IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 278
EMPC 314/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LEI YANG Plaintiff
AND	TE WHATU ORA – HEALTH NEW ZEALAND, TE TAI TOKERAU (NORTHLAND) Defendant

Hearing:	14–17 October 2025 (Heard at Whangārei)
Appearances:	L Yang, plaintiff in person D Grindle and G Blockley, counsel for defendant
Judgment:	19 December 2025

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] On 15 November 2006 Ms Yang was employed as a scientist in the laboratory at Whāngarei Hospital. Her employment came to an end on 14 March 2023. Prior to her dismissal she had been placed on what was described as a supported training plan. The plan lasted for six months, and involved supervision, feedback and training. At the end of that time Health NZ wrote to Ms Yang advising that the concerns that had led to placement on the plan had not been addressed and that it was considering dismissal for serious misconduct. Dismissal was later confirmed.

[2] Ms Yang filed a personal grievance for unjustifiable disadvantage and dismissal. She also sought interim reinstatement. The Employment Relations Authority found that while she had an arguable case, she should not be reinstated pending determination of her grievances.[1] The Authority subsequently investigated the grievances and found that Ms Yang had been unjustifiably dismissed and unjustifiably disadvantaged.

[3] The Authority ordered remedies against Health NZ. It awarded a global figure of $25,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (to address the humiliation, loss of dignity and injury to feelings she had suffered as a result of Health NZ's breaches), reducing that amount by 20 per cent to reflect contributory conduct. The Authority also awarded two months' lost wages, declining to order more because Ms Yang had failed to adequately mitigate her losses. The Authority declined to order reinstatement, finding that it was neither practicable nor reasonable. Finally, while the Authority found that Health NZ had breached its obligations of good faith to Ms Yang, it declined to order a penalty in respect of the established breach.

[4] Ms Yang challenges the Authority's determination on limited grounds, contending that the Authority made a number of errors of law and/or fact. Ms Yang's primary concern relates to reinstatement, which she firmly seeks. She also seeks an increase in the compensatory and lost wages awards, disputes the finding that she contributed to the circumstances giving rise to her grievance and says that the Authority erred in declining to impose a penalty for breach of good faith.

[5] One final preliminary comment might be made. Because of the nature of the challenge, alleging errors of fact and/or law, the Court must be focused on the Authority's findings and what they were based on. That raises particularly difficult issues in light of the fact that there is no recording of proceedings in the Authority and uncertainty as to what evidence was given in that forum. Nevertheless, the Court is directed to make its own decision on a challenge.[2] Thus, while the focus is on the

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1 *Yang v Te Whatu Ora – Health New Zealand, Te Tai Tokerau (Northland)* [2024] NZERA 445.
2 Employment Relations Act 2000, s 183.

decisions that the Authority made, the Court is not limited in its consideration of the plaintiff's case to only the evidence that was available to the Authority.[3] In the present case both parties called evidence directed at the matters at issue on the challenge.

The facts

[6] Before turning to consider each of the challenge grounds it is necessary to set out further detail as to what led to the events that are complained about.

[7] Whangārei Hospital operates a large laboratory. The laboratory is accredited. Maintenance of accreditation depends on compliance with Standard Operating Procedures set by the Medical Sciences Council New Zealand.

[8] Significant concerns arose in 2020 that the laboratory might lose its accreditation. This led to a restructuring. Existing employees, including Ms Yang, were offered the opportunity to move into specific roles within different parts of the laboratory. Ms Yang opted to move into the area of Microbiology. Microbiology operates on a roster system, 24 hours per day, seven days per week.

[9] The restructure brought with it new management. Shortly after Ms Yang's move to Microbiology, concerns were identified in respect of technical aspects of her work, and a refresher training course was arranged. It was common ground that no performance (or other) issues had previously been raised with Ms Yang.

[10] Towards the end of 2021 consideration was given to extra training, and Ms Yang met with her manager to discuss matters. Ms Yang initially declined to participate in additional training. The day after the meeting Ms Yang emailed her manager's manager complaining that she was being bullied. A training plan was subsequently agreed, and it commenced on 16 June 2022. Witnesses for Health NZ gave evidence that it was the most comprehensive training plan that had ever been offered within the laboratory.

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[3] *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 33, [2023] ERNZ 98. See also *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC), at [7]-[8].

[11] Initially the training plan went well, as reflected in the contemporaneous documentation. However, in October and November 2022, concerns began to be noted in the laboratory's data recording system (referred to as Datix), in respect of Ms Yang's work. By early December 2022 issues were also being raised about her interpersonal relationships with colleagues. By the time the training plan had come to an end, Ms Yang was assessed as only being competent to perform unsupervised on two of the seven benches within Microbiology. Ms Yang was advised that she had failed to satisfactorily complete her training plan, that she would not be able to return to shift work and that she could only work under supervision.

[12] At this point Health NZ pivoted to a disciplinary process, advising Ms Yang on 21 December 2022 that she was to attend an investigation meeting on 18 January 2023 to discuss a range of issues, including her competency levels. The letter advised Ms Yang that disciplinary action was a possible outcome, including dismissal.

[13] The meeting proceeded as scheduled; Ms Yang was represented by a Union delegate. At the meeting, it was agreed that a review would be undertaken of the training plan and that it would be conducted by the Clinical Director of Pathology Services. Ms Yang was placed on paid special leave during the review period. The reviewer concluded that it was both concerning and puzzling that, despite the comprehensive training that had taken place, Ms Yang had not achieved competency to work as an independent scientist in Microbiology.

[14] On 2 February 2023 Health NZ wrote to Ms Yang advising her that a preliminary decision had been reached to terminate her employment for serious misconduct, setting out 13 separate matters. A meeting was held on 7 March 2023, during which the decision-maker heard from Ms Yang. At the meeting Ms Yang's representative raised a concern that the training plan had been intended to be supportive rather than punitive and could not form an appropriate basis for dismissal. Also raised was a concern that many of the complaints about Ms Yang's communications with colleagues lacked specificity.

[15] The decision to dismiss was confirmed by way of letter dated 14 March 2023. The grounds for dismissal focused on the failure to satisfactorily complete the training plan and inappropriate communications and interactions with colleagues.

Authority determination

[16] I have already touched on the Authority's findings of breach by Health NZ. The factual basis for those findings is relevant to the matters that need to be decided on the challenge.

[17] The Authority found that Health NZ took into account allegations about poor behaviour, and concerns about Ms Yang's interrelationships with colleagues, without first properly investigating them. The Authority also noted that Ms Yang's manager had essentially proactively sought complaints against her.

[18] In relation to the training plan, the Authority found that there was a significant amount of consultation with Ms Yang, including in relation to its content, and that she had agreed to undertake it. However, the Authority found that Ms Yang was unaware that if she failed to satisfactorily complete the training plan her employment was at risk. That was problematic because the outcome of the training plan was a key basis for the decision to dismiss. The decision to dismiss was found to be unjustifiable. Related to this finding was the Authority's conclusion that Health NZ's disciplinary investigation was "defective in several significant respects" and that this resulted in Ms Yang being unjustifiably disadvantaged.

[19] I pause to note that Mr Grindle, counsel for Health NZ, submitted that the Authority's findings were limited to procedural irregularity and that it was apparent that the Authority had concluded that the decision to dismiss was substantively justifiable. I do not read the Authority's determination in this way. The relevant extracts from the determination are as follows:[4]

> [74] The onus is on Te Whatu Ora to justify its actions and justification requires the consideration of both substantive and procedural fairness.

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4 Emphasis added.

> [75] Te Whatu Ora has submitted the potential risk to patients by Ms Yang's technical breaches such as failure to follow SOPs, mislabelling samples etc. are in themselves serious misconduct and potential grounds for justified dismissal.
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> [76] Although these alleged breaches may have occurred, they should have been addressed during the training plan. These incidents raise issues regarding Ms Yang's future performance, but *in themselves do not give rise for grounds to dismiss.*
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> [77] To the extent Te Whatu Ora could claim there was a valid substantive reason for dismissing Ms Yang, I find this was undermined by the employment investigation it conducted. In my view, Te Whatu Ora's investigation was defective in several significant respects which resulted a high level of unfairness to Ms Yang, such as to make her dismissal unjustified.

[20] When viewed in context, it appears that the Authority concluded that the decision to dismiss was both substantively and procedurally unjustifiable.

[21] I now turn to deal with each of the grounds for challenge, starting with the breach of good faith.

Penalty for breach of good faith

[22] A party who fails to comply with the duty of good faith in s 4(1A) of the Employment Relations Act 2000 is liable to a penalty if the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship.

[23] The Authority found that Health NZ had breached its duty of good faith. That finding was squarely focused on the failure to advise Ms Yang that it had moved from a supported training process to a disciplinary process. The Authority turned its mind to whether the breaches were broader, and found they were not.

[24] As I understand it, underlying Ms Yang's claim for a penalty is a concern that Health NZ embarked on the training plan because it wanted to secure her departure from the laboratory. She says that this is reflected in the way in which her manager engaged with her and others, requesting feedback on her and encouraging them to fill in reports about her work.

[25] Ms Yang feels strongly that she was singled out and that unjustified faults were found with her work; she also says that she was under a considerable amount of pressure during the six-month period the training plan was in place and that this contributed to difficulties she had completing tasks.

[26] If I was satisfied that Ms Yang's manager and others had conspired to secure termination of her employment via the training plan, that would almost certainly warrant the imposition of a penalty for breach of good faith, and a significant one at that. However, such a finding would require me to make a number of inferences which I am not in a position to make based on the material and evidence before the Court. Statements I was taken to in numerous emails are reasonably capable of a benign interpretation, particularly when seen within the wider context, including feedback that Ms Yang was given.

[27] I have not overlooked the Authority's factual findings that Ms Yang's manager sought complaints against her and that there was a failure to properly investigate allegations and concerns before taking them into account in reaching adverse conclusions against Ms Yang. Those factual findings might, when taken in isolation, support the sort of inference Ms Yang invites me to make. However, they sit within a broader factual context, including findings that on occasion Health NZ went above and beyond its obligations to Ms Yang, and positive feedback that she had received when her training had gone well. This evidence, as Mr Grindle pointed out, was not reflective of an employer determined to get rid of an employee on manufactured grounds.

[28] Also relevant is the evidence that was given, and which I accept, about the difficulties confronting Ms Yang's manager in seeking to navigate a particularly challenging situation with an overlay of professional standards in a high risk workplace, in terms of patient health and safety. The evidence did not support the existence of a plan to get rid of Ms Yang; it did reflect significant concerns about her ability to competently carry out her role, which her manager was seeking to work through.

[29] To the extent that the Authority limited its finding of breach of good faith to the failure to advise Ms Yang that her employment was under threat, I do not consider that to be in error. That conclusion was open to the Authority on the facts. Nor do I consider that the Authority erred in declining to order a penalty in respect of the established breach. The Authority found that the breach was not sustained or repeated and that, when viewed in light of the good faith steps Health NZ did take, a penalty was not warranted. That finding was open to it.

[30] I note for completeness that the Authority referred to compensation under s 123(1)(c)(i) as also being relevant to whether or not a penalty should be imposed.[5] Penalties serve a very different purpose from compensation and should not be conflated.[6] Having said that, the Authority's observation appears to have been made in passing, was not integral to its analysis and does not amount to a material error of law in the circumstances.

Were any wages lost as a result of the defendant's breach or was there a failure to mitigate?

[31] I next turn to the Authority's findings in relation to lost wages. Ms Yang sought reimbursement of lost earnings from the period of the date of her dismissal (14 March 2023) until she commenced employment at a different laboratory on 11 December 2023. The Authority ordered two months' lost wages in Ms Yang's favour, finding that she had failed to mitigate her losses and so there was no basis for granting her anything in addition. Ms Yang says that the Authority erred on this point.

[32] The Authority summarised the approach to lost wages as follows:

> [97] Where the Authority finds that an employee has a personal grievance, and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
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5 At [115].
6 *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514, at [51].

> [100] Ms Yang was dismissed on a months' paid notice. I agree she has failed to adequately mitigate her lost wages or provide evidence supporting a basis for as to why, however in the circumstances I am persuaded to grant Ms Yang reimbursement of 2 months' salary.

[33] As was observed in *Maddigan v Director-General of Conservation*:[7]

> [62] …The asserted duty on employees to mitigate their losses, which has become a well-engrained mantra in this jurisdiction, tends to be used as an unhelpful shorthand which focusses the inquiry on steps taken, or not taken, by an employee rather than what – if anything – might reasonably have been expected in the particular circumstances. To the extent that Gorrie can be interpreted as expressing a blanket rule that a failure to take any steps to find alternative work means that an employee has lost no wages as a result of the grievance, and accordingly is entitled to no reimbursement, I respectfully disagree with it.
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> [63] As the ordinary law makes clear, a plaintiff may only recover the losses s/he would have suffered had s/he taken reasonable steps to mitigate the damage. That seems to me to be the key point in the Hamer analysis, and it is one which (in my view) logically applies to determining remedies for lost wages in personal grievance claims (the defendant did not seek to argue that any award of compensation for non-pecuniary loss should be reduced).
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> [64] I approach the issue of mitigation in this case in the following way. Mr Maddigan suffered at least 13 weeks' lost wages as a result of the defendant's breaches. He did not take steps to find alternative work in that period. Was that reasonable in all of the circumstances? If it was reasonable, he is entitled to recover his losses for that period.

[34] In other words, the focus should be on an assessment of what could reasonably be expected by way of steps to mitigate loss in the particular circumstances. The point was made by the Court of Appeal in *Carter Holt Harvey Ltd v Yukich*, emphasising that the extent of efforts made by an employee to find alternative work must be viewed in context.[8]

[35] Ms Yang was found not to have mitigated her losses, the Authority noting that there was no evidence as to why she had failed to do so.[9] Reference is however made to Ms Yang's assertion that she had to refrain from working due to her lodging an application for interim reinstatement.[10]

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7 *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550 (footnotes omitted).
8 *Carter Holt Harvey v Yukich* [2005] ERNZ 300 (CA), at [38].
9 At [100].
10 At [98].

[36] While an application for reinstatement does not act as a freeze on the duty to mitigate,[11] there is a need to be realistic about the extent to which employees are able to commit to a prospective new employer while, at the same time, seriously progressing a claim for reinstatement.

[37] It is also necessary to be realistic about the likely impact on an employee of an unjustifiable dismissal. In *Maddigan* it was relevant to the analysis (of what was reasonable in the circumstances) that Mr Maddigan had been summarily dismissed after a 20-year career with the defendant, in circumstances he struggled to understand and following a process which was flawed.[12] He was negatively impacted by the dismissal, and it would have taken him time to find his feet. While Mr Maddigan was inactive on the job-seeking front in the period following dismissal, this was held to be reasonable in the particular circumstances.

[38] There are some similarities with the present case: Ms Yang had been employed with the defendant for 16 years; on Health NZ's evidence performance issues within the team had not historically been managed. While the Authority found that Ms Yang was effectively blind-sided by the defendant's concerns, how they were dealt with and what they ultimately led to, and found that Health NZ's breaches had had a "profound" impact on Ms Yang, it does not appear to have had regard to such factors when considering what could reasonably be expected in terms of mitigation. I conclude that the finding that Ms Yang was only entitled to two months' lost wages because of a failure to mitigate her losses was in error.

[39] Having reached that view I must now decide what an appropriate period for lost wages is.

[40] Section 128 (Reimbursement) provides that:

> **128 Reimbursement**
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> (1) This section applies where the Authority or the court determines, in respect of any employee,—
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> (a) that the employee has a personal grievance; and

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11 *Yukich,* above n 8, at [38].
12 *Maddigan*, above n 7, at [66].

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[41] Ms Yang argues that she should be awarded full reimbursement of lost wages, including to reimburse her for the drop in wages she incurred when leaving Health NZ and taking up employment elsewhere.

[42] I am satisfied that three months' ordinary remuneration is appropriate in the particular circumstances. While there is a residual discretion to award more I am not persuaded, on the material before the Court, that an adequate basis has been made out for doing so. In particular, the legitimate performance issues that have been established, on a counterfactual analysis, point away from employment continuing for a significantly longer period.[13] And, as Ms Yang's current manager noted in evidence, there is an endorsement on Ms Yang's practicing certificate, which requires her to work under supervision.

Compensation

[43] Ms Yang says that the Authority should have awarded her significantly more than $25,000 by way of compensation for loss of dignity, injury to feelings and humiliation, having regard to what she describes as disregard for her human rights and the significant breaches committed against her. She seeks separate relief in respect of the established unjustifiable disadvantages and the unjustifiable dismissal.

[44] The Authority member made the following findings in relation to compensation:

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[13] See for comparison *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482, at [39].

> [104] It is accepted the impact of the unjustified dismissal has had a profound and negative impact on Ms Yang. It is appropriate to assess compensation under this head globally. I am satisfied Ms Yang experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Ms Yang is entitled to a global award to compensate the humiliation, loss of dignity and injury to feelings suffered consequent to the established personal grievances of $25,000.

[45] When the extract is read in context, it is apparent that the Authority was taking a global approach to assessing compensation for both the unjustifiable disadvantage and the unjustifiable dismissal. Given the intertwined nature of the established grievances, that is not surprising, is an approach that is not uncommon,[14] and does not give rise to an error of law.

[46] The Authority's approach to quantum is more problematic.

[47] As counsel for Health NZ pointed out, the Court adopts a banding approach to assessing the appropriate quantum of compensation for losses under s 123(1)(c)(i). One of the reasons why the Court adopts a banding approach is to provide a clear framework for analysis.[15] The banding approach provides for the type of loss to be identified, the extent of the loss to be assessed and then an appropriate band to be alighted on. The appropriate band will depend on not only the facts of the particular case but also the facts of the particular case in comparison to other comparable cases.

[48] The banding approach is designed to inject some analytical rigour into the assessment process, and to provide a degree of clarity (including for parties and the Court on any subsequent challenge) as to how a figure has been arrived at. A banding approach is adopted in the Human Rights Review Tribunal,[16] which exercises parallel jurisdiction in respect of discrimination in employment, and is also adopted in the employment jurisdiction in the United Kingdom.[17]

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14 See for example *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179, [2023] ERNZ 710, at [46].

15 See Christina Inglis and Liz Coats "Compensation for Non-Monetary Loss — fickle or flexible" (paper presented to the Employment Law Conference, Auckland, October 2016), at 389-391; *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

16 See *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

17 *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318.

[49] It is possible that the Authority applied the banding approach and arrived at the award of $25,000 having concluded that Ms Yang had suffered mid-range loss.[18] However, the absence of a clear application of the conventional methodology, and the way in which the compensatory sum was arrived at, makes it difficult for the Court on a non de novo challenge to conclude that no error was made.

[50] It might further be noted that while the unjustifiable dismissal was described as having had a "profound" and "negative impact" on Ms Yang, there is no reference to the impact of the unjustifiable disadvantage on her or where, in comparison to other cases, the damage was said to sit.

[51] I cannot be satisfied that the Authority correctly applied the law to the facts in arriving at the quantum it did.

[52] For completeness I note observations in respect of precedent made by Chief Judge Goddard in *New Zealand Public Service Assoc v Electricity Corp of NZ Ltd, Marketing Division*.[19] There he said that:[20]

> In New Zealand there exists … a hierarchical system of Courts. … Just as it is not open to this Court to refuse to follow a judgment of the Court of Appeal on a question of law, so it is not open to a chairperson of a disputes or grievance committee to ignore a decision of this Court on a question of law or other principle, including the construction of the same provision of an award or agreement.
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> …a tribunal may, if it sees fit, establish a jurisprudence based in part upon consistency of decisions made by members of the tribunal. I hope that it will but that is entirely a matter for the tribunal; but *should it feel free not to follow its own decisions, it will not – I venture to suggest – be entitled to exercise the same freedom in relation to relevant judgments of the higher tiers, the Employment Court and the Court of Appeal*.

[53] What is an appropriate compensatory award?

[54] It is clear that Ms Yang suffered humiliation, loss of dignity and injury to feelings. Those losses were causally connected to Health NZ's established breaches.

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[18] It did footnote reference to the *Archibald* case where the banding approach was first articulated, above n 15, at [62].

[19] *New Zealand Public Service Assoc v Electricity Corp of NZ Ltd, Marketing Division* [1991] 2 ERNZ (LC).

[20] At 381 (emphasis added).

I was not drawn to Health NZ's submission that Ms Yang would have seen her dismissal coming and that it could not have been a shock to her. That is not consistent with the Authority's factual finding that Ms Yang was effectively blind-sided by the move from supported training to performance management and dismissal. The contemporaneous documentation relating to a doctor's visit the day after her dismissal reinforces the point. Ms Yang's evidence about why she went to the doctor, and the outcome of that visit, is also relevant to assessing the extent of the loss she sustained as a result of Health NZ's breaches. Having regard to the impact on Ms Yang, and in light of other comparable cases (which I return to below), band 2 is appropriate.

[55] The bands were revised in 2023 to account for inflation.[21] While the revision took place after the events complained of, it is appropriate to apply the bands as they stand now. The change was merely to adjust for inflation, and Ms Yang should be compensated with an award that reflects the value of money today. Older cases must be viewed with that in mind in terms of the comparative exercise.

[56] There are some similarities between the degree of harm suffered in the present case and cases from before the inflation adjustment: *Maddigan* ($18,000 awarded, subject to a reduction for contribution);[22] *Archibald* ($20,000 awarded);[23] *Marx v Southern Cross Campus Board of Trustees* ($25,000 awarded);[24] *Zhang v Telco Asset Management Ltd* ($22,500 awarded).[25] Each of these cases was assessed as sitting in the middle band in terms of loss. Following these cases, the lowest band has increased from $0-$10,000 to $0-$12,000; the middle band increased from $10,000-$40,000 to $12,000-$50,000; and the top band is now $50,000 and higher. Examples of awards since then include *Gumbeze* ($35,000 awarded),[26] and *Carrington Resort Jade LP* ($29,000 awarded).[27]

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21 *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409, at [162].
22 *Maddigan*, above n 7.
23 *Archibald*, above n 15.
24 *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76, (2018) 16 NZELR 24.
25 *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438.
26 *Gumbeze v Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133, [2024] ERNZ 612.
27 *Carrington Resort Jade LP v Grant* [2024] NZEmpC 127, [2024] ERNZ 556.

[57] Counsel for Health NZ referred me to judgments where a figure of $25,000 was said to be "high", and that compensation in excess of this sort of quantum would be "extraordinary". The cases referred to are over 15 years old, and I do not accept that in 2025 an award of $25,000 is appropriately reserved for cases involving extraordinary loss. Such an approach would make the top half of the middle band and the top band largely redundant. What is clear is that each case must be decided based on its own factual matrix, requiring an assessment of its particular circumstances.

[58] It is necessary to return to a central theme of Ms Yang's case, namely that the losses she suffered were substantially increased by the egregious nature of the defendant's breaches. I have already touched on this issue. I accept that Ms Yang genuinely believes that her manager, and various colleagues and others who she interacted with, were complicit in devising a plan to secure her departure from the defendant's employ. The Authority did not accept that this was so.[28] Having considered the evidence I have reached the same conclusion. A further point might also be made. Awards under this head are designed to compensate for humiliation, loss of dignity and injury to feelings caused as a result of an employer's unjustifiable actions; they are not designed to punish or mark out egregious behaviour.

[59] Health NZ does not seek to disturb the award of $25,000 compensation (subject to a reduction for contribution). The quantum awarded by the Authority sits at the middle of the middle band pre-adjustment; at the lower end of the middle band post adjustment. I consider that an award of $25,000 is appropriate in the circumstances. I have reached the same outcome as the Authority, albeit via a somewhat different route.

Contribution

[60] Section 124 of the Act requires the Court, in deciding both the nature and the extent of the remedies to be provided in respect of a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation

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[28] *Yang*, above n 1, at [115].

giving rise to the grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[61] In the present case the Authority reduced remedies by 20 per cent, stating:

> [109] Ms Yang's failure to follow [Standard Operating Procedures] and adopt incorrect procedures is evidence of blameworthy behaviour that contributed to the circumstances resulting in her dismissal. There is a causal link between Ms Yang's actions and the situation that gave rise to the dismissal.

[62] Health NZ says that the Authority's reduction was appropriate and open to it; Ms Yang says that she did not contribute to her losses and no reduction should have been made.

[63] The approach to contribution which emerges from recent judgments of the Court can be summarised as follows:[29]

(a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?

(b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?

(c) Third, what is a fair assessment of the extent of the contribution?

(d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[64] The central issue in respect of contribution is whether the Authority made an error of law in finding that Ms Yang's contributory conduct was culpable and/or blameworthy. Mr Grindle submitted that the Authority did not err – Ms Yang was dismissed for poor performance; her poor performance contributed to her dismissal and so there should be a reduction for contribution.

[65] I see a logical difficulty with the analysis. Taken to its conclusion, an employee who is unable through no fault of their own to reach the standards required of a role

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[29] *Maddigan*, above n 7, at [73].

they have been appointed to would be liable to have any remedies reduced for contribution. I cannot agree that this is the sort of situation that s 124 is designed to address. Nor do I read the full Court's judgment in *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* as supporting the interpretation adopted by the Authority and advanced on behalf of the defendant.[30] In *Xtreme Dining* the Court specifically observed that the question will be whether "the employee acted in a culpable or blameworthy way".

[66] I was referred to the judgment in *Maddigan.* However, the factual basis for the finding of contribution materially differed. In that case the plaintiff's actions were found to be blameworthy, in the sense required by s 124, because he had incurred infringements in a departmental vehicle and then failed to tell the appropriate person about them; he lost his licence and drove while on notice that his licence had been suspended. He did not communicate in a satisfactory manner with his employer and the Court found that there was no doubt that his actions contributed to the situation giving rise to his ultimate dismissal.

[67] Further, while the Court found that Mr Maddigan had engaged in blameworthy conduct that was causally connected to the employer's breaches, a distinction was drawn with deficiencies in the process, which had worked significantly against him and for which he could not be blamed. The same point can be made in the present case. In this regard I do not accept that what was described by the reviewer as the "puzzling" and "inexplicable" difficulties Ms Yang experienced in consistently meeting the applicable standards can be described as "blameworthy" and "culpable", and are not causally connected to the breach in the sense required by s 124. Insofar as the Authority took them into account (as it appears it did) that was in error.

[68] Having reached that conclusion it is necessary to consider whether a reduction for contribution should be made.

[69] In *Xtreme Dining* the Court made it clear that care should be taken before imposing a reduction of 25 per cent, which it described as being of "particular significance."[31] In the event, the full Court applied a 16.67 per cent reduction

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30 *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628.
31 At [218]. See *Paykel Ltd v Morton* [1994] 1 ERNZ 875 (EmpC), at 886.

($12,000 to $10,000) in circumstances where the employee was found to have contributed to an unsatisfactory questioning process leading to an unjustifiable dismissal by giving implausible answers to the employer. In *Maddigan* a 20 per cent reduction was ordered.[32] The same reduction was made in *Appleton v Tasman Cargo Airlines Pty Ltd*.[33] A more modest reduction of five per cent was made in *Cronin-Lampe v The Board of Trustees of Melville High School*.[34]

[70] I have not overlooked concerns about Ms Yang's interactions with co-workers and whether they might be relevant to contribution. A reduction is warranted but not to the extent of 20 per cent; the conduct was less significant than in *Maddigan*. The evidence suggests that the primary reason for dismissal was the technical performance issues rather than interactions with other staff members, so the extent to which these interactions contributed to the dismissal is minimal. Standing back I consider that five per cent is the appropriate reduction in this case.

Reinstatement

[71] Ms Yang is particularly focused on reinstatement as a remedy, which the Authority declined to order. The reasons for the Authority's decision in respect to reinstatement were as follows:

> [93] Although Te Whatu Ora's investigation into Ms Yang was unfair, there were a number of uncontested complaints about her interactions with other members of staff.
>
> [94] This employment relationship problem concerns the ability of Ms Yang to make decisions involving a high level of trust and integrity and professional judgement when carrying out the laboratory work competently. I find Ms Yang has failed to provide that level of trust and confidence.
>
> [95] In the circumstances I find Ms Yang should not be reinstated.

[72] As Ms Yang correctly pointed out in submissions, reinstatement is the primary remedy, reflective of a legislative acknowledgement that employment relationships

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32 *Maddigan*, above n 7, at [76].
33 *Appleton v Tasman Cargo Airlines Pty Ltd* [2023] NZEmpC 191, [2023] ERNZ 781, at [95].
34 *Cronin-Lampe v The Board of Trustees of Melville High School* [2023] NZEmpC 221, [2023] ERNZ 905, at [440].

matter;[35] that saving them is generally better for both workers and employers; and routinely ordering money rather than reinstatement creates perverse incentives. As she also observed, she had worked with Health NZ for 16 years during which time no issues were raised about her performance or her interrelationships with colleagues. She says that this changed when the laboratory was restructured and a new manager was appointed. I have already dealt with the inferences Ms Yang draws from this sequence of events.

[73] Health NZ is strongly opposed to reinstatement. Its objections were primarily focused on a breakdown in the relationship and an inability to trust Ms Yang to work unsupervised. In this regard it was submitted that reinstatement would be neither practicable nor reasonable, and that there was ample evidence to support the Authority's conclusion that reinstatement should not be ordered.

[74] Concerns about Ms Yang's ability to work unsupervised and to undertake the role safely were supported by the evidence of her current manager. She appeared under summons and presented evidence that was materially reflective of technical difficulties that had arisen in Health NZ's employment and which it had sought to address, albeit by problematic means. The witness gave straightforward evidence – which was balanced, and which was not challenged. I accept her evidence. The witness also confirmed that an endorsement remains on Ms Yang's current practicing certificate, which has been in place for some considerable time and which requires her to work under supervision. I accept that this would create significant practical difficulties for Health NZ in terms of reinstatement; it also reinforces genuine competency concerns, which weigh against reinstatement as an appropriate remedy in such a safety sensitive workplace.[36]

[75] I do not consider that the Authority erred in fact and/or law in declining to reinstate Ms Yang to her role. Reinstatement, in the particular circumstances of this case, is neither practicable nor reasonable.

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35 Employment Relations Act 2000, s 125.

36 See *Appleton v Tasman Cargo Airlines Pty Ltd* [2023] NZEmpC 191, [2023] ERNZ 781, at [82]-[90].

Summary

[76] The Authority's determination that Ms Yang be reimbursed two months' lost wages is set aside, as is the Authority's finding that remedies ordered in her favour be reduced by 20 per cent for contribution. Health NZ is ordered to pay Ms Yang reimbursement for lost wages equivalent to three months; the compensation for hurt and humiliation ordered in her favour is to be reduced by five per cent.

Costs

[77] Costs are reserved. I note that the Court's Guideline Scale provides for costs to litigants in person, recognising the financial impact on them of pursuing and defending claims.[37] The Guidelines currently provide for $500 per day by way of costs. Disbursements are also claimable. I do not anticipate any issue of costs to arise but if I am wrong I will receive memoranda, to be filed within 21 days of the date of this judgment by Ms Yang and a further 14 days by the defendant.

Christina Inglis
Chief Judge

Judgment signed at 9.00 am on 19 December 2025

[37] "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 18.