

Attention is drawn to an order prohibiting publication of parties' identification details.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHU ROHE**

[2024] NZERA 100
3216980

BETWEEN	HFM Applicant
AND	IMH Respondent

Member of Authority:	David G Beck
Representatives:	Ashleigh Fechney, advocate for the Applicant Robert Thompson, advocate for Respondent
Investigation Meeting:	12 December 2023
Submissions Received:	12 December 2023, additional information 14 December from the Applicant 12 December 2023, additional information 13 December and further submission 21 December 2023 from the Respondent
Date of Determination:	23 February 2024

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Pursuant to a discretion available in s 10 (1) Schedule 2 of the Employment Relations Act 2000 (“the Act”) the Authority on an interim basis, resolved to not publish the parties’

names, location of the employment and certain features of this dispute due to the sensitive nature of the matters in dispute and potential harm to both parties. I balanced this against the contextual issues in this dispute that entail the likelihood of negative and intrusive media scrutiny.

[2] The applicant seeks a permanent non-publication order identifying them and I have considered their further submissions on the issue. The respondent latterly made no opposing submission but had opposed an interim order preventing the applicant being named. However, the respondent did not oppose non-publication of the applicant's health issues.

[3] I consider that the applicant has legitimate concerns that the issues in dispute relate to private health matters that do not warrant any public interest and that identifying the applicant may have an unfair and discriminatory impact upon their future employment prospects. The applicant, however, was willing to identify the nature of their health issue to not deter general awareness of the specific health issue in the community and in an employment context. In the circumstances of the claims, it would be impractical not to refer to health issues and if I named the parties, naming of the respondent may also lead to the identification of the applicant.

[4] I must be satisfied of specific adverse consequences or other compelling reasons to order non-publication - it is a high standard to meet but on balance given the factual circumstances, it has been achieved here where I consider the applicant, if named, to be in a vulnerable situation.¹

[5] In considering all the factors, including the circumstances of the employment relationship ending, I make the non-publication order covering the names of both parties permanent.

¹ See *Erceg v Erceg* [2016] NZSC 135 and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511 and *FVB v XEY* [2020] NZEmpC 182 and *GF v NZ Customs Service* [2021] NZERA 382.

[6] I use the following identifiers for the applicant, the respondent company and company director who gave evidence during the investigation meeting and the director's partner who is an equal shareholder and worked in the business but did not give evidence. I have redacted parts of evidence and only quoted correspondence where specific detail is necessary:

- HFM - the applicant.
- IMH Ltd - is the respondent company.
- The Director – sole company director of IMH Ltd.
- EJS – equal joint shareholder of IMH Ltd and partner of the Director.

The employment relationship problem

[7] HFM was employed by IMH Ltd (IMH) as an apprentice mechanic from 8 November 2021 until they resigned on 11 January 2023 giving two weeks' notice. The position was full time (42.5 hours per week), the subject of an individual employment agreement and HFM was paid \$22 per hour.

[8] HFM claims they were the subject of ongoing, unreasonable treatment by IMH that amounted to discrimination and that IMH breached owed good faith obligations, which led to HFM's resignation, in circumstances that they claim amount to a constructive dismissal. HFM seeks findings of unjustified dismissal and that they were discriminated against in HFM's employment.

[9] In contrast, IMH denies discriminating against HFM and denies breaching good faith obligations. IMH asserts HFM resigned prematurely whilst holidaying overseas. IMH says prior to the communicated resignation, they offered a meeting to discuss: HFM's return to work date after a significant absence following a workplace accident; issues of concern IMH had about previous and future sick leave usage; clarity on the ongoing impact of a disclosed medical issue; and the timing of previously approved annual leave. IMH submitted HFM's

loss of employment was due to their decision to resign instead of HFM engaging with IMH's "investigative" process at an offered meeting.

[10] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[11] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered evidence and submissions received from both parties and refer to them where appropriate and relevant.

[12] HFM and their partner provided written briefs and gave supportive evidence at the investigation meeting. Likewise, for IMH, the Director, provided a written brief and answered questions put at the investigation meeting .

Issues

[13] The issues to be determined are:

- (i) Did IMH engage in any actions that discriminated against HFM in their employment?
- (ii) Did IMH breach terms of employment or duties owed to HFM, if so, was it reasonably foreseeable that they would resign and the ending of the employment relationship be categorised as a constructive dismissal rather than a resignation?
- (iii) If any or all of HFM's claims are established, what remedies should follow?

(iv) If HFM is successful in all or any element of their personal grievance claims should the Authority reduce any remedies granted because of contributory conduct?

(v) How costs are to be dealt with.

What caused the employment relationship problem?

[14] HFM commenced working for IMH in November 2019 as an apprentice mechanic. IMH is a well-established franchise dealership with an attached workshop. The business was operated by the Director (a qualified mechanic) in conjunction with their partner, an equal joint shareholder (EJS), who undertook administration and showroom sales work. HFM alongside another apprentice, undertook customer's mechanical repairs and maintenance work.

[15] HFM described a busy workshop and working environment that was largely amicable between the workshop staff but they described their relationship with the EJS as sometimes problematic. An early issue HFM highlighted was not long after they had successfully completed a three months' probation period, HFM had cause to speak to the Director about the EJS's repeated use of a pejorative racist term and use of bigoted language (noting it was not directed at them but nevertheless, offensive). The Director says they considered the matter to be serious and counselled the EJS to desist from using racist terms. However, HFM while acknowledging the usage of a particular 'n' word ceased, says homophobic and bigoted language persisted but HFM did not follow the matter up further with the Director despite saying he was generally distressed by the terms the EJS used.

[16] HFM says at the time of their appointment they were struggling with some mental health issues and they discussed a recent (September 2021) psychologist's diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD) with the Director during their pre-employment interview in November 2021. Unchallenged evidence, in the form of a clinical

psychologist's letter to the Authority, disclosed HFM's ADHD was of a "moderate severity" and that HFM was engaged in therapy to assist in dealing with the diagnosis.

[17] The Director says they could not specifically recall HFM raising health issues at the time of the informal job interview but did not rule out this possibility. However, the Director indicated it was not uncommon for people he employed in mechanics' roles to have what they described as 'learning difficulties' but says it did not impact the decision to employ HFM as they concentrated on an assessment of HFM's mechanical capabilities.

[18] As the employment progressed through 2022, the Director says there was an emerging concern about HFM taking time off during working hours to seek counselling assistance with their ADHD and the timing of annual leave. From IMH's perspective, it impacted the small team's ability to address customer needs. Tension around HFM's use of sick leave was evidenced in an email exchange between the EJS and IMH's accountant and payroll administrator of 16 September 2022, that asked for a report of sick days taken at that date. The email was also derogatory of HFM's work attitude and claimed they (IMH) had never had a staff member "have so many sick days".

[19] A particular flashpoint was in October 2022, when HFM had a week's annual leave request refused as IMH had difficulty with the timing of such. This led to HFM initially trying to mislead IMH by suggesting a 'ghost' GP appointment on the day they sought time off for their partner's birthday. IMH became aware of the proposed deception when they asked for evidence of the medical appointment and not being able to produce such, HFM withdrew their request for leave. I note however, IMH took no disciplinary action despite that IMH says the trust in the relationship understandably became an issue. When questioned during the investigation, the Director says he just decided to let it go.

[20] In the event, leave was granted for the following week that coincided with leave taken by the Director and EJS. I observe that concerns raised about HFM's absence impacting

on the small team apparently did not prevail in this instance but I accept leave timing issues require mutual agreement and are sometimes imposed (albeit with statutory guidance).²

[21] HFM described a tense relationship with the EJS over a variety of work-related issues that they had cause to speak to the Director about but conceded none led to formal complaints but they suggested a reluctance to trust that the Director would follow up issues with the EJS. Given the latter pairs relationship, this was understandably difficult for the Director.

The accident

[22] Unfortunately, on 3 November 2022, HFM sustained a significant injury to their right hand while unloading a crate at work. HFM contended in unchallenged evidence that at the time of the incident, the EJS administered initial first aid but did not offer to drive them to hospital and they had to phone their partner to come and collect them to take them to hospital. The Director recalled it being a bad laceration with the bone showing but when asked why HFM was not immediately transported to hospital, they responded with “can’t answer that”.

[23] HFM says while waiting for their partner to arrive, the EJS approached them and asked them to sign a statement suggesting IMH was not at fault for the accident as HFM had not been following their crate handling procedure. HFM says they were feeling unwell and signed the document as they did not want an argument. It was difficult to assess the veracity of this allegation as although it was outlined in HFM’s written brief of evidence, EJS did not provide a rebuttal statement or appear at the investigation meeting. During the investigation meeting the Director denied the existence of any signed document. I note HFM did not take the matter up further at the time and did not alert ACC to the issue. In HFM’s subsequent personal grievance letter of 15 February 2023 this allegation was not raised. It was also not alluded to in the 7 March 2023 application to the Authority.

² Section 19 Holidays Act 2000 : When Employee May be Required to Take Annual Holidays.

[24] The nature of HFM's injury (a fracture and partially debrided finger) made a short recovery problematic given the nature of the work required fine hand dexterity and HFM is right-handed. HFM was on ACC leave and supplied regular GP certificates. The disclosed ACC file showed IMH had some difficulty contacting HFM to arrange a proposed meeting to discuss a return to non-mechanical light duties (doing administration work) that by the end of November 2022 fell through with the offer being no longer available.

[25] The ACC file disclosed that the EJS by 29 November 2002 was becoming frustrated HFM was not able to return during a busy work period but acknowledged "it was a very unfortunate accident". ACC advised in these circumstances HFM would remain absent unfit up to 20 December 2022 (supported by a medical certificate provided on 24 November). During the absence there was limited direct contact between HFM and IMH. The Director recalled two phone conversations with HFM and recounted a 21 November call where HFM briefed them on the progress of the injury and an upcoming GP appointment.

Annual leave

[26] IMH had prior to the accident, approved HFM's annual leave to travel to Scotland from 21 December 2022 with a return-to-work date of Monday, 16 January 2023. HFM sought the leave well in advance (May 2022) and it was approved by the Director on 15 August 2022. A compounding factor was the Director had also earlier (on 5 July 2022) approved further leave for HFM to attend a family holiday in Australia between 20 January 2023 and 30 January 2023. Effectively this entailed, though not known at the time the leave was granted, HFM being potentially absent for three months with a combination of sick leave and annual leave, from 3 November 2022 to 30 January 2023.

The letter

[27] Frustrated by the situation IMH say they instructed their advocate to write to HFM setting out various concerns. The purpose, timing, content, and impact of the letter unfortunately became central to the employment relationship problem.

[28] The first issue was the purpose and timing of the letter while HFM was on annual leave overseas. The Director described various concerns that prompted their decision to formalise matters. These included a suggestion they were worried about HFM's health and fitness as they had not had anyone taking sick leave "at that rate before"; a suggestion they needed to conclusively know HFM would be 100% fit to return to work from their hand injury or whether they had to arrange cover; a concern of potential further time off for medical appointments associated with HFM's ADHD (and some clarity around this diagnosis); a concern some sick leave taken may not have been genuine after the attempt by HFM to mislead them when annual leave had been refused and the timing of their Australian trip.

[29] When pressed on the timing of the letter, the Director reiterated they were unsure about a certain return date from the accident induced injury. The Director's statement said they wanted to meet to discuss "all of the options and issues" and an advocate was engaged to handle correspondence and "manage the process" they envisaged to "keep things simple and legally correct". Further the Director indicated:

I wanted to get information about [their] injury and know the status of [their] holiday plans and if [they were] able to take [their] annual leave at another time so that others in the workshop could get a break too. And:

As we had limited information available to us, we also wanted a better understanding of whether [their] hand had fully healed from the injury and whether [they] would be expecting to need any time off to attend further appointments regarding [their] hand or [their] ADHD diagnosis. If this was the case, the business would need to consider its staffing in the workshop to make accommodations.

[30] Despite the above concerns, the Director claimed in evidence upon being made aware of the ADHD diagnosis: "It had no impact on [their] work or how I saw [them]" – "we

continued to treat [them] like any other employee”. The Director also indicated they had no concerns about HFM’s performance of their work role, describing HFM as keen and eager to learn. However, on viewing HFM’s evidence describing the ADHD diagnosis, the Director commented this was the first time they became aware of the full extent of the ADHD diagnosis and that was the type of information they sought and were willing to discuss at the envisaged meeting.

[31] HFM says they received the letter by email of 21 December 2022 (sent 11:08 am NZ time) while in Hong Kong on route to the UK, and recall being confused and upset by its heading “RE: Absenteeism” and the content given they were on approved annual leave.

[32] Setting aside the unfortunate timing of the letter, that the Director says was drafted in consultation with their advocate, I find the tone and content was objectively unreasonable and confronting. It traverses too many issues. I reproduce the 21 December letter in full below except for identifying factors:

RE: Absenteeism

I act for your employer [redacted]. The Company has instructed me to contact you on its behalf regarding your pattern of absences from the workplace.

While the Company sympathises with your medical requirements and the recent injury you have suffered, your absenteeism is impacting the business.

It is important that the Company continues to meet its obligations to its customers. To do this, the workshop must remain adequately staffed. Your absenteeism impacts the Company’s ability to staff the workshop, meet its customer demand, and accommodate the leave of others. This is unacceptable.

The Company recognises that the injury you have suffered needs a period to heal. However, this injury has rendered you unfit for work until after your planned leave at the end of January 2023. Medical information received to date by the Company regarding your injury and prognosis for a return to work has been unclear.

This current medical absence is on top of your entitlements to 10 days’ sick leave, of which you have used all but 0.75 hours. The Company understands that much of this sick leave has been used for doctors’ appointments related to your ADHD diagnosis, however, you have not been forthcoming with information relating to your condition. The Company is concerned that it does not understand the full

extent of how your condition may impact your ability to attend and perform work. It can only make allowances based on the information it has been given.

Your upcoming period of annual leave for 20 January 2023 to 30 January 2023 is above your accrued entitlement for annual leave. This will put your entitlement to paid annual leave in deficit which will impact your entitlement to annual leave for the next year. The Company must also consider the planned leave of other staff for the period December 2022 and February 2023, and that it is a busy time of the year for the business.

As your employer, the Company is trying to balance your entitlement to leave with the needs of the business. Based on the impact that your absenteeism is having on the business, the Company has reached the point where it is assessing whether or not it can accommodate your period of leave between 20 January 2023 30 January 2023.

In January 2023, I will contact you to arrange a time to meet with the Company to discuss your pattern of absences and whether or not the Company can accommodate your planned leave between 20 January 2023 and 30 January 2023.

In the meantime, please provide the Company with further medical information about your current injury and any other medical matters that are likely to impact your ability to perform your role at full capacity. This information must be received by **close of business Friday 13 January 2023**. You do not have to provide any information you are not comfortable with, however, the Company can only make decisions based on the information it receives.

Please direct communications regarding this to the writer. The Company will not permit your unscheduled return to the premises to discuss the contents of this letter.

[33] HFM described being distressed by the content of the above letter saying they focused on a belief it was a formal disciplinary letter preventing them contacting the employer directly; questioning past absenteeism and saw it as a threat to cancel leave for their Australian trip.

[34] HFM responded to the emailed letter by email of 27 December 2022, confirming receipt of such and questioning the appropriateness of the short response time to provide information (being a day before HFM returned to New Zealand – a fact IMH would have been likely aware of). HFM also indicated they needed time to obtain legal advice and:

May I please also ask exactly what documents the Company requires? I have provided them everything they need as far as ACC injury is concerned and they

have spoken to my doctors, as well as ACC, and have a confirmed date to return to work of 16/01/23.

[35] HFM further noted the Director knew of their ADHD diagnosis and they requested their sick leave record and communication from the EJS pertaining to such. In response HFM got an “out of office” message indicating the advocate’s office would be closed until 16 January 2023. The Director says they did not turn their mind when helping the advocate draft the letter, to the fact the advocate was unavailable to respond during the Christmas/New Year break and the Director accepted they could have approached their concerns in a more caring manner.

[36] An email exchange disclosed by IMH’s advocate, showed the email from HFM was not forwarded to IMH’s email address until 16 January 2023, with a message from an advocate in the advocate’s office saying: “We will be looking to follow this up with [HFM]”.

The Resignation

[37] In the interim, HFM had communicated their resignation to IMH by email of 11 January 2023 indicating their last day of work would be 25 January (consistent with a two weeks’ notice period). HFM did not communicate a reason for the resignation that was accepted by email of the same day from the Director with a brief “your resignation is accepted”. The Director says they accessed the emailed resignation when on leave out of town and after speaking to the EJS decided to communicate acceptance of the resignation without seeking legal advice or engaging further with HFM.

[38] The Director says they were unaware of any concerns HFM had and suggested “[they] could have just come to a meeting with us or asked for clarity”. The Director also says it was never their intent to cancel HFM’s planned and pre-approved leave to go to Australia but they were unable to articulate why they had referred to this possibility in the 21 December letter; other than to accept in hindsight, that the suggestion of cancelling the leave was unreasonable while maintaining they only wanted a discussion of possibly moving the leave to another date. I note the 21 December letter did not specify a suggested meeting date.

[39] HFM on returning to New Zealand after resigning, attended work at 8:30 am on 16 January 2023. HFM was approached by the EJS and told that they had meant to email the previous week saying HFM did not have to work out the notice period and had to pack up their tools and go. There was no conversation about HFM's reason for resigning and HFM later discovered the EJS had emailed at 8:30 am on 16 January, stating they were not required to work out the notice period and that their accountant and lawyer would sort out a final pay.

[40] HFM says they resigned while in a stressed and anxious state focusing on what they perceived as the negative content and tone of the 21 December letter, including the difficulty of getting medical information to IMH in the time allotted. IMH's advocate put to HFM that there was nothing in the letter that suggested their job was in jeopardy and HFM responded by acknowledging there was no direct threat but felt they (IMH) did not want them back at work and HFM believed it was a disciplinary letter. IMH's advocate put to HFM that they had made unwarranted assumptions about the 21 December letter. HFM responded they were afraid of what their employer would do and took it that leave would be cancelled rather than just re-assessed and if the required information was not provided by the given deadline, a decision to terminate the employment may have been made.

[41] Objectively viewed, the letter did, after setting the deadline for information provision, indicate IMH "can only make decisions based on the information it receives" and I find this could reasonably be construed to be a potentially negative decision impacting HFM's ongoing employment.

[42] I put to HFM why not wait till they had had a conversation with the Director before resigning? HFM responded they were not sleeping, thinking about the letter's content and dwelling on the worst-case scenario (leave being cancelled or them being dismissed if they insisted on the Australian trip going ahead). HFM says they felt like being accused of using sick leave because of their ADHD. HFM says they thought the employer was trying to get rid of them and the letter was indicative of that.

[43] On why their resignation email was sent on 11 January, HFM says they panicked and that they were continuing to dwell on the matter driven by ADHD related anxiety. HFM says they were angry that the letter effectively prevented them approaching the Director and they had no ability to ask questions which they say exacerbated HFM's anxiety. HFM's partner's unchallenged evidence alluded to travelling with HFM and observing their distressed state at the time the letter was received.

Sick leave record and ACC absence

[44] An analysis of HFM's sick leave usage did not show absenteeism was extraordinary, unexplained, or objectively excessive. The information provided showed that in the letter of 21 December 2022, IMH's advocate cited HFM having .75 hours of remaining sick leave entitlement with the next allocation falling due in May 2023. The letter suggests "much of this sick leave" had been utilised by HFM to attend ADHD related appointments.

[45] In fact, the leave record showed that HFM was absent on sick leave on eight separate occasions from 26 April 2022. Of those occasions, 76.5 hours were related to HFM having to isolate and then testing positive for Covid-19, with HFM being absent for two weeks of work. There was one occasion of 1.5 hours for a doctor's appointment and three separate days where HFM was absent for the whole day. On other occasions, HFM utilised annual leave to attend doctors' appointments.

[46] Given the genuineness of HFM's Covid absence, I struggle to see any reasonable basis for IMH to formally assert utilised sick leave formed a "pattern of absences" warranting the suggestion in the 21 December letter, that the absences were "unacceptable". I find there was no reason to suggest absenteeism for sick leave taken prior to the accident as being specifically unacceptable. Likewise, suggesting a pattern of absence was continuous after the accident ignores the fact sick leave was taken for a genuine and accepted reason.

[47] I accept that a discussion would have been required had HFM not been fit to return to work from their injury when they ended their first pre-approved annual leave on 16 January

2023 (as they were working four days before the next period of leave commenced). However, there was no suggestion that this was the situation facing IMH other than the fact that HFM had not been declared fit by their GP to return to work beyond their last medical certificate that expired on 20 December 2022. Given IMH was on leave overseas, it was reasonable they would attend to this requirement upon returning before recommencing work.

[48] A review of the ACC file notes provided shows on 29 November 2022, ACC knew HFM had been told by the GP that if they were unable to return for work upon returning from annual leave, they were to immediately contact ACC, their GP, and the employer. In addition, the ACC notes show on 30 November ACC emailed IMH's EJS saying they expected HFM to return to full duties on 16 January 2023. It was apparent however that HFM was not communicating with the EJS and providing specific updates on how the injury was responding to treatment beyond GP certificates. Setting this frustration aside for IMH, it was difficult to comprehend why they waited until 21 December to forward a letter to HFM, and why they chose to raise a variety of issues (including the ADHD diagnosis) in such an objectively confrontational manner.

[49] I accept this may have been an emerging situation where an employer-initiated process for medical incapacity could have been at issue after a significant period of absence but this was only a remote possibility at the time, given the nature of the injury and the anticipated return together with the involvement of ACC.

Issue 1: did IMH engage in discriminatory actions?

[50] I was invited by submissions to conclude the discriminatory action taken by IMH was broadly to inquire into and ask for private medical information related to HFM's ADHD diagnosis and that HFM was being singled out due to their disability.³ This may have been evident from the wording of the 21 December letter that went beyond seeking medical information on HFM's hand injury and extended to a request for medical information on "any

³ Section 105 Employment Relations Act 2000 defines prohibited grounds of discrimination to include "disability" at s 105(1)(h).

other medical matters that are likely to impact your ability to perform your role at full capacity”, followed by the directive such information “must be received” by 13 January 2023.

[51] While the letter included a codicil that HFM did not have to provide information they were not “comfortable with”, it was accompanied by an objectively threatening observation that “the Company can only make decisions based on the information it receives”. While such an observation is correct, the context in which the request was being made (linking it to HFM’s absences to attend medical appointments) objectively had no bearing on HFM’s return to work after a work-related injury. HFM says they thought if they failed to provide the information sought about their ADHD it would lead to a negative consequence. In contrast, the Director suggested all IMH wanted was clarity and understanding of HFM’s specific ADHD diagnosis and its future impact on their business, if any.

[52] I find, given that other than the limited time spent on attending medical appointments, the Director had not raised any issues of HFM’s performance as a mechanic, the importance placed on needing to ascertain the ADHD diagnosis is problematic for IMH. I can only conclude the implied purpose of alluding to the ADHD was to place unwarranted pressure on HFM and to make it clear it was becoming a concern for IMH.

[53] Objectively, I find there was no justifiable reason to raise the ADHD as being at issue. I do not however, conclude that this action was an act of conscious discrimination. While being clumsily expressed, I consider IMH was entitled to enquire as to the nature of how HFM’s disclosed diagnosis may impact the business and what if any accommodation was required to deal with any future problems. The Director claimed a very limited awareness of ADHD and the evidence demonstrated this was confined to a perception it was a learning difficulty. The Director says that they took no steps to ascertain generally whether this assumption was valid and they wanted HFM to explain their specific diagnosis to them.

[54] I balance matters against the fact that ADHD is by its nature a spectrum-based diagnosis with a range of symptoms and severity of impact and some more dialogue between IMH and HFM could have been useful for both parties, but intertwining it with HFM’s return

after a physical injury was inappropriate and so was the request or effective demand, for disclosure of private medical information.

[55] Overall, I find that the action of highlighting the ADHD in the 21 December letter was not discrimination but it was not the act of a reasonable employer and IMH could have easily appreciated that this would cause HFM unnecessary anxiety and distress or at the very least ruin their holiday. As such, this was an action that unjustifiably disadvantaged HFM.

[56] As a further factor, HFM's advocate suggested that IMH initiating a formal process around absenteeism/the injury prognosis/the ADHD paired with a threat to withdraw pre-approved leave caused HFM detriment. I concur with this analysis and find that the threat to withdraw HFM's pre-approved leave was a particularly unjustified action and made more callous by the Director's comment made at the Authority investigation meeting, that it had never been their intention to prevent the leave from proceeding. The suggestion by the Director that they only wanted to discuss moving the leave to another date was impractical given the timing involved and knowledge the Director had of the leave's purpose.

[57] Having found HFM was unjustifiably disadvantaged, HFM is entitled to the consideration of remedies. I also find that the act of including reference to HFM's ADHD in the 21 December letter, was not constructive in maintaining the employment relationship and was a breach of a duty of good faith owed to HFM, although no penalty for such breach was claimed.

[58] The question of whether the identified breaches are sufficient to establish that HFM was also constructively dismissed is discussed below.

Issue 2: Was HFM constructively dismissed?

[59] A 'constructive dismissal' can be found if an employer's breach worthy conduct compels a worker to resign in circumstances where although on the surface, the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this premise (as alleged here) is where the resignation is caused by an alleged

breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer.

[60] The Court of Appeal has stated the broad legal approach as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. ⁴

[61] The overarching and well recognised duty that is now statutorily recognised as a component of ‘good faith’, ⁵ is that an employer should not without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. ⁶

Submissions

[62] HFM’s advocate suggested the breach of duty was initially a breach of good faith in that IMH did not maintain an active and constructive approach to the employment relationship. As outlined above, I find a breach has been established.

[63] However, I reject HFM’s advocate’s suggestion that IMH was proposing to punish HFM by withdrawing their leave approval based on HFM’s ADHD related absences. I do not

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

⁵ Section 4 (1A)(a) and s 4(1A)(b).

⁶ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

accept on the facts, that this was so – it is more likely than not, that IMH were wrongly contemplating withdrawing the leave approval because IMH’s overall absence due to the injury, was being extended by the unfortunate timing of HFM’s two periods of annual leave.

[64] It was then submitted that IMH breached a duty to act as a fair and reasonable employer by:

- (a) Commencing a formal process to address the length of absence when HFM had been cleared to return to work. I do not find this to be so, as HFM produced no medical evidence that at the time of the 21 December letter, they were cleared to return to work – this was implied by the fact that he had not provided a further medical certificate but complicated by the timing of the annual leave. In fact, HFM resigned before obtaining a medical clearance to return.
- (b) Commencing a formal investigation to address HFM’s ongoing absenteeism when HFM had not exhausted their sick leave allocation. I find this to be the case – there were no reasonable grounds to suggest HFM’s rate of sick leave taken was excessive or not genuine.
- (c) Seeking private medical information, where there was not a reasonable basis for an assessment that HFM’s ADHD was impacting the work they undertook. I however find this to be not an unreasonable request per-se once HFM disclosed their diagnosis but misguided to raise in the context it was.
- (d) Threatened to alter the timing of pre-approved annual leave. I find this was an unreasonable stance and have found above, it may have been viewed as exerting pressure on HFM. The timing of the suggestion to alter the agreed leave period was ill judged.

[65] HFM’s advocate then alluded to procedural deficiencies including the barrier placed on HFM being able to communicate with the employer directly and the timing of the information request and unavailability of IMH’s advocate.

[66] In contrast, IMH's advocate suggested no significant breach occurred to warrant HFM's resignation and that any likely breach was anticipatory as the meeting envisaged did not proceed. The 21 December letter was characterised as a legitimate request for information both on HFM's injury progress and any future issues associated with the disclosed ADHD diagnosis.

[67] HFM's advocate contended the letter did not suggest placing HFM's ongoing employment in jeopardy. HFM was described as resigning freely without identifying any issues and that HFM was agreeable to work out a notice period. It was suggested that IMH was willing to meet with HFM as soon as possible to discuss any issues but HFM chose to resign without exploring meeting IMH, seeking legal advice or suggesting alternatives such as mediation. Overall IMH's advocate asserted there was no causative link between the 21 December letter and the 11 January resignation and even if there was, the length of time broke the causal 'chain' as HFM had sufficient time to consider other options.

[68] In further discussing whether any established breach was sufficiently serious IMH's advocate noted this was a question of fact and degree but in this case HFM's reaction to the 21 December letter was based merely on dissatisfaction about a potential change to annual leave timing and a negative perception of what was intended and this could not give rise to a successful constructive dismissal claim. It was then suggested that HFM's resignation was not reasonably foreseeable and if HFM perceived IMH's actions amounted to a breach then they should have put IMH on notice of a potential resignation.

Assessment – were the breaches cumulatively serious enough, to make it foreseeable HFM would resign?

[69] In reviewing all the contextual circumstances leading up to the resignation, I conclude HFM was the subject of ongoing breaches of a nature sufficiently serious and causative of their resignation.

[70] IMH's advocate asserted there was no actual threat to withhold the pre-approved annual leave, rather a legitimate request to discuss the timing of such was being advanced. I do not find this premise to be credible when the preface in the letter was: "Based on the impact that your absenteeism is having the Company has reached the point where it is assessing your period of leave". I find this an unfortunate linkage that objectively suggests because of HFM's unforeseeable absence due to an accident, they could have previously agreed leave cancelled.

[71] I find as discussed above, IMH breached duties it owed to HFM including the duty of good faith by engaging in an unnecessarily formal approach to HFM's prior use of sick leave when no objectively serious problem existed; unreasonably seeking to change the timing of agreed annual leave; setting unrealistic timelines on the provision of medical information that was coupled with an implication that failure to provide this may lead to a negative outcome and inappropriately raising the issue of HFM's ADHD in the context of a return to work from a physical injury.

[72] I find the only legitimate issue to raise was IMH's uncertainty about HFM's medical clearance to return to work that could have been easily dealt with by normal workplace communication that did not need to involve an advocate. Further an insistence that all contact be through the advocate while taking no steps to ensure the advocate was available to promptly respond, was unreasonable. The timing of this discussion could have been either just prior to HFM taking leave or in the four days available between the periods of leave. ACC could have been asked to facilitate this as part of a supportive return to work process. The timing, content and tone of the 21 December 2021 letter was confusing and conflicting in its messages, was unreasonable and likely to cause distress.

[73] I find the level of potential distress was objectively foreseeable and the additional impact of HFM's ADHD and associated anxiety should have been appreciated.

Finding on personal grievances

[74] IMH's actions outlined above were unjustified and in breach of good faith obligations and as a result:

- (a) HFM suffered a disadvantage in their employment.
- (b) HFM resigned in circumstances where it was foreseeable that they would, this amounted to an unjustified dismissal.
- (c) The actions of IMH did not amount to discrimination.

Issue 3 : Remedies

[75] Given the findings above I turn to what remedies HFM may be entitled to pursuant to s 123 of the Act.

Compensation

[76] Section 123(1)(c)(i) of the Act provides for a potential award of compensation if humiliation, loss of dignity and injury to feelings result from an employer's unjustified actions (including dismissal) and any breaches of duties owed. Various Employment Court decisions provide broad guidance on factors to be assessed.⁷ What they show is the Authority must assess the impact of the unjustified behaviour on HFM and the harm and loss caused by such. Once I do this, I have to then have regard to proportionality of the harm established and where that sits with comparable awards.

[77] HFM's evidence of how they felt in response to IHM's actions included that it ruined the holiday they were taking and impacted upon their relationship with their partner at a time they were visiting family. The letter caused the applicant to be stressed and anxious and confused why their ADHD had suddenly become an issue when no previous request for

⁷ Including for example *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Richora Group Ltd v Cheng* [2018] NZEmpC 113 and *Mikes Transport Warehouse Limited v Vermuelen* [2021] NZEmpC 197.

information had been made. This led to poor sleep patterns and partner conflict and a sense they (HFM) were somehow being punished for minor absences that could place the pre-agreed leave in jeopardy. HFM and their partner also described the impact of what they considered a forced resignation was loss of confidence, embarrassment, and depression. On a bright note, HFM produced medical information to confirm he was working on managing and living with ADHD.

[78] In the overall circumstances I consider the harm and loss is at a significant but moderate level, unfortunately heightened by HFM's existing health related issues. In these circumstances I quantify the compensation to be \$18,000.

Lost wages

[79] HFM says they found some part-time bar work after returning from their trip to Australia on 30 January 2023, then applied for several positions to resume the apprenticeship. HFM was successful in securing a new role on 13 March 2023 that enabled them to continue an apprenticeship. In these circumstances I make an award of six weeks lost wages calculated at \$935 per week in the total amount of \$5,610.

Issue 4: Contribution

[80] Section 124 of the Act states that I must consider the extent to what, if any, HFM's actions contributed to the situation that gave rise to their personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*.⁸

[81] Given the circumstances and findings I cannot detect any actions HFM took or blameworthy conduct engaged in that contributed to the identified personal grievance warranting a reduction in the remedies granted.

⁸ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Summary

[82] I have found that:

- (a) HFM was unjustifiably dismissed by IMH Limited.
- (b) IMH Limited must pay HFM:
 - (i) \$18,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
 - (ii) \$5,610 lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.

Issue 5: Costs

[83] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party that considers they are entitled to a consideration of a cost contribution has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be determined outside this timeframe unless prior leave is sought and granted to make submissions out of time. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

David G Beck
Member of the Employment Relations Authority

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