Employment Court of New Zealand

Pact Group v Robinson [2023] NZEmpC 173 (5 October 2023)

Last Updated: 10 October 2023

ORDER PROHIBITING PUBLICATION OF SOME OF THE EVIDENCE GIVEN
IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2023] NZEmpC 173
EMPC 428/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PACT GROUP Plaintiff
AND	CAREY ROBINSON Defendant

Hearing:	20-23 June 2023
Appearances:	F McMillan, counsel for plaintiff R Jamieson and I O'Sullivan, advocates for defendant
Judgment:	5 October 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Ms Robinson was a community support worker with Pact Group. She had held that role for approximately 15 years prior to her dismissal. The Employment Relations Authority found that Ms Robinson had been unjustifiably dismissed and ordered the company to pay her $20,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).1 Pact Group challenged the determination on a de novo basis.

1 *Robinson v Pact Group Ltd* [2022] NZERA 598 (Member English).

Background

[2] Ms Robinson was employed by Pact Group and its predecessor company as a community support worker. Her role involved supporting clients to live as independently as possible within the community. The job was varied, as were the needs of each of the clients Ms Robinson worked with. Ms Robinson was evidently well regarded, and received positive performance reviews over the years. No issues had been raised in respect of any aspect of her work. This was to change towards the end of 2021.

[3] Earlier in 2021 Pact Group embarked on a restructuring exercise and sought feedback from affected staff. Ms Robinson,

and other support workers in her team, were impacted by the proposed changes, including in respect of working hours. Ms Robinson raised concerns about the proposed changes. In the event existing staff entitlements were essentially grandparented.2 It is evident that the change process had been difficult for both Ms Robinson and her line manager, who had only recently been appointed.

[4] Later in 2021 further disruption was caused within the workplace by the COVID-19 pandemic. On 17 August 2021 New Zealand moved to Alert Level 4, entering into a national lockdown. This had a significant impact on Ms Robinson's work, and how she was able to undertake it. Face-to-face contact with her clients suddenly ended. On 1 September 2021 the Wellington Region, which was where Ms Robinson was based, transitioned to Alert Level 3; on 7 September to Alert Level 2.3 It was at this stage, 7 September 2021, that Ms Robinson was able to begin the process of reconnecting with her clients in person.

[5] It was also around this time that Pact Group support workers, including Ms Robinson, were required to complete additional training in respect of the administration of medication. Ms Robinson gave evidence that she had difficulty

2. In that they were able to continue working normal office hours, rather than sleepovers, evening or weekend shifts. While Ms Robinson remained on similar hours overall, later in 2021 it was agreed that she was to start work at 8.00 am instead of 9.00 am.

3 Limitations remained on mask wearing and gathering size.

doing this as it required her to be in the office at or before 8.00 am, and she provided daily care for her elderly mother before she started her working day.

[6] On 21 September 2021 Ms Robinson's line manager, Ms Eastergaard, emailed Ms Robinson asking her to book her additional training. Ms Robinson emailed her manager back advising that she had been trying to catch up with all of her clients since lockdown and had been attempting to complete the medication requirements outside her rostered hours. Ms Robinson advised that "this has been a huge juggle for myself and my clients." In addition, she noted that she had spent time orientating new staff following the restructuring exercise. Ms Robinson's email was to set the wheels in motion for the involvement of senior management.

[7] Unbeknown to Ms Robinson, her line manager forwarded the 21 September 2021 email to her own manager, Mr Cardy. Mr Cardy was at the time the company's General Manager, based in Dunedin. He said that he was concerned by Ms Robinson's comment that "this has been a huge juggle" and that had prompted him to look into Ms Robinson's work. He did this without first discussing matters with Ms Robinson, or seeking clarification of what her concerns were. Rather, he caused enquiries to be made into Ms Robinson's work diary and clients assigned to her as shown on the company's online management system. He also caused enquiries to be made into the electronic time recording system used by all staff, the records from Ms Robinson's work phone and the GPS records on her work vehicle. All of this occurred without Ms Robinson's knowledge.

[8] By 28 September 2021 Ms Robinson had completed the requested training.

[9] On 28 September 2021, Mr Cardy wrote to Ms Robinson explaining that he had undertaken a review of her current workload and that as a result he had some concerns in relation to how she was spending her work hours. The review covered a three week time period around the beginning of September 2021. As I will come to, this time period coincided with a return to the workplace after a COVID-19 lockdown.

[10] Mr Cardy proceeded to set out his concerns over some six pages of closely typed text, complete with illustrated tables. In summary, his concerns centred on

whether Ms Robinson was claiming payment for time that she had not in fact worked. From the data collated on Mr Cardy's behalf, he calculated the start and finish times of Ms Robinson's work day, how long he believed she was at scheduled appointments, how long he believed it would take her to travel to and from her destinations and made an allowance for the time he believed was reasonable for her to make updating notes on a client's file following the meeting. Mr Cardy advised Ms Robinson that, if proven correct, it would lead to the conclusion that she was not performing work for all hours in her stipulated working day and that she was receiving payment for those hours via the electronic timesheet system, amounting to her having falsified records and making fraudulent claims for payment. He advised Ms Robinson that dismissal was a possible outcome.

[11] Mr Cardy concluded the letter by telling Ms Robinson that she was required to attend a meeting with him, the services manager and the workforce advisor on 4 October, and that this meeting would be conducted virtually via Zoom.4

[12] Unsurprisingly Ms Robinson was shocked to receive Mr Cardy's correspondence. She asked to meet with Mr Cardy in person to discuss matters. The request for an in-person meeting was refused, for reasons which I will return to. Rather, the meeting proceeded via Zoom as Mr Cardy had indicated it would. Ms Robinson, together with her representative, joined the virtual meeting. She explained in evidence (which I accept) that she did not feel that the meeting, and the way it was

conducted, enabled her to talk to Mr Cardy in a direct and personal way; she formed the impression that he was not listening to her; she struggled to hear all that Mr Cardy was saying; and that she and her representative were obliged to sit together in front of a small iPad, juggling papers. The evidence established that the meeting took around three hours.

[13] At the meeting Ms Robinson reiterated that she had wanted to meet in person, and said that the way in which Mr Cardy had dealt with matters had left her feeling "stripped of her mana, culturally disadvantaged, and that this mishandling of [her] mana had resulted in feelings of shame." She also touched on her personal

4 There was no proposal from Mr Cardy that Ms Robinson's line manager attend the meeting.

circumstances, including that she was the carer of her mother and that she was suffering herself from a health condition.

[14] Ms Robinson advised Mr Cardy that she had always been paid to work an 80- hour fortnight and had some ability to be flexible with when she worked. Flexibility was, she said, necessary given the nature of her role; serving clients within the community involved travel and, often, a variable workload depending on the level of complexity of her clients' needs at any given time. Further she stated that her understanding was that she was unable to claim overtime because her line manager edited the timesheets to an 80-hour fortnight prior to submitting them to the payroll department. Ms Robinson expressed her view that Mr Cardy had unfairly made assumptions that when she was not with a client or driving during the work day, she was not working. She pointed out that there were numerous other tasks that she was required to attend to, including engaging with stakeholders and attending to arrangements to provide support to her clients in order to meet their complex needs.

[15] On 12 October 2021, Mr Cardy wrote again to Ms Robinson. The letter referred to the matters raised by and on Ms Robinson's behalf at the meeting but advised that he had reached the preliminary view that the company could not have trust and confidence in her ability to complete the stipulated hours of work and that she had made fraudulent claims for payment.

[16] The letter referred to what was described as a pattern of seeking payment for time worked over contracted hours on days she worked overtime, but still clocking a full day when she took time off in lieu and worked a shorter day. In evidence, Mr Cardy accepted that the overtime issue had since been resolved from the company's perspective, and that the company accepted that Ms Robinson was not fraudulent in that regard. However, the evidence points to Mr Cardy either having not reached this conclusion at the relevant time, or if he had, he failed to sufficiently communicate his view to Ms Robinson. The letter also referred to an alleged failure to complete stipulated hours of work, by starting later and/or finishing work earlier than the applicable rostered time, and still claiming payment for those hours not worked.

[17] Ms Robinson responded by way of letter dated 21 October 2021. She reiterated her position that seeking payment for time over her contracted hours was impossible because her line manager always edited her timesheets to a standard 80 hours of work per fortnight as per her rostered hours. She raised concerns that her line manager had not been part of the disciplinary meeting and that the meeting (conducted via Zoom) was unsatisfactory and it had been hard for her to hear.

[18] The next day Mr Cardy wrote to Ms Robinson stating that he had formed the view that she had failed to provide a reasonable explanation for her actions and that she was dismissed for serious misconduct, with immediate effect. The conduct referred to in the dismissal letter was the failure to complete stipulated hours of work, and consequently claiming/being paid for hours that were not actually worked.

[19] As I have said, the Authority concluded that Ms Robinson had been unjustifiably dismissed. In reaching that conclusion, the Authority member found that the company had failed to follow a fair and reasonable process, had failed to sufficiently investigate the allegations against Ms Robinson before dismissing her, had failed to give her a reasonable opportunity to respond to its concerns, and had failed to genuinely consider her explanations before dismissing her.

[20] This is a de novo challenge and I am obliged to consider the evidence afresh and reach my own conclusions on the evidence. Having done so I find myself in broad agreement with the findings of the Authority. I explain the basis for my conclusions, and the consequential remedial relief, below.

Analysis

What were the relevant circumstances at the time?

[21] As s 103A(2) of the Act makes clear, an employer's actions are to be assessed having regard to what a notional fair and reasonable employer could have done "in all the circumstances at the time the dismissal or action occurred".

[22] In this case, I agree with Ms Robinson's representative, Mr Jamieson, that all of the circumstances included the fact that the company had recently undergone a restructuring, and this had resulted in a degree of disruption to accepted work practices. I agree too that the fact that the country had only very recently come out of lockdown, the uncertainty surrounding the pandemic and its impact on a return to the workplace, was a relevant circumstance. Also relevant, as

submitted, were Ms Robinson's personal circumstances and her cultural needs.

[23] The significant resources available to the company (management, financial, human resources and legal) are also relevant to an assessment of the 'reasonable action' mix.5 Put in a nutshell, higher standards can generally be expected of the notional fair and reasonable employer who is well resourced and well supported.6

[24] It is clear from the evidence that Ms Robinson's email which triggered Mr Cardy's involvement came at a time of significant transition within the workplace. Lockdown had recently been lifted and there was a return to the workplace. Lockdown had placed serious limitations on the ability of community support workers (such as Ms Robinson) to interact with their clients in order to meet their needs. Ms Robinson clearly cared about her clients and their well-being and was concerned about their welfare during the COVID-19 restrictions. At the time the events occurred, Ms Robinson was in the process of seeking, as a matter of priority, to renew contact with her clients, who had a range of needs (some of which were complex).

[25] What the company may not have known at the time it commenced its formal process, but which Ms Robinson alerted it to during the Zoom meeting, was that she had caregiver responsibilities to her mother (who suffered from dementia and required daily care). Ms Robinson also referred to being impacted by health issues. It is common ground that she did not go into any detail about her health issues at the

5. Employment Relations Act 2000, s 103A(3)(a). Note that s 103A(3) lists the resources available to an employer as a mandatory factor for consideration but is linked to the extent of the investigation carried out. The factors listed in s 103A(3) are not exhaustive; the Court may consider any other factors as it considers appropriate: s 103A(4). The level of resource and support available to each party may be more broadly relevant when assessing the reasonableness of the employer's actions, depending on the particular circumstances.
6. See, for example, *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431 at [52]; and former Chief Judge Colgan's observations in *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6, [2015] ERNZ 437 at [10].

meeting. As became clear during the course of evidence, the health issues which Ms Robinson was dealing with at the relevant time were of a personal nature which she felt embarrassed about discussing in the context of a disciplinary meeting conducted via Zoom.7

[26] It is notable that Mr Cardy did not request further information as to the personal challenges Ms Robinson was evidently confronting, either during or following the meeting. When the point was put to him in evidence, he indicated that Ms Robinson should have provided full disclosure of her health issues during the Zoom meeting if she considered them relevant to his inquiry. This overlooks the point, which should have been plain, that Ms Robinson *did* consider her health issues relevant – she raised them in the context of a disciplinary meeting in response to concerns raised by her employer as to her alleged conduct in the workplace. It was his obligation as a fair and reasonable employer in the particular circumstances to take steps to ensure he had the relevant information to inform the inquiries that he had chosen to initiate in a disciplinary context before reaching any concluded view.

[27] Also relevant to the circumstances was the fact that Ms Robinson is Māori and raised, during the first meeting with Mr Cardy, concerns that her mana was being impacted by the processes adopted by him.8 There is nothing to suggest that these concerns were seriously considered, explored, or factored into the way in which the company responded; indeed it is apparent that the process was hurried and conducted in a distanced, impersonal way that undermined, rather than maintained, Ms Robinson's mana.9

7 Non-publication orders were made in respect of this evidence.

8. See the discussion in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [185]: "Mana conveys concepts of power, presence, authority, prestige, reputation, influence and control. While mana is one of the most valuable and important things a person can have, an allegation of a hara alone may result in a corresponding loss of mana. It applies at both an individual and collective level, so that a hara does not occur against the individual only but can impact the whānau, hapū or iwi." In evidence, Ms Robinson pointed to specific examples which caused her to feel "stripped of mana" including Mr Cardy's comments regarding her "attitude and tone" in the initial email and the way in which the disciplinary meeting was conducted.
9. Utu, "the action undertaken in reciprocity", is linked to mana. To show and reciprocate generosity enhances mana and strengthens relationships, whereas the failure to give or receive utu diminishes the mana of both parties to the relationship: Te Aka Matua o te Ture, Law Commission *He Poutama* (NZLC SP24, 2023) at 66. Ms Robinson gave evidence that she felt as though Pact Group's treatment of her failed to reciprocate the care, empathy and consideration she was expected to bring to her own role within the company.

[28] I return to the stated reasons for the Zoom meeting at this juncture. Mr Cardy gave evidence that he resides in Central Otago and that the company's head office is in Dunedin. While he gave evidence that he travels to Wellington on a monthly to six- weekly basis, he said he did not consider it necessary to travel to Wellington to meet in person with Ms Robinson to discuss the possible termination of her employment against the backdrop of concerns about her integrity and an allegation of workplace fraud. Rather, he said there were scheduling issues prevented a prompt in-person meeting, and that as a result a virtual meeting was, in his view, preferable. He also cited the pressures placed on the company operating as an essential service in the context of a pandemic, and the resulting impact this had on his available time for this matter. I was not drawn

to this aspect of Mr Cardy's evidence.

[29] While I do not discount the possibility that there may be circumstances in which it is fair and reasonable to conduct a disciplinary meeting via Zoom, and to decline a request from an affected employee for an in-person meeting, the circumstances of this case fall well short. The reality is that this was a very serious issue, both from the company's perspective and from Ms Robinson's perspective. Ms Robinson had raised concerns from the outset about the appropriateness of the Zoom meeting, had indicated that she had trouble hearing and that the way in which the meeting had been conducted undermined her ability to communicate with Mr Cardy.

[30] Ms Robinson had also made it clear to Mr Cardy that she considered the lack of face-to-face communication was inadequate and engaged cultural concerns from her perspective. She provided Mr Cardy with documentation which she believed would assist him in understanding her cultural perspective. Then, in a letter responding to the company's record of that meeting, she reiterated that she felt there had been a failure to acknowledge or have regard to the cultural concerns she had raised.

[31] As the contemporaneous documentation reflects, Mr Cardy did not accept the validity of the cultural concerns Ms Robinson had raised, rejecting them without seeking to engage further on them. When it was put to him in cross-examination, Mr Cardy readily accepted that Pact Group incorporated tikanga into the workplace via

company policies.10 It was clearly viewed as relevant by both parties to the employment relationship in this case.11 I have no difficulty concluding that, at the very least, a fair and reasonable employer would have considered what an appropriate process might require in light of its obligations to staff under its own policy and Ms Robinson's expressed cultural needs, and engaged with her on these points. And a fair and reasonable employer in the circumstances, particularly in light of the relatively frequent travel the company permitted at that time, would have arranged an in-person meeting.

[32] Pact Group raised a concern during the course of the hearing that it had not been put on notice (including via the pleadings) that its cultural competency would be put in issue and if it had been it may have called expert evidence. In particular reference was made to additional evidence being given during the course of evidence in chief, which had not been given in the Authority. It is correct that some of the evidence given before the Court appears not to have been given in the Authority. The challenge was pursued on a de novo basis and the evidence was given afresh. As I have said, cultural issues were engaged in this case from a very early stage, and during the company's process. In any event it is not uncommon for further supplemental, or sometimes conflicting, evidence to come out on a de novo hearing. The opposing side remains able to pursue an application for leave to call further evidence if taken by surprise and there may be cases where an adverse inference can be drawn from the fact that new and/or conflicting evidence has been given. That is not, however, the situation here, no application was advanced by the company and it was able to cross- examine in the usual way. For completeness, I do not accept that Ms Robinson's cultural concerns were inadequately pleaded.

[33] Further, I note the risks that may be associated with conducting disciplinary processes via Zoom. In this regard recent research suggests that low audio quality

10 See the company policy: "Engaging with Māori Policy", which referred to supporting Māori staff to achieve a good quality of life and wellbeing, and to participate in and contribute to te ao Māori

– the Māori world.

11 See *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [265]; and see also *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [16], where the Court observed that the statutory framework for employment relationships does not preclude the incorporation of tikanga/tikanga values and noted the natural alignment of employment law and tikanga principles.

negatively impacts the impression people take from the information being conveyed in a virtual forum.12

[34] There are other difficulties with the approach taken by the company, as the Authority member pointed out. The company proceeded on the basis of assumptions as to what Ms Robinson was spending her time at home doing. I agree with the Authority that if the company genuinely believed that Ms Robinson was underperforming (despite her years of apparently good service with no issues) and that she should have been doing more work than she was, then that was a performance issue that ought to have been dealt with under that umbrella. That would have involved clarifying expectations and then giving Ms Robinson time to meet those expectations.

[35] More particularly, there was a failure to adequately consider the flexible work arrangements that had previously been in place and whether a change in approach had been adequately communicated. Ms Eastergaard gave evidence for the company that she had one-on-one conversations with every staff member to clarify the company's expectation that people were not to work from home for extended periods of time. Ms Robinson could not recall such a discussion taking place; she said that no new instruction or guidance as to how to "record time in lieu" was given by the company at or around the relevant time. Other than Ms Eastergaard's evidence, no evidence was before the Court to support the suggestion that clear communications had been given at the relevant time (post a return to the office) in respect of working times.13

[36] Ms Robinson believed that the former practice of a flexible start/finish time, and sometimes making up hours in the evening by completing administrative tasks, continued on that same informal basis. That was reasonable in the circumstances. If the company was concerned that there had been non-compliance with a relatively recent change in policy which it considered had been communicated to staff, a proportionate response would have been to clarify the new approach with Ms

12 See Elena Bild and others "Sound and Credibility in the Virtual Court: Low Audio Quality Leads to Less Favorable Evaluations of Witnesses and Lower Weighting of Evidence" (2021) 45(5) Law and Human Behaviour 481; and Eryn Newman and Norbert Schwarz "Good Sound, Good Research: How Audio Quality Influences Perceptions of the Research and Researcher" (2018) 40(2) Science Communication 246.

13 There was one earlier email communication but it was not sufficiently proximate or precise to assist the company's case.

Robinson, ensure that she understood it and the company's expectations, and the need to comply with it.14

[37] At the initial meeting Ms Robinson raised a concern that the company had launched into an investigation without first discussing matters informally and in person, particularly in light of her long service to the company (almost 15 years). That objection to the process adopted by Pact Group was well made.

GPS monitoring and use of records

[38] As I have said, the company relied on GPS tracking records in its disciplinary process and to support the decision that serious misconduct had occurred and that dismissal was justified. The company policy has a section relating to company vehicles and, in particular, the GPS navigation unit. It provides that the purpose of the GPS system is to "help with health and safety of staff and passengers" and "improve the efficiency of vehicle running". The policy also provides that the GPS data can be used to determine a vehicle's speed, and that that data can form the basis of a disciplinary process for misconduct if there has been a breach of legislation, such as speed limits. While the company policy is explicit that GPS data can be used as the basis for a disciplinary process in circumstances involving a legislative breach, it does not provide that GPS data can be used more generally for disciplinary purposes.

[39] While not referred to by either party, I note that in *Waste Management NZ Ltd v Jones* the Court considered an employer's investigation into performance concerns based on GPS data.15 The facts of this case materially differ; Pact Group initiated an investigation that was described as disciplinary in nature from the outset. It is seriously arguable that it is problematic for an employer to on the one hand advise its

14 See, for example, Otumarama Private Hospital Ltd v Bell, [1995] NZEmpC 329; [1995] 2 ERNZ 491 (EmpC) at 495: "It has often been held and is a matter of common sense anyway that if there has been an element of permission in the past there must be a clear statement of any modification or withdrawal of that permission before any employee is disadvantaged by the strict application of pre-existing rules or policies that have not been insisted upon before." See too Wellington Abattoir Employees' IUOW v Wellington City Corp [1984] ACJ 267 (Arbitration Court) where the Court held that an employer who seeks to change a long-standing permitted practice must be prepared for a thorough educative process before the new rule is fully enforced.

15 *Waste Management NZ Ltd v Jones* [2020] NZEmpC 73. However, the use of GPS data for those investigative purposes was not in issue; the Court was concerned with Ms Jones' allegation she had been constructively dismissed and her issues with other elements of the investigative process.

employees that information it collects may be used for limited disciplinary purposes and then to proceed to use it for different disciplinary purposes. The point does not, however, need to be finally decided in this case in light of the conclusions I have otherwise reached.

Justification

[40] In cases involving accusations of workplace fraud, the employer must operate on a reasonable basis.16 In respect of the Court's inquiry, justification is assessed against a standard of proof (balance of probabilities) flexibly applied depending on the circumstances.17 I accept that if the company had an adequate basis for concluding that Ms Robinson had fraudulently filled in her time sheets that may reasonably have led to a finding of serious misconduct.

[41] I am not however satisfied on the evidence before the Court that a fair and reasonable employer could have reached the conclusions the company did in all of the circumstances. While the material relied on may have provided an adequate basis for raising performance concerns, it did not justify advancing immediately down the disciplinary route, and nor did it justify the end point the company got to. The company did not adopt a fair process in dealing with its concerns and its failings in that regard were not minor. The dismissal was both substantively and procedurally unjustified.

Remedies

[42] The company submitted that if the Court found that Ms Robinson had been unjustifiably dismissed she should not be entitled to any relief. That would be an unusual outcome against the backdrop of a finding of unjustified dismissal, and one that I do not consider viable in this case.

16 *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198, [2015] ERNZ 361 at [108]. The Court of Appeal declined leave to appeal in *Ritchies Transport Holdings Ltd v Merennage* [2016] NZCA 191.

17 *Whanganui College Board of Trustees v Lewis* [2000] NZCA 136; [2000] 1 ERNZ 397 (CA) at [20].

Compensation for humiliation, loss of dignity and injury to feelings

[43] The Court invariably applies a banding approach to assessing compensatory awards under s 123(1)(c)(i) of the Act. The purpose of such an approach is to make clearer the basis on which an award has been arrived at and to promote a degree of consistency in compensatory awards in both the Court and the Authority.18

[44] I am satisfied that Ms Robinson suffered non-pecuniary loss because of the company's failures. She was blindsided by Mr Cardy's letter which, from her perspective, had come out of the blue and which was based on work pressure concerns expressed in an email she had sent to her line manager. Those concerns should have prompted a discussion rather than an in-depth inquiry (initially without her input) into how she was spending her time.

[45] Ms Robinson felt on the back-foot during the course of a disciplinary meeting conducted via Zoom, during which she had trouble hearing, and believed Mr Cardy had difficulty understanding what she was saying; her integrity was called into question against a backdrop of 15 years of trouble-free service to the company; and she felt that she had not been listened to or her explanations given the sort of consideration that would be expected of a fair and reasonable employer acting in good faith. The impact of the company's unjustified actions included damage to her mana, reputation, serious financial pressure, feelings of whakamā, a loss of self-confidence, and personal stress. It also undermined her relationships (which were personally and professionally important to her) with her vulnerable clients. Contact with them abruptly ceased and she did not get an opportunity to say goodbye to them. In addition Ms Robinson felt unable to seek further work in a field she was committed to because of the intense sense of embarrassment and shame she shouldered following her dismissal.

[46] The company's unjustified actions came shortly after a lockdown had lifted and support workers such as Ms Robinson were taking steps to re-engage with the physical workplace and their clients. In other words, it came at a time of upheaval and uncertainty, which the company was well aware of. It also came at a time when Ms

18 See *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

Robinson was, as her employer knew or ought to reasonably to have known, under personal pressure.

[47] Counsel for the company submitted that disciplinary processes are, by their nature, distressing and that this factor must be taken into consideration, along with the steps the company took to minimise such distress, including providing access to counselling and paid discretionary leave in the period following the meeting. While I accept that for many, if not most, a disciplinary process and advice of termination is stressful and upsetting, the central inquiry for the Court is focused on the damage suffered by Ms Robinson, which was causally connected to the company's breaches. It is that damage that compensation is aimed at addressing. Further, while there is inherent stress in any disciplinary process, it goes without saying that the stress is likely to be substantially increased where the process is procedurally and substantively unjustified, is unnecessarily rushed, is conducted in an impersonal way, is at odds with the employee's cultural needs, and is undertaken in a way which diminishes, rather than supports, their mana.

[48] Counsel for Pact Group then submitted that if the Court determined that compensation ought to be awarded it should be at the low end of band 1. In support of this submission it was said that no independent evidence of ongoing harm, such as the need for specialist medical intervention, had been called and accordingly there was an insufficient evidential basis for a higher award band.

[49] There must be a link between the grievance and the loss; if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123.19 That is because remedies are directed at addressing the losses sustained as a result of the breach giving rise to the grievance.20 I do not, however, accept that it is appropriate to read in a requirement for independent evidence, including medical evidence, when that does not appear in s 123(1)(c)(i) itself. Medical evidence may be called, and may be relevant, but it should not be regarded as a necessary touchstone where an employee seeks compensation for humiliation, loss of dignity and injury to feelings beyond band 1.

19 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [48].

20 At [51].

[50] Emotional harm of the sort which s 123(1)(c)(i) compensation is directed at engages personal emotions, which the affected employee is likely to give best direct evidence of, and which can then be evaluated against other sources of evidence. In this case both Ms Robinson and her sister gave compelling evidence of the impact of the company's breaches on Ms Robinson, which I accept. Her sister gave evidence of Ms Robinson being substantially impacted by feelings of whakamā, which she described as deep shame, hurt and embarrassment.21 She also gave evidence about the significant change she observed in Ms Robinson during the disciplinary process and after her dismissal. That evidence, in terms of assessing harm, is highly relevant to the Court's inquiry.22

[51] In arriving at an appropriate quantum of compensation, regard is had to analogous cases. I regard Judge Shaw's judgment in *Good Health Wanganui v Burberry* as particularly helpful.23 There she awarded compensation of $15,000. The case was decided 21 years ago. I accept that the facts differ from the present case, including because there an employee worked in a Māori setting, wanted to attend a culturally significant event and there were not precisely the same indignities in the way the dismissal was affected, namely that Mrs Burberry was escorted off the premises in a culturally inappropriate manner.24 Nevertheless the reasons given to justify the award were largely analogous with the present case; Mrs Burberry experienced intense shame and humiliation, a loss of mana due to losing her position and she felt unable to apply for positions which may have restored her mana.25

21 See also Joan Metge *In and Out of Touch: Whakamaa in Cross Cultural Context* (Victoria University Press, Wellington, 1986) at 78 for the connection between whakamā and mana: "...the comments of contributors generally and my own experience point clearly to a causal connection between loss or lack of mana and whakamaa, to be traced sometimes directly, sometimes through intermediate links. Whakamaa occurs when persons or groups perceive that they have less mana than particular others, or lose mana, whether as a result or their own doing or others. It is both product and expression of lower or lowered mana."

22 I record an objection was also taken to some of the evidence directed at emotional harm, again on the basis that it was not given in the Authority. The company submitted that it ought, in these circumstances, to be given little if any weight. I do not accept that submission, for the reasons I have also rejected the objection to evidence given in Court as to the cultural issues raised. I also understood the company to advance a submission that any relief ought to be reduced because Ms Robinson did not explain the impact of the breach to it at the time the breach occurred. There is no obligation on an employee to do so. And while an employee's response to a breach may inform the Court's assessment of harm, in this case I have not found the point made by the company materially helpful.

23 *Good Health Wanganui v Burberry* [2022] 1 ERNZ 668 (EmpC).

24 At [59].

25 At [62].

[52] I am satisfied that the circumstances of this case falls comfortably within the middle range of band 2. Applying the revised bands referred to in *GF* (band 1 $0-

$12,000; band 2 $12,000-$50,000; band 3 over $50,000) I would place this case at

$31,000.26

[53] No issues of financial capacity or third-party interest were identified by either party as relevant to an award under s 123(1)(c)(i).

Contribution

[54] Ms McMillian submitted that Ms Robinson had contributed to the situation giving rise to her grievance, warranting a reduction in remedies.27 It was submitted that it was her own conduct, which was both culpable and blameworthy, that led to her dismissal and accordingly a "maximum reduction" would be appropriate in respect of any remedies the Court awards.28 As I have already indicated, the company's investigation was insufficient to reach the conclusion it came to as to the level of culpability and/or blameworthiness of Ms Robinson's alleged misconduct. As a result, I am not satisfied that it would be appropriate to make a reduction for contribution.

Mitigation

[55] Lost wages are sought under s 128(2). The company submits that no relief for lost wages should be granted because Ms Robinson has failed to establish any loss, and has failed to establish that she took steps to mitigate her losses. The Court's judgments in *Allen v Transpacific Industries Group Ltd* and *Radius Residential Care Ltd v McLeay* were cited in support of the proposition that the onus is on an employee to establish, by way of detailed evidence, the steps taken to obtain alternative

26 *GF v Comptroller of the New Zealand Customs Service*, above n 11, at [162]. In *GF*, $25,000 was awarded and the uplift in the bands had not yet been applied. In the present case fraud was alleged (analogous to the shame of being labelled: see *Marx v Southern Cross*

Campus Board of Trustees [2018] NZEmpC 76, where $25,000 was awarded) and long service was not recognised (see *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, where $22,500 was awarded). Ms Robinson also raised specific concerns about her cultural identity needs which were ignored.

27 Employment Relations Act 2000, s 124.

28 Citing *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628; and *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550.

employment.29 Those judgments now need to be read in light of more recent judgments of the Court, and do not (in my view) reflect the law as it presently stands.

[56] As the Court observed in *Maddigan v Director-General of Conservation*:30

[62] It is well established that in ordinary breach of contract cases a plaintiff is under no duty to mitigate their losses. No positive duty emerges from the wording of the [Employment Relations] Act. The key question is not whether a legal duty exists but what the prerequisites for reimbursement are. The asserted duty on employees to mitigate their losses, which has become a well- engrained mantra in this jurisdiction, tends to be used as an unhelpful shorthand which focusses the inquiry on steps taken, or not taken, by an employee rather than what – if anything – might reasonably have been expected in the particular circumstances.

[57] In a subsequent case, *Concrete Structures (NZ) Ltd v Ward*, the Court referred to a failure by Mr Ward to take up an offer of a return to work, relied on by the company to support a claim that Mr Ward had failed to mitigate his losses. The Court had no difficulty concluding that the failure to take up further work, given the background circumstances and having regard to the nature of the breaches that had occurred and the damage that had been caused, meant that the "failure" was reasonable.31 In the present case Ms Robinson undertook part-time work as a "stop-gap" measure before embarking on study, which was entirely reasonable given the adverse impact on her caused by the company's breaches.32

[58] Ms Robinson was, as I have said, knocked sideways by her unjustified dismissal. She was sufficiently impacted by it that she felt that a return to the sort of work she had been doing over the preceding 15 years, and which she had previously felt proud of, was no longer a viable option. It was clear from her evidence, and the evidence of her sister, that this conclusion in large part stemmed from a sense of whakamā and the significant blow she sustained to her self-confidence. In any event, it is clear that she would likely have struggled to find similar work having regard to the stated reasons for her dismissal. Such work involved, as Ms Eastergaard explained in evidence, a high trust model. It goes without saying that a dismissal for workplace

29. *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")* [2009] NZEmpC 38; (2009) 6 NZELR 530 (EmpC); and *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371.

30 *Maddigan*, above n 28.

31 *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219, [2020] ERNZ 495 at [45].

32 See *Henry v South Waikato Achievement Trust* [2023] NZEmpC 20 at [118].

fraud does not sit well with such a model, and it is likely prospective employers would have viewed it in this way.

[59] Ms Robinson looked for alternative work when she was reasonably in a position to do so.

Lost wages

[60] In the event Ms Robinson retrained and now runs a small business. I consider that an award equivalent to three months' lost wages is appropriate to compensate her for remuneration lost as a result of her grievance. She was out of work for three months, and gave evidence that she obtained part time employment on 21 January 2022 and then embarked on a course of study to retrain on 22 March 2022.

[61] I have considered whether to order a sum greater than the equivalent of three months' lost wages, in the Court's discretion under s 128(3). While I might otherwise have been drawn to a submission that s 128(3) was engaged, the difficulty is that there is insufficient evidence before the Court in respect of the losses said to be suffered following the expiration of the three month period. I accordingly decline to award a greater amount.

Special leave entitlement

[62] The statement of defence pleads that Ms Robinson is entitled to long service leave under the employment agreement, being a benefit Ms Robinson might reasonably have been expected to obtain if the grievance had not arisen.33 It was submitted she would have, but for her dismissal, become eligible for special leave of three weeks for completing 15 years of continuous employment, a few days following the date of her dismissal. In fact, Ms Robinson was dismissed approximately two weeks before the anniversary of her 15 years with the company. Mr Jamieson suggested this award should be in addition to any compensation or reimbursement awarded by the Court. I agree.

33 Employment Relations Act 2000, s 123(1)(c)(ii).

[63] While Ms McMillian submitted that in the context of a summary dismissal, Ms Robinson would not have been entitled to special leave, the point becomes circular where, as I have found, the dismissal was unjustified. As s 123(1)(c)(ii) of the Act makes clear, the test requires a but-for analysis; it requires the Court to consider what benefit the employee might reasonably have been expected to obtain *if the personal grievance had not arisen*.34 I have already concluded the dismissal was unjustified, both from a procedural and substantive standpoint. As I have said, while the company was entitled to dismiss an employee for serious misconduct, there needed to be adequate basis before doing so. That was lacking in this case, exacerbated by the procedural failings, as Mr Jamieson pointed out. The long service leave was a benefit Ms Robinson might reasonably have expected to obtain had her grievance not arisen and she ought to be compensated for that.

Outcome

[64] Ms Robinson was unjustifiably dismissed by the company. She is entitled to be compensated for the losses sustained as a result of her grievance. The following orders are made:

- A payment of $31,000 by way of compensation under s 123(1)(c)(i);
- A sum equivalent to three months' lost wages under s 128(2);
- A payment equivalent to three weeks' long service leave by way of compensation under s 123(1)(c)(ii).

[65] The company is ordered to pay the above sums to Ms Robinson within 21 days of the date of this judgment.

[66] The defendant is entitled to costs on the company's challenge, the quantum of which is reserved. The parties are encouraged to agree costs, and reference is made to the Court's Guideline Costs. The parties are reminded that a costs categorisation of 2B was agreed to at an initial directions conference. However, if costs cannot be

34 Emphasis added.

agreed I will receive memoranda, with the defendant filing and serving within 30 days of the date of this judgment; the plaintiff within a further 14 days; and anything strictly in reply within a further seven days.

Christina Inglis Chief Judge

Judgment signed at 3.45 pm on 5 October 2023