

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 189
5466315

BETWEEN EVELYN MICHALEWSKA
Applicant

A N D KAIZUKA LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Chrissy Gordon, Advocate for the Applicant
Phil Butler, Advocate for the Respondent

Investigation Meeting: 8 and 9 September 2015 at Christchurch

Submissions Received: 15 September and 7 October 2015 on behalf of the
Applicant
30 September 2015 on behalf of the Respondent

Date of Determination: 3 December 2015

DETERMINATION OF THE AUTHORITY

A I have found Evelyn Michalewska was unjustifiably disadvantaged and unjustifiably dismissed.

B I order Kaizuka Limited to pay to Evelyn Michalewska the sum of \$9360 gross being reimbursement of lost wages under s 123 (1) (b) of the Act.

C I order Kaizuka Limited to pay to Evelyn Michalewska the sum of \$19,500 without deduction being compensation under s 123 (1) (c) (i) of the Act for unjustified disadvantage and unjustified dismissal grievances.

D I order Kaizuka Limited to reimburse Evelyn Michalewska for the cost of a third medical certificate.

E There is no award made for a penalty for a breach of good faith.

F Costs are reserved and failing agreement a timetable has been set.

Employment relationship problem

[1] Evelyn Michalewska commenced her employment with Kaizuka Limited on 3 June 2013 as a Chef. Kaizuka Limited (Kaizuka) is a duly incorporated company and trades as Kaizuka Eatery and Garden Bar in Christchurch. Ms Michalewska is Polish and came to New Zealand to live and work with her husband Thomas in recent years.

[2] There are two directors of Kaizuka. The Authority heard evidence from one of the directors, Tiffany Vaughan, who is active in the business of Kaizuka. Ms Vaughan made the decision to dismiss Ms Michalewska.

[3] Ms Michalewska was party to an individual employment agreement (the employment agreement) with Kaizuka dated 3 June 2013. Her employment was without incident for the first few months.

[4] Ms Michalewska says that from in or about December 2013 she was subjected to unjustified actions that caused her disadvantage, that there were breaches on the part of Kaizuka of its good faith obligations and that her dismissal on 8 April 2014 was unjustified.

[5] Ms Michalewska seeks remedies clarified in final submissions as follows:

- Lost wages from 8 April 2014 to 8 July 2014 in the sum of \$8,640;
- Compensation for the unjustified dismissal in the sum of \$25,000;
- Compensation for unjustified disadvantage in the sum of \$15,000;
- Costs at the daily tariff rate for two days and reimbursement of the filing fee.

[6] Kaizuka does not accept that there were actions on its part that were unjustified and disadvantaged Ms Michalewska. It does not accept that it did not act in accordance with the required obligations of good faith and says that Ms Michalewska was justifiably dismissed or, in the alternative, that any remedies awarded should be reduced by 100% for contribution.

The issues

[7] The Authority has to determine the following issues in this case:

- a. Were there unjustified actions on the part of Kaizuka that caused Ms Michalewska disadvantage?
- b. What were the allegations of serious misconduct?
- c. What were the reasons for Ms Michalewska's dismissal?
- d. Could a fair and reasonable employer have justifiably dismissed Ms Michalewska from her employment for these reasons?
- e. If Ms Michalewska was unjustifiably disadvantaged in her employment and/or unjustifiably dismissed, then what remedies is she entitled to and are there issues of contribution and mitigation?
- f. Were there breaches of good faith for which a penalty should be awarded?

The relevant provisions of the individual employment agreement

[8] There are several relevant provisions in the employment agreement entered into between Ms Michalewska and Kaizuka.

[9] Clause 10 deals with termination of employment and clause 10.1.1 reflects that termination of employment may occur in several ways, including resignation, dismissal, abandonment, incapacity, redundancy or lack of licence or qualification relevant to work.

[10] Clause 13 refers to other employment and conflicts of interest and requires written consent before an employee engages in other employment or business activities and that the employee avoid all situations where there may be a conflict of

interest, particularly where there is an interest in a business in competition with Kaizuka or there is a personal relationship with a person employed by a business in competition. If there could be a possible conflict of interest then clause 13 refers to a need to discuss that.

[11] Clause 14 deals with disciplinary procedures and provides that where performance is unsatisfactory or there is misconduct the procedure in the second schedule apply. Clause 14.2 provides *the disciplinary procedures are complete and as such no terms, obligations or procedures which might otherwise be implied shall apply*".

[12] Schedule two of the employment agreement sets out a procedure where work performance is unsatisfactory. A series of five steps is provided. Step 1 is a situation where performance or attitude is causing concern and the process is to firstly counsel the employee. If there is no significant improvement then step 2 requires the matter be discussed and a verbal warning may be issued which will be noted on the file. A verbal warning, it is specifically noted, is less formal than the process for issuing a final warning. If the performance problems persist step 3 requires a letter is to be given recording the specific matters causing concern, giving the time of the meeting to explain the concerns and indicating a final warning may be issued and advising of the right to be represented at the meeting. Step 4 provides that if after the meeting a final warning is believed to be justified, then a letter will be given specifying the corrective action the employee is required to take, providing a reasonable period in which to improve, advising that unless there is significant improvement in performance or attitude then employment will be terminated and advising of the date on which the employee and Kaizuka will meet to discuss the outcome of the review.

[13] Step 5 has two components. The first is that if there has been a significant improvement and no further disciplinary action is warranted then there is to be a meeting and the view of significant improvement confirmed in writing. The second is that if there has been no significant improvement then there will be a letter prior to a meeting explaining the particular matters where there has not been significant improvement, the time of the meeting to provide an explanation, the possibility of dismissal and the right to be represented. After consideration of the explanation then a decision may be made for dismissal of the employee with dismissal being on notice.

[14] Another relevant provision is that regarding suspension which is also dealt with in the second schedule and found alongside other disciplinary procedures. Consideration of suspension with or without pay is step 1 in the serious misconduct procedure with a requirement the alleged misconduct could constitute serious misconduct. There is a provision that suspension may be with or without pay pending an investigation but that there will be consultation before any suspension occurs so that comment may be made on the proposal to suspend the employee. The process of consultation must be completed within 8 hours of the employee being advised of the proposal to suspend during which period the employee may be placed on special leave at the discretion of the employer.

The test of justification in s 103A of the Act

[15] Under s 103A of the Employment Relations Act 2000 the Authority must, in determining whether an action or a dismissal is justifiable, objectively determine whether the actions of Kaizuka and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[16] The Authority must, in applying the test set out above, consider the four procedural factors set out in s 103A (3)(a) to (d) of the Act and any other factors it thinks appropriate. It must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[17] A fair and reasonable employer will also comply with the statutory obligations of good faith.

Were there unjustified actions on the part of Kaizuka that caused disadvantage to Ms Michalewska?

[18] I asked Ms Gordon to clarify at the commencement of the investigation meeting what was relied on as unjustified actions causing disadvantage. I have recorded as follows:

- a. Ms Michalewska said that she was unaware that she had received any warning during her employment. To the extent it is said that she was

given warnings she was only aware of this when notes were provided at the time of the disciplinary process leading to her dismissal but these were relied on at the time of her dismissal and were procedurally and substantively unjustified.

- b. The suspension was unjustified and caused disadvantaged.
- c. The general manager, Aaron Scott telephoned Ms Michalewska about the suspension when he knew she was unwell.
- d. The nature of the disciplinary meeting and role of Mr Butler was misrepresented.

Warnings

[19] Ms Michalewska was spoken to at various times about matters relating to issues in the kitchen before allegations of serious misconduct were put to her in a letter of 24 March 2014.

[20] It was not until 25 March 2014 when she was given the letter of 24 March inviting her to a disciplinary investigation meeting that Ms Michalewska saw many of the typed notes of various meetings and understood that these may have been seen as warnings by Kaizuka. Ms Gordon correctly submits that many of the notes appear to be file notes rather than warning letters with some of them being created as word documents for the first time on 24 March 2014, no doubt to attach to the letter setting out allegations of serious misconduct of that same date. Whether a warning was given in late January or early February 2014 will require a more focussed analysis.

[21] There is an issue about the various file notes and whether the interaction at the time of each meeting and conclusion amounted a warning. This is because Ms Michalewska was dismissed on the grounds set out in a letter from Ms Vaughan dated 4 April 2014 which included reference to Ms Michalewska's conduct, performance and attitude having produced various warnings over the last three/four month period.

[22] Whether Ms Michalewska was in fact given warnings and whether a fair and reasonable employer could rely on warnings at the time of making the decision to dismiss is in this case a matter inextricably linked to the justification of the dismissal

and should properly be considered under that head of grievance. I record that the Authority under s 160(3) of the Act is not bound to treat a matter as being of the matter described by the parties but rather should concentrate on resolving the employment relationship problem however described.

[23] I will consider any issues about the warnings when I consider the grievance of unjustified dismissal.

Suspension

[24] On 18 March 2014 Ms Michalewska was asked to attend a meeting with Ms Vaughan and Mr Scott. Two main issues were discussed. The first was that the fridge had not been cleaned but that Ms Michalewska had signed on a laminated sheet that it had been cleaned. Ms Michalewska gave an explanation for that matter. The other issue was that Ms Vaughan and Mr Scott had been told by other staff that she was opening her own café. Ms Vaughan and Mr Scott say that Ms Michalewska did not give any explanation to the second matter. Ms Michalewska said that she told them it was only a dream to open a café in the future which she spoke to other staff about. There is agreement that Ms Michalewska was told that it was inappropriate for her to talk about opening her own café in Kaizuka's work time and Ms Michalewska said that she agreed not to do it anymore.

[25] There was another short meeting on 20 March 2014 with Mr Scott, Ms Vaughan and Ms Michalewska. There is a dispute about what was said although for present purposes I accept that the file note prepared by Mr Scott about the exchange that day largely reflects the discussion. I find it likely that Ms Vaughan advised she was to speak to an employment lawyer regarding the matters discussed with Ms Michalewska on 18 March 2015.

[26] On Saturday 22 March 2014 Ms Michalewska went to dinner with her family and felt sick afterwards. She sent a text to Mr Scott at about 10.40pm to see if he could cover her shift the next morning. A series of text messages were sent between Ms Michalewska and Mr Scott.

[27] Mr Scott asked Ms Michalewska to obtain a medical certificate the following day in one of the text messages. Ms Michalewska had concerns about the nature of the communication leading to this request and the requirement to get a medical certificate the following day, a Sunday.

[28] Ms Michalewska raised issues in the text exchange about what her employment agreement provided for in the circumstances and that she considered the employer was only able to require a medical certificate where there was an absence of three days or more. Mr Scott responded and said that the agreement states that an employer can request one at any time although that is not completely correct.

[29] Clause 8.1.7 provides in the employment agreement that Kaizuka have the right to require an employee to undergo a further medical examination if there is reason to believe the employee is not sick or if Kaizuka wishes to exercise its rights under an incapacity clause to consider termination. There was no evidence to support that Mr Scott was intending to rely on either of those situations on the Saturday evening. If he was then I do not find he made that clear.

[30] Mr Scott advised Ms Michalewska she would not be able to return to work for 24 to 48 hours after her last symptoms. There was a suggestion that Ms Michalewska may be responsible for meeting the costs of the medical certificate because her absence would take her over the three days before she would be fit to return to work.

[31] Mr Scott said that the vomiting and diarrhoea Ms Michalewska described led him to a view that she was suffering from food poisoning and he put this to her in the text messages as the likely issue. It is well understood that those handling food have to be careful if they become unwell. Food can become contaminated and this can have serious consequences for consumers¹.

[32] Objectively assessed Mr Scott's conclusion about Ms Michalewska's medical condition was not without foundation. It would though have been more appropriate in response to Ms Michalewska's questions about a medical certificate and who would pay for it to have considered her employment agreement provisions.

[33] Mr Scott could then have made contact with Ms Michalewska the following day to raise his concerns about food poisoning and public health and reach agreement about obtaining a medical certificate on the basis that Kaizuka would pay for it. Ms Michalewska did not refuse to get a medical certificate and as asked obtained one on Sunday 23 March 2014. She did though have a genuine question about the requirement to do so and who would meet the costs.

¹ Ministry for Primary Industries Food Control Plan – Food service and catering

[34] On Saturday 22 March 2014 Mr Scott said that he was told by another employee at Kaizuka, Callum Armstrong, that he thought Mr Scott should know that he had had a job offer from Ms Michalewska.

Advice of suspension

[35] On Sunday 23 March 2014 Mr Scott said that he was told by another employee at Kaizuka, Amanda Robson that Ms Michalewska had asked her on Wednesday 19 March 2014 whether she would like to take control of the front of house operation in her [Ms Michalewska's] new business. That was after the meeting on 17 March 2014 and the instruction not to discuss the business further.

[36] Mr Scott spoke to Ms Vaughan immediately and she asked that Ms Robson provide details of the conversation. Ms Robson provided a handwritten statement that provided as follows:

On Wednesday 19 March Evelyn told me about her new business venture. She asked if I would like to work for her and control front of house operations. I declined.

Amanda Robson

March 23 2014

[37] On 23 March Ms Michalewska received a text from Mr Scott at 8.16am stating *U need to call me ASAP*. When Ms Michalewska telephoned Mr Scott back shortly after 9am he told her that she had attempted to recruit a staff member for the new café and that she would be suspended without pay for five days and would be informed about the decision after there had been investigation of it. Ms Michalewska said that she had no idea what Mr Scott was talking about as to why she was being suspended.

[38] Ms Michalewska obtained a medical certificate from Dr Heather Jefferies at the after-hours emergency surgery that same day, Sunday 23 March 2014. It provided that Ms Michalewska was medically unfit from 23 March 2014 but would be able to resume work on 26 March 2014. It did not provide the nature of the medical condition that prevented her working.

[39] Later that evening Ms Michalewska telephoned Mr Scott and told him that suspension required a meeting, referring to the relevant extract from her employment agreement summarised in [14] above. Ms Michalewska said, and I accept her evidence on this point as likely, that Mr Scott told her that the quotes she read out about suspension were incorrect and wrong. Mr Scott said in evidence that he simply misinterpreted the clause and did not accept he was abusive as Ms Michalewska claimed at that time.

The requirement to obtain further medical certificates

[40] I want to set out some interaction about the medical certificates. On 24 March 2014 Ms Michalewska took the medical certificate from Dr Jefferies to Kaizuka. At this time Ms Michalewska was suspended in accordance with Mr Scott's earlier advice without pay. She said that she advised Mr Scott of the advice from Dr Jefferies that she was suffering from stress and had been given some sleeping pills. Mr Scott did not accept that Ms Michalewska advised at that point she was diagnosed with a stress condition and said that it was not until later that Ms Michalewska told him about this.

[41] I find that Ms Michalewska in all likelihood did advise Mr Scott about the diagnosis of stress rather than food poisoning when she handed over the medical certificate. I am strengthened in my conclusion about this because the letter inviting Ms Michalewska to a disciplinary meeting which is dated 24 March 2014 and signed by Ms Vaughan refers to Ms Michalewska advising the doctor had put her symptoms down to stress. There was no mention of stress on any of the medical certificates so this supports that Ms Michalewska verbally conveyed that information.

[42] Mr Scott said he told Ms Michalewska that he required a further medical certificate because he needed to know what had caused the vomiting and diarrhoea from a food health and safety perspective. Ms Michalewska's evidence was that she believed Mr Scott wanted her to obtain a further medical certificate that she did not have food poisoning. Dr Ben Chang on 24 March 2014 confirmed in a medical certificate that Ms Michalewska in his opinion did not have gastroenteritis/food poisoning which is consistent with that evidence.

[43] This second medical certificate was also unsatisfactory to Mr Scott. Ms Michalewska said that Mr Scott asked her to get a certificate from the same doctor

she had seen on 23 March 2014, Dr Jefferies. Dr Jefferies confirmed in a third medical certificate that the consult with Ms Michalewska on 23 March 2014 was not regarding food poisoning symptoms.

[44] Mr Scott in his oral evidence said that he was somewhat unclear why the third medical certificate was required but in his written evidence Mr Scott said at [47] that the second medical certificate said that her consult was not regarding food poisoning symptoms and he took that to mean that she had not mentioned vomiting and diarrhoea. He wrote in his written evidence that she was asked to get a certificate that she did not have food poisoning.

[45] I find the requests for additional medical certificates somewhat unusual particularly because Ms Michalewska's suspension meant that she would not be returning for five days from 23 March 2014 and it was already known and recorded that she was suffering from stress. Objectively assessed in those circumstances the making and timing of these requests seemed to be reflective more of some difficulties in the relationship rather than a genuine concern about food poisoning. That is why I have set this matter out in some detail.

[46] Ms Michalewska was only reimbursed for two medical certificates following a subsequent disciplinary meeting. My view on an assessment of the evidence is that she is entitled to be reimbursed for the third medical certificate as this was also requested by Mr Scott and I so order. Ms Michalewska said that the total cost of obtaining the three medical certificates was \$145.00.

Notification that Mr Scott was incorrect about suspension

[47] Mr Scott obtained advice from Mr Butler on Monday 24 March 2014 that he was not in a position to suspend Ms Michalewska. A letter was prepared in the name of Ms Vaughan to advise Ms Michalewska of this. It set out three allegations of serious misconduct and invited Ms Michalewska to a meeting to discuss these.

[48] Ms Michalewska was given this letter on 25 March 2014 when she went to Kaizuka to drop off the two further medical certificates I have referred to above. I will refer to its contents in more detail when I consider the claim of unjustified dismissal and focus at this point on what it said about suspension.

[49] It stated that Mr Scott's advice was incorrect about the suspension for five days pending the outcome of the investigation. It advised that Ms Michalewska was currently off work on sick leave until 26 March. There was advice in the letter that Kaizuka given the nature of the allegations was proposing to suspend Ms Michalewska once her sick leave expires but that she would have an opportunity to comment on that proposal.

[50] Ms Michalewska understood from 25 March 2014 that she was not suspended but there would be discussion about suspension at the disciplinary meeting.

Conclusion about suspension

[51] Mr Butler properly accepted that the suspension of Ms Michalewska on 23 March 2014 was unjustified. It was not in accordance with the process set out in Ms Michalewska's employment agreement which required that she be consulted so that she could comment on the proposal to suspend with or without pay.² Such consultation was to be completed within 8 hours of the advice of the proposal during which time there was discretion to place the employee on special leave.

[52] Mr Butler submits that although there was a lack of justification in the suspension there was no corresponding disadvantage because Ms Michalewska was off on sick leave and her suspension was lifted before it could take effect. Further Mr Butler submits that in respect of suspension Kaizuka was *damned for* [suspending] *and damned for not doing so*³ because of what Ms Michalewska said in a letter to a proposal that her employment be terminated dated 7 April 2014.

[53] In the 7 April 2014 letter Ms Michalewska referred to the unfairness of her suspension and then raises a concern that she was not given a chance at the disciplinary meeting to comment on suspension as proposed. She then refers to the stress of being at work whilst the investigation was ongoing and that her representative asked for stress leave and paid suspension but that was not discussed until an email on 5 April 2014. In an email to Ms Michalewska's then representative, Anna Oberndorfer, of that date Mr Butler advised that if Ms Michalewska is stressed she can take unpaid sick leave or use her annual leave. He advised that his client was not prepared to suspend Ms Michalewska on pay.

² Second schedule of the employment agreement under serious misconduct, step one clauses 2.1 – 2.1.4 on page 18.

³ Page 5 clause 2.6.5 of respondent's submissions

[54] Kaizuka did resolve the lack of justification with respect to the suspension in its letter of 24 March which Ms Michalewska received on 25 March 2014. The mistake was acknowledged by Kaizuka quite properly in the letter of 25 March 2014 which was in accordance with good faith obligations. I take that into account in considering whether there was disadvantage and if I get to the point of assessing a remedy.

[55] Ms Michalewska was advised of the suspension at a time when Mr Scott knew she was unwell. Objectively assessed it is difficult to see why it was necessary to advise Ms Michalewska of her suspension first thing on a Sunday morning when she was unwell and had been instructed to obtain a medical certificate. I am satisfied that it was stressful for her to be told of her suspension in those circumstances.

[56] Ms Michalewska contacted Mr Scott back on the same day he had advised her of her suspension and told him that he had acted incorrectly in terms of her employment agreement. I find the evidence supports that he did not take the time to consider that but simply rejected what Ms Michalewska had to say even though she was clearly correct. Had he considered what Ms Michalewska had to say and acknowledged he had acted incorrectly then Mr Butler may have been on stronger ground with his submission that there was no or very limited disadvantage. Instead Mr Scott by his actions at that time confirmed the suspension and did not accept Ms Michalewska's view of what her employment agreement provided. Ms Michalewska remained of the view that she was suspended until she read the letter on 25 March.

[57] I do not accept that Ms Michalewska's subsequent request for consideration for paid suspension or stress leave after the disciplinary meeting was inconsistent with a concern about her first suspension advice. Rather the requests reflected her state of mind and symptoms of stress that her representative advised in emails to Mr Butler she was suffering as a result of being at work during an ongoing disciplinary investigation.

[58] I find that Ms Michalewska had a personal grievance that she was unjustifiably disadvantaged when she was suspended on 23 March 2014. I shall deal with remedies at the conclusion of this determination.

Misrepresenting the nature of the disciplinary meeting

[59] When Ms Michalewska went to pick up the letter inviting her to a disciplinary meeting on 25 March 2014 Mr Scott advised her to the effect that there would be an employment lawyer (Mr Butler) at the disciplinary meeting who would advise both parties and that it was a neutral meeting. Mr Scott did not dispute that he said this although said that he said that he encouraged Ms Michalewska to bring her own representative which she denies. Mr Scott said that he had never been to a meeting like this and genuinely thought that was what would happen.

[60] Ms Michalewska engaged Ms Oberndorfer to represent her at the disciplinary meeting which, although stated in the letter of 24 March to be taking place earlier, took place on 31 March 2014.

[61] I find that this is a matter inextricably linked to the justification of the dismissal and falls to be considered amongst other matter whether Ms Michalewska was unjustifiably dismissed. I shall turn to that now.

The allegations of serious misconduct Ms Michalewska was required to answer at the disciplinary meeting on 31 March 2014

[62] The letter of 24 March 2014 referred to the information that had come to Kaizuka's attention. That was that Ms Michalewska had attempted to recruit Amanda Robson to a position controlling the front of house operations of a new business she was setting up. Further that Ms Michalewska had confirmed she was setting up a business but refused to confirm when this would happen and where it would be located. This information was stated to give rise to three allegations as follows:

- a. That Ms Michalewska had acted in breach of her duty of fidelity by seeking to recruit a Kaizuka staff member to a business in which she has some proprietary interest.
- b. That Ms Michalewska was responsible for causing a conflict of interest between her personal interests and Kaizuka's in that contrary to the terms and conditions of her employment she appeared to be engaging in business without prior consent.

- c. That she appeared to have wilfully disobeyed a lawful and reasonable instruction given to her on Tuesday the previous week, in particular that she was not to talk about her new business venture with staff.

The reasons for Ms Michalewska's dismissal

[63] To apply the test in s 103A of the Act in assessing whether Ms Michalewska's dismissal was justifiable I need to identify the reasons for her dismissal and how the decision to dismiss was reached.

[64] Ms Vaughan made the decision to dismiss in this case. Ms Michalewska was summarily dismissed by letter dated 8 April 2014 sent by Mr Butler to Ms Oberndorfer. Mr Butler advised that Kaizuka had decided to terminate Ms Michalewska's employment with immediate effect on the grounds laid out in its letter giving Ms Michalewska their provisional conclusions. The letter providing the provisional conclusions is dated 4 April 2014 and is the starting point therefore for identifying the reasons for dismissal.

[65] The reasons for Ms Michalewska's dismissal do not align neatly with the allegations of serious misconduct set out above. This is explained in part by Ms Michalewska's explanations for the allegations at the disciplinary meeting on 31 March 2014 and what was concluded subsequently about the allegations. Ms Michalewska said by way of explanation that there was no business; no equipment and she had only been talking [to staff] about a *dream* one day to open a café. Her explanation was that it was an idea in her head. She denied asking if Ms Robson would be interested in working for her in the front of house and said that she did not get along with her. She said *if I wanted to offer someone a job, I mean, in something that doesn't exist, it's just a bit silly to me.*

[66] Ms Vaughan set out in her letter of 4 April 2014 the background to her provisional conclusions and I shall expand on that as I consider each reason. Materially in respect of the business she concluded it was a made up story so two of the allegations of serious misconduct then fell away. Ms Vaughan concluded with a final paragraph which I find contains the reasons for dismissal as follows:

When I put together all the information, it shows that your conduct, performance and attitude that have produced various warnings over the last three-four months has caused a serious breakdown in the relationship. The recent misrepresentations, the story you made up,

your failure to comply with our instruction lead me to conclude, albeit provisionally at this point, that there is an irreconcilable breakdown in the employment relationship.

I am therefore considering terminating your employment instantly. Before making that decision I am giving you a final opportunity to comment.

[67] Mr Butler refers to this case illustrating the organic nature of disciplinary processes in his final submissions. He submits what was an investigation into primarily an allegation of breach of fidelity and a failure to comply with a lawful and reasonable instruction evolved in response to what Ms Michalewska said and claimed.

[68] Ms Michalewska's dismissal and its justification fall to be determined in light of the requirements of s 103A of the Act and there is to be an assessment of the procedural fairness and whether there was good cause for the dismissal.

Could a fair and reasonable employer have justifiably dismissed Ms Michalewska for these reasons?

Performance

[69] Performance was not one of the allegations in the 24 March 2014 letter which Ms Michalewska was to explain at the disciplinary meeting. The relevance of performance issues was confined to a situation if Ms Michalewska's explanations were unacceptable and then her employment history would be taken into account in determining the appropriate [disciplinary] outcome.

[70] At the disciplinary meeting on 31 March 2014 Ms Oberndorfer wanted it noted that Ms Michalewska was not aware of all of the notes that were taken of various meetings and seemingly relied on as warnings. Ms Oberndorfer said it was not accepted that they reflected accurately the meetings.⁴ Although there was a suggestion that issue would be discussed further it was not from my reading of the meeting transcript a subject returned to. There was though extensive discussion that the fridge had not been cleaned by Ms Michalewska and that that issue was ongoing.

[71] It was clear from the 4 April provisional conclusion letter that should Ms Michalewska be dismissed previous *various warnings* were relied on as one reason for dismissal. Ms Michalewska responded in writing to that as invited to in a

⁴ Page 3 of transcript of meeting on 31March 2014.

letter dated 7 April 2014. She stated that she did not feel it was correct to say that there have been many performance issues. She noted that she only received one letter dated both 30 January and 4 February 2014 which she initialled. The other file notes she said she saw for the first time on 25 March 2014 when she picked up the 24 March letter and she did not accept they were accurate. She stated that it was not fair to make a decision based on them.

[72] There was no further investigation about this with Mr Scott who had prepared the various notes or consideration as to whether they did in fact amount to warnings under schedule two of the employment agreement. Ms Vaughan confirmed in her oral evidence that she did not talk to Mr Scott between receiving Ms Michalewska's first letter of 3 April⁵ and the dismissal of Ms Michalewska on 8 April 2014.

[73] The various interactions and file notes therefore require some analysis. A file note records a discussion on or about 26 January 2014 between Mr Scott and Ms Michalewska about some chicken that had to be thrown out and it was considered that food in the cabinet was not up to a standard of sale and looked disgraceful. There was also mention of cakes having to be thrown out in December 2013 and Ms Michalewska having previously been talked to about kitchen issues.

[74] Ms Michalewska signed a document dated 30 January with a default date of 4 February 2014 about food handling practices, cleaning of the kitchen and general productivity with her role. It referred to the chicken wastage discussed on 26 January 2014 and presenting food in the cabinet appropriately and working with staff members to achieve these results. I find that this was simply a continuation of the process about the concerns raised on 26 January and in effect a conclusion. Ms Michalewska said that she was unaware that what she signed was a warning. Kaizuka on the other hand say that is a verbal warning. There is a further file note dated 17 February which refers to a final conclusion letter regarding the issues discussed by Mr Scott and Ms Michalewska on 26 January and 4 February 2014. It states this letter is to inform Ms Michalewska that this is the first written warning in regards to the issues discussed about food handling practices and the costs they have on the business. I could not be satisfied that Ms Michalewska saw that file note or was advised that she had on her file a first written warning.

⁵ The letter in the bundle of documents dated 2 April is in all likelihood a draft and I have relied on document F attached to the statement of problem which is dated 3 April 2014.

[75] I find that the signed note about those matters is the only discussion that could arguably amount to a [verbal] warning under the second schedule disciplinary process where there are concerns about performance remaining after counselling.

[76] The next file note concerned a meeting held on 6 March 2014. I accept that Ms Michalewska had never seen this note before 25 March. The note has a default date of 24 March 2014. It refers to a meeting between Ms Vaughan and Mr Scott and Ms Robson and Ms Michalewska. The meeting it is recorded was about food not being presented to the standard Kaizuka wanted, not taking responsibility for the products and letting them go to waste. There is discussion about a system being put in place that any chef in the kitchen was to sign a sheet attached to the fridge to state it had been cleaned and checked to make sure food wastage was kept to a minimum. There is no reference to any warning being issued and I do not find one was.

[77] The next file note is dated 18 March and concerns the meeting between Ms Vaughan and Mr Scott and Ms Michalewska about the fridge concerns and food preparation and the concern that she is talking about her new business. There was no warning that followed that meeting or the meeting on 20 March but rather performance matters were overtaken by the new business/venture issues.

[78] There was no fair investigation into whether Ms Michalewska had received *various warnings* for performance or other issues in circumstances where she denied that she had. The procedural requirements of s103A (3) (a) to (d) of the Act were not met and the procedural defects were not minor because if such an investigation had been undertaken it would have shown that various warnings had not been given to Ms Michalewska. A fair and reasonable employer could not have concluded as part of its decision to summarily dismiss Ms Michalewska that she had received various warnings. A conclusion on that basis that the relationship had broken down was unavailable to a fair and reasonable employer.

[79] Kaizuka had become dissatisfied with aspects of Ms Michalewska's performance but there was a clear process about performance issues that could have been followed in schedule two of the employment agreement. It was not followed.

Recent misrepresentations

[80] Ms Vaughan stated in the letter of 4 April that she was surprised to read some of the things Ms Michalewska was alleging and that what Ms Michalewska had

written misrepresented the situation. These included an issue about breaks and that Ms Michalewska claimed that she did not get all her break entitlements. Ms Vaughan wrote that Ms Michalewska was deliberately misrepresenting the situation in order to portray Kaizuka as a bad employer. I note Ms Oberndorfer had raised an issue about Ms Michalewska being denied her break entitlements in an email dated 2 April 2014 to Mr Butler. Ms Michalewska was entitled to set out her view about breaks even if it does not accord with that of Kaizuka or even if her view was incorrect. To raise or dispute an issue is not misconduct. Further discussion and clarification would have been sensible on this matter.

[81] Ms Vaughan said in the letter Ms Michalewska stated Mr Scott had insinuated that she was not sick because she had been out for dinner and then jumped to irrational conclusions that she had food poisoning. Ms Vaughan said she had considered text messages sent by Mr Scott at that time and they did not show that he had jumped to an irrational conclusion/diagnosis that she had food poisoning and again that the written statement deliberately misrepresented the situation. Ms Michalewska's view on what happened at the time is not misconduct even if it does not accord with Mr Scott's view. There were other matters set out about the interactions at that time about which there was some basis for Ms Michalewska to be concerned. The focus by Ms Vaughan was limited to the above matter.

[82] Thirdly, Ms Vaughan said that Mr Scott was very disappointed with Ms Michalewska's description of the conversation he had had when she had picked up the letter giving notice of the disciplinary meeting. That is somewhat misleading because it suggests that there was discussion with Mr Scott about one of the situations raised by Ms Michalewska. Ms Vaughan accepted that she did not discuss the contents of Ms Michalewska's letter of 3 April 2014 with Mr Scott.

[83] Ms Vaughan stated in the letter of 4 April that Mr Scott was very firm in denying that he said Mr Butler would advise both sides and that he had told Ms Michalewska to get legal advice and representation. It was confirmed in the letter he had replied *sort of* to Ms Michalewska's question whether the meeting was a type of mediation. Ms Vaughan agreed when she gave her evidence that she was incorrect about this matter as the disciplinary meeting transcript confirms that Mr Scott agreed that was what he had said about Mr Butler's role and the nature of the meeting.

Ms Vaughan said that would not have changed her conclusion that Ms Michalewska's employment should be terminated.

[84] Fourthly, Ms Vaughan advised that she rejected out of hand that Mr Scott's conduct at the disciplinary meeting was forceful and that he was correct to show pictures taken when he discovered she had not signed off cleaning the fridge.

[85] Having received Ms Vaughan's concerns about misrepresentations, Ms Michalewska explained further in her letter responding to Ms Vaughan of 7 April 2014 her views about various interactions with Mr Scott. She put in that letter that she believed Mr Scott did not want her to work at Kaizuka any longer and issues that she said indicated that to be the situation.

[86] There was no fair process in investigating these new allegations of misrepresentations. A fair and reasonable employer could not have concluded in respect of these matters that there was misconduct by Ms Michalewska in setting out how she felt about various interactions with Mr Scott, let alone serious misconduct justifying dismissal. One conclusion reached was clearly incorrect but used as an example of misrepresentation.

[87] A fair and reasonable employer approaching the decision making with an open mind would have seen Ms Michalewska's concerns in the context of earlier interactions with Mr Scott.

Made up story about a business

[88] Ms Vaughan noted in her letter of 4 April 2014 that Mr Butler had approached the New Brighton Surf Club about an opening of a café but they were unaware this was happening. Ms Vaughan wrote she did not intend investigating the matter any further and had provisionally concluded that what Ms Michalewska had said to Ms Robson was a story she had made up and was untrue.

[89] The result of Kaizuka's investigation was that there was no evidence to conclude that Ms Michalewska had a business in conflict with her employment with Kaizuka or that she had a business to recruit a member of staff into.

[90] Ms Michalewska accepted that she had spoken to staff including Ms Robson about a business in the context of a desire to start her own business not that she had her own business.

[91] In her response letter of 7 April 2014 at page three, Ms Michalewska stated as follows amongst other matters:

I told you I talked about wanting a café. I do not have one. I cannot offer jobs at a non-existent business. I was not aware in those casual chats that I had to make Amanda clear that this was a 'dream'. Never for a moment did I think that anyone would make an issue out of that. I think it this had not been blown up, we could have worked through any fridge cleaning and break issues.

...

If I did make up a story, as you suggest- I cannot see that I can be fired for that. I am quite confused by all of this and fully shocked at the decision you have made.

If I had talked about being a professional rally car driver and one of the staff could be my co-driver when I make it big – would you have followed this same process? I think I followed reasonable instructions from work; I am not sure how much I can be censored in casual conversations with workmates and perhaps that should have been discussed before such serious actions were taken?

[92] There was no further investigation undertaken by Kaizuka, into the adverse conclusion that Ms Michalewska had untruthfully made up the whole story about a business although it was a different allegation to those that were the subject of the disciplinary meeting.

[93] Even if Kaizuka concluded that Ms Michalewska had made up and/or exaggerated an idea she had for a business to her co-workers when there was no such business a fair and reasonable employer could not conclude that was serious misconduct destructive or deeply impairing of the level of confidence and trust it needed to have in her.

Failure to follow a reasonable and lawful instruction

[94] Ms Vaughan in her letter of 4 April stated that she preferred Ms Robson's account of the subsequent conversation given during a telephone interview with Mr Butler after the disciplinary meeting and concluded that Ms Michalewska had held a detailed conversation with Ms Robson about opening the café having been

instructed not to do so in Kaizuka's time and had wilfully disobeyed the instruction given.

[95] An instruction was given to Ms Michalewska on 18 March 2014 not to talk about her business. The allegation was that the following day, 19 March 2014, there had been a breach of that instruction when Ms Michalewska proceeded to discuss the business with Ms Robson and invited her to work at the business venture.

[96] In submissions Mr Butler states that Ms Michalewska did not deny having a conversation with Ms Robson after having been instructed not to at the disciplinary meeting or later. At the Authority investigation meeting though Ms Michalewska denied breaching that instruction and said that she did not talk about a business with staff after being instructed not to on 18 March 2014.

[97] I need to focus on what a fair and reasonable employer could have concluded about that allegation based on the information from the disciplinary meeting, a subsequent telephone interview with Ms Robson and other available information.

[98] At the start of the disciplinary meeting on 31 March 2014 it was outlined that Ms Michalewska had spoken to Ms Robson on 19 March about her business in breach of a lawful and reasonable instruction. Mr Butler did not accept more was required of a fair and reasonable employer when the allegation was clear to answer although what is fair and reasonable depends both on the circumstances and the allegation itself.

[99] A fair and reasonable employer needs to conclude as part of its investigation whether the employee did breach the instruction.

[100] Ms Michalewska did not accept or deny that there was a conversation with Ms Robson on 19 March 2014 about the business. She denied saying to Ms Robson that the business was opening in six weeks' time and denied offering her a job. Those were the main points of the conversation Mr Scott had recorded in a file note dated 24 March 2014 and Ms Robson had recorded in her handwritten note about the discussion on 19 March 2014. Ms Michalewska was not asked at the disciplinary meeting in light of those denials what was said and whether she had spoken about the business at all on 19 March 2014 to Ms Robson.

[101] After the disciplinary meeting Mr Butler telephoned Ms Robson and another employee Callum Armstrong to interview them about what Ms Michalewska had said

at the disciplinary meeting. Both employees attended the interview in the presence of Mr Scott and the interviews were recorded.

[102] Mr Butler, on 2 April when attaching the follow up interview records from Ms Robson and Mr Armstrong to Ms Oberndorfer, noted that Ms Michalewska had not stated what she had said to Ms Robson.

[103] Ms Robson was not asked about the date of the conversation during the telephone interview. There was other information available at that time by way of a file note dated 17 March 2014 to the effect that on that date Ms Robson asked Mr Scott if he knew of the discussions taking place in Kaizuka amongst staff that Ms Michalewska was opening a café. There was no questioning around whether there was more than one conversation between Mr Scott and Ms Robson and/or there could have been some confusion. Ms Robson in her evidence to the Authority said that she had only had one conversation with Mr Scott about Ms Michalewska's discussions about opening a café which would be inconsistent with the evidence about a subsequent discussion on 19 March or an earlier discussion.

[104] There were also two file notes dated 23 March 2014 prepared by Mr Scott. One is at page 27 of the bundle and the other is document 10 which is at page 93 of the bundle. The first file note refers to a discussion with Ms Robson about her being asked if she wanted to work for Ms Michalewska in her new venture on Tuesday 18 March 2014. Mr Scott said that that date was typed incorrectly. The second file note of the same day is that Ms Michalewska asked Ms Robson on 19 April. There is then a sentence that this was after Ms Vaughan and Mr Scott had discussed these issues with Ms Michalewska on 18 March. The work after is underlined.

[105] Ms Robson in her interview said that she had had a conversation with Ms Michalewska in which there was discussion about her new café and what she was planning to do including building of some stairs. Ms Robson said that Ms Michalewska asked whether she wanted to come and work for her controlling the front of house. Ms Robson said that she took about ten minutes to think about it and then declined the offer.

[106] Ms Michalewska responded to Ms Robson's telephone interview in her letter of 3 April 2014 to Ms Vaughan. She set out that she does not accept she talked about an actual plan and denied that she offered Ms Robson a job because they did not get

on and she had no business or position to offer anyone. She does not address the date issue.

[107] Ms Michalewska wrote further to Ms Vaughan on 7 April 2014 after the provisional conclusion that her employment should be terminated. At the first paragraph on the second page of her letter she makes reference to the notes that were provided to her with the invitation to the disciplinary meeting and says:

I do not agree that the notes are accurate; many details that I recall have been left out, dates are not always right and I do not think it is fair to make a decision based on them. One states that Amanda came to Aaron on Monday 17 March about my discussions and then Amanda is asking me about my plans on Wednesday 19 March.

[108] There was no question asked of Ms Michalewska as part of the investigation why she would talk about her business after 18 March to another staff member after being told not to. The deliberateness or wilfulness of any breach of the instruction would have to be considered in light of the conclusion that the business was simply a made up story.

[109] I could not be satisfied that a fair and reasonable employer had enough information to safely conclude that there had been a wilful and deliberate breach of the instruction given on 18 March 2014 to Ms Michalewska not to discuss her business. The instruction was given on the basis that Ms Michalewska had a new business venture and understandably Ms Vaughan did not want that business venture discussed further at Kaizuka. In light of the conclusion reached after hearing Ms Michalewska's explanation at the disciplinary meeting that the business was simply a made up story the seriousness of any breach would also have to be considered. There is no suggestion that there was further consideration given to that matter. Ms Vaughan said in her evidence that she would still have terminated Ms Michalewska's employment even if she had not concluded there was a breach of the lawful instruction because the trust and confidence was gone. This requires consideration of the final reason for dismissal.

Irreconcilable breakdown of the relationship

[110] This was the final reason for terminating Ms Michalewska's employment. Mr Butler submits that Ms Michalewska's 3 April letter and her statement at paragraph 19 as set out below went *too far* and Ms Michalewska needed to either affirm the relationship or resign and bring a claim of constructive dismissal:

After the way I have been lied to, scrutinised, disbelieved and unfairly accused of all manner of misconduct, I cannot see how we are all going to retrieve our professional relationships and work with the kind of trust that is needed.

[111] There was no fair investigation I find after Ms Michalewska's letter of 3 April 2014 for a fair and reasonable employer to conclude that the relationship had irreconcilably broken down. Ms Michalewska's concerns about Mr Scott were not investigated or discussed with him. Several of her concerns in the letter of 3 April had some basis but raising these became further reasons for dismissal.

[112] One of the concerns for Ms Vaughan was that Ms Michalewska had lied because contrary to what she subsequently maintained she had not told her at the 18 March meeting the business was a dream. I accept that caused concern but has to be viewed in light of the fact there was no evidence ultimately to satisfy Kaizuka that there was actually a business. In her letter of 3 April Ms Michalewska says that when Mr Scott gave her the letter inviting her to a disciplinary meeting on 25 March she told him that there was no business or café. That was not investigated by Ms Vaughan with Ms Scott before dismissal.

[113] There were issues in the relationship between Mr Scott and Ms Michalewska. These needed to be considered by Ms Vaughan with an open mind as to whether there was any basis for them and what steps could be taken to improve the relationship in the future. There could have been performance management of Ms Michalewska about any concerns.

[114] I find that this matter is distinguishable from the Authority determination in *O'Brien v Xtend-life Natural Products (International) Limited*⁶ Mr Butler referred to. I do not find it was available for Kaizuka during a disciplinary investigation to simply rely on a statement without further investigation and discussion to conclude the relationship had broken down. To do so was not in accordance with good faith obligations or the procedural requirements under s 103A (3) of the Act.

[115] I accept Ms Gordon's submission on this matter that there are mutual obligations on the parties to be active and constructive in maintaining a productive employment relationship.

⁶ CA 45/08

Conclusion

[116] I am not satisfied that a fair and reasonable employer could have concluded there was good reason to summarily dismiss Ms Michalewska. Allegations which were not the subject of the disciplinary meeting were relied on without further investigation. The process was flawed and could not support a decision to dismiss. I accept that Ms Vaughan's views were genuinely held but the actions and the decision to dismiss were not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. Ms Vaughan said in her evidence that she gave no consideration to the alternatives to dismissal.

[117] Ms Michalewska has a personal grievance that she was unjustifiably dismissed and is entitled to consideration of remedies for that and the unjustified action in terms of her suspension.

Remedies*Unjustified action causing disadvantage*

[118] Ms Michalewska wrote about the effect of being advised she was on unpaid suspension in her letter of 3 April 2014 to Ms Vaughan⁷. She wrote the suspension caused her a substantial amount of worry in the interim while she was sick notwithstanding that it was later withdrawn. She also set out that it caused a lot of damage to the trust in the relationship as Mr Scott seemed intent on punishing her.

[119] I take into account in assessing a remedy for this grievance that Ms Michalewska was unwell when suspended. Also that she tried to talk to Mr Scott about the fact he had not complied with her employment agreement on the day of suspension to no avail. There must though be some recognition of the fact that a mistake was acknowledged by Kaizuka and the suspension withdrawn in any award. An attempt to fix mistakes, procedural and otherwise, is to be encouraged in this area.

[120] I am satisfied that the advice of unpaid suspension caused injury to the feelings of, worry and concern for Ms Michalewska and a suitable award is the sum of \$3500.

⁷ Paragraph 6

[121] I do not find under s 124 of the Act that Ms Michalewska contributed to the situation that gave rise to the personal grievance about the suspension.

[122] I order Kaizuka Café Limited to pay to Evelyn Michalewska the sum of \$3,500 without deduction.

Unjustified dismissal

Lost wages

[123] Ms Michalewska is claiming lost wages from 8 April to 8 July 2014 in the sum of \$8,640. I note that the period is incorrectly described as 12 weeks and lost wages incorrectly calculated on that basis when it is in fact a period of 13 weeks. A period of 13 weeks lost wages calculated on the basis of \$18 per hour for 40 hours per week is the sum of \$9360.

[124] Ms Michalewska was declared fully unfit to return to work from 11 April 2014 until 30 June 2014 in a medical certificate from Dr Ben Chang because of post-traumatic stress disorder, depression and stress.

[125] Mr Butler submits that it may be that Ms Michalewska had an existing medical condition that caused her to be unwell. Ms Vaughan in her evidence recalled that Ms Michalewska had told her she suffered from stress and anxiety and was having acupuncture for stress.

[126] Ms Michalewska said that her acupuncture was for weight loss and not stress related. She did not accept that there were earlier issues about depression. Ms Michalewska said that she was prescribed anti-anxiety pills in February 2014 as she felt under increasing pressure at work and then sleeping pills in March 2014 to cope with the stress of working. She recounted two episodes of vomiting from stress after the disciplinary meeting at work in her evidence and I note several email requests from Ms Oberndorfer in or around early April to Mr Butler referring to Ms Michalewska suffering from *extreme stress*. There is reference in one email to the prescribing of anti-depressants because of the pressure of attending at work.

[127] I accept Mr Butler's submission that the psychiatric report dated 15 November 2014 from Caroline Bell following an assessment of Ms Michalewska involved self-reporting. I shall refer further when considering compensation why the

report is to be regarded with some caution. The conclusion in the psychiatric report was that after dismissal there had been a depressive episode with significant anxiety symptoms described as Adjustment Disorder (with anxiety). Ms Bell concluded that the cause of incapacity was solely related to the mental injuries which she described in the report in the form of psychological and emotional abuse over a protracted period. It was set out in the report there was no previous history of any psychological difficulties and nothing in Ms Michalewska's history that would indicate any vulnerability for the symptoms being experienced. Ms Bell's conclusion was that the current mental injuries related to work [at Kaizuka]. I prohibit from publication any details in the Psychiatric report which are not set out in this determination.

[128] Ms Michalewska was prescribed medication for anxiety and sleeping issues whilst at Kaizuka and she suffered from stress issues after the disciplinary meeting while at work. I do not therefore rely solely on the psychiatric report in reaching a view as to whether the declaration of Ms Michalewska as fully unfit for a period until 30 June 2014 was due to events leading to and her dismissal.

[129] I am satisfied that there was a link between the inability to work for the period from termination until 30 June 2014 and Ms Michalewska's dismissal. Income during that period was lost as a result of her personal grievance. Ms Michalewska said that for the period until 30 June 2014 she did not get out of bed and did not really do anything. After June 2014 Ms Michalewska looked for work as financially the household required two incomes and she was successful in getting initially some casual work. For the brief period from 30 June until 8 July 2014 I am satisfied there was appropriate mitigation particularly given the evidence about a subsequent loss of confidence.

[130] Subject to any issue of contribution Ms Michalewska is entitled to be reimbursed for lost wages in the sum of \$9360 gross.

Compensation

[131] Ms Michalewska claims the sum of \$25,000 for compensation for her personal grievance of unjustified dismissal. I accept that the impact of the flawed process and termination on Ms Michalewska was significant. Ms Michalewska was unable to work for a considerable period. She lost confidence in her ability as a chef and suffered from reduced self-esteem. Her husband was so worried he paid for her

mother to come from Poland to support her for a few months from in or about June/July.

[132] There were financial difficulties as a result of Ms Michalewska being unable to work. As her husband is employed she was not entitled to any sort of benefit. There was also an inability for Ms Michalewska to move on from her dismissal because she could not understand the reasons being adequate to end the relationship. Ms Michalewska said that she was shocked to get *fired* and that everything piled up. She said that when Kaizuka established there was no business it then concluded she was dishonest and as she described it *a really bad Chef*. Ms Michalewska said that she started to have panic attacks when Mr Scott was around in the kitchen and I accept was shocked to receive typed notes which were described as warnings most of which she had not previously seen.

[133] I do have some disquiet about placing too much reliance on the psychiatric report. The report refers to events involving Mr Scott which were never raised with him and are not part of the Authority's investigation and it also contains inaccuracies. For completeness Mr Scott strenuously denied these events and I accept he never had an opportunity to answer those matters. I did not hear from Ms Bell.

[134] There is though some other evidence to support that the dismissal incapacitated Ms Michalewska for a period, which I have outlined above when considering loss of wages. Ms Michalewska confirmed in her evidence that she had not previously suffered from depression until the events with Kaizuka. Ms Michalewska has had counselling to assist her to move on from the events. I do note that she was as of November 2014 no longer incapacitated by her mental illness and has been able to regain her confidence and self-esteem in her work, though Ms Michalewska said when she returned to work on a causal basis she was somewhat anxious to start with.

[135] Subject to any issues of contribution I find that Ms Michalewska is entitled to an award for compensation in the sum of \$16,000 without deduction.

Contribution

[136] The Authority is required under s 124 of the Act where it has determined an employee has a personal grievance to consider the extent to which the actions of the

employee contributed toward the situation that gave rise to the personal grievance and if required reduce remedies that would otherwise have been provided.

[137] Mr Butler submits that there should be a significant reduction for the conduct that gave rise to the action taken and that it would be enough to make an award for costs only.

[138] He submits that there was contribution firstly by way of Ms Michalewska's performance and attitude being well below what was required and posing a threat to the business in terms of food hygiene and presentation. He relies on the Employment Court judgment in *Morris v Christchurch International Airport Limited*⁸ where the then Chief Judge Goddard found contribution with a performance issues and reduced remedies simply awarding a contribution to costs.

[139] Ms Morris was employed in the car park booth at Christchurch airport. She was subject to a performance management regime which made it plain what the concerns were and that monitoring of performance in the near future was contemplated. There had been a number of complaints from customers about her. Ms Morris was also advised that should the expectation of the company not be met then there would be formal disciplinary action which may include termination of employment. It was implied that there would be a period of 3 to 6 months in which to meet the expectations of the employer. Within that period Ms Morris committed an error of judgment when she took a break from her booth when traffic was heavier and this caused great inconvenience to her employer causing the traffic to back up considerably to an extent that the security officer let the cars out without charge on payment of a gold coin.

[140] There are distinguishing factors in the *Morris* judgment and this matter. Ms Morris was called to a disciplinary meeting about the performance issue set out above. Ms Michalewska was not called to a meeting about performance concerns. Ms Morris it was found contributed to the procedural flaws that then occurred. Ms Michalewska did not contribute to any procedural flaws. It was clear in *Morris* that Ms Morris knew further issues may result in termination of employment. It was not clear to Ms Michalewska.

⁸ [2004] ERNZ 336

[141] Performance was not a matter that Ms Michalewska believed would be discussed at the disciplinary meeting as one of three issues which could, depending on her explanation, lead to her dismissal. Kaizuka concluded I have found incorrectly that Ms Michalewska had been given various warnings. Ms Michalewska understood from the letter inviting her to a disciplinary meeting that issues in her employment would only be considered at the point there was a disciplinary outcome. Her representative clearly raised a concern that Ms Michalewska had not seen many of the various file notes but that issue was never returned to.

[142] I do not find contribution because of performance issues or concerns. Had Ms Michalewska's employment not been terminated then Kaizuka may have proceeded under step 3 and 4 of the second schedule to deal with issues about work performance. If it was justified Kaizuka could have issued a final written warning about the fridge issue and given a period for improvement under step 5. That did not happen. The award for lost wages was for three months. Had it been for a greater period I would have limited it to three months recognising the performance issues and other concerns.

[143] I do not find that raising concerns about Mr Scott, or putting forward a view of matters contrary to that of Kaizuka was destructive of trust and confidence in the employment relationship. There is no contribution on that basis.

[144] I have then considered the issue about the business. I find on the balance of probabilities that Ms Michalewska had less of a dream and more an idea about a future business. I accept her evidence though that she was renting a house and finances would not permit such an idea to move towards fruition. Having an idea for a business is not misconduct. The evidence does not support an actual plan. This was not a situation where Ms Michalewska recruited other employees for a new business.

[145] Although Kaizuka did not place weight on a telephone interview with Mr Armstrong after the disciplinary meeting I find that his account objectively assessed is more in line with Ms Michalewska's explanation about an idea or an aspiration to own her own cafe. Mr Armstrong said initially that Ms Michalewska had told him she was thinking about trying to open up her own business. Mr Butler asked whether Ms Michalewska was *thinking about* opening her business or *starting* her own business. Mr Scott at one point also pressed for clarification on this point. Mr Armstrong said that Ms Michalewska said *I am*. The high water-mark of any job

offer from the interview with Mr Armstrong was *you can come and work for me if you are not happy*. Mr Armstrong had not thought the matter was a big deal until Ms Robson had talked to him and he said *that's when they found out she had offered more than one person a job*.

[146] The only staff member who seemed to think any discussions should be reported was Ms Robson. Both Ms Robson and Ms Michalewska agreed there had been some difficulties in their working relationship. In an informal discussion between two colleagues there is always room for misinterpretation and confusion. No-one is being particularly careful or often professional about what is said.

[147] Following investigation only one of the allegations remained on foot which was the wilful failure to follow an instruction. I could not be satisfied on the balance of probabilities that Ms Michalewska breached a lawful and reasonable instruction not to talk about her business idea by offering Ms Robson an actual position in a non-existent business the very next day.

[148] I do not find that the actions of Ms Michalewska in talking to staff about her idea are blameworthy or culpable actions that contributed to the situation that gave rise to the grievance so as to require a reduction in remedies that would otherwise be awarded.

[149] I do not find that the above awards should be reduced for reasons of contribution.

Penalty

[150] Ms Michalewska claims a penalty for a breach of the statutory duty of good faith for several reasons.

[151] The first and fourth reason is that Kaizuka falsified file notes and misled and deceived her that they were warnings. Further she was not able to have access to the information to comment on it before warnings were issued. Kaizuka could type up notes of various meetings and it was not a breach of good faith to do so. Most of the file notes though could never be seen as warnings. Ms Michalewska did have an opportunity to deny that she had seen most of the notes earlier and/or had been warned. Kaizuka incorrectly concluded she had received various warnings. I am not

satisfied that the conduct in that matter was of an egregious nature so that a penalty would be appropriate.

[152] The second reason was about Mr Scott's conduct when he told Ms Michalewska that the disciplinary meeting was like mediation and Mr Butler was there to advise both parties. Fortunately Ms Michalewska disregarded his advice and obtained a representative. Mr Scott said that he genuinely believed that to be the case but was incorrect. Mr Scott on my assessment would say things before thinking or considering them and was unfortunately often wrong in the days leading up to the disciplinary meeting with what he said to Ms Michalewska. It was not satisfactory and led to Ms Michalewska losing trust in him. I find though it was a case of Mr Scott giving an unconsidered view about an unfamiliar disciplinary process rather than being deliberately misleading.

[153] The third reason was that statements were taken from unreliable sources and relied on to justify the actions in regard to dismissal. There was only one statement relied on and that was from Ms Robson. It was more that what was said and the context in which it was said was not a reason for dismissal rather than bad faith.

[154] The fifth reason was that there was pre-determination of the disciplinary outcome and reliance on mistaken understandings. That is more a matter that goes to justification of dismissal rather than a breach of good faith.

[155] Finally there is the refusal to allow Ms Michalewska to go on stress or special leave although she was vomiting at work due to stress. Ms Michalewska was able to take sick leave although that would be unpaid as I understand the matter or use her annual leave. Suspension could also have been without pay under the employment agreement. The issue was more about payment for leave rather than bad faith I find.

[156] I do not find that the actions were of an egregious nature so that a penalty for a breach of good faith should be awarded.

Costs

[157] I reserve the issue of costs. Ms Gordon has set out that she claims costs of two days at the daily tariff of \$3500 and also seeks reimbursement of the filing fee of \$71.56. If there is no agreement to that Mr Butler has to lodge any submissions in

reply by 16 December and if required Ms Gordon has a further week to reply by 23 December 2015.

Orders Made

[158] I order Kaizuka Limited to pay to Evelyn Michalewska the sum of \$9360 gross being reimbursement of lost wages under s 123 (1) (b) of the Act.

[159] I order Kaizuka Limited to pay to Evelyn Michalewska the sum of \$19,500 without deduction being compensation under s 123 (1) (c) (i) of the Act for unjustified disadvantage and unjustified dismissal grievances.

[160] I order Kaizuka Limited to reimburse Evelyn Michalewska for her third medical certificate.

[161] There is no award made for a penalty for a breach of good faith.

[162] Costs are reserved and failing agreement a timetable has been set.

Helen Doyle
Member of the Employment Relations Authority