

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 298
3227279

BETWEEN PETER GAARKEUKEN
Applicant

AND ORTHOMED NZ LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Rachel Walsh, counsel for the Applicant
Simon Greening, Erin Drew, counsel for the Respondent

Investigation Meeting: 13 February 2024

Submissions received: 21 February from Respondent

Determination: 21 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Gaarkeuken was employed by the respondent (Orthomed) as a senior level ‘Category Manager’ from early 2022 until March 2023. His role included selling specific categories of surgical medical implants and associated supplies. The role involved ongoing relationship building with medical professionals as users of the products in orthopaedic surgery. Mr Gaarkeuken had worked in this area for some years prior to his employment with Orthomed.

[2] The two directors of Orthomed are Messers Courtney MacKay and Benjamin Diack.

[3] On 13 February 2023 Mr Gaarkeuken went on leave. He communicated through his representative that this was due to workplace stress, later explained as caused by the way Orthomed had initiated a performance improvement process that involved a meeting and a subsequent performance improvement plan (PIP) being sent to him without consultation. Orthomed says the PIP was just a proposal to support Mr Gaarkeuken to improve his performance and in these proceedings adds that its concerns were just in relation to improved sales performance and not the client-based issues it had raised in the meeting and then included in the PIP.

[4] Approximately just under four weeks after going on 'stress leave' Mr Gaarkeuken resigned through his representative and raised grievances for unjustified constructive dismissal and disadvantage as well as claiming a breach of good faith. Claims relating to loss of benefit of a company car and a penalty for non-provision of records were withdrawn.

[5] Mr Gaarkeuken seeks compensation and reimbursement of lost earnings with interest and legal costs. He also says he should have been paid notice (from 3 March 2023) and that Orthomed should not have announced his last day as 3 March to staff because he had not intended to end his employment that day. He raised a second grievance of disadvantage through his representative about this because he says that Orthomed should have clarified what he meant by 'effective immediately' in his resignation.

[6] Orthomed denies the claims.

The Authority's investigation

[7] A one day investigation meeting was held. I heard evidence from Mr Gaarkeuken and his wife in person; from the co-director of Orthomed, Mr Courtney MacKay by AVL and Mr Gaarkeuken's immediate manager, Ms Natasha Cropp in person. Representatives had the opportunity to ask questions of each witness. Written submissions were timetabled to be received just after the meeting. Only the respondent lodged submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues are:

- a. Was Mr Gaarkeuken constructively dismissed amounting to an unjustified dismissal?
- b. Was Mr Gaarkeuken disadvantaged in his employment?
- c. Depending on the above, what if any compensation is awarded under s 123(1)(c)(i) of the Act?
- d. Depending on the above, what if any reimbursement for lost earnings is awarded?
- e. Is interest to be awarded?
- f. Is any remedy to be reduced for employee contribution under s 124 of the Act?
- g. What if any costs are to be awarded?

Background

Invitation to a performance meeting

[10] On 2 February 2023 Mr Gaarkeuken was invited to a meeting with his employer in a letter from Mr MacKay. The invitation was headed 'Invitation to meeting to discuss performance.'

[11] The above referred letter included:

You will be aware that we have recently been discussing your performance with you and some concerns we have. We are now considering a formal performance management process, and we would like to discuss this with you before making any decisions on how to proceed. I am writing to invite you to a meeting to discuss your performance, how we can support you, and potentially putting in place a Performance Improvement Plan (PIP).

[12] The above referred letter continued that after Mr Gaarkeuken's 'performance' was discussed at the meeting he would have 'an opportunity to respond' and then Orthomed would:

... consider next steps. If we decide to implement a PIP we will provide this to you and give you an opportunity to provide feedback before making any decision.

[13] The above referred letter concluded with giving Mr Gaarkeuken the opportunity to bring a support person or legal representative to the meeting and giving a potential date to meet, 7 February 2023.

8 February performance meeting

[14] On 8 February 2023 the above referred meeting was held. It was electronically recorded. That record shows it lasted approximately seven and a half minutes. Mr MacKay and Ms Cropp (Mr Gaarkeuken's direct manager) attended the meeting with Mr Gaarkeuken on his own. The meeting started with preliminaries and then Mr MacKay invited Ms Cropp to explain what can be described as issues relating to performance on the job relating to two separate situations. Ms Cropp described one of these as one that she had already discussed with Mr Gaarkeuken. Evidence shows me this was dealt with sometime previously in about September 2022. Mr Gaarkeuken's evidence is that there were learnings from that situation, and he had apologised. It related to transfer of equipment between hospitals. Ms Cropp's evidence is that this matter had previously been resolved. The other issue Ms Cropp raised had not been put to Mr Gaarkeuken before. It related to a medical professional reportedly being unhappy with the way Mr Gaarkeuken had instructed his staff as reported in a call to Ms Cropp by the client contact. The allegation as Ms Cropp described it was a concern from 'surgeons' about Mr Gaarkeuken's level of knowledge. When Mr Gaarkeuken asked who the medical professional was, Ms Cropp said the person who rang would not say but then Ms Cropp proposed her best guess to Mr Gaarkeuken. All of this took only minutes.

[15] Immediately after the above, Mr MacKay interjected with, 'obviously that's not great for us that they've done that' and then began to refer to sales targets not being met and the

need for Mr Gaarkeuken to provide a plan to address this. Mr Mackay talked for most of the meeting about this with little said by Mr Gaarkeuken except that on three occasions he repeated a request to have matters being raised in the meeting put in writing for him to address. At the end of the meeting Mr Mackay said he wanted a sales plan that day, Mr Gaarkeuken says it would take a few days, Mr MacKay asks what would impede the plan getting done and Mr Gaarkeuken ended up saying 'yep' to getting the sales plan to Mr MacKay on Friday 10 February 2023.

[16] During the meeting Mr MacKay referred once to the need for a performance improvement plan (PIP) interspersed with words about sales improvement and getting leads for sales all in repeated responses back to Mr Gaarkeuken asking for something to be put in writing for him to consider. Nothing can be heard on the record that included discussion about what why the PIP was required or what would be included in a PIP as was indicated in the invitation to the meeting. Mr McKay's oral evidence is that the sales information plan is what the meeting was about. His oral evidence included that he saw the PIP and sales plan as the same thing. His written evidence differs from this. Ms Cropp in her oral evidence says they were not the same thing. Mr MacKay's later actions that I will return to below, indicated through email to Mr Gaarkeuken that they were not the same thing. Mr Gaarkeuken appeared to understand the two documents were different things, but he says he understood that he was still going to get the performance improvement concerns put to him in writing before he would be responding. His oral evidence is that he said 'yep' to completing the sales plan by Friday 10 February because by that time he was in 'full stress mode' at the meeting.

[17] Several things then happened on Friday 10th February 2023. I set these out in time order as they occurred.

Friday 10 February 2023 (3.30pm) meeting between Mr Gaarkeuken and Ms Cropp

[18] At 3.30pm Ms Cropp and Mr Gaarkeuken met in one of their regular 'catch up' one on one meetings. Ms Cropp was Mr Gaarkeuken's immediate manager. The audio record indicates that this was a friendly and positive meeting mostly about the work Mr Gaarkeuken had been doing in the past week. Ms Cropp interjects positively about Mr Gaarkeuken's

progress with leads for product sales using words like ‘wow’ and ‘that’s great news’. The discussion was detailed in relation to technical aspects of orthopaedic surgery procedure and products as it related to strategy for sales. Mr Gaarkeuken referred to a lengthy positive meeting he had that week and how much the medical professional liked a specific product. Again, Ms Cropp is enthusiastic about this. It was not until the last approximately two minutes of the 16-minute meeting that Ms Cropp first raised anything about the performance improvement issues:

[Ms Cropp] Um in terms of a plan – a territory plan - my day has sort of gotten away from me today so I think we can probably go through that in a little bit more detail um early next week that’s when I’m going through the plans with the other guys as well.

[Mr Gaarkeuken] Yep I’m happy to do that because I haven’t done much because I was run around in the last few days.

[Ms Cropp] Yeah yeah

[19] Mr Gaarkeuken then reminds Ms Cropp that he had asked at the 8 February meeting for the issues raised about performance issues to be sent to him in writing, and that this affected his ability to reply. Ms Cropp’s reply was that she was going to follow up on that because:

I know it’s not pleasant having that sitting there on your shoulders so I will follow that up and I don’t think, know whether being Friday afternoon anything will come today. But if it does I’m assuming it will be Monday.

[Mr Gaarkeuken] Yep yep well, I can’t respond until I’ve had that so

[Ms Cropp] Yeah of course. That’s understood.

[20] The 10 February meeting then ended not long before 4.00 pm with friendly close offs including each wishing the other a good weekend.

Friday 10 February 2023 email Ms Cropp to Mr Gaarkeuken

[21] After the above 10 February 2023 meeting the next communication Mr Gaarkeuken received from his employer was through his manager Ms Cropp at 5.04 pm (just over an hour

later). Ms Cropp emailed Mr Gaarkeuken with the following communication which was in contrast to where things has left off in the meeting just over an hour before:

Please find attached a performance improvement plan as discussed on Wednesday morning, aimed at addressing and improving the performance of your territory. If you have any comments or response to the attached document please reply in writing. Also please sign and return the attached document via email.

Friday 10 February 2023, attached PIP

[22] The attached PIP to the above referred email was in table format with columns headed 'Issue', 'Expectation', 'Support in place', 'Measuring progress' and 'Review date.' The four issues stated for each row in the table were as follows:

- Non achievement of sales targets
- Lack of understanding and adherence to procedures and processes related to movement of equipment between hospitals.
- Lack of understanding of surgeon's preferences and how to communicate these clearly when instructing scrub staff in theatre.
- Lack of progress on gaining access to key customers and low levels of sales-related activity with key customers.

[23] The PIP ends with a statement under which Ms Cropp has signed leaving for Mr Gaarkeuken to sign that he agreed to:

I agree to the above objectives and the proposed scheduled/steps in order to meet the objectives. I understand that my performance is not presently at a satisfactory level and that if it does not improve within a reasonable period of time further steps may be taken, including the extension of the PIP process for a further period, or disciplinary steps.

[24] Mr Gaarkeuken did not respond or sign the PIP.

Friday 10 February 2023 at 5.43pm, Ms Cropp texts Mr Gaarkeuken

[25] Ms Cropp texted Mr Gaarkeuken soon after sending him the above email saying that she was not aware that Mr MacKay was wanting the territory sales plan over the weekend to review, 'but if you could send it through at some point this evening please. Apologies, Peter [Mr Gaarkeuken] I really didn't know he was keen to review over the weekend.'

[26] Mr Gaarkeuken did not reply to Ms Cropp. Mr Mackay then sent Mr Gaarkeuken two emails, one later that evening and one the next morning, on Saturday 11 February 2023.

Friday 10 February 2023 email at 7.00pm, Mr MacKay to Mr Gaarkeuken

[27] On 10 February 2023 at 7.00pm Mr MacKay emailed Mr Gaarkeuken with the following:

I am expecting today your plan for your territory so I can review over the weekend as discussed. This was what we talked about in our discussion and you agreed to in the meeting.

You can respond to the PIP on Monday however but I need that plan today.

[28] Mr Gaarkeuken did not reply to this email.

Saturday 11 February 2023 email at 10:55:47 am, Mr MacKay to Mr Gaarkeuken

[29] On 11 February 2023 at just before 11.00 am Mr MacKay emailed Mr Gaarkeuken with the following:

I have noted that you didn't send the plan as agreed on the original meeting on Tuesday. And I have no correspondence from you since the email below¹.

¹ Refers to Mr MacKay's email to Mr Gaarkeuken the evening before at 7.00pm as I set out at [27].

[30] Mr Gaarkeuken did not respond to Mr Mackay or provide the plan as requested.

Monday 13 February 2023, Mr Gaarkeuken goes on leave and instructs representation

[31] Mr Gaarkeuken instructed a representative and on the Monday following the above weekend communications. The representative communicated with Orthomed that Mr Gaarkeuken was taking leave for stress in the workplace and requested his personnel file and records to further obtain instructions. The letter asked for Mr Gaarkeuken's leave situation to be kept confidential. The letter did not set out details of the cause of the workplace stress. A medical certificate stated Mr Gaarkeuken was 'unfit for work' until 27 February 2023 being for two weeks.

Further communications after 13 February 2023

[32] On 15 February 2023 Mr Gaarkeuken's representative communicated how Mr Gaarkeuken saw the process regarding the performance improvement process was unfair to him and received replies² from Orthomed. Orthomed through its representative included that the PIP was a proposal to support Mr Gaarkeuken to improve his work and a discussion had already occurred about this prior to 8 February 2023, and that Orthomed 'has been committed to a fair and reasonable process to support Peter's performance and encourage him to meet the expectations of the business.'

[33] On 22 February 2023 Orthomed through its representative raised an issue about Mr Gaarkeuken allegedly contacting Orthomed clients while on leave, telling them he was on 'stress' leave. Mr Gaarkeuken accepts he did this but that he did not tell clients the reason for the stress leave but communicated so that clients knew of his unavailability. Orthomed further complained that because communications from Mr Gaarkeuken's representative were sent to the company's office by post 'the letter was opened by one of the administration team, and "now word has spread" across the office that Peter is on stress leave.'

² Emails from Erin Drew to Rachel Walsh dated 15 and 20 February 2023, Statement of Problem attachment "M".

Friday 3 March 2023 4.56pm, resignation and raising of personal grievances.

[34] Just before 5.00pm on Friday 3 March 2023 with Mr Gaarkeuken still on leave having extended this with a further medical certificate, Mr Gaarkeuken instructed his representative to raise personal grievances and communicate his resignation using the words, 'effective immediately'.

Monday 6 March 2023 at 5:18:53 pm, Mr MacKay emails staff about the resignation

[35] Mr MacKay emailed staff about Mr Gaarkeuken's resignation after 5.00 pm on the Monday following the resignation saying:

... it had been great having him as part of our team with his wealth of experience and his knowledge in the surgical space. We want to thank him for all his hard work. We wish Peter all the best in the future. Peter's last day was Friday 3rd March.

9 March 2023 further grievance raised

[36] On 9 March 2023, a secondary grievance was raised on Mr Gaarkeuken's behalf on the basis that the email dated 6 March [referred to above] was not one that a reasonable employer would send prior to acknowledging the resignation with the employee, confirming acceptance of the same and consulting about what was to be communicated to staff about the reason for the resignation.

Was Mr Gaarkeuken constructively dismissed amounting to an unjustified dismissal?

[37] A 'constructive dismissal' can be found if an employer's conduct compels an employee to resign in circumstances where although the employee appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal.

- [38] There are three non-exhaustive situations³ where constructive dismissal might occur:
- a. The employee is given a choice of resignation or dismissal.
 - b. The employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign.
 - c. The employer has breached a duty serious enough that the employer ought to have reasonably foreseen that the employee would resign as a result.

[39] Mr Gaarkeuken appears to claim two of the above categories, b and c.

Did Orthomed follow a course of conduct with the deliberate and dominant purpose or coercing Mr Gaarkeuken to resign?

[40] It has been submitted for Orthomed that I have little evidence to support that there was a course of actions by Orthomed that had the intention of getting him to resign. To the extent that Mr Gaarkeuken refers to his feeling that Orthomed wanted to ‘get rid of him’ I have little to support this as something deliberate. Mr Gaarkeuken’s evidence includes what he was unhappy about in his job and focuses on things he describes like equipment unavailability and Orthomed management’s lack of specialist knowledge, both as I take it responding to claims about him not getting leads for sales or getting enough sales. Mr Gaarkeuken’s wife in her oral evidence says her husband told her that he believed Orthomed ‘wanted to get rid of me’ as far back as when he worked in Auckland. This evidence is general and in terms of the high threshold of deliberateness I would have to consider, I am not satisfied it shows me Orthomed through Mr MacKay or Ms Cropp were deliberately trying to get rid of Mr Gaarkeuken. While Orthomed’s process in raising performance issues will be addressed below, it communicated to him, at the very least, an opportunity to put forward a sales territory plan, a forward moving request inconsistent with the deliberate intent I would need to find likely for a deliberate course of actions designed to extract a resignation.

[41] Accordingly, I am not satisfied Mr Gaarkeuken has shown it was likely that Orthomed followed a course of conduct with the deliberate and dominant purpose or coercing

³ Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited (1985)* 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

him to resign. I will therefore now consider the other starting point to consider a constructive dismissal claim⁴: that the employer has breached a duty serious enough that the employer ought to have reasonably foreseen that the employer would resign as a result.⁵

Did Orthomed breach a duty serious enough that it ought to have reasonably foreseen that Mr Gaarkeuken would resign as a result?

[42] The Court of Appeal⁶ has provided guidance for examination of constructive dismissal claims based on employer breach. I summarise the framework I will follow as:

- a. Was there a breach?
- b. If so, ‘was the breach of sufficient seriousness to make it reasonably foreseeable that Mr Gaarkeuken would not be prepared to work under the conditions prevailing’⁷?
- c. If so, was the dismissal justified under the principles of s103A of the Act?

Was there a breach of duty by Orthomed?

[43] Mr Gaarkeuken claims a breach of good faith. It is submitted for Orthomed that there is little to clarify this breach in Mr Gaarkeuken’s claim. I interpret that it relates to section 4A of the Act which includes that the duty of good faith in employment relationships is wider than that of trust and confidence⁸ and requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, and communicative.⁹

[44] As I understand his claim, Mr Gaarkeuken says that the meeting on 8 February

⁴ See above at note 3.

⁵ See above at note 3.

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW Inc* (1994) 2 NZLR 415 (CA) at 419 later endorsed in *Business Distributors Ltd v Patel* (2001) 1 ERNZ 124 (CA). *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

⁷ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

⁸ Employment Relations Act 2000, section 4A(a).

⁹ Employment Relations Act 2000, section 4A(b).

2023 left him extremely stressed. I accept this was likely. As noted above Mr MacKay did most of the talking and confirms in his oral evidence that he ignored Mr Gaarkeuken's repeated requests to have something put in writing for him to respond to. Mr Gaarkeuken had little or no detail to respond to about the need for a PIP which is in effect a disciplinary step. Mr Mackay told me he just considered it was one and the same as the sales plan. This supports a dismissive approach inconsistent with communicating with Mr Gaarkeuken in a way that was constructive and responsive towards maintaining the employment relationship.

[45] While an employee is likely to feel stress from a performance management process even if run well, I accept that Mr Gaarkeuken reacted as could reasonably be expected at the 8 February 2023 meeting to the way in which he was not being communicated with about the actual performance concerns. Mr MacKay has later denied he said he would put something in writing. This is inconsistent with Ms Cropp's apparent understanding. She was at the 8 February 2023 meeting. Her meeting with Mr Gaarkeuken on 10 February 2023 shows she did not question this was what he expected even though her evidence now says it was Mr Gaarkeuken who initiated asking for more time for the sales plan. The manner of communication was further exacerbated when Ms Cropp followed up with Mr MacKay after this 10 February 2023 catch up meeting about getting something in writing to Mr Gaarkeuken and the response was for Mr MacKay to demand the sales plan back that night after the working week had finished, coupled with drafting a PIP never discussed and asking for this to be returned by either return email (Ms Cropp) or on Monday (Mr MacKay's 7.00pm email to Mr Gaarkeuken on 10 February 2023). I find this all compounded the breach of good faith started at the 8 February 2023.

[46] Considering the above, I find that Orthomed breached a duty of good faith to Mr Gaarkeuken to be constructive and responsively communicate with him to maintain the employment relationship.

Was the breach of good faith of sufficient seriousness to make it reasonably foreseeable that Mr Gaarkeuken would not be prepared to continue to work under the conditions he had experienced about the communications regarding improving his performance?

[47] It has been submitted for Orthomed that there is a 'significant break in the chain of causation between' Orthomed's actions and Mr Gaarkeuken's decision to resign. I do not agree. While Orthomed submits it had no contact with Mr Gaarkeuken during the time after he went on stress leave to when he resigned just over three weeks later there were communications between representatives and Orthomed that made it clear that its position was that it had previously discussed the PIP with Mr Gaarkeuken. I find this is not supported by the evidence before me and misses the point entirely about a process of communication that could be regarded as constructive and responsive when an employer wants to raise performance improvement issues and the need to put in place what is effectively a disciplinary step, a PIP. This means no disrespect to representatives. They act on instructions.

[48] I find that Orthomed ought to have foreseen the effect on Mr Gaarkeuken when it effectively doubled down by continuing to say that it was simply trying to support Mr Gaarkeuken having already discussed his performance improvement issues. There are two problems with this. The record of the 8 February 2023 meeting shows that the performance improvement and stated failures in the PIP were not discussed in any detail for Mr Gaarkeuken to respond to. Secondly, Mr MacKay and Ms Cropp communicated to Mr Gaarkeuken in an inconsistent way, a moveable feast of communication. The evidence from Ms MacKay continues this confusion about what the performance issues were with him continuing to insist that the process was simply about sales and not the other issues which were stated in the PIP. What makes this a serious breach of good faith is that Mr Gaarkeuken was understandably shocked by the PIP. Decisions had been made according to the statement in that document that he had failed in four areas of his performance. Even if, as Orthomed now says, it was mistakenly sent as a document to sign rather than an intended proposal, this still misses the point that none of the content had been consulted on as was Orthomed's purpose for the 8 February 2023 meeting invite as set out in its written invitation to that meeting. I find it ought to have been reasonably foreseeable that Mr Gaarkeuken would have lost any faith that the communications would be any different if he remained in his employment given the position that Orthomed continued to take from 13 February 2023 onwards.

[49] Based on the above, I find that Mr Gaarkeuken was constructively dismissed from his employment with Orthomed.

Was the dismissal justified?

[50] For similar reasons to the above I find that Orthomed was not justified to dismiss Mr Gaarkeuken. An analysis of its actions under s 103A of the Act supports that it did not act as a fair and reasonable employer could have done in all the circumstances at the time. The performance concerns were unfairly merged and not explained or in the case of the client complaint, not even verified when put to Mr Gaarkeuken at the 8 February meeting. Mr Gaarkeuken's requests for more information to respond to were deliberately ignored. In terms of meeting sales targets and getting leads, I have nothing to show me any process used by Orthomed that could have justified dismissal for these things. A sit down after dinner at a conference was explained. Mr Gaarkeuken was given a list of leads connected to products. There is nothing else before me where things had escalated to managing performance or communicating what the actual performance issue was beyond outcomes and leads not being achieved.

[51] Orthomed had access to advice. It had the opportunity to consider any advice. It continued to instruct responses that it had supported Mr Gaarkeuken in a performance management process when I find it in reality did not.

[52] I do not find Orthomed justified to dismiss Mr Gaarkeuken.

Was Mr Gaarkeuken disadvantaged in his employment?

[53] Mr Gaarkeuken's claim for disadvantage is based on the procedure used for the PIP, not working in a 'safe' environment and that (the secondary grievance raised) Orthomed did not respond to his resignation fairly in that it announced his resignation to staff without clarifying what he meant by resigning 'effective immediately.'

[54] I have already considered and made findings that encompass the procedure for the PIP under the constructive dismissal. Orthomed submits that the 'safe environment' was not well explained. I find a likelihood it refers to the emotionally safe environment which I find consistent with the same finding above in that Mr Gaarkeuken reached a point he could not trust that the communication would continue to be responsive and constructive. Both of these things can be dealt with under remedies for the constructive dismissal grievance.

[55] I am not satisfied that Mr Gaarkeuken was disadvantaged by the way Orthomed interpreted his 'effective immediately' resignation. The words are plain. Even if I am wrong I find it appropriate to consider remedies under the constructive dismissal grievance. I rely on s 160(3) of the Act.

Depending on the above, what if any compensation is awarded under s 123(1)(c)(i) of the Act?

[56] Mr Gaarkeuken claims \$60,000.00 in compensation.

[57] Mr Gaarkeuken refers to what I interpret as a sense of humiliation at having to resign from his employment. He says he had been successful in his field in New Zealand and South Africa and respected by the medical professionals he dealt with. He has provided positive references. I accept the breach of good faith dented his self-worth after years working in his specialised area and at a time he was moving into the latter part of his working life. He describes sadness at ending his employment and referred to ongoing levels of anxiety. He says he has lost faith in employers generally and lost confidence in himself. Mrs Gaarkeuken's evidence supports this evidence although as noted above, her evidence appears to extend back before the circumstances I have found in relation to the constructive dismissal. She refers to Mr Gaarkeuken becoming stressed about being asked to formulate strategies and get in front of customers and that he was on 'tenterhooks' during his employment. She referred to Mr Gaarkeuken being stressed in the lead up to the performance improvement meeting on 8 February 2023 and that he was worried about his future with Orthomed. She says she had tried to get employment when Mr Gaarkeuken has been unable to get a job. She says she believes he felt he had let her down.

[58] While I accept these descriptions about how Mr Gaarkeuken felt, I am not satisfied that everything Mr Gaarkeuken struggles with was the result of my finding of constructive dismissal. He appears to have been unhappy with his employment prior to the process that has been examined in this determination but like Orthomed has not provided evidence of when and how he may have raised issues before. I have also not been satisfied that Orthomed announcing the end of his employment to staff when he resigned 'effective immediately' is to be taken into account in terms of the effect this had on Mr Gaarkeuken. The message to staff was positive and complimentary. I accept it was not delivered directly to him but Orthomed to some extent could be forgiven because it had been told to exclusively deal with Mr Gaarkeuken's representative.

[59] Mr MacKay's evidence includes that he saw Mr Gaarkeuken wanting to have the performance issues put in writing as him not wanting to engage. I find this consistent with the sense Mr Gaarkeuken describes as being disregarded by his employer, not listened to, not respected. IT ought to have been known to Mr MacKay he had ignored the request to have more information to respond to and yet Orthomed's representative was instructed to say that there had been consultation about the PIP. Further, within this context, Mr MacKay's email on Saturday 11 February 2023 had an aggressive tone consistent with the way Mr Gaarkeuken says he felt he was being treated particularly by Mr MacKay. Compensation is for the human effect on an employee as a result of the grievance. I find there was a serious human effect on Mr Gaarkeuken here although not to the level he has claimed. I find in the circumstances Orthomed should compensate Mr Gaarkeuken \$15,000.00.

Depending on the above what if any reimbursement for lost earnings is awarded?

Is interest to be awarded?

[60] Mr Gaarkeuken was paid a \$170,000.00 gross salary. I accept his evidence that he was unable to get further employment after he left Orthomed. The list of positions he applied for were not in the speciality area he was experienced in. I find it likely that his options were limited in that discreet expert role. Mrs Gaarkeuken gave evidence that she tried to get employment to support them after Mr Gaarkeuken left his employment and was unsuccessful.

I find there was a significant financial loss here because of the grievance and that Orthomed should reimburse this.

[61] In the above circumstances I find that Mr Gaarkeuken should be awarded three months' salary post his employment ending on 3 March 2023, less earnings he confirmed as 44 hours at \$26.00 gross per hour, a total of \$1,144.00 gross.

[62] In summary, a salary of \$170,000.00 gross equates to approximately \$14,166.00 gross per month. Three months lost earnings under s 128 of the Act is \$42,498.00, less \$1,144.00 gross is \$41,354.00 gross.

[63] Orthomed is to pay Mr Gaarkeuken \$41,354.00 gross under s 128 of the Act to reimburse him for lost wages because of the grievance of unjustified constructive dismissal.

Interest

[64] Mr Gaarkeuken claims interest.

[65] I find that Mr Gaarkeuken is entitled to be paid interest on his lost earnings of \$41,354.00 gross. This is to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a term that starts on 3 March 2023 to the date of this determination.

Is any remedy to be reduced for employee contribution under s 124 of the Act?

[66] I do not find evidence to support that Mr Gaarkeuken contributed to the circumstances of the grievance to the extent he should have any remedies reduced under s 124 of the Act.

What if any costs are to be awarded?

[67] Mr Gaarkeuken as the successful party is entitled to a contribution to his legal costs. The Authority considers costs based on a tariff basis.¹⁰ The investigation meeting ended mid-afternoon, but submissions were timetabled beyond this. In these circumstances I consider a full first day tariff of \$4,500.00 should apply. Mr Gaarkeuken is also to be reimbursed the filing fee of \$71.55.

Summary of Orders

[68] Orthomed NZ Limited is to pay the following to Peter Gaarkeuken:

- a. \$15,000.00 in compensation under s123(1)(c)(i) of the Act;
- b. \$41,354.00 gross as reimbursement of wages under s 128 of the Act;
- c. Interest on the above \$41,354.00 gross in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a term that starts on 3 March 2023 to the date of this determination;
- d. \$4,500.00 as a contribution to costs; and
- e. \$71.55 reimbursement of the Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority

¹⁰ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1