IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 269
3368143

	BETWEEN	DANIEL BLY Applicant
	AND	FUTURECO LIMITED Respondent
Member of Authority:	Simon Greening	
Representatives:	Applicant in person Jack Stone, counsel for the Respondent	
Investigation Meeting:	1 April 2026 in Auckland	
Submissions received:	9 April 2026 from the parties	
Determination:	1 May 2026	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Daniel Bly was employed by FutureCo Limited (FCL) in the position of Full Stack Developer from 25 September 2023 until 5 December 2024.

[2] FCL specialises in complex software development, gamification and marketing. FCL is a small business with nine employees.

[3] Mr Bly was primarily working on the KFC 6 & Shout game at the time of his dismissal. The KFC 6 & Shout game is an interactive, cricket-themed game, which runs in KFC's mobile phone application (project).

[4] Mr Bly was the only full-time software developer employed by FCL.

[5] Mr Bly reported to Oz Jabur, the director of FCL. Luke McGregor is employed by FCL as a software developer and reported to Mr Bly.

[6] FCL was required to complete the project by the end of November 2024.

[7] Mr Bly was the lead software developer for the project. Mr McGregor supported Mr Bly with this project.

[8] By the middle of November 2024, Mr Bly says he was exhausted by the long hours he had worked to ensure the project was delivered on time to the client. Mr Bly says FCL did not provide him with adequate support, and he felt overwhelmed by stress.

[9] During the evening, on 25 November 2024, and the early hours of the morning on 26 November 2024, Mr Bly posted on his Instagram account about his hours of work and the stressful environment given the project deadline he was working hard to complete.

[10] Mr Bly says the stressful environment at work, was also partly to blame for him communicating with Mr McGregor in an unprofessional manner, by text message and Slack, on 20 and 21 November 2024. Mr Bly says these communications occurred within a high pressure and stressful software development environment.

[11] On 26 November 2024 at 10.07am, Mr Bly called Mr Jabur on the phone and told him he had posted about his work situation on his Instragram account.

[12] On 27 November 2024, Mr Bly received an email from Mr Jabur placing him on garden leave effective immediately.

[13] Later that morning, Mr Bly received a letter from Mr Jabur alleging Mr Bly had communicated in an inappropriate manner towards Mr McGregor, and the posts on his Instagram account had breached FCL's social media policy.

[14] Mr Jabur proposed that Mr Bly be placed on suspension. Mr Bly responded to the proposal. He was suspended by FCL from 28 November 2024 until the termination of his employment on 5 December 2024.

[15] Mr Bly has brought several employment relationship problems to the Authority for determination. Mr Bly says he was unjustifiably disadvantaged by FCL requiring him to work hours well in excess of the ordinary hours of work set out in his individual employment agreement.

[16] Mr Bly says he did not work in a healthy and safe work environment because of the stress he experienced as a result of the long hours he was expected to work on a regular basis.

[17] Mr Bly has also raised a personal grievance for unjustified dismissal for which he seeks remedies in the form of compensation and lost remuneration.

[18] My Bly contends that FCL has breached s 4 of the Employment Relations Act 2000 (the Act) by not acting in good faith towards him and has asked the Authority to issue a penalty against FCL.

[19] Mr Bly maintains that FCL did not pay him the correct annual leave balance at the conclusion of the employment relationship. Mr Bly says there is a shortfall in the payment of annual leave made by FCL, amounting to 16 hours, for which he seeks payment.

The Authority's investigation

[20] For the Authority's investigation written witness statements were lodged by Mr Carlos O'Brien, Mr Jabur, Mr McGregor, and Mr Bly. The witnesses answered questions from me under oath or affirmation, and from counsel for FCL.

[21] As permitted by s 174E of 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

[22] The issues requiring investigation and determination are:

(a) Whether Mr Bly was unjustifiably disadvantaged because FCL required him to work additional hours, over and above the ordinary hours of work stated in his employment agreement, between the period 5 September 2024 and 25 November 2024?

(b) Did FCL unjustifiably disadvantage My Bly by failing to provide him with a healthy and safe work environment?
(c) Did FCL unjustifiably disadvantage Mr Bly by its decision to suspend him?
(d) Was Mr Bly unjustifiably dismissed by FCL?
(e) Did FCL breach s 4 of the Act and, if so, should a penalty be issued?
(f) Does FCL owe Mr Bly unpaid annual leave?
(g) If a personal grievance is established, what remedies (if any) should Mr Bly receive, with regard to:
    i. compensation under s 123(1)(c)(i) of the Act; and
    ii. remuneration lost under s 128(2) of the Act.
(h) Should any remedy awarded be reduced under s 124 of the Act for blameworthy conduct by Mr Bly which contributed to the circumstances which gave rise to the dismissal grievance?
(i) Is either party entitled to an award of costs?

Whether Mr Bly was unjustifiably disadvantaged because FCL required him to work additional hours, over and above the ordinary hours of work stated in his employment agreement, between the period 5 September 2024 and 25 November 2024?

[23] A personal grievance for unjustified disadvantage is a claim that an employee's employment, or one or more conditions of the employee's employment, is or are affected to the employee's disadvantage by some unjustifiable action by the employer.[1]

[24] The Authority is required to consider the actual effect of the employer's decision by focusing on what has occurred and then assessing the impact on the employee's employment.[2]

[25] Clause 16 of the individual employment agreement records:

> The Employee's usual hours of work shall be 40 hours over Monday to Friday. Generally, the hours will be 8.30am to 5pm, however from time to time the Employee may be required to complete work beyond these hours, or on a Saturday or Sunday based on business needs.
> …
> From time to time, the Employee may also be required to work additional hours over the hours specified in this agreement and may not unreasonably refuse such additional hours. The Employee's salary includes compensation for being available to work.
> …

[1] Employment Relations Act 2000, s 103(1)(b).
[2] *Wiles v The Vice Chancellor of the University of Auckland* [2024] NZEmpC 123 at [98].

> The Employee's salary is payment for the overall performance of the position, and all hours worked, overtime is not payable.

[26] Git is a version control system designed to track changes in source code during software development. A git commit occurs when a software developer saves the code they have been working on to the git.

[27] Mr Bly says that during the course of his employment with FCL, he regularly worked beyond 40 hours per week.

[28] Mr Bly extracted git commit records for projects he worked on between 5 September 2024 and 25 November 2024. Based on his analysis, Mr Bly says that during this period he worked an additional 278 hours.

[29] Mr Bly authored 144 of the 146-backend git commits for the project. Sixty-five of these git commits occurred after 5pm. Five git commits occurred between midnight and 5am. Mr Bly authored git commits after his normal hours of work across thirteen days during this period.

[30] Over an eleven-week period, Mr Bly says he worked approximately an additional 25 hours per week. The additional hours of work Mr Bly undertook during this period, was primarily in the form of git commits.

[31] There is sufficient evidence to support the conclusion that Mr Bly worked the additional hours he has claimed. Although the express term in his employment agreement records that Mr Bly's salary compensated him for *"all of the hours worked",* the hours worked by Mr Bly during this period were unreasonable.

[32] Mr Bly was unjustifiably disadvantaged by FCL requiring him to work excessive hours which were over and above the ordinary hours of work stipulated in his employment agreement, between 5 September 2024 and 25 November 2024.

Did FCL unjustifiably disadvantage My Bly by failing to provide a healthy and safe work environment?

[33] FCL owed an implied duty to Mr Bly to maintain a healthy and safe work environment. The content of this implied duty is informed by the Health and Safety at

Work Act 2015.[3] Section 36 of this Act provides that employers must ensure, so far as is reasonably practicable, the health and safety of employees while at work.[4]

[34] The requirement to take all practicable steps to ensure an employee's safety only arises where an employer knows, or ought to reasonably know, about the circumstances giving rise to the risk of harm.[5]

[35] Mr Bly says FCL did not maintain a healthy and safe work environment because he was required to work excessive additional hours for FCL which led to Mr Bly becoming fatigued and exhausted.

[36] On 20 November 2024, Mr Bly called Mr Jabur. The Authority was provided with a transcript of this call.

[37] During the call, Mr Bly discussed his excessive hours of work with Mr Jabur. At one point during the conversation Mr Jabur said to Mr Bly:

> Firstly, I just want to say, well done for staying cool, calm and collected. Obviously, you guys are putting in some crazy hours and nerves are up in the air.

[38] Later on, in the conversation Mr Bly says to Mr Jabur:

> I've already done 40 hours. I was meant to have a chill day so I could be back tomorrow if needed. Now it looks like I'll be working all day, and I'm not really in the state to be doing that.

[39] Earlier on in the conversation, Mr Bly informed Mr Jabur that he had been sick but was recovering. Mr Jabur was in Australia when Mr Bly called him.

[40] During the conversation on 20 November 2024, FCL became aware that Mr Bly was working excessive hours and was struggling with his workload.

[41] During the call Mr Jabur told Mr Bly that he would contact a contractor who might be able to assist Mr Bly with completing the project.

[42] Both Mr Jabur and Mr Bly recognised it was a stressful period due to the tight timeframe for completing the project and delivering it on time to the client.

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[3] *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99 at [25].
[4] Health and Safety at Work Act 2015, s 36(1).
[5] Above n 3 at [29].

[43] Mr Jabur offered support to Mr Bly in the form of additional contracted programming hours. Towards the end of the call, Mr Jabur said to Mr Bly:

> Just to summarise – you focus on final bugs and season mode. Get Andy on the design refresh. See if we can get it sorted by today.

[44] Mr Bly also said to Mr Jabur he would probably take sick leave the following day. Mr Jabur replied:

> You were right to call me. If you need to call, you need to call me. Look after yourself.

[45] In the context of operating a small business, and the requirement to complete the project by 25 November 2024, FCL took reasonable practicable steps to support Mr Bly.

[46] During the call, additional contracted hours for software development were discussed, Mr Jabur offered to contact Mr McGregor to discuss the project and what was required in terms of his support.

[47] Although he was struggling with fatigue and exhaustion, I find that in the circumstances FCL took reasonable practicable steps to support Mr Bly. Mr Bly does not succeed with this claim.

Did FCL unjustifiably disadvantage Mr Bly by its decision to suspend him?

[48] At 8.11am on 27 November 2024, Mr Jabur sent an email to Mr Bly advising that concerns had been raised about his conduct at work. Mr Bly was placed on paid gardening leave with immediate effect.

[49] At 6.13pm on 27 November 2024, Mr Jabur sent a letter to Mr Bly proposing that he be placed on suspension while FCL investigates allegations of misconduct. Mr Jabur invited Mr Bly to provide his response to the proposal by midday on 28 November 2024.

[50] Mr Bly replied to Mr Jabur by email on 28 November 2024. In his email, Mr Bly explained to Mr Jabur that he wished to remain employed by FCL, he was struggling with sleep deprivation and wanted to work with Mr Jabur to explore how his workload could be managed more effectively.

[51] Mr Bly concluded this email by agreeing with FCL's proposal to place him on paid suspension.

[52] An employer is generally required to give notice to an employee of a proposal to suspend and seek the employee's comments before the decision is made.[6] Although initially, Mr Bly was placed on garden leave without being consulted by FCL, later that same day FCL provided Mr Bly with an opportunity to comment on the proposal to suspend him. Mr Bly agreed with FCL's proposal.

[53] Therefore, Mr Bly was not unjustifiably disadvantaged by FCL's decision to suspend him.

Was Mr Bly unjustifiably dismissed by FCL?

The allegations

[54] On 28 November 2024, Mr Bly received a letter from Mr Jabur inviting him to attend a disciplinary meeting. The letter recorded the following allegations:

> **Inappropriate communications:** On the 20th, 21st and 26th of November, you sent messages to Luke McGregor and myself, that were threatening, aggressive, and bullying in nature.
>
> **Social media activity:** On the 26th of November, you posted several stories on social media that revealed private messages between us.

[55] Copies of the posts and messages were provided to Mr Bly with this letter.

[56] FCL alleged Mr Bly had breached particular clauses in the individual employment agreement:

> **Employment agreement**
> - Clause 12.5: conduct yourself in a professional and respectful manner.
> - Clause 29.1: protect confidential information.
> - Clause 12.3, 12.5: act in the best interest of the employer and refrain from actions that could bring the company into disrepute.
> - Clause 12.1: comply with lawful and reasonable directions.
> - Clause 12.4: deal with the employer in good faith at all times.
> - Clause 35.2: avoid breaching the privacy of any colleague, or the employer.

[57] In addition, the letter records that FCL alleged Mr Bly had breached clauses set out in various policies, including obligations of the employee (clause 12), confidential information (clause 29), and social media (clause 33.1).

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[6] *ETU Incorporated v Singh* [2024] NZEmpC 84 at [54].

[58] Clause 33:1 of Mr Bly's individual employment agreement was specifically referred to in the letter, which states:

> The Employee must not use any social media communication to make comments that jeopardize, disparage, or otherwise damage the interests of the employer, its business, commercial activities or other employees.

[59] The letter also includes references to Mr Bly's obligations to protect the privacy of his colleagues and FCL. The letter recorded:

> Sharing private messages involving sensitive projects, and the company's director on social media is concerning and, if proven, undermines the trust required in your role. Such actions may also contravene the Privacy Act 2020.

[60] There was a reference in the letter to the "live story" that Mr Bly had shared on his Instagram account, noting:

> In particular, the live story you shared was extremely disparaging about the company and its staff and publicly shared on social media.

[61] The conclusion of the letter recorded:

> If any of these allegations are substantiated, they may amount to serious misconduct as defined under clause 41 of your individual employment agreement. If proven, behaviour may justify disciplinary action up to and including summary dismissal.

Messages and posts

[62] The first allegation involved Mr Bly's communication with Mr McGregor on 20 and 26 November 2024. Mr Bly sent Mr McGregor a series of message on Slack on 21 November 2024:

> Not good at all Luke, very disappointed in you. Sort it now. Will talk to you later. Go and read my message on Slack in full, I actually took time to leave you some instructions.

[63] Mr Bly sent Mr McGregor a series of text messages:

> Luke, I will remind you that you are arguing with your literal boss. I am already not very happy with you Luke, why are you arguing with me?
>
> …
>
> OK, please don't touch (the code). You can go and do whatever was important enough to cause me all that stress.

[64] Mr McGregor replies to Mr Bly:

> Dan you can't speak to me like this. This is really quite unreasonable.

[65] The second allegation involves Mr Bly posting on his Instagram account.

[66] The first post was made at 3.16am on 26 November 2024. The post contains a picture of characters from the South Park series. The text of the post reads:

> Actual footage of Daniel bitching about working unpaid overtime as a university dropout working as development lead. Thought I'd bring this one back before anyone thinks I hate my job (I love my job) ((mostly)).

[67] The first post was posted on Mr Bly's Instagram account as a story. This means the post was up for 24 hours before it would automatically disappear. It was a restricted post, which means only Mr Bly's followers could see the post. Mr Bly has approximately 60 followers on his Instagram account. There were 60 views of this post.

[68] The second post was posted at 7.51am on 26 November 2024. The post contains a screenshot of a short series of messages between Mr Jabur and Mr Bly about Mr Jabur offering to shout Mr Bly breakfast, which he declines. It was posted on Mr Bly's Instagram account as a story. It was a restricted post. There were 53 views of this post.

[69] The third post was posted at 8.42am on 26 November 2024. The post contains a picture of Mr Bly's laptop screen. It was posted on Mr Bly's Instagram account as a story. It was a restricted post. The post includes small text in the search function box: "Search Future Co Labs". There is a large text "1stg" with an emoji depicting a lady putting a hand over her face. The post contains a series of messages between Mr Jabur and Mr Bly.

[70] In the series of messages there is a reference to "KFC", a comment that "testers are on standby", and a further comment written by Mr Bly which states "thank you Oz".

[71] There were 32 views of this post.

[72] The fourth post was posted at 9.42am on 26 November 2024. The post is a screenshot of a short series of messages from Mr Bly to Mr McGregor. The post is not restricted. It was posted on Mr Bly's Instagram account as a story. The post does not refer to Mr McGregor. It does not include any messages from Mr McGregor in reply to Mr Bly. The post reads:

> Seriously I am trying to be professional here, but even I have my limits.
> Can you please explain why I just got a call from Luke?
> I will turn my phone off.
> Please reschedule the meeting.
> Seriously unimpressed with your behaviour.
> I shouldn't need to growl you on this you are almost my father's age.

[73] There were 19 views of this post.

[74] The fifth post was made at 9.53am on 26 November 2024. The post is a live video. It was posted on Mr Bly's Instagram account as a story. In the video Mr Bly says he is upset with his boss because he has been working all night. He is referring to Mr Jabur but does not mention his name or the company he works for. Mr Bly swears three times, in reference to his work and his boss.

[75] The post also includes text:

> 3 grandparents funerals since I've been here and bro doesn't even know one died (I was working for at least a bit on ALL OF THEIR FUNERALS)

[76] There were 13 views of this post.

[77] The final post was made at 4.32pm on 26 November 2024. The post was restricted. It was posted on Mr Bly's Instagram account as a story. There were 45 views of this post. The background of the post is a picture of Mr Bly's laptop (in the distance). The text of the post reads:

> OK so final update:
> Boss is being well behaved now and has briefly sopped cracking the whip so it is now NAP TIME (surely he wants to go on another honeymoon).

Disciplinary meeting

[78] The disciplinary meeting was held on 5 December 2024 at midday. Ms Templeton, counsel for FCL, was present at the meeting, along with Mr Jabur, Mr Bly, and Cyrus Chow who attended in the capacity of note-taker.

[79] The meeting concluded at 12.23pm.

[80] Notes taken by Mr Chow at the meeting record Mr Bly's responses to the allegations, which follow:

(a) Dan stated he had no specific rationale for the posts and attributed them to exhaustion.
(b) He acknowledged the posts were inappropriate and admitted they should not have been made.
(c) Dan expressed embarrassed over the incident and assured that such behaviour would not recur.
(d) Dan acknowledged the unprofessional nature of his communication with Luke McGregor and Oz.
(e) He stated that his behaviour was due to a lack of sleep and not reflective of his usual self.
(f) Dan admitted he should have refrained from communicating in that state and apologised for his conduct.
(g) He expressed embarrassment and regret for his actions.

(h) Dan clarified that he did not intend to be threatening or bullying and reiterated that his actions stemmed from exhaustion.
(i) Dan explained that his intent behind the social media posts was to inform team members about the situation, though he admitted it was not the appropriate platform or approach.

[81] The meeting resumed at 12.50pm. Mr Jabur advised Mr Bly that after reviewing Mr Bly's explanation and the circumstances, a decision had been made to terminate his employment effective immediately.

[82] On 5 December 2024 Mr Bly received a letter from Mr Jabur confirming his employment had been terminated by FCL. The reason for termination, was recorded in the letter which follows:

> The decision to terminate employment has been reached following a thorough review and substantiation of the allegations outlined in my letter dated 28 November 2024. This determination includes careful consideration of your responses and explanations provided during our meeting, as these have been integral to the decision-making progress.

[83] Clause 41 of the individual employment agreement sets out a definition of serious misconduct. The relevant sections are set out below:

> Serious misconduct may include but is not limited to: …misuse of internet or email, harassment of a colleague or customer, and actions which seriously damage the Employer's reputation.

Legal principles and application

[84] The legal test for determining whether a dismissal is justified, is whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.[7]

[85] The Authority must have regards to the resources available to the employer when considering the employer's actions in context.[8] There may be a range of responses open to a fair and reasonable employer, the task of the Authority is to objectively examine the employer's decision-making process, and determine whether what the employer did, and how it was done, were steps which were open to a fair and reasonable employer.[9] Overall, it is an objective assessment.[10]

[86] Where an employer is investigating an employee for a failure to adhere to a policy, the employer is required to assess whether the employee's failure to comply was

[7] Employment Relations Act 2000, s 103A(2).
[8] Above n 6 at [49].
[9] *Emmerson v Northland District Health Board* [2019] NZEmpC at [263].
[10] *Cowan v Idea Services Limited* [2020] NZCA 239 at [16].

because of inadvertence, oversight, or negligence, or whether it was done deliberately in the knowledge that it was wrong.[11]

[87] In assessing whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Authority must consider whether a fair and reasonable employer could characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship.[12]

[88] This includes considering the behaviour of the employee alongside the employer's classification of certain behaviours, as misconduct or serious misconduct, in a code of conduct or disciplinary policy.

[89] My Bly was unjustifiably dismissed by FCL. My reasons for this conclusion follow:

(a) The evidence before the Authority does not support the conclusion that Mr Bly had engaged in behaviour that could amount to serious misconduct as defined in clause 41 of the individual employment agreement.

a. The first allegation relates to Slack messages between Mr Bly and Mr McGregor. At the most, Mr Bly's correspondence with Mr McGregor was unprofessional in nature. It did not amount to behaviour that could be described as bullying and/or harassment.[13]

b. The second allegation relates to Mr Bly's posts. FCL did not provide information to Mr Bly in support of the allegation that its business interests and/or reputation had been damaged by Mr Bly's posts. On the whole, Mr Bly's posts do not refer to where he works, the name of his employer, or the director of FCL.

c. I understand Mr Jabur would have felt very upset when he viewed the posts. FCL is a small business. Mr Jabur formed the view that the comments about the "boss" damaged his reputation and therefore FCL's reputation was also tarnished by the posts.

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[11] *Minhinnick v New Zealand Steel Limited* [2010] NZEmpC 30 at [26].
[12] *Emmanuel v Waikato District Health Board* [2019] NZEmpC 81 at [58].
[13] *FGH v RST* [2018] NZEmpC 145 at [210].

d. The key issue is, a fair and reasonable employer could not have concluded that Mr Bly's posts brought, or risked bringing, FCL into disrepute.[14]

e. The focus of FCL's inquiry was the social media clause in Mr Bly's individual employment agreement. Most of the posts were restricted, they were on Mr Bly's story for less than 24 hours and had limited views.

f. Mr Jabur did not receive any complaints from customers or clients about the posts. Mr Jabur was not aware of the posts until Mr Bly called him on 26 November 2024 at 10.07am to explain the posts.

g. The live video post is the only post which is disparaging towards Mr Jabur.[15] However, Mr Bly does not mention FCL or Mr Jabur. The other posts are not disparaging towards FCL or Mr Jabur. Mr Bly accepted at the disciplinary meeting the tone of some of his posts were unprofessional in nature. I agree.

h. In context, the posts are similar to a vlog, as described by Mr Bly. My Bly was working during the evening, and early hours of the morning. He was feeling exhausted and upset due to long hours at work, and while working he posted on Instagram that he was upset about these issues. This is unprofessional behaviour on the part of Mr Bly. However, Mr Bly's posts did not bring the company into disrepute or damage the reputation of the business.

(b) FCL did not sufficiently investigate the allegations because in the termination letter it did not explain, based on any findings, on what basis serious misconduct had been established. Mr Bly was informed by FCL that the allegations had been "substantiated". There was no reference in the termination letter as to why the employer has concluded that bullying and/or harassment has been established, why FCL had concluded that the posts were disparaging in nature, why FCL had concluded that it had been brought

[14] *Wikaira v The Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [158].
[15] *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [80].

into disrepute, or whether it had reached a conclusion that its business interests had been damaged by the posts.

(c) FCL did not genuinely consider Mr Bly's response. There is no reference in the termination letter to Mr Bly's response to the allegations or FCL's consideration of the same. Mr Bly was genuinely remorseful. Prior to the commencement of a disciplinary process, Mr Bly went out of his way to alert Mr Jabur to the existence of the posts and provided an explanation for them.

(d) FCL did not consider alternatives to dismissal. There is no reference in the termination letter to FCL's consideration of alternatives to dismissal.

Did FCL breach s 4 of the Act and, if so, should a penalty be issued?

[90] There is no legal or factual basis for making a finding that FCL breached the duty of good faith set out in s 4 of the Act, or that issuing a penalty would be justified.

Does FCL owe Mr Bly unpaid annual leave?

[91] Based on the information before the Authority, FCL did not correctly pay Mr Bly his outstanding annual leave balance upon termination of employment. Mr Bly is entitled to be paid outstanding annual holiday pay.

[92] Within 28 days of the date of this determination, I order FCL to pay Mr Bly the sum equivalent to 16 hours annual holiday pay.

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[93] The remedy of compensation is for the emotional harm suffered by the employee as a result of the personal grievance and not intended as a punitive action to signal disapproval of the employee's conduct.[16]

[94] In considering an award of compensation, the assessment required is the nature and extent of harm caused to the employee by the employer's breach.[17]

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[16] *Paykel Ltd v Ahlfield* [1993] 1 ERNZ 344 at [342].
[17] *Pyne v Invacare New Zealand Limited* [2023] NZEmpC 179 at [41].

Unjustified disadvantage – excessive hours of work – 5 September to 25 November 2024

[95] Mr Bly was unjustifiably disadvantaged by FCL requiring him to excessive hours which were over and above the ordinary hours of work stipulated in his employment agreement, between 5 September 2024 and 25 November 2024.

[96] It was clear from the evidence before the Authority, the hours Mr Bly was required to work in order to complete project were significant and negatively impacted his emotional and mental health.

[97] Mr Bly was sleep deprived due to long hours of work. Mr Bly was committed to completing the project, but the timeframes for project completion were tight. The workload had a detrimental impact on Mr Bly's mental health. During a call which involved a discussion about the long hours he had recently worked, Mr Bly explained to Mr Jabur that he had recently been unwell and would probably need to take the following day off as sick leave. I have also considered awards of compensation in similar cases.[18]

[98] Taking all of these factors into account, I consider an award of $3,000 as compensation under s 123(1)(c)(i) of the Act to be appropriate in this case.

[99] Within 28 days of the date of this determination, I order FCL to pay Mr Bly the sum of $3,000 pursuant to s 123(1)(c)(i) of the Act.

Unjustified dismissal – compensation – s 123(1)(c)(i) of the Act

[100] At the investigation meeting I listened carefully to Mr Bly explain the impact the dismissal had on him. Mr Bly experienced embarrassment, loss of professional standing and reduced confidence as a result of the manner in which his employment ended.

[101] Mr Bly says the dismissal interrupted his career progression and materially affected his professional confidence. Mr Bly re-entered the workforce as an intermediate full stack developer, representing a reduction in seniority and

[18] *Simpson v Tasman Glass Limited* [2009] CA 207/09; *John Gilbert & Company Limited v Peter Chiu* [2005] AA 117/06.

responsibility compared to the lead development role he had been promoted to in April 2024 by FCL.

[102] Mr Bly was forced to move out of the flat he was living in and stay with a friend because he did not have any income following the dismissal. He did not secure new accommodation until March 2025.

[103] Taking all of these factors into account, I consider an award of $12,000 as compensation under s 123(1)(c)(i) of the Act to be appropriate in this case.

[104] Within 28 days of the date of this determination, I order FCL to pay Mr Bly the sum of $12,000 pursuant to s 123(1)(c)(i) of the Act.

Reimbursement of lost wages

[105] The Authority must order the employer to pay the lesser of a sum equal to remuneration lost or to three months' ordinary time remuneration, subject to contribution and the discretionary power in s 128(3) to order an employer to pay a greater sum.

[106] Mr Bly was dismissed on 5 December 2024. He did not obtain new employment until 16 June 2025. Mr Bly provided the Authority with evidence demonstrating his attempts to secure new employment.

[107] The steps Mr Bly took in the three-month period following his dismissal, taking into account the Christmas period, were reasonable, and therefore he is entitled to recover his losses for that period.[19]

[108] Between 5 December 2024 and 16 June 2025, Mr Bly received Jobseeker Support payments totalling $10,178.90. Any question of reimbursement of such payments is between the Ministry of Social Development and Mr Bly; this sum is not taken into account when considering lost remuneration pursuant to s 128(2) of the Act.[20]

[109] This is a case where it is appropriate for the Authority to exercise its discretion and order FCL to pay Mr Bly a sum greater than 3 months' ordinary time remuneration.

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[19] *Maddigan v Director-General of Conversation* [2019] NZEmpC 190 at [164].
[20] *Judea Tavern Ltd v Jesson* [2017] NZEmpC 82 at [40].

The assessment of the compensation must be individualised to the circumstances of the case.[21]

[110] I make the following observations. There was no evidential basis to conclude that Mr Bly had engaged in serious misconduct. Mr Bly apologised and accepted the posts were unprofessional. Mr Bly alerted FCL to the existence of the posts. If Bly had not told his employer about the posts, it is more likely than not that FCL would have not become aware of the posts. This is because the posts were made on Mr Bly's story, therefore the posts would have automatically disappeared after 24 hours.

[111] Mr Bly was honest with his employer. He accepted his mistakes.

[112] FCL did not consider Mr Bly's response. When considering the terms of employment and its own policies, FCL did not turn its mind to whether Mr Bly had engaged in behaviour that could be described as serious misconduct.

[113] FCL's termination letter did not explain to Mr Bly why his behaviour amounted to serious misconduct. Following his dismissal, Mr Bly wrote to FCL because he was not clear as to why he had been dismissed or on what basis FCL had concluded his behaviour amounted to serious misconduct.

[114] Mr Bly was forced to live with a friend because of the impact of his dismissal and financial situation that followed. He then had to move out of his friend's house and lived in his car for a period of time. Mr Bly's search for new work was extensive. He persisted with his job search over a number of months until he secured new employment in June 2025.

[115] Mr Bly enjoyed his job. He was the only full-time software developer and took the lead in working on key client projects. There is no evidential basis to conclude that Mr Bly's employment would have concluded before June 2025.

[116] Taking all of these factors into account, the sum equivalent to 6 months' salary as lost remuneration awarded under s 128(2) of the Act is appropriate in the circumstances.

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[21] *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA at [26].

[117] Within 28 days of the date of this determination, subject to contribution, I order FCL to pay Mr Bly the sum equivalent to 6 months' salary pursuant to s 128(2) of the Act.

Contribution

[118] The Authority must consider whether there ought to be a reduction in the remedies that would otherwise have been awarded to the employee.[22]

[119] The approach to contribution requires the Authority to consider whether the employee's conduct contributed to the situation giving rise to the dismissal and, if so, whether the conduct was culpable and/or blameworthy.[23]

[120] Mr Bly accepted the posts on his Instagram account, and his correspondence with Mr McGregor, were unprofessional in nature.

[121] Mr Bly's behaviour contributed to the situation which gave rise to the personal grievance. Mr Bly's behaviour was also blameworthy.

[122] I have undertaken a proportional assessment in determining the level of contribution that should be taken into account. I've considered other cases as part of this assessment and conclude the sum of remuneration ordered at paragraph [117] of this determination be reduced by 50 percent.[24]

[123] There is an important principle of accountability underpinning the contribution finding. Although the decision to terminate the employment agreement was unjustified, this does not mean Mr Bly's behaviour should be excused. His behaviour was unacceptable and unprofessional. To Mr Bly's credit, he agrees. Mr Jabur was justifiably upset because of Mr Bly's posts.

Summary and orders

[124] Within 28 days of the date of this determination FCL is ordered:

(a) to pay Mr Bly the sum equivalent to 16 hours annual holiday pay; and

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[22] Employment Relations Act 2000, s 124.
[23] *Yang v Te Whatu Ora – Health New Zealand* [2025] NZEmpC at [63].
[24] *Xtreme Dining Limited v Dewar* [2016] NZEmpC 136 at [220].

(b) to pay Mr Bly the sum of $3,000 pursuant to s 123(1)(c)(i) of the Act; and

(c) to pay Mr Bly the sum of $12,000 pursuant to s123(1)(c)(i) of the Act; and

(d) to pay Mr Bly the sum equivalent to 6 months salary, less a 50% reduction to this sum for contribution pursuant to s 124 of the Act.

Costs

[125] Mr Bly was not legally represented. Costs will lie where they fall.

Simon Greening
Member of the Employment Relations Authority