

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2021] NZEmpC 183  
EMPC 345/2020**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN SHELLEY STENHOUSE  
Plaintiff

AND TOWMAN TOWING GROUP LIMITED  
Defendant

**EMPC 167/2021**

AND IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN TOWMAN TOWING GROUP LIMITED  
Plaintiff

AND SHELLEY STENHOUSE  
Defendant

Hearing: 13–14 September 2021  
(Heard at Christchurch)

Appearances: A Halse, advocate for Ms Stenhouse  
P Cahill, advocate for Towman Towing Group Ltd

Judgment: 26 October 2021

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**JUDGMENT OF JUDGE K G SMITH**

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[1] Shelley Stenhouse and Stephen Saul were once good friends. Their friendship led to them building a house together that they occupied as flatmates and, eventually, working together.

[2] Mr Saul had an ongoing interest in a vehicle towing business. To operate the business he incorporated a company called Towman Towing Ltd (it has since changed its name to Towman Towing Group Ltd). From the beginning of Towman's business Ms Stenhouse assisted Mr Saul and then became an employee. Towman provided towing services through Mr Saul and a driver. Ms Stenhouse provided administrative support.

[3] When the business began Mr Saul operated Towman from the house he and Ms Stenhouse shared. The business grew and Mr Saul acquired another towing company that operated in conjunction with Towman. The growth of the business prompted Towman to move to new premises. More drivers were taken on and, eventually, another employee was engaged to provide administrative support.

[4] Unfortunately, the employment relationship and friendship soured. Allegations of bullying and/or harassment were made. For a time Ms Stenhouse worked from home. Eventually she did not work at all but was paid for her time.

[5] In December 2018 Towman began an investigation into several alleged breaches of the employment agreement by Ms Stenhouse. In January 2019 she was summarily dismissed.

[6] Ms Stenhouse was dissatisfied with the circumstances in which she came to work from home and being dismissed. She raised personal grievances with Towman. They were not resolved and the Employment Relations Authority investigated them.

### **The Authority determination**

[7] On 15 October 2020, the Authority released its determination dealing with the grievances Ms Stenhouse had raised.<sup>1</sup>

[8] The Authority identified Ms Stenhouse's claims for being unjustifiably disadvantaged as:<sup>2</sup>

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<sup>1</sup> *Stenhouse v Towman Towing Group Ltd* [2020] NZERA 426 (Member van Keulen).

<sup>2</sup> At [12].

- (a) Did the company act fairly and/or properly in dealing with complaints she made about bullying and/or harassment by a colleague?
- (b) Did Towman unilaterally changed her place of work by requiring her to work from home rather than the company's office.
- (c) Did Towman prevent her from carrying out work for it by restricting access to the company's email, stopping access to relevant accounting, invoicing and payroll systems and information and not providing her with the necessary equipment to work.
- (d) Revisiting issues that had been resolved in June 2018 in a disciplinary meeting in January 2019.

[9] Ms Stenhouse's claim for unjustified dismissal was unsuccessful.<sup>3</sup> The Authority held that Ms Stenhouse was unjustifiably disadvantaged in her employment because Towman varied her work conditions and restricted her access to its systems.<sup>4</sup>

[10] Ms Stenhouse was awarded compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of \$10,500.<sup>5</sup> The amount was reduced from what would otherwise have been awarded because the Authority made a deduction for her contributory conduct.

[11] The Authority imposed a penalty on Towman for not providing time and wage records. The company was penalised \$1,500 of which \$375 was payable to the Crown and the balance to Ms Stenhouse.<sup>6</sup>

### **The challenges**

[12] The Authority's determination brought two challenges. The first was by Ms Stenhouse. She challenged the whole of the Authority's determination and added

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<sup>3</sup> At [58]–[59].

<sup>4</sup> At [36]–[38].

<sup>5</sup> At [76].

<sup>6</sup> At [78]–[79].

a claim to those described by the Authority, that Towman had breached her right to privacy.<sup>7</sup>

[13] Ms Stenhouse claimed as relief:

- (a) Payment of lost income of \$1,407.20.<sup>8</sup>
- (b) Lost child support payments as a result of the grievance of \$229.80.<sup>9</sup>
- (c) “Payment for lost income” for Working for Families payments lost as a result of the personal grievance of \$1,152.<sup>10</sup>
- (d) Compensation for “hurt and humiliation” of \$30,000.<sup>11</sup>
- (e) A penalty of \$20,000 for a breach of the duty of good faith.<sup>12</sup>
- (f) A penalty for failing to provide time and wage records.<sup>13</sup>
- (g) A penalty of \$20,000 for a breach of good faith for entering into a course of action designed to mislead and deceive.<sup>14</sup>
- (h) Interest on unpaid wages.<sup>15</sup>
- (i) Costs of filing and representation.<sup>16</sup>

[14] Towman confined its challenge to the Authority’s conclusion that a personal grievance had arisen because of the circumstances in which Ms Stenhouse worked

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<sup>7</sup> Employment Relations Act 2000, ss 179(1) and (179(3)(b).

<sup>8</sup> Section 123(1)(b).

<sup>9</sup> Section 128.

<sup>10</sup> Section 128.

<sup>11</sup> Section 123(1)(c)(i).

<sup>12</sup> Section 4.

<sup>13</sup> Section 130(2).

<sup>14</sup> Section 4(1)(b); particulars of the behaviour alleged to have misled or deceived were not pleaded.

<sup>15</sup> Interest on Money Claims Act 2016.

<sup>16</sup> No separate remedy was claimed for breaches of privacy and it was not the subject of submissions.

from home.<sup>17</sup> Its statement of claim was spartan. The company claimed Ms Stenhouse had always worked from home and that the evidence presented at the investigation meeting should have led to a different result.

[15] In combination, therefore, both challenges placed in issue all of the circumstances that led to Ms Stenhouse's grievance claims and, following on from them, the awards by the Authority.

### **What happened?**

[16] Ms Stenhouse began performing administrative tasks for Towman sometime during 2017. The precise date is not material. On 15 May 2018 Ms Stenhouse and Towman signed an individual employment agreement.

[17] In that agreement Ms Stenhouse's position was described as "Office Admin". What that meant was fleshed out in an attached schedule. The work required was general office duties described as answering phones, dispatching jobs, taking photographs for insurance purposes, invoicing jobs, pricing, dealing with the public, allocating jobs to drivers and general housekeeping.

[18] At some point additions were made to the agreement providing more information about Ms Stenhouse's terms and conditions of employment. The first addition was about being provided with Xero training. The other additions were about allowances payable to her and wages. She was provided with a \$20 per week petrol allowance, \$20 per month for a phone account, and her work hours became 20 per week at \$20 per hour.

[19] The only description of how the business operated came from Ms Stenhouse. She said that Mr Saul would get telephone calls from clients for towing jobs. He provided the towing service and she handled the paperwork.

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<sup>17</sup> Employment Relations Act 2000, s 179(4): commonly called a non-de novo challenge.

[20] Initially Towman operated from the house Ms Stenhouse and Mr Saul owned. At the beginning of April 2018, Mr Saul purchased a second towing business with its own premises. A decision was made to move the combined business from Ms Stenhouse's and Mr Saul's home address to the new premises. Other steps were taken to operate the expanded business including acquiring a computer, printer and monitors. Ms Stenhouse retained her laptop and home printer so she could follow up any work from home.

[21] In April 2018, Mr Saul made a decision to employ Ashleigh Murphy to perform office work. Shortly after Ms Murphy began working a problem emerged between her and Ms Stenhouse. On 18 April, Ms Stenhouse raised with Mr Saul feeling uncomfortable about Ms Murphy being employed. Ms Stenhouse's concern was that Ms Murphy had been delegated work she would normally undertake. According to Ms Stenhouse, Mr Saul brushed off her concerns.

[22] The incident that gave rise to Ms Stenhouse's bullying and/or harassment complaint occurred on 23 May 2018. Ms Stenhouse went to the office that day and encountered what she said was persistent taunting from Ms Murphy. The nature of the taunting was difficult to grasp from Ms Stenhouse's description of it but seems to have been an allegation that Ms Murphy adopted a snide or sneering tone while talking about her to others. Ms Murphy was said to have made remarks like "Shelley's here" while talking to a person on the phone and then laughing, and to have said "Shelley is still here" in the same tone. Ms Murphy was also said to have confronted Ms Stenhouse by saying that a named staff member would not come into the office while she was present.

[23] Ms Stenhouse did not welcome this behaviour. She spoke to Mr Saul about it when he arrived in the office. Ms Stenhouse said that Ms Murphy continued with her unacceptable comments until Mr Saul told her to stop. Shortly afterwards, Ms Stenhouse left the office and thanked him for his intervention.

[24] On 25 May 2018, while at home, Ms Stenhouse accessed Towman's Gmail account and sent what she described as work emails to her personal email address

intending to print them out later at the office. Almost immediately Mr Saul was notified about Towman's account being accessed in this way.

[25] In response Mr Saul locked Ms Stenhouse out of Towman's Gmail account and denied her access to its Xero accounting software. Ms Stenhouse sent Mr Saul an email from her personal email address asking what had happened. There was a prompt reply. Mr Saul advised her that he was concerned that company emails had been forwarded to her personal email address and, because the transfer made no sense to him, he had changed the password temporarily.<sup>18</sup>

[26] Mr Saul went further and stated that she had always had full access to the company's Gmail and he was unsure why information needed to be sent to her personal email account. He went on to ask Ms Stenhouse if she was concerned about her position before commenting that her pay and hours had been increased and that her job was secure. Ms Stenhouse was directed to provide her explanation for what had happened to an email address that was different from the company's Gmail.

[27] Ms Stenhouse sent her explanation to Mr Saul on 25 May 2018. In her email she began by mentioning the uncomfortable situation at work and describing what happened on 23 May 2018. She labelled the incident "bullying/harassment" and described it as being condoned by Mr Saul. Ms Stenhouse mentioned she felt undermined and undervalued in her job, because there were occasions when she thought Ms Murphy was taking over her work and taking credit, wrongly, for her initiatives.

[28] Towards the end of this email, Ms Stenhouse informed Mr Saul that she had found him unapproachable when attempting to bring these matters to his attention. Ms Stenhouse advised him that she was taking stress leave for two weeks to reflect on what had happened and ended the email by requesting permission to undertake a Xero training course. There was no explanation for accessing the company's documents.

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<sup>18</sup> Surprisingly, because of the role which the emails took in the subsequent disciplinary process, there was no evidence explaining why they were confidential or considered to be significant beyond being Towman's property.

[29] Ms Stenhouse was on sick leave until 11 June 2018. On 6 June 2018 she received a letter from a law firm instructed by Towman regarding the email of 25 May 2018. The letter began by stating that Towman had considered the information in the email and investigated her concerns. She was informed that four named people were interviewed by Towman. Copies of the statements taken in those interviews were enclosed with the letter. The outcome of the investigation was announced; Towman was satisfied that Ms Stenhouse's claims of bullying and/or harassment had no basis.

[30] The lawyers' letter rejected Ms Stenhouse's contention that she had been undermined or undervalued. That was not the end of the correspondence, however, because the letter contained a complaint about Ms Stenhouse. According to the lawyers' letter, Towman claimed to have discovered that she had spoken "badly about Mr Saul and the Company". Comments were attributed to her to the effect that she had described the business as "going under" or that "my client had significant health issues". After setting out passages of the employment agreement said to be engaged by this alleged behaviour, Ms Stenhouse was invited to attend a disciplinary meeting to respond to the complaint. She was informed that if the allegations were established they could amount to serious misconduct destroying Towman's trust and confidence in her ability to continue working for it.

[31] The lawyers proposed a meeting for 12 June 2018, the day after Ms Stenhouse's sick leave was to end. In the meantime her request to undertake a paid Xero course was declined.

[32] The meeting took place as proposed. Ms Stenhouse was represented. The subject of the meeting was the company's investigation of her and the allegations that she was bullied and/or harassed were not considered. Ms Stenhouse said that at the conclusion of the meeting Mr Saul agreed there would be no further action arising from the complaint in the lawyers' letter but attributed to him a unilateral decision that in future she would work from home. Mr Saul agreed that he decided to take no further action on the complaint, but said that the meeting ended with an agreement for Ms Stenhouse to work from home.

[33] Ms Stenhouse started back at work on 13 June 2018. From that time on she worked remotely. On 19 July 2018 Ms Stenhouse's lawyers raised a personal grievance with Towman on her behalf claiming she had been disadvantaged because:

- (a) Towman had changed Ms Stenhouse's place of work and her role without consultation or consent.
- (b) Towman's actions had made it extremely difficult for her to perform her duties.
- (c) The company did not act in a procedurally fair manner regarding Ms Stenhouse's complaint that she had been bullied on 23 May 2018.
- (d) Towman's actions were intentional, breaching s 4 of the Act, and could form the basis for a further claim for constructive dismissal should Ms Stenhouse's situation not be addressed.

[34] On 21 August 2018, Ms Stenhouse was locked out of some of the company's systems. She instructed her lawyers to make inquiries about why that had happened and to request mediation. On 27 August 2018 a further grievance was raised about being blocked from gaining this access.

[35] Although Towman did not restore Ms Stenhouse's access, or answer her request for an explanation for being denied it, she was able to continue some work. Then, on 11 October 2018, her access to the company's Inland Revenue account was deleted.

[36] From about August 2018 the work Ms Stenhouse was able to perform declined until she stopped doing any at all. She continued to submit time sheets and was paid. Matthew Plaistead, Towman's accountant, explained that during the time Ms Stenhouse was not provided with access to the company's systems he completed some tasks she would otherwise have performed such as compiling information for GST returns. He showed Mr Saul how to process wages. I infer that, as a result of

processing the wages, Mr Saul knew Ms Stenhouse continued to be paid while not being allocated work.

[37] Matters came to a head on 13 December 2018 when Ms Stenhouse received a letter from Towman, signed by Nicola Pink, asking her to attend a formal meeting to discuss the company's concerns. Those concerns covered several topics some of which may have touched on what had been raised by Towman's lawyers previously. They were, however, couched in a way suggesting Ms Stenhouse had taken exception to that investigation and/or its findings coupled with a complaint that her behaviour in the workplace had become "negative".

[38] The meeting was held on 25 January 2019. A few days later, on 31 January 2019, Towman informed Ms Stenhouse of the outcome. The company concluded that her behaviour was serious misconduct in breach of the employment agreement. Among other things she was said to have abused her authority as an employee, disrupted Towman's business and operations, and "inflamed" relationships in the workplace. She was dismissed without notice. Her final day of work was 31 January 2019.

[39] At some time, precisely when is unclear, Mr Saul moved out of the house he and Ms Stenhouse shared as flatmates. There was a subsequent dispute between them over the property and its realisation. That dispute seems to have caused lingering problems between them but has no bearing on the issues in this case.

## **The issues**

[40] The issues in this case are:

- (a) Was Ms Stenhouse unjustifiably dismissed by Towman?
- (b) If the answer to (a) is yes, what remedies (if any) is she entitled to?
- (c) Did Towman adequately investigate Ms Stenhouse's bullying and/or harassment claim?

- (d) If the answer to (c) is no, did Towman's action create a personal grievance? If it did, what remedies (if any) is she entitled to?
- (e) Was Ms Stenhouse prevented from carrying out work and, if so, does that give rise to a personal grievance? If it did what remedies (if any) is she entitled to?
- (f) Was there a breach of the duty of good faith and, if there was, should a penalty be imposed?
- (g) Was there a course of conduct designed to mislead or deceive and, if so, should a penalty be imposed?
- (h) Did Towman supply time and wage records and, if it did not, should a penalty be imposed?

[41] Each of these issues will be addressed in turn.

*Unjustified dismissal?*

[42] Having dismissed Ms Stenhouse, the issue for assessment is whether Towman can satisfy s 103A of the Act. Section 103A(1) provides that whether a dismissal was justifiable must be determined, on an objective basis, by applying the test in s 103A(2). The test in s 103A(2) is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.<sup>19</sup>

[43] In applying the test four matters must be considered.<sup>20</sup> They are:

- (a) Having regard to the resources available to the employer, the sufficiency of the investigation into the allegations before the dismissal occurred.

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<sup>19</sup> And see *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466.

<sup>20</sup> Section 103A(3)(a)–(d).

- (b) Whether the concerns were raised by the employer with the employee before the dismissal.
- (c) Whether a reasonable opportunity for a response was provided before the dismissal occurred.
- (d) Whether the employer genuinely considered the employee's explanations (if any) about the allegations against the employee before dismissing.

[44] The obligation falls on the employer to show that the what was done and how it was done was fair and reasonable.<sup>21</sup>

[45] What is puzzling about this case is how Towman responded to the claim. Mr Saul gave evidence about many of the events Ms Stenhouse discussed but could not respond to what she said about the dismissal. He explained how the towing business was established and the friendship that led them to build a house together. He described the fact that a disciplinary meeting took place on 25 January 2019 at which Ms Stenhouse and her lawyer were present. According to him, she was given an opportunity to respond to the company's concerns.

[46] Mr Saul did not, however, participate in drafting the letter sent to Ms Stenhouse in December 2018 containing the company's complaints, the meeting that took place on 25 January 2019, or in the decision-making that led to the dismissal. The fact that he had not participated in any way became apparent in answers to questions from the Court. He explained that the entire process and decision-making were delegated by him to Ms Pink. Mr Saul said that by distancing himself in this way the decision, whatever it was, would be impartial and he only found out what happened when Ms Pink reported the outcome to him.

[47] Ms Pink did not give evidence but it would appear that she was available to do so. Mr Cahill, Towman's advocate, offered as an explanation for her absence that he

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<sup>21</sup> *Cowan v Idea Services Ltd* [2020] NZCA 239, [2020] ERNZ 252 at [39] (CA); *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [19]–[20] (CA).

had understood she was going to be summonsed by Ms Stenhouse. Mr Cahill did not seek an opportunity to rectify the situation by belatedly calling her to give evidence.

[48] Ms Stenhouse denied doing anything that would have justified either an investigation into her behaviour or Towman's decision to dismiss her. The only evidence Towman could point to as a way of explaining its actions, and to contradict Ms Stenhouse, was Ms Pink's letters. Copies of them were in the common bundle of documents filed by the parties but including them only established that they were what they purported to be; Towman's correspondence with Ms Stenhouse and that was not in dispute. Ms Stenhouse was not questioned about them.

[49] By themselves Towman's letters did not, and could not, prove that Ms Pink undertook an investigation into the complaints that was fair and reasonable in the circumstances. Nor could the company establish that the decision it made was one open to it at the time. There was no other evidence on which Towman might have relied to attempt to demonstrate that its investigation and decision were justified. In fact, Mr Cahill did not attempt to argue that the correspondence should be treated as determinative.

[50] In the absence of any evidence explaining Towman's actions and decision it is not in a position to satisfy s 103A(2) of the Act. It follows that Ms Stenhouse was unjustifiably dismissed.

#### *Remedies?*

[51] Where a personal grievance succeeds s 123 of the Act provides for remedies. They include the reimbursement to the employee of the sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance, compensation for humiliation, loss of dignity, and injury to the feelings of the employee and loss of any benefits that the employee might reasonably have expected to obtain had the grievance not arisen.<sup>22</sup> Where lost remuneration is to be awarded the

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<sup>22</sup> Sections 123(1)(b) and 123(1)(c)(i) and (ii).

Court must order the employer to pay the employee the lesser of a sum equal to the lost remuneration or three months' ordinary time remuneration.<sup>23</sup>

[52] Ms Stenhouse described her lost remuneration only generally by saying she was unemployed for a period of time after the dismissal. In answer to a question from the Court, Ms Stenhouse said that she obtained a replacement job in 2019 but did not say when. The replacement job was for 18 hours per week at the same hourly rate she earned when employed by Towman.

[53] The statement of claim sought to recover lost remuneration of \$1,407.20. The pleading did not explain that calculation or why, given that Ms Stenhouse was paid \$20 per hour, the claim was for an uneven number of dollars. Making the best of the available information, and based on the pleading, I find that Ms Stenhouse was out of work for about a month. I consider it is appropriate to order Towman to pay her the actual loss she sustained in that time which I fix at \$1,400.<sup>24</sup> Towman is ordered to pay that amount pursuant to s 123(1)(b) of the Act.

[54] The statement of claim made a further claim for lost income by reference to Working for Family payments. No evidence was provided explaining that claim and it is, therefore, unsuccessful.

[55] Mr Halse, Ms Stenhouse's advocate, submitted that fees she paid to a law firm, to another employment advocate and to his company were recoverable from Towman. No evidence was provided about those fees. What was done and charged for was not stated. That omission was drawn to Mr Halse's attention but he did not seek leave to call evidence on those subjects. In the absence of evidence to support them those claims are unsuccessful.

[56] Ms Stenhouse sought \$30,000 for alleged humiliation, loss of dignity and injury to her feelings. Assessing this compensation is an inexact science and there can be difficulties in ensuring consistency between cases. In *Waikato District Health*

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<sup>23</sup> Section 128(2).

<sup>24</sup> 20 hours x \$20 per hour = \$400 per week x 3.5 weeks = \$1,400.

*Board v Archibald* a banding system was developed to help in assessing compensation against what was described as a broad analytic framework.<sup>25</sup> Three bands were proposed to assist with the assessment. Band 1 involved low-level loss or damage, band 2 was for mid-range loss or damage and band 3 involved high-level loss or damage.

[57] In the subsequent decision *Richora Group Ltd v Cheng* financial parameters were proposed for those bands.<sup>26</sup> They were; for band 1 up to \$10,000, for band 2 from \$10,000 to \$40,000, and for band 3 more than \$40,000.<sup>27</sup>

[58] Mr Halse and Mr Cahill did not refer to *Archibald* or *Richora*, or to any other cases from which a comparison might potentially be drawn in determining what, if any, compensation should be awarded.

[59] Ms Stenhouse said that for the first few weeks after being dismissed she was embarrassed, suffered anxiety and stayed at home. She described applying for a few jobs but did not say, initially at least, when she secured replacement employment. She said that she gave up her independence by returning to a welfare benefit while she looked for another job and felt she was spiralling into a “deep dark hole at times” encouraged only to keep things together for the sake of her young daughter.

[60] From that evidence I have concluded that the impact described is consistent with band 2, but towards the lower end of it. In my assessment an appropriate sum to order as compensation under s 123(1)(c)(i) of the Act is \$12,000.

[61] The Court is required to consider whether any compensation it is proposing to award should be reduced because of the contributory conduct by the employee towards the situation that gave rise to the grievance.<sup>28</sup> There was no evidence from which it could be said that Ms Stenhouse had contributed to her dismissal and, consequently, there is no basis to reduce the compensation.

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<sup>25</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62].

<sup>26</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 37.

<sup>27</sup> At [67].

<sup>28</sup> Sections 124(a)–(b).

### *Disadvantage grievances*

[62] Under s 103(1)(b), a personal grievance is established if one or more conditions of an employee's employment have been affected to that person's disadvantage by an unjustifiable action by the employer.

[63] Ms Stenhouse raised two disadvantage grievances. The first of them was a claim that Towman did not act as a fair and reasonable employer because it failed to conduct an impartial investigation into her bullying and/or harassment complaint. The second disadvantage grievance arises from her claim that she was compelled to work from home and that her access to Towman's systems was blocked.

### *Bullying/Harassment*

[64] Mr Halse submitted that Ms Stenhouse was entitled to a fair and impartial investigation but that did not happen. He was critical of the way Towman investigated and with Mr Saul's involvement because he was said to be implicated in the complaint. Mr Halse was not, however, concerned to establish that there had been any bullying or harassment. Instead his submissions concentrated on alleged deficiencies in what Mr Saul did in response to Ms Stenhouse's complaint.

[65] To establish that Towman's handling of the complaint was inadequate, Mr Halse relied on comments by the Court in *Goel v Director-General for Primary Industries* and, subsequently, by the Authority in *Franich v Vodafone NZ Ltd* as establishing the steps to take to investigate.<sup>29</sup>

[66] In *Goel* the Court commented favourably on the quality of an investigation undertaken on behalf of the defendant Government department. In that case the independence of the investigator was noted and the process used described as a textbook example of how a disciplinary investigation should be carried out.<sup>30</sup> Neither subjects were relevant to the decisions made by the employer in that case so the

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<sup>29</sup> *Goel v Director-General for Primary Industries* [2015] NZEmpC 214; *Franich v Vodafone New Zealand Ltd* [2016] NZERA Auckland 7.

<sup>30</sup> *Goel*, above n 29, at [42].

remarks were obiter. In *Franich*, the Authority reviewed the steps taken by the employer's investigator and compared them unfavourably to the process commended in *Goel*.<sup>31</sup> In *Franich* the process was found to be wholly inadequate but the deficiency did not arise from failing to replicate the procedure favourably received in *Goel*. The comparison was made by the Authority to illustrate how inadequate the procedure in that case was.

[67] Drawing on those decisions Mr Halse distilled 18 steps he described as being key to an investigation. The steps are elaborate and, seemingly, do not take into account matters such as the employer's resources.<sup>32</sup> The steps Mr Halse relied on were:

1. Receipt of terms of reference by investigator (complainant)
2. Investigator identifies what was required to be determined and who should be interviewed
3. Investigator identifies the appropriate definitions of bullying
4. Investigator constructs a series of open-ended questions
5. Investigator's questions are peer reviewed to ensure they are fit for purpose
6. Investigator contacts complainant to ask who else should be interviewed
7. Investigator discusses process with complainant
8. Investigator arranges to meet with complainant in a neutral area and reminds complainant of their right to bring a support person and recommends support via the organisation's EAP.
9. Investigator interviews all witnesses identified by the complainant
10. All interviews are conducted using pre-approved open-ended questions with responses recorded verbatim.
11. Investigator explores key witness comments further if bullying behaviours are described
12. Interview notes are provided to each person interviewed, and each person is asked to verify that the interview was correctly recorded
13. A draft investigation report is prepared, including examples of bullying behaviours experienced by persons other than the complainant
14. All interview notes sent to the complainant for comment
15. Complainant advised that comments on the draft report are needed before it being sent to the decision maker
16. Complainant's comments considered by investigator and report updated if necessary
17. Final report prepared by investigator
18. Final report, including complainant's comments and interview transcripts, provided to the decision maker

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<sup>31</sup> *Franich*, above n 29, at [42].

<sup>32</sup> Section 103A(3)(a).

[68] Measured against these steps Mr Saul's response to the complaint was said to be inadequate. Given that Mr Saul had not followed those steps, or something similar, the submission was that Towman had failed to investigate. In turn, that was said to result in a personal grievance.

[69] Did Towman adequately investigate? When Ms Stenhouse wrote to Mr Saul on 25 May 2018, her email began with a statement about "constant bullying/harassment", naming Ms Murphy as the source of the problem and the date on which this event occurred: 23 May 2018. Her email was precise. She described the event as taking place between 9 am and 3 pm before stating that Mr Saul had condoned the behaviour in front of other staff.

[70] There are two problems with Ms Stenhouse's allegation that the company did not fairly and impartially investigate her complaint. The steps in Mr Halse's preferred process seemed to be designed to ascertain, so far as possible, what happened in anticipation of a suitable response. The first problem is that the complaint was known about and dealt with on the day it occurred. Mr Saul heard at least some of Ms Murphy's comments, acknowledged Ms Stenhouse's complaint about them and instructed Ms Murphy to stop. There was no evidence that Ms Murphy disobeyed that instruction. Given what happened it is difficult to see why Towman's response was inadequate or needed to follow the elaborate process put forward by Mr Halse. The problem was identified, the company responded and the behaviour ended. Further, Ms Stenhouse accepted how the situation was dealt with (at least initially) because she thanked Mr Saul for intervening.

[71] The second problem was touched on only briefly in the evidence but was about Towman's subsequent investigation. When Towman's lawyers wrote to Ms Stenhouse on 6 June 2018 their letter advised her that an investigation had been carried out and she was provided with statements that came from it. While the investigation was arguably incomplete, because it seemed from what Ms Stenhouse said that she did not have prior notice of it, and may not have been interviewed, what she described suggests that enough work was undertaken by the company to lead it to conclude that

further investigation was not warranted. Mr Halse did not address this investigation, and what flowed from it, in his submissions.

[72] The next issue is whether Mr Saul was the right person to investigate. When presenting closing submissions Mr Halse confirmed that the complaint was confined to the incident on 23 May 2018.

[73] Three reasons arising from the complaint were said to have compromised Mr Saul's ability to investigate it. The first of them was an allegation in Ms Stenhouse's email that he had condoned the offending behaviour when it occurred on 23 May. The second was that in the early evening of 23 May 2018, when she was travelling in a car with him, he yelled at her and called her a liar. The third was that Mr Saul was alleged to have called Ms Stenhouse "fatty" at work in front of others. While not expressed in these terms, from Mr Halse's submissions it appears that the argument is that these incidents either separately or together made it inappropriate for Mr Saul to be involved in the investigation.

[74] I do not accept that Mr Saul condoned the behaviour. It was common ground that he instructed Ms Murphy to stop which is the opposite of condoning the behaviour. The submission also overlooked the reality of the situation where a complaint was made and a prompt response followed.

[75] I am not prepared to find that Mr Saul lacked impartiality because he was accused of having yelled at Ms Stenhouse and called her a liar. The circumstances in which this conduct occurred were not traversed in any detail at the hearing, however, the accusation was described in the complaint as happening at 7 pm on 23 May 2018. Ms Stenhouse's complaint was about what occurred earlier that day, during working hours, and was dealt with by Mr Saul before she left the workplace at about 3 pm. That chronology means, even if Mr Saul's behaviour that evening was open to criticism, it cannot have had any bearing on what happened earlier in the day.

[76] The last reason advanced to question Mr Saul's impartiality was that at work in front of others he made a derogatory remark to Ms Stenhouse about her weight. Mr Saul denied making the remark but said he had called her "bigfoot" because she

deliberately walked over newly laid lawn at their house. Where the admitted remark was made, and to whom, were not discussed. What was said by both of them was not tested. In those circumstances I am not prepared to conclude that Mr Saul did make the remark attributed to him, or that his admitted remark made him incapable of properly investigating a work-related complaint.

[77] For completeness it is necessary to mention that Ms Stenhouse's evidence touched, briefly, on three other incidents in which she attributed unwelcome behaviour or conduct to Ms Murphy. All of them post-dated 23 May 2018. Those incidents were not referred to by Mr Halse in his submissions and do not appear to be part of Ms Stenhouse's case. Nevertheless, if they were, I would not conclude from them that they were events of bullying and/or harassment or that they were connected to the working environment such that Towman was required to investigate them. All of the alleged incidents happened away from work and after business hours and there was no evidence that they were drawn to Towman's attention.

[78] It is also important to note that Ms Murphy gave evidence, having been summonsed as a witness by Towman. Her evidence was confined to an unsuccessful attempt to have her identify a statement she made to the company that was included in the material supplied to Ms Stenhouse with the lawyer's letter of 6 June 2018. She was not asked about any of the events Ms Stenhouse referred to, whether on 23 May 2018 or otherwise.

[79] I am satisfied that Towman conducted a fair and impartial investigation into the complaint made on 25 May 2018 about the incident that had occurred on 23 May 2018.

*Working from home/blocked access*

[80] The next disadvantage grievance claim arose from what happened at the conclusion of the meeting on 12 June 2018. That meeting, it will be recalled, followed an investigation as to whether emails had been dealt with wrongly by being sent to a private email address.

[81] Ms Stenhouse says that at the conclusion of the meeting Mr Saul made a unilateral decision that she had to work from home. He said an agreement was reached that she would work from home.

[82] In Mr Halse's submissions he acknowledged that the circumstances that led to Ms Stenhouse working from home could be aptly described as her reluctant agreement to do so. That concession removed the basis for Ms Stenhouse's claim. Towman cannot be said to have acted unjustifiably to her disadvantage if it was implementing an agreement.

[83] The remaining part of this personal grievance claim was about Ms Stenhouse's access to Towman's systems being blocked. As a result, from about August 2018 onwards until her employment ended in January 2019, Ms Stenhouse was assigned little or no work. She made several unsuccessful attempts to log in. Requests for an explanation went unanswered. Throughout this time Ms Stenhouse submitted timesheets for payment and was paid.

[84] Towman did not dispute that access was denied or, for that matter, explain why. Instead, Mr Cahill concentrated on attempting to draw an adverse inference from Ms Stenhouse seeking to be paid during that time, taking the view that she was claiming wages that were not payable to her. He went so far as to submit that tendering timesheets for payment was tantamount to an offence because, having done no work, she was not entitled to be paid. There is no substance to that submission. Ms Stenhouse's employment agreement provided for her hours and days of work. She was entitled to payment for being ready, willing and available to work. It is immaterial to her claim for payment of wages that Towman did not provide her with work during that time.

[85] I am satisfied that preventing Ms Stenhouse from performing work she was contracted for and was ready, willing and able to undertake can properly form the basis of an unjustified personal grievance. The company had work to perform but, for reasons it did not disclose to Ms Stenhouse or to the Court, elected not to provide her with any.

[86] Ms Stenhouse did not lose income while being denied access to work. Her claim for remedies is, therefore, confined to compensation for humiliation, loss of dignity and injury to feelings which must be proved.<sup>33</sup> In this case, little attention was paid to the circumstances facing Ms Stenhouse arising from the unjustified disadvantage claim.

[87] Ms Stenhouse described the impacts on her from Towman's decision-making but did not differentiate between what she relied on to establish the claim for humiliation, loss of dignity and injury to her feelings arising from being unjustifiably dismissed, or for the same compensation arising from its unjustifiable action in withholding work from her. Having made that observation, however, it is important to ensure that the same effects are not relied on twice, to avoid providing more compensation than is justified.

[88] There are some aspects of her evidence about the impact on her that are adequately connected to this grievance to justify an award of \$2,000 under s 123(1)(c)(i) of the Act. Ms Stenhouse did not contribute to the circumstances giving rise to this grievance so no reduction in that compensation is needed.

#### *Penalties?*

[89] The first penalty claimed was for an alleged breach of the duty of good faith in s 4 of the Act. The claim was that Towman failed to be communicative and responsive by refusing to disclose information to Ms Stenhouse and her representative. The statement of claim did not provide particulars of the alleged refusal. Ms Stenhouse did not explain. In the absence of any evidence explaining what the claim was no penalty can be imposed.

[90] The second penalty claim was for a failure to comply with a request for copies of time and wage records breaching s 130(2) of the Act. Ms Stenhouse dealt with this claim briefly by saying the information was to be supplied to the Privacy Commissioner. Mr Saul dealt with it by saying information had been given to his then

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<sup>33</sup> *Lim v Meadow Mushrooms* [2015] NZEmpC 192 at [18].

lawyers to be passed on. What happened to it, and why, was not disclosed. However, Mr Saul was not challenged as to the veracity of what he said. In those circumstances I am not satisfied that Ms Stenhouse has established a breach occurred or, if it did, that the circumstances warrant a penalty being imposed.<sup>34</sup>

[91] The third claim for a penalty was for \$20,000 which was said to arise as a result of a breach of s 4(1)(b) of the Act. The pleaded particulars of the claim were that Towman entered into “a course of action which was designed to mislead and deceive the applicant”. Ms Stenhouse did not say how she was misled or deceived by Towman and there is no evidence that she was. Consequently, this penalty claim cannot succeed.

## **Conclusion**

[92] In summary:

- (a) Ms Stenhouse’s claim to have been unjustifiably dismissed is successful and she is awarded compensation for lost wages of \$1,400 under s 123(1)(b) of the Act.
- (b) In relation to the unjustified dismissal, Ms Stenhouse is awarded \$12,000 under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings.
- (c) Ms Stenhouse was subjected to unjustified disadvantage and is awarded \$2,000 under s 123(1)(c)(i) for humiliation, loss of dignity and injury to feelings for that personal grievance.
- (d) All other personal grievance claims by Ms Stenhouse are unsuccessful.
- (e) Towman’s challenge to the Authority’s conclusion, about working from home, succeeds.

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<sup>34</sup> See *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; and *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 383.

(f) The penalty claims are unsuccessful.

[93] Ms Stenhouse claimed interest on her lost remuneration. Under cl 14 of sch 3 to the Act, in any proceeding for the recovery of money the Court may order interest to be paid on the whole or part of that money, for the whole or part of the period between the date when the cause of action arose and the date of payment. Where interest is awarded it is to be calculated in accordance with sch 2 to the Interest on Money Claims Act 2016. It is appropriate to award interest on the lost remuneration, from the date of Ms Stenhouse's dismissal on 31 January 2019 until it is paid. Leave is reserved to apply to the Court if there are any difficulties in calculating the amount of interest that is payable.

[94] Costs are reserved. If either party intends to seek costs, memoranda may be filed seeking directions for an exchange of submissions.

K G Smith  
Judge

Judgment signed at 4.45 pm on 26 October 2021