically, the letter stated:

The law in relation to suspension is well settled. Not only must there be a contractual provision allowing for possible suspension, there are three grounds that may justify suspension:

- Health and safety concerns; and/or
- Concerns the conduct alleged may be repeated; and/or
- Concern the employee remaining in the workplace may impact on the employer's ability to conduct an investigation.

We submit that none of those grounds exist in the present situation and there is no basis for the Board to consider suspension. Moreover:

- There is no precedent for suspension given the allegations were made against the CEO in 2022 and they have remained in situ while an investigation has been undertaken for more than 9 months;
- Ms Jacobsen does not regularly interact with the complainant and estimates she would only see him in the office approximately once per fortnight, which can be managed;
- Email correspondence can be managed if required.

[38] At the conclusion of the letter a request was made for documentation:

Please advise:

- What steps has Raukura Hauora o Tainui taken to keep Ms Jacobsen safe during its ongoing investigation process?
- When was the complaint against Ms Jacobsen received?
- Please advise what preliminary investigation Raukura Hauora o Tainui has undertaken to ascertain whether investigation is required.
- Please provide a copy of the complaint.
- Please provide draft terms of reference for the proposed investigation.

[39] Ms Burne-Vaughan said that the Board had been concerned about the interactions Ms Jacobsen had with Mr D, in particular the comments contained in her email to Ms Moke on 19 January 2023 which had been copied to Mr D. The Board considered that it appeared to be an

attempt to persuade Ms Moke to dismiss Mr D and for him to be aware that Ms Jacobsen wanted him forced out of RHOT.

[40] Ms Burne-Vaughan said the Board had become aware of other emails in which Ms Jacobsen had disagreed with Mr D, and which she had copied to the whole mailing list of RHOT. This included external contacts. The Board considered that this undermined the trust the RHOT employees should have in the SLT members.

RHOT response 9 March 2023

[41] Having taken legal advice, the Board responded by letter dated 9 March 2023 confirming a decision to suspend Ms Jacobsen. Its reasons for doing so were set out in the letter as being:

- (i) a health and safety concern due to the nature of the complaint, being bullying and harassment, against Ms Jacobsen;
- (ii) the comment by Ms Jacobsen in her email dated 6 March 2023 that she had no trust and confidence in Mr D which led the Board to conclude that he would be excluded from “important functions of his role”; and
- (iii) that from her comments in the 6 March 2023 email it appeared that Ms Jacobsen had no trust and confidence in the Board.

[42] The Board invited Ms Jacobsen to meet with it to discuss the suspension decision on either 14 or 16 March 2023. There was no reference in the email to members of the Board other than Ms Burne-Vaughan and Mr Hope meeting with Ms Jacobsen.

[43] When asked during the Investigation Meeting if the Board had considered having other members of the Board meeting with Ms Jacobsen, Ms Burne-Vaughan said it had not considered the request because the Board had appointed her and Mr Hope to deal with the matter.

[44] The letter concluded by stating that a copy of the complaint would be provided ‘shortly’ and that Ms Jacobsen would: “be provided with a copy of the draft terms of reference and consulted as to the identity of the investigator in due course.”

Announcement 10 March 2023

[45] On 10 March 2023 Ms Burne-Vaughan on behalf of the Board sent a message to employees which stated:

Kia ora Ngaa Kaimahi o Raukura Hauore O Tainui

The board advises that Terina and Telisa will be away from work for a period of time.

While they are away ...

[Mr D] will be responsible for Auckland and Waikato hapori teams, HR and Operations.

I encourage you all to focus on our work and not be distracted by rumours and continue to support each other and our whanau.

[46] Ms Jacobsen said the announcement was a shock because it meant that the complainant Mr D was now acting in her role of General Manager People, Culture and Capability and had access to emails, information and other files pertaining to him and relevant to the investigation against her. She said she considered this was inappropriate and showed bias and pre-determination by the Board in relation to the complainant.

[47] Ms Burne-Vaughan said Mr D had been given responsibility for the HR role because he was the only member of the SLT still working at that time because Mr B had resigned, Ms Moke was on special leave, and Ms Jacobsen was suspended. In addition, she said it was an opportunity for him to “prove himself.”

[48] Following the announcement there were two emails sent by employees dated 10 March 2023. One was an email circulated to all RHOT employees and the wider RHOT organisation. It was critical of Mr D, the Board, and supportive of Ms Moke and Ms Jacobsen.

[49] The second email sent by the Health and Safety Advisor was circulated to a similar circulation list. It stated that the sender refused to work with Mr D because she had no confidence in him, her colleagues also had no confidence in Mr D to lead them, and stated:

You must take action now. There is a definite lack of confidence in [Mr D] and frankly a dwindling confidence in the board to support kaimahi. Appointing him as the acting manager of HR and ... hapori support teams when he cannot and does not fulfil his role as operations manager is in complete disregard for kaimahi health, safety and well-being.

14 March 2023 emails blocked

[50] On 14 March 2023 Ms Jacobsen said that she was advised that the Board had blocked her access to the Trust emails and database.

[51] When questioned, Ms Burne-Vaughan said it was not usual to block an employee's access to emails, but the action had been taken to prevent group emails being sent inside and outside RHOT.

Requests for updates on the investigation and events to 26 April 2023

[52] Ms Jacobsen said she decided to await the draft terms of reference and engage in the investigation. However, there was no contact by the Board or information provided by the status of the investigation despite Ms Jacobsen's lawyer requesting updates on behalf of Ms Jacobsen on 17 and 23 March 2023.

[53] Ms Jacobsen said she was made aware of an email which Ms Burne-Vaughan sent to all the Trust employees on 20 March 2023 which included the statement that: "As most of you will know, Terina and Telisa are away from the workplace pending the completion of employment investigations."

[54] Ms Jacobsen said she regarded the email as another breach of her privacy, which added to the distress she was experiencing in circumstances in which the investigation had not commenced, and she had received no communication from the Board about it.

[55] On 23 March 2023 in response to the second email requesting an update, the lawyers for the Board advised that it was in the process of engaging a firm of solicitors to appoint an investigator and carry out the investigation. The email concluded by stating that the RHOT lawyers would be meeting with the investigator the next day and: "we will follow up with you" when that had occurred.

[56] On 24 March 2023 Ms Jacobsen's lawyer responded:

Thank you for your email although that is disappointing to hear. Our client has been suspended since 9 March and it appears despite 2 weeks having passed, few steps have been taken to progress the investigation process. We are extremely concerned that this investigation will become protracted. Our client is already aware of an investigation being undertaken on behalf of the Board that has been ongoing for more than 9 months.

In the circumstances we do not consider it is reasonable or necessary for Ms Jacobsen to remain suspended. Nor do we think it is reasonable for her access to her emails to be suspended. We are particularly concerned that the complainant has access to all staff emails and we are aware of allegations of emails being accessed and deleted by the complainant.

[57] Ms Jacobsen said that she was informed that Mr Hope and Ms Burne-Vaughan had visited the RHOT Auckland office, advised the employees that an investigation was being conducted, and referred to four complaints being involved.

[58] Ms Jacobsen said she was shocked to learn this because she had not been contacted or received any updates from the Board; nor had she been made aware by the Board of the four complaints referred to having been made against her in the five weeks she had been suspended.

[59] Ms Jacobsen said she was further shocked to receive a letter from the Board on 18 April 2023 which stated that it believed she had downloaded documents including employment agreements and job descriptions. The letter requested that she delete the data immediately otherwise there would be legal action taken.

[60] Ms Burne-Vaughan said the Board had instructed Mr D to instruct the IT contractors engaged by RHOT to do a security check to block email traffic, and identify any concerns or issues. It was this which had resulted in the downloading of some documents by Ms Jacobsen coming to the Board's attention.

[61] Ms Jacobsen said the only documentation she had in her possession was in relation to the concerns she had raised about Mr D and the Board, and pertaining to her investigation. Other documents she had were employment agreements and job descriptions which were publicly available.

[62] On 19 April 2023 a letter in response was sent on behalf of Ms Jacobsen in which it was confirmed that Ms Jacobsen had a USB stick with some information. That information related to herself and the complaint made against her, noting that no copy of the complaint had been received despite the requests made on 18 March 2023.

[63] The letter attached two emails sent on behalf of Ms Jacobsen on 24 March and 5 April 2023 requesting updates but to which no response had been received. The letter continued: "we urgently require an update on the investigation process".

[64] The letter noted that no terms of reference or the allegations had been sent to Ms Jacobsen despite her having been suspended since 9 March 2023. It concluded with "We await your responses to all matters as a matter of urgency."

[65] No response from RHOT was received by Ms Jacobsen.

Resignation

[66] Ms Jacobsen said that towards the end of April 2023 she was considering resigning due to the lack of response and updates from the Trust, together with the threat of legal action being taken against her.

[67] On 26 April 2023 her lawyer wrote to RHOT's lawyers outlining the dates of requests made for information on the complaint and the investigation terms of reference. It noted that Ms Jacobsen had lost trust in the process, and stated that she believed the Board had engaged

in a course of conduct, by its actions in suspending her and failing to investigate quickly, with the intention of inducing her to resign.

[68] The email concluded:

If the Board does not provide:

- A copy of the complaint; and
- Terms of reference for the investigation; and
- An undertaking that the investigation will commence promptly

by no later than 5pm on Thursday 27 April 2023, our client will have no option but to resign in order to preserve her own mental health and wellbeing.

[69] There was no response to this letter from RHOT.

[70] Mr Hope said there had been discussions between the Board's lawyers and the legal firm approached to conduct the investigation. This had included discussion about whether or not the Board should obtain further information from Mr D about his complaint before sending it to Ms Jacobsen, however the Board considered the legal firm should do this to ensure an independent investigation.

[71] Mr Hope, who resigned from the Board during April 2023, said his understanding was that RHOT's lawyers worked with the legal firm and he understood draft terms of reference had been prepared.

[72] Ms Burne-Vaughan said that before the arrangements involving the independent investigator were concluded, Ms Jacobsen resigned.

[73] Ms Jacobsen resigned on 1 May 2023 and raised a personal grievance for unjustified constructive dismissal.

[74] Ms Jacobsen said there was no acknowledgment of her resignation and she continued on special leave until she received her final pay on 19 May 2023, three weeks after her resignation.

Was Ms Jacobsen constructively dismissed by RHOT?

[75] An employee who has resigned freely has not been dismissed. 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.

[76] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether or not there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.¹

[77] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.²

[78] Ms Jacobsen is claiming in the third category: a breach of duty by RHOT arising as a result of a suspension which subsisted for two months without a copy of the repeatedly requested complaint or the draft terms of reference for the investigation being provided to her. She claims there was a complete failure to communicate with her about the progress of the investigation.

[79] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*³. The Court of Appeal in examining the question of constructive dismissal observed that in examining whether a constructive dismissal under this heading has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

¹ *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

² *Auckland Shop Employees etc IUOW etc v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

³ *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

[80] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he or she had no other option.

A breach of Duty?

[81] The letter dated 8 March 2023 sent on behalf of Ms Jacobsen requested, amongst other information, a copy of the complaint and the draft terms of reference for the proposed investigation.

[82] The Board failed to follow up on whether or not the complaint had been provided to Ms Jacobsen. Ms Burne-Vaughan's evidence was that she had expected the RHOT lawyers to have provided it. However neither she nor Mr Hope checked this had happened, despite the repeated requests from Ms Jacobsen which should have alerted them to the fact that it had not been done.

[83] In fact it was made clear from the discussion towards the end of April 2023 about whether the Board or the independent investigator should obtain further information on his complaint from Mr D that no copy of the complaint had been provided to Ms Jacobsen.

[84] Even at that stage however, there was no apology or explanation for the delay made to Ms Jacobsen

[85] As early as 23 March 2023 RHOT informed Ms Jacobsen that it was in the process of engaging an investigator, would be meeting with the investigator the following day, and would update Ms Jacobsen afterwards.

[86] In response Ms Jacobsen's lawyer noted that this step had taken two weeks from the date of Ms Jacobsen's suspension. There was no response to this email.

[87] Ms Jacobsen repeatedly requested the draft terms of reference and/or an update on the status of the proposed investigation. Updates were requested on 17 and 23 March, and on 5 and 19 April, and again on 26 April 2023.

[88] I find the failure to provide any information despite multiple requests from Ms Jacobsen is difficult to understand, especially when RHOT had engaged a specialist employment legal firm and had an experienced employment lawyer on its Board.

[89] I accept that RHOT was experiencing difficulty identifying and engaging an investigator, however that does not explain why it did not communicate that fact to Ms

Jacobsen. Instead she was left on suspension with no update which would have been stressful and frustrating for her.

Resignation Foreseeable?

[90] Section s4 of the Act states that the parties to an employment relationship are expected to deal with each other in good faith and, pursuant to s4(1A)(b), 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,

[91] Whilst an employer does not necessarily have to provide a copy of a complaint, it must provide details of allegations against the employee is sufficient detail for him or her to be able to respond.

[92] Although the letter dated 3 March 2023 contained some details of the allegations made by Mr D, I find that by not keeping Ms Jacobsen updated with information pertinent to the complaint about her and particularly in respect of the proposed employment investigation, RHOT were not acting in good faith towards her.

[93] I observe that despite RHOT failing to respond to Ms Jacobsen about the investigation, it was able to take some steps in the investigation as exemplified in the letter to Ms Jacobsen on 18 April 2023 alleging she had downloaded confidential documents and advising that if there had been misuse of the information: “legal action will be commenced against Telisa personally.”

[94] In her response to the allegation, Ms Jacobsen also requested an urgent update on the investigation. Again there was no response.

[95] On 26 April 2023 Ms Jacobsen advised RHOT that she believed the Board had engaged in a course of conduct, namely by its actions in suspending her and failing to investigate quickly, with the intention of inducing her to resign.

[96] Even in light of the advice that she considered she was considering resignation RHOT provided no response, and no update on the investigation.

[97] I consider that an employer who was acting in good faith would have contacted Ms Jacobsen at that point, if not earlier, to provide a response informing her of the reason for the delay in providing the draft terms of reference, and discussed the necessity of her resigning.

[98] On 1 May 2023 Ms Jacobsen resigned. Extraordinarily but perhaps consistently, RHOT did not contact her to ask her to reconsider, or provide advice on when the investigation would commence. It merely acknowledged her resignation in an email to her lawyer by giving an indication of her final pay.

[99] I find that the resignation of Ms Jacobsen was the result of a breach of the duty of good faith on the part of RHOT by its failure to inform her of the full details of the complaint against her, and more importantly by not letting her know the status of the proposed investigation.

[100] This breach was serious and I find it was clearly foreseeable in the circumstances that a continuation of that situation would result in Ms Jacobsen's resignation. At the point Ms Jacobsen resigned, she had been involved as a witness in the investigation involving Ms Moke. That had been nine months in progress.

[101] Her own situation was one in which she had been informed that there would be an investigation, but two months later she had not been provided despite multiple requests with requested documents, or advised at what stage the investigation was likely to commence.

[102] Even when RHOT was advised prior to the resignation that Ms Jacobsen felt she would have no option but to resign unless the requested information was provided, it failed to respond by providing the requested information, or providing an update on the investigation process.

[103] In these circumstances I find that Ms Jacobsen's resignation should have been, and indeed was, clearly foreseeable by RHOT.

[104] I determine that Ms Jacobsen was constructively dismissed by RHOT.

Was Ms Jacobsen unjustifiably disadvantaged as a result of being suspended from her employment?

[105] Ms Jacobsen is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[106] The elements of s103 (1) (b) are twofold:

- . An unjustifiable action by the employer, which
 - a. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[107] Ms Jacobson must therefore establish that the suspension was unjustifiable and affected her terms and conditions of employment to her disadvantage.

[108] There was a contractual right to suspend in Ms Jacobsen's employment agreement set out in clause 41 which stated:

The employer might decide to suspend the employee on pay while investigating allegations against the employee, eg for serious misconduct, or if a condition, illness or injury means the employee poses an immediate risk to themselves and/or others.

[109] Even with a contractual right to suspend, it must be exercised in a fair and reasonable manner and be justifiable in all the circumstances. In *Singh v Sherilee Holdings Limited* the Court commented:

„, To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.⁴

[110] It is submitted for RHOT that the suspension was justified on the grounds that comments in the letter from Ms Jacobsen on 6 March 2023 confirmed its serious concern about her ability to work with Board members in a constructive manner and in good faith. The basis for this view was submitted as being her:

- (a) reiterated comment that she had no trust and confidence in Mr D and this view was held by others;
- (b) Her reference to the complaints made by Mr B and Ms F;
- (c) Her view that the intermediary arrangement was not working.

[111] It is submitted in the circumstances that suspension was not only open to RHOT as a fair and reasonable employer but it was difficult to see how it could be avoided.

[112] Ms Jacobsen had made complaints about Mr B, Mr D and Ms F prior to being notified of the complaint Mr D had made about her on 3 March 2023. It appears that no action was taken on these complaints, certainly Ms Jacobsen comments on the fact that the only response was one received from Mr Hope five months after she had made the complaint about Mr B's conduct.

[113] Ms Jacobsen received no response to her further complaint about Mr D made on 19 January 2022. Although Ms Burne-Vaughan's evidence was that the Board expected Ms Moke to address it, it was a serious complaint and the Board failed to follow it up to check it had been handled appropriately.

⁴ *Singh v Sherilee Holdings Limited* AC 53/05 22 September 2005 at [91].

[114] By contrast in response to the complaint received from Ms F, an investigator had been appointed in a timely manner and met with Ms F.

[115] I observe that this non-responsiveness was reflected in the RHOT's behaviour after Ms Jacobsen was suspended by it failing to provide her with the promised copy of Mr D's complaint, the draft terms of reference for the investigation, or keep her updated on the stage the investigation had reached.

[116] RHOT's action in response to Mr D's complaint was to suspend Ms Jacobsen, removing her from the workplace and unable to carry out her duties.

[117] I find in that situation a fair and reasonable employer acting in good faith would have ensured that it was responsive and communicative by providing Ms Jacobsen with details of the information it had which supported its decision to suspend her.

[118] In the letter to Ms Jacobsen dated 9 March 2023, RHOT referred in paragraph 10.3 to the Board having obtained: "copies of correspondence referred to therein which have tended to confirm that the allegations have substance"; and it committed to providing Ms Jacobsen with; "copies of all that material".

[119] Despite this assurance, Ms Jacobsen did not receive the information RHOT promised in that letter, either at the time the suspension decision was made or at any time during the period of suspension.

[120] It is unclear from the evidence why RHOT decided to suspend Ms Jacobsen rather than considering alternatives such as placing her on special leave, or giving consideration to parameters around contact which was feasible given she and Mr D did not share the same workplace.

[121] However RHOT did give consideration to managing Ms Jacobsen's role in her absence on suspension. It appointed Mr D, the complainant, to Ms Jacobsen's position as General Manager People, Culture and Capability. In that position he had access to her emails, and was enabled to instruct that a sweep of her computer systems be undertaken by Securicor. In contrast Ms Jacobsen's access to her emails was blocked while she was suspended.

[122] It was not clear from the evidence why this decision to appoint Mr D to Ms Jacobsen's role had been taken. Mr Hope referred to some personal circumstances affecting Mr D making him vulnerable. In responding to questioning during the investigation meeting Mr Hope commented that he wanted to avoid "retraumatising a victim." Ms Burne-Vaughan referred to

Mr D needing a chance “to prove” himself and appointing him into Ms Jacobsen’s role was that opportunity.

[123] I appreciate that the Board was in a difficult position given that Mr D was the only member of the SLT still in the workplace, however I observe that the Board’s decision to suspend Ms Jacobsen rather than putting parameters in place to minimise any contact between her and Mr D had resulted in that situation.

[124] The decision to appoint Mr D to act in Ms Jacobsen’s role and the comments supporting it appear to point towards a bias on the part of these two members of the Board in favour of Mr D before any investigation into his complaint was undertaken and Ms Jacobsen provided with an opportunity to respond to it.

[125] The Respondent submitted that it was appropriate to justify blocking Ms Jacobsen’s access to emails because of the group emails being sent, in particular the two sent by employees on 10 March 2023.

[126] I note however that these appear to have been prompted by the action of the Board in making Mr D responsible for HR and hapori teams.

[127] I find that the action of suspending Ms Jacobsen disadvantaged her and adversely affected her conditions of employment.

[128] I determine that Ms Jacobsen was unjustifiably disadvantaged by RHOT.

Remedies

[129] I have found that Ms Jacobsen was unjustifiably dismissed and unjustifiably disadvantaged in her employment with RHOT and she is entitled to remedies.

Unjustifiable Dismissal Claim

Lost wages

[130] Ms Jacobsen said that she applied for other positions after her resignation, mainly to telephone or through online portals. She had also communicated with recruitment agencies and been honest in explaining the reasons underlying her resignation. This may have adversely affected her opportunities for alternative employment.

[131] Ms Jacobsen had been successful in obtaining alternative employment which was anticipated to commence during July or August.

[132] In considering the appropriate period of time for lost remuneration I take into consideration what has been described as the ‘vicissitudes of life’.⁵

[133] In all the circumstances of this case, including the dysfunction pervading RHOT management, and the ongoing investigation in which Ms Jacobsen was tangentially involved as a witness, I consider six months is an appropriate period for which to award Ms Jacobsen lost remuneration.

[134] Lost wages from 19 May 2023 until 19 October 2023 amounts to \$65,000 gross. From that amount I deduct Ms Jacobsen’s earnings of \$20,044.50.

[135] RHOT is to pay Ms Jacobsen the sum of \$44,955.50 gross pursuant to s 28(3) of the Act.

Compensation

[136] Ms Jacobsen gave evidence of the effect her experiences had on her. These included immense stress, anxiety and hurt, and financial pressure. Her reputation both in the RHOT workplace and with external stakeholders had been tarnished by RHOT’s failure to conduct a fair process.

[137] I accept that Ms Jacobsen suffered humiliation, loss of dignity and injury to feelings as the result of the breach in failing to conduct a fair and reasonable process during which she was threatened by legal action.

[138] I order RHOT to pay Ms Jacobsen the sum of \$30,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[139] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[140] It is clear that there was dysfunction affected the SLT at RHOT. This was characterised by a culture of complaint. Ms Jacobsen had been responsible for a number of complaints prior

⁵ *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [73].

to being suspended in March 2023. However it was not these that gave rise to her suspension but a complaint from Mr D to which she had been active and responsive whilst RHOT failed to respond or engage.

[141] I have considered the matter of contribution as I am required to do under s124 of the Act. On balance I find that Ms Jacobsen did not contribute to the situation which resulted in her suspension and dismissal and there is to be no reduction in the remedies awarded.

Unjustifiable disadvantage Claim

[142] Ms Jacobsen was also successful in her claim of unjustifiable disadvantage.

[143] This claim is based upon the same facts as formed the basis of her successful unjustifiable dismissal claim for which she has been awarded remedies. There is no separate remedy award under this head.

Penalty

[144] Ms Jacobsen is seeking a penalty in respect of a breach of good faith arising from the termination of her employment.

[145] Pursuant to s 4A(b)(iii) a penalty for a breach of good faith is available if the failure was deliberate, serious, and sustained, or the failure was intended to: “undermine an employment relationship”.

[146] I have found RHOT breached the duty of good faith set out in s 4 of the Act by constructively dismissing and unjustifiably disadvantaging Ms Jacobsen as exemplified by a complete failure to communicate with her. It did not act as a fair and reasonable employer could have acted in the circumstances, and its actions fundamentally undermined the employment relationship.

[147] In deciding whether to impose a penalty and if I decide to, how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in a number of judgments.⁶

[148] The purpose of penalties is punitive. They are not imposed to remedy the applicant’s loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

⁶ For example, *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

[149] The starting point for a penalty in the case of a company is a maximum amount of \$20,000.00.

[150] **In all the circumstances and considering proportionality, I consider that a penalty of \$12,000.00 to be appropriate.**

[151] Ms Jacobsen been compensated for all her losses. The purpose of penalties is to deter, not to compensate. The penalties imposed are to bring home to RHOT the importance of acting in good faith in the employment relationship.

[152] However I observe that the failure to communicate with Ms Jacobsen even after multiple requests to do so caused significant stress to her.

[153] **I order RHOT to pay a penalty of \$12,000, of which \$3,000.00 is to be paid to Ms Jacobsen. The penalty is to be paid into the Authority. On recovery of that amount the Authority must then transfer that amount into a Crown Bank Account and the Crown will transfer the proportion awarded to her to Ms Jacobsen.**

Orders

[154] **I have made the following orders that RHOT pay to MS Jacobsen:**

- a) **The sum of \$44,955.50 gross in respect of lost remuneration.**
- b) **The sum of \$30,000.00 as compensation pursuant to s 123(1)(c)(1) of the Act.**
- c) **I order RHOT to pay the full penalty amount of \$12,000.00 to the Authority for transfer to a Crown Bank Account and from there \$3,000.00 is to be deducted and transferred the amount ordered to be paid to Ms Jacobsen.**

Costs

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

[156] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[157] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[158] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁷

Eleanor Robinson
Member of the Employment Relations Authority

⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].