

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 531
3137260

BETWEEN SHODA TUA
 Applicant

AND GOLD STAR TRAINING
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Greening, counsel for the Applicant
 David Watson, advocate for the Respondent

Investigation Meeting: 15 June 2022 at Auckland

Submissions Received: 7 July 2022 from the Applicant
 13 July 2022 from the Respondent
 10 October 2022 from Respondent
 12 October 2022 from Applicant

Date of Determination: 14 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mrs Shoda Tua, was dismissed for serious misconduct by Gold Star Training Limited (Gold Star) from her role as the Auckland Regional Workplace Course Manager. Mrs Tua was given four weeks' notice of dismissal on 21 October 2020, so her employment ended on 18 November 2020.

[2] Gold Star decided to dismiss Mrs Tua on notice, even though it considered serious misconduct had occurred, to give her time to complete all outstanding student assessments, which she had been paid a 'piece rate' for in advance of having completed the work. However,

Mrs Tua went on sick leave after the disciplinary meeting, and did not return to work before her employment ended.

[3] Mrs Tua claimed her dismissal was unjustified and she sought lost wages, distress compensation and costs.

[4] Gold Star said Mrs Tua's dismissal was justified. Gold Star believed Mrs Tua had been dishonest and had deliberately deceived it by working from her home in Taipa Northland, when she knew she was expected and required to work in Auckland. Gold Star said that Mrs Tua's failure to follow its lawful and reasonable instructions led it to lose trust and confidence in her to work unsupervised.

Investigation meeting

[5] The Authority held an in-person investigation meeting on 15 June 2022 in Auckland.

[6] Mrs Tua gave evidence in support of her claims. Mrs Ingrid Sa'ena-Brown and Ms Lesley Paton gave evidence for Gold Star. Mrs Sa'ena-Brown was the owner and manager of Gold Star and she operated the business from Northland. Ms Paton was employed by Gold Star as an Administrator, so she worked with Mrs Sa'ena-Brown and Mrs Tua.

[7] Both parties filed additional information and written submissions after the investigation meeting.

Issues

[8] The following issues are to be determined:

- (a) Was Mrs Tua's dismissal justified?
- (b) If not, what if any remedies should she be awarded?
- (c) What costs and disbursements should the successful party be awarded?

Background facts

Mrs Tua's role

[9] Mrs Tua's position required her to arrange on the job workplace training and assessments for secondary school students in Auckland who were undertaking the Gateway workplace course.

[10] Mrs Tua was required to contact schools to secure student placements, to contact business operators to secure suitable work placements for the students, and to schedule and carry out the training, assessment and support students needed to complete their course.

[11] That involved Mrs Tua visiting schools and workplaces within the Auckland region, as well as marking assessments along with other administrative duties that she was able to complete when working from home.

[12] Mrs Tua was required to attend in person meetings with schools, businesses, students and other Gold Star personnel in Auckland, as necessary but she could undertake her administrative duties while working from home.

Importance of student assessments

[13] Students were required to complete assessments that were marked by Gold Star, to NZQA unit standards. The students' assessment records then had to be submitted by Gold Star for moderation and subsequent awarding of qualifications by an approved Training Organisation (TO). Gold Star was contracted and moderated by Front-line Training Consultancy Limited (Front-line) as the TO.

[14] Failure by a student to complete assessments to the required standard meant they would not be able to complete their course. It was Gold Star's job to support students to get their qualification by helping them to complete the necessary workplace training and associated assessments. Gold Star was therefore expected to support a student until the student had completed their course.

Prior independent contractor relationship

[15] From July 2016 to November 2019 Mrs Tua was engaged by Gold Star as an independent contractor, providing the same services she did as an employee.

[16] As a contractor Mrs Tua had a large amount of freedom and independence in her role. That included control over her working hours, and the ability to decide what activities she would do and how and when she would do them, provided she achieved the outcome of students completing their course.

[17] As an independent contractor Mrs Tua was used to structuring the work she did for Gold Star around her own priorities, meaning she was used to working autonomously. When

Front-line became Gold Star's TO, it prohibited Gold Star from using independent contractors. That required Mrs Tua's status to change from that of an independent contractor to being an employee.

Problems in the employment relationship

[18] The Authority finds that Mrs Tua had not made the mindset change from being an independent contractor in business on her own account, to being an employee who was required to work under the direction and control of Gold Star.

[19] That created problems in the employment relationship because Mrs Tua did not accept the reality that Mrs Sa'ena-Brown (as Mrs Tua's manager and the owner of Gold Star) could legitimately give Mrs Tua direction or instructions about work related matters. When Mrs Sa'ena-Brown attempted to do so, Mrs Tua would inappropriately accuse Mrs Sa'ena-Brown of bullying her.

[20] The Authority records its finding that Mrs Sa'ena-Brown did not engage bullying conduct or behaviour towards Mrs Tua. Mrs Sa'ena-Brown's interactions with Mrs Tua were reasonable, appropriate and involved legitimate work related issues. The Authority noted that Mrs Tua appeared to be quick to accuse Mrs Sa'ena-Brown of bullying whenever she (Mrs Tua) did not get her own way.

[21] Mrs Tua presented as a strong forceful personality who was determined to do whatever she wanted to do. She did not understand or accept Mrs Sa'ena-Brown's management prerogative to make set priorities for the business. Non-exhaustive examples of this included:

- (a) Mrs Tua informing Mrs Sa'ena-Brown she was not available to meet when Mrs Sa'ena-Brown had requested a meeting time and date (even though Mrs Sa'ena-Brown was the person who had to travel down from Whangarei for their meeting);
- (b) Failing to attend a meeting that Mrs Sa'ena-Brown had travelled from Whangarei to attend that had been reorganised to meet Mrs Tua's preferred timing (saying she forgot despite a reminder email having been sent to her);
- (c) When Mrs Tua was asked to come to the meeting she said she had forgotten to attend, she shouted at Mrs Sa'ena-Brown so loudly on the phone that a manager at the meeting venue asked Mrs Sa'ena-Brown if she was okay;

- (d) Failing to provide student Assessment Booklets for moderation by Mrs Sa'ena-Brown, despite being repeatedly asked to do so;
- (e) Failing to meeting with Mrs Sa'ena-Brown to go over moderated Assessment Booklets;
- (f) Refusing to take moderated Assessment Booklets that needed remediation by her, after the 19 October 2020 meeting;
- (g) Unilaterally rescheduling a meeting with students on 16 October 2020 that she had strongly objected to attending, but which Mrs Sa'ena-Brown had told her she had to attend;
- (h) Ignoring Mrs Sa'ena-Brown's instruction not to contact a particular client who Mrs Sa'ena-Brown had been communicating with, and directly contacting that client;
- (i) Repeatedly making unfounded accusations of bullying against Mrs Sa'ena-Brown, who was trying to address legitimate work related matters or to set work priorities/expectations with Mrs Tua.

Employment agreement

[22] When Mrs Tua became an employee she was given a written individual employment agreement, that attached her job description, which Mrs Tua signed on 29 November 2019 ("the November IEA"). Although Mrs Tua's employment began in December 2019, the nature of the job meant she did not actually start doing work until January 2020.

[23] Mrs Tua's November IEA was updated in August 2020. Mrs Tua was given an updated written employment agreement dated 30 August 2020 and an updated job description dated 14 September 2020. The changes from the November IEA were highlighted so they were easy for her to see.

[24] Mrs Tua's core terms and conditions such as the hours of work, 'piece rate work' payment for students she was the Assessor for, and her place of work did not change.

[25] The biggest change was instigated by Mrs Tua. It reflected the agreement the parties had reached that Gold Star would employ (on a casual basis) Mrs Tua's husband and son to do student assessments during the school holidays, that Mrs Tua would co-ordinate and over see.

Gold Star employed Mrs Tua's family members, at her request, specifically to help her with student assessments.

[26] New paragraphs covering the payments Mrs Tua would receive, and the timing of that, for co-ordinating and overseeing the student assessments done by her husband and son were added into the "*Payment of wages*" clause.

[27] A new "*Performance Management*" clause was also added. This provided for a written warning and a Performance Management Plan to be implemented in the event of performance issues.¹

Variations to the original job description

[28] The job description that was updated on 14 September 2020 also contained highlighted changes that included the requirement:

To be readily available to visit schools and workplaces 'in person' within the Auckland region, Monday to Friday, between the hours of 8.30am – 4.30pm.

[29] It also included new key duties that related to:

- (a) The requirement to be available to the Managing Director between 8.30am – 4.30pm for updates or enquiries about course completion status;
- (b) Documentation requirements, as per the template provided;
- (c) Assistance with training a replacement if that became necessary;
- (d) Completion of a weekly planner (as per the template in the Google drive) from 15 September onwards that recorded the actual work done during the preceding week;
- (e) Communications by email, and with the schools and Managing Director;
- (f) Marking requirements, student records on progress and status, requests for resources;
- (g) Assessment requirements/obligations;
- (h) Relationships with Front-line and students;

¹ There were some other minor but (in respect of this matter) not material changes, so those are not set out.

- (i) Health and safety form for schools to complete;
- (j) Attendance at Professional Development and Internal Moderation days.

Alleged non-agreement to updated employment documentation

[30] Mrs Tua told the Authority she had not signed, so did agree to, the updated employment documentation. However, she did not explain what she disagreed with or why.

[31] Mrs Tua was presented with the first copy of the proposed variations to her employment agreement on 30 August 2020. She was given another copy (of the same agreement) on 23 September 2020. She was asked to sign and return the updated employment agreement and job description, but did not do so.

[32] It was clear that Mrs Tua had provided feedback on the proposed changes to her August employment agreement, because the rate she was to be paid for overseeing student assessments (that were done by her husband or son) was adjusted at her request.

[33] While Mrs Tua was employed she did not inform Gold Star that she did not agree with some of the proposed changes to the updated employment agreement or job description, or did not intend to sign this updated employment documentation. Mrs Tua had opportunities to discuss any concerns she may have had about the changes with Mrs Sa'ena-Brown, but did not do so.

[34] The Authority finds that Mrs Tua's conduct led Gold Star to reasonably believe that Mrs Tua had agreed with the changes, because she:

- (a) Did not object to any of the proposed changes;
- (b) Did not raise any concerns;
- (c) Did not say she would not sign the updated employment agreement;
- (d) Did not inform Gold Star that she disagreed with any of the changes that had been made to her job description;
- (e) Worked in accordance with the changes, for example by:
 - (i) Overseeing student assessments done by her family members;
 - (ii) Obtaining the benefit of the new payment arrangements arising from the casual employment of her family members;

- (iii) Passing on casual employment agreements to her family members.

[35] The Authority did not accept Mrs Tua's argument that because she did not sign the updated employment agreement or job description they did not apply to her. Mrs Tua's employment was governed by the August employment agreement and the updated job description.

Material terms and conditions of the employment

[36] Both employment agreements contained the same place of work, hours of work and meetings and moderation clauses, that stated:

Place of work

The employee's main place of work will be in the Auckland region, New Zealand.

The employer may ask the employee to travel for work from time to time, but they don't have to agree.

Hours of work

The employee will work for 40 hours each week on Monday to Friday, between the hours of 8.30am – 4.30 pm.

Flexitime – the employee can choose when to start and end work each day (within agreed limits), as long as they work the agreed number of hours.

Meetings and Moderation

The employee will be available to attend all scheduled meetings such as: Staff meetings, Professional Development, Moderation meetings, one to one meetings with the Employer, phone/video calls and health and safety.

If the employee is unable to attend, 48 hour notice may be given, where arrangements can be made to reschedule to an agreed upon time.

[37] The job description that accompanied the August employment agreement stated:

Location/Region: Auckland

Primary Objectives:

[...]

To be readily available to visit schools and workplaces ‘in person’ within the Auckland region, Monday to Friday, between the hours of 8.30 am – 4.30 pm.”

[38] The Authority finds that a core term of Mrs Tua’s employment was that her role was based in the Auckland region. Mrs Tua was not free to choose to work from anywhere anytime she wanted to.

[39] Mrs Tua was employed to work 40 hours a week, involving eight hours a day from Monday to Friday, which was to be worked in the Auckland region. Mrs Tua’s job also required her to be available to attend all scheduled meetings in Auckland and to provide all assessment documentation that NZQA required so students could to complete their courses.

Alleged alternating week work pattern

[40] Mrs Tua told the Authority that from August 2016 until she was dismissed she had established a pattern of working alternating weeks, one week on site then the next week working from home.²

[41] Mrs Tua said that during the ‘on-site week’ she would work onsite with students at various schools and workplaces in Auckland and during the following ‘work from home week’ she would mark assessments and complete all of the other administration/office based work that was required of her, from her home office.

[42] Mrs Sa’ena-Brown disputed that such a work pattern had been occurring, and said she did not know that Mrs Tua had been working one week on site and the following week from home. Mrs Sa’ena-Brown said the first she heard about this alleged alternating work pattern was when Mrs Tua’s counsel raised it in her personal grievance letter dated 19 November 2020 (after her employment had ended).

[43] Mrs Sa’ena-Brown said she would not have approved such a work pattern because Mrs Tua’s role required her to be readily available to students, schools and business that were providing work placements to the students. That was recorded in the job description. The alternating pattern Mrs Tua described would therefore not have suited the way the business needed to operate.

² The period July 2016 to November 2019 involved an independent contractor relationship and the period December 2019 to November 2020 involved an employment relationship.

[44] Mrs Sa'ena-Brown's understanding was that Mrs Tua would schedule fortnightly meetings with students and schools but in the other week would still also be available to attend meetings in person with students who needed her assistance, or to engage with schools and the workplaces that were offering placements for the students as required.

[45] Mrs Sa'ena-Brown told the Authority that the work schedules Mrs Tua had provided, and the discussions Mrs Tua had with Mrs Sa'ena-Brown about her work, did not support the existence of an alternating work pattern (week on site then week from home) that Mrs Tua had described. Ms Paton supported Mrs Sa'ena-Brown's evidence about that. Ms Paton confirmed the Assessor had to be available to help students every week, not just every second week.

[46] The Authority preferred Mrs Sa'ena-Brown's evidence over Mrs Tua's evidence. If there had been such a pattern then Mrs Tua would likely have referred to it when she and Mrs Sa'ena-Brown were discussing her move to Taipa in September and October.

[47] If it was a known or agreed work pattern then Mrs Tua would likely have been up front with Mrs Sa'ena-Brown about the fact she (Mrs Tua) was not available to attend meetings when Mrs Sa'ena-Brown had asked her to, because Mrs Sa'ena-Brown was trying to set these up during Mrs Tua's 'work from home week'. However, Mrs Tua's failure to provide that explanation during September and October 2020 undermined the credibility of her evidence about the alternating work pattern.

[48] The Authority concluded that the 'alternating work pattern' was more likely than not put forward as an ex post facto justification to explain why Mrs Tua had been in Taipa for the entire week commencing 12 October 2020, instead of in Auckland as her job required.

Ability to work from home

[49] Mrs Sa'ena-Brown was aware that Mrs Tua would work from her home office in Auckland on occasion. The nature of Mrs Tua's work allowed her flexibility in terms on onsite work versus work from home, provided she remained available to attend to in person work obligations as and when required. Mrs Tua could not insist on working from home if/when she had work obligations that had to be undertaken on site.

[50] There was no arrangement or agreement that Mrs Tua could elect to 'work from home' from anywhere outside of Auckland or that she could refuse to make herself available to attend

in person meetings in Auckland on the basis she had unilaterally scheduled herself a 'work from home' week that she had elected to carry out away from Auckland.

Move to Taipa

[51] On 2 September 2020 Mrs Tua advised Mrs Sa'ena-Brown that she and her family would be moving to Taipa, Northland which was approximately four hours north of Auckland. There were various communications between the parties about that, because Mrs Sa'ena-Brown was concerned that meant Mrs Tua was resigning.

[52] Mrs Tua's intention was to be based in Taipa, but to continue working in her position as Auckland Regional Workplace Course Manager for Gold Star, while Mrs Sa'ena-Brown expected Mrs Tua to work in accordance with the terms of her employment agreement, which required her to be based in Auckland.

[53] Mrs Sa'ena-Brown disagreed and clearly communicated that to Mrs Tua during a recorded phone call during which Mrs Sa'ena-Brown told Mrs Tua "*You do need to be in Auckland which is the job requirement, ok it's not to do the job from up north.*"

[54] Mrs Tua then assured Mrs Sa'ena-Brown that she intended to continue doing her job and said her situation was like when Mrs Sa'ena-Brown first started the business, when Mrs Sa'ena-Brown lived up north and travelled to Auckland.

[55] Mrs Sa'ena-Brown's response to that was to tell Mrs Tua:

No Shoda, no, no. I don't think you actually understand what I'm saying here, I need you in Auckland as per your employment agreement to do the job, I need, if you're going to stay with Gold Star this is the job.

[56] Mrs Tua's replied:

Well maybe I need to resign then Ingrid, maybe I need to resign then.

[57] Mrs Sa'ena-Brown told Mrs Tua:

Shoda I need you, Shoda I need you to do your job, I need you to be there during the holidays, and I need you to be there during term four, because that is what your job is, I can't put that any more plainly than that.

[58] Mrs Tua responded:

Well then maybe Ingrid I will be resigning then I will be handing in my notice, if that's what you're trying to say to me.

[59] Mrs Sa'ena-Brown replied:

I'm not trying to say anything to you, I'm just trying to say to you that I need you to do the job.

[60] Mrs Tua then discussed how important it was to the family that she went up North with her husband and she stated:

I'm not going to stay down in Auckland while my husband's up North.

September communications about the Taipa move

[61] As a result of the communications Mrs Sa'ena-Brown had with Mrs Tua about her move to Taipa, Mrs Sa'ena-Brown engaged an advocate. That resulted in a letter from Mrs Sa'ena-Brown to Mrs Tua dated 11 September 2020 that recorded their discussion the previous day.

[62] A number of items were covered in that letter, which included advice from Mrs Sa'ena-Brown to Mrs Tua that "*If any employee expects to take time for personal reasons they are to request 'annual leave' to do so*". The letter recorded Mrs Sa'ena-Brown's concerns that:

The current situation/status of the Auckland region workplace courses, with an extremely high number of students currently completing and so many placements now unavailable, requires your attention and expertise at this time.

[...]

I hope you can see that you moving away from the region at this time is extremely inconvenient and places enormous pressure on the business and the company as a whole if we are unable to deliver the service and expectations that is required of us by schools/students/Front Line and NZQA.

[...]

However, if you are unable to accommodate this then, as your choice to move from the Auckland region has now made the current Auckland region position untenable, please submit your resignation which includes four weeks' notice in writing.

[63] Mrs Tua responded by an email on 14 September 2020 that stated she had decided not to resign and that:

I will honour and work through my contractual obligations with Gold Star Training 2020. Although I am moving up north I will continue to service the Auckland region going forward.

[64] Mrs Sa'ena-Brown responded by email that stated:

I am pleased you have decided to work to the end of the year, however, you will still be required to work in Auckland as per your agreement.

[65] Mrs Tua replied:

Not only will I work to the end of the year I am continuing my role as the Auckland Workplace Manager for the next year as well

[66] On 17 September 2020 Gold Star's advocate wrote to Mrs Tua "*To resolve an employment problem that has developed in the past few weeks.*" The letter recorded that Mrs Tua's hours of work and place of work had not changed since she was employed, with her place of work from Monday to Friday being the "*Auckland region, New Zealand.*" She was told:

Continuation of your duties, Monday to Friday in the Auckland region remains a requirement of your employment agreement.

[...]

We require a response in writing on or before 18 September 2020, acknowledging the following:

Attendance time and place is to remain as contracted at being **Monday to Friday, in Auckland.** (emphasis added)

If you are intending to resign due to relocation then we require written notice and to discuss how that notice period will be worked.

[...].

[67] Mrs Tua replied by email stating:

No change to my attendance in the Auckland region. (emphasis added)

Not resigning.

[...]

Ingrid made it clear that there would be no flexibility or compromise to moving up north.

[68] Gold Star's advocate replied by letter dated 18 September 2020 that recorded (among other things):

Confirming that you will continue to be a full time resource based in Auckland is a huge relief for Ingrid.

Was fortnightly attendance in Auckland agreed?

[69] Mrs Sa'ena-Brown reasonably believed from Mrs Tua's responses that she had agreed to be based in Auckland from Monday to Friday, in order to do her job as usual. That still gave Mrs Tua freedom to work from home, from her Auckland home office, if she needed to because she would have been "*readily available*" to attend meetings that arose.

[70] Mrs Sa'ena-Brown told the Authority that Mrs Tua's plan to commute to Auckland from Taipa once a fortnight was never raised with her, was never agreed upon, and was not documented. Mrs Sa'ena-Brown was under the impression that Mrs Tua would be working normal business hours every week, Monday to Friday, in Auckland.

[71] Gold Star had made it clear to Mrs Tua that she was required to be in Auckland from Monday to Friday and Mrs Tua had confirmed she knew there was "*no change to my attendance in the Auckland region.*" It was significant that Mrs Tua never raised the possibility of working from her home in Taipa every second week during their September communications about work location.

[72] Mrs Tua's view was that she had agreed she would work one week in Auckland and one week from her home office in Taipa, in accordance with what she claimed was her usual practice. The Authority considered Mrs Tua's view about that was unreasonable in light of the communications that had occurred.

[73] Accordingly, Mrs Tua's evidence that she was entitled to 'work from home' from her home in Taipa, meaning she would only be Auckland, or available to attend meetings, every second week was not accepted by the Authority. Mrs Tua knew or ought to have known that she was required to work in Auckland during the week.

22 September 2020 meeting

[74] On 18 September 2020 Mrs Sa'ena-Brown tried to set a time and date to discuss some performance issues with Mrs Tua. However, Mrs Tua replied that she was not available to meet on the scheduled dates. In the end Mrs Tua and Mrs Sa'ena-Brown agreed that they would meet on 22 September 2020, which was a date that Mrs Tua had proposed. Mrs Sa'ena-Brown confirmed that arrangement in an email to Mrs Tua dated 18 September 2020.

[75] Mrs Sa'ena-Brown travelled from Whangarei and arranged a meeting venue in Auckland and overnight accommodation for herself in Auckland, so she could meet with Mrs Tua on 22 September 2020.

[76] Mrs Tua did not attend the meeting. When Mrs Sa'ena-Brown called Mrs Tua to find out where she was, Mrs tau said she had forgotten about their meeting so was at a physio appointment. Mrs Sa'ena-Brown asked Mrs Tua if she could still make the appointment after she had completed her physio, but Mrs Tua responded with accusations that Mrs Sa'ena-Brown was "*bullying her*".

[77] Mrs Sa'ena-Brown said Mrs Tua had responded in such a loud and aggressive manner that the manager of the meeting venue, who was sitting in the office next to Mrs Sa'ena-Brown, asked Mrs Sa'ena-Brown if she was alright because she was so visibly upset by the call.

Negative feedback from schools

[78] It came to Mrs Sa'ena-Brown's attention that some of the schools were not happy with what they believed was Mrs Tua's lack of communication and there was concern that the standards of the services provided were below expectations.

[79] Mrs Sa'ena-Brown became aware that some schools were making negative comments about Gold Star because they had found it difficult to get hold of Mrs Tua and students had been complaining about not receiving full support from her.

[80] Schools had informed Mrs Sa'ena-Brown they were concerned that their students would not be able to complete their course, and therefore not receive their credits after coming out of lockdown.

[81] Mrs Sa'ena-Brown told the Authority that she went into 'damage control' mode, so offered all Auckland schools "*full support*" to help students complete their assessments.

Because the end of the school year was fast approaching, it was a matter of urgency for students to have completed their course as soon as possible.

[82] An individual referred to as “G” (from a school that did not need to be named) responded to Mrs Sa’ena-Brown’s offer of support by asking for Gold Star to arrange a meeting with students at the school. G told Mrs Sa’ena-Brown that the school students were behind so they really needed help. G suggested that 16, 19 or 22 October 2020 would be suitable.

[83] The work schedule that had been shared/submitted by Mrs Tua between 4 and 9 October 2020 showed that she was uncommitted on 16 October 2020, so should have been able to meet the students that day. Mrs Sa’ena-Brown confirmed the appointment with G for Mrs Tua to provide a full day of support to the students who were struggling from 10am on 16 October 2020.

16 October 2020 meeting at G’s school

[84] Mrs Sa’ena-Brown emailed Mrs Tua to inform her that she had been booked to attend a support session for the students at G’s school on 16 October 2020. The meeting was two weeks away, so Mrs Tua had two weeks within which to reorganise her previous work plans.

[85] Mrs Tua was angry and annoyed that Mrs Sa’ena-Brown had scheduled an appointment without consulting her, so she (Mrs Tua) resisted it and accused Mrs Sa’ena-Brown of bullying her.

[86] Mrs Tua emailed Mrs Sa’ena-Brown saying that she could not attend the appointment with G’s school because “*I have a schedule already in place where I will be following up on schools*” and “*I will contact G myself to arrange a day and time*”. Mrs Tua claimed Mrs Sa’ena-Brown had over committed her (Mrs Tua) because she had made plans with other schools.

[87] Gold Star and the Authority both noted that no such plans were recorded on Mrs Tua’s work schedule.

[88] Mrs Sa’ena-Brown informed Mrs Tua that the meeting with G’s students was important to the business because the students were behind and she (Mrs Sa’ena-Brown) asked why she (Mrs Tua) could not do it on 16 October. Mrs Sa’ena-Brown invited Mrs Tua to explain what

else she had on that was more urgent than the 16 October meeting, if she wanted Mrs Sa'ena-Brown to reconsider Mrs Tua's attendance at the 16 October meeting.

[89] Mrs Tua responded that she had plans with other schools and was prioritising meeting with students who had started in the workplace. It later turned out that Mrs Tua had arranged, unbeknown to Mrs Sa'ena-Brown, to work from home from Taipa that week. However, she did not share that information with Mrs Sa'ena-Brown at that time.

[90] Mrs Sa'ena-Brown replied by noting that Mrs Tua had not finalised her work schedule for 16 October, she had no other visits booked that day and had not explained what was so urgent that meant she could not attend the 16 October 2020 meeting. Mrs Sa'ena-Brown therefore recorded her expectation that Mrs Tua's work schedule would include the 16 October 2020 meeting.

[91] Mrs Sa'ena-Brown also sent a separate email to Mrs Tua at 11.27am on 5 October 2020 that said "*Please do not contact [G], I will get back to you.*"

[92] Mrs Sa'ena-Brown did that because the support session had been arranged after speaking with G at length, it was a solution that the school was happy with and it was intended to address the adverse perception the school had about the services that Mrs Tua had been providing.

[93] Mrs Sa'ena-Brown had also noted that Mrs Tua had no student visits scheduled that day, because her schedule at the time was blank, which meant she was available on 16 October 2020.

[94] Mrs Tua's objection at the time was that she would be too busy doing other (administrative work) on 16 October. However, it was later discovered that Mrs Tua had decided to work from Taipa that week, so the Authority considered it likely that Mrs Tua resisted attending the 16 October meeting because she did not want to have to travel to Auckland for it.

Rescheduling of 16 October 2020 meeting

[95] Contrary to advice not to contact G, Mrs Tua emailed G at 11.39am on 8 October 2020 saying she was not available to attend the meeting on 16 October, but could meet the students

the following week instead. Mrs Tua then rearranged the full day 16 October 2020 meeting to a two hour meeting on 22 October 2020.

[96] On 9 October 2020 Mrs Tua emailed Mrs Sa'ena-Brown to inform her that the appointment at G's school had been changed. She implied G had initiated the change, by saying G preferred the alternative date of 22 October 2020.

[97] Another bullying accusation was also made. Mrs Tua also accused Mrs Sa'ena-Brown of being "*very unprofessional and you are using bully tactics to get your way*", which is a comment the Authority believed more appropriately applied to Mrs Tua's behaviour.

[98] Mrs Sa'ena-Brown made inquiries with G and discovered the appointment had been rearranged by Mrs Tua who had informed G she (Mrs Tua) was not available on 16 October 2020. Mrs Sa'ena-Brown then initiated a disciplinary process.³

Discovery that Mrs Tua was in Taipa, not Auckland

[99] Mrs Sa'ena-Brown lives and works in Northland. She travelled to Auckland on 13 October 2020 with a second lot of Assessment Books she had received from Mrs Tua which she (Mrs Sa'ena-Brown) had moderated. Mrs Sa'ena-Brown intended to meet with Mrs Tua to discuss the errors and corrections that needed to be made to the Assessment Booklets to enable the students to pass their course.

[100] Mrs Sa'ena-Brown called Mrs Tua to arrange a time to drop off the books with the intention of going through the assessment notes that she (Mrs Sa'ena-Brown) had made when she met up with Mrs Tua to hand over the Assessment Booklets. Mrs Tua told Mrs Sa'ena-Brown she was not available to meet her.

Mrs Tua's unavailability during the week commencing 12 October 2020

[101] Mrs Sa'ena-Brown said that Mrs Tua eventually explained to Mrs Sa'ena-Brown on 13 October 2020 that she (Mrs Tua) had been "*working from home*" in Taipa, marking assessments, so she was unavailable to go through the assessment booklets with Mrs Sa'ena-Brown.

³ The 9 October 2020 disciplinary letter scheduled a 14 October 2020 disciplinary meeting.

[102] Mrs Sa'ena-Brown believed that Mrs Tua had deliberately and dishonestly hid that from her (Mrs Sa'ena-Brown) when they were communicating about the 16 October 2020 meeting.

[103] Mrs Tua had not discussed working from Taipa for a week with Mrs Sa'ena-Brown, who was surprised and annoyed to find that out. Nor had Mrs Tua recorded on her work schedule that she would not be working in Auckland the entire week commencing 12 October 2020.

[104] During the disciplinary process it was discovered that Mrs Tua's husband was being welcomed to his new school in Taipa with a Powhiri, and that Mrs Tua was involved in the Powhiri and also had associated whanau hosting responsibilities on Monday 12th, Tuesday 13th and Wednesday 14th October 2020.

[105] Mrs Sa'ena-Brown pointed out that prior to 13 October 2020 Mrs Tua did not tell her "*it was her week working from home*" or that she would be in Taipa for the week, but if she had, then Mrs Sa'ena-Brown would have questioned it. Mrs Sa'ena-Brown considered Mrs Tua's unavailability, because she was working at home in Taipa, was contrary to the agreement that she was required to be "*based in Auckland*".

[106] Mrs Sa'ena-Brown believed Mrs Tua had given her written agreement on 18 September 2020 that she would be working during the week "*in Auckland*", so she was available to schools, students, and contactable by Mrs Sa'ena-Brown if/while Mrs Sa'ena-Brown was in Auckland. Mrs Sa'ena-Brown viewed that as a key part of Mrs Tua's job requirements.

[107] This discovery caused Mrs Sa'ena-Brown to issue a second disciplinary letter dated 15 October 2020, that included two new allegations, that arose from Mrs Tua's unavailability in Auckland during the week 12 October 2020.

Inconvenience to Gold Star

[108] Mrs Tua's unilateral decision to work in Taipa the week commencing 12 October 2020 was highly inconvenient for Gold Star. Mrs Tua could not meet with:

- (a) Mrs Sa'ena-Brown on Tuesday 13 October 2020;
- (b) Mrs Sa'ena-Brown on Wednesday 14 October 2020 to attend an in person disciplinary meeting;

- (c) Students who had fallen behind with their course requirements and needed support on 16 October 2020.

[109] Mrs Sa'ena-Brown travelled from Whangarei to Auckland infrequently, so Mrs Tua's failure to be available to meet her on 13 October 2020 to review and discuss the Assessment Booklets was very inconvenient. It also likely contributed most of the student assessments being of an inadequate standard, which required considerable resources from Gold Star to remedy, after Mrs Tua's employment had ended.

[110] The 22 October 2020 meeting with students at G's school, that Mrs Tua had unilaterally rescheduled from 16 October to 22 October, also did not occur, causing maximum inconvenience to all involved.⁴

Material contractual clauses

[111] Mrs Tua's employment agreement contained a performance management clause. This provided that if the employee was not meeting expectations then the employer would issue a formal written warning and undertake a performance management plan, that outlined the issues and an action plan to resolve the problem.

[112] The employment agreement also contained a serious misconduct clause which provided that an employee could be dismissed on notice for serious misconduct which was defined in the employment agreement as "*behaviour that fundamentally compromises the employer's trust and confidence in the employee*".

[113] There were eight (non-exclusive) examples of conduct that would be viewed as serious misconduct. This included (among other things) "*repeated failure to follow a reasonable instruction*" (emphasis added).

Was Mrs Tua's dismissal justified?

Justification test

[114] Justification is to be assessed in accordance with the justification test in s 103A of the Employment Relations Act 2000 (the Act). This required the Authority to objectively assess

⁴ The morning of the 22 October 2020 student meeting Mrs Tua emailed G to say she was sick so would not be attending the meeting. Gold Star was unable to arrange for someone else to attend the meeting at such short notice, so it did not occur.

whether Gold Star's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time that Mrs Tua was dismissed.⁵

[115] A fair and reasonable employer is expected to comply with its statutory obligations. This includes the good faith obligations in s 4(1A) of the Act and each of the four procedural fairness tests in s 103A(3) of the Act.

[116] Section 103A(5) of the Act prevents the Authority from finding that a dismissal was unjustified solely because of minor process defects that did not result in unfairness to the employee.

Good faith obligations

[117] Section 4(1A)(c) of the Act requires an employer that is proposing to make a decision adverse to an employee's ongoing employment to provide the employee with access to relevant information and an opportunity to comment on it before a final decision is made.

[118] Gold Star did not provide Mrs Tua with any information about its disciplinary concerns, other than the two disciplinary letters she was sent.⁶ She did not receive any of the documents Gold Star was relying on.

[119] Gold Star failed to explain to Mrs Tua why the disciplinary allegations were viewed as serious misconduct instead of performance issues or misconduct. Mrs Sa'ena-Brown also made further inquiries with G after the disciplinary meeting, but failed to disclose that to Mrs Tua, who was therefore deprived of an opportunity to respond to it.

[120] The Authority was not satisfied that Gold Star complied with its s 4(1A) good faith obligations. Its failure to do so undermined its ability to justify Mrs Tua's dismissal.

Disciplinary allegations

[121] Gold Star set out seven disciplinary allegations in the 9 October 2020 letter to Mrs Tua, that was emailed to her on 10 October 2020. Gold Star set out two more disciplinary allegations in its disciplinary letter dated 15 October 2020.

⁵ Section 103A(2) of the Act.

⁶ See the disciplinary letters dated 9 and 15 October 2020.

[122] The Authority has summarised (and paraphrased) the nine disciplinary allegations as follows:

- (a) Failure to follow lawful and reasonable instructions regarding the scheduling of work, namely the rescheduling of the 16 October 2020 meeting with G's students;
- (b) Deliberately contacting G after being told not to;
- (c) Failure to supply requested work schedules;
- (d) Failure to update google spreadsheet, student records and to supply information about the number of completed student assessment books;
- (e) Failure to place students during the school holidays, resulting in refunds;
- (f) Not advising schools of placement opportunities in a timely manner;
- (g) Advising Gold Star that placement numbers available at a worksite were limited to 8 when there were 15-20 placements available;
- (h) Failing to attend work in the Auckland Region the week of 12 October 2020;
- (i) Failing to notify Gold Star the week prior to 12 October 2020 that you would be unavailable to work.

First disciplinary meeting

[123] Mrs Tua informed Mrs Sa'ena-Brown that she was "*unable to attend in person*" the disciplinary meeting on 14 October 2020 so she asked to attend by Zoom. Mrs Tua did not explain that she could not attend the 14 October meeting because she was working from Taipa that week.

[124] The disciplinary meeting was rescheduled and held on 19 October 2020. The meeting was chaired by Gold Star's advocate, Mr David Watson who was accompanied by Mrs Sa'ena-Brown and Ms Paton. Mrs Tua attended in person and was accompanied by her mother-in-law and a support person, Ms Davida Suasua.

[125] The disciplinary meeting was recorded and an agreed transcript of that recording was included in the joint bundle of documents used during the investigation meeting.

[126] During the meeting the parties worked through each of the allegations, and Gold Star made notes of Mrs Tua's explanations to the disciplinary concerns.⁷ Mrs Tua denied any wrongdoing.

[127] At the end of the meeting the parties arranged to have a second meeting on 27 October 2020.

Mrs Tua's 19 October 2020 email

[128] Mrs Tua sent an email to Mrs Sa'ena-Brown on 19 October 2020 (after the disciplinary meeting) complaining that the process "*was not fair and reasonable*", she had not been treated in good faith and that she had felt "*intimidated and bullied by [Mrs Sa'ena-Brown's] emails and phone conversations and added expectations throughout the last 4 weeks.*"

[129] The Authority finds that the bullying and intimidation allegations by Mrs Tua reflected her subjective views but were not objectively correct. Mrs Sa'ena-Brown's communications and expectations were reasonable, necessary and appropriate.

[130] The Authority finds that Mrs Tua's responses to reasonable and appropriate work related communications from Mrs Sa'ena-Brown was not "*responsive and communicative*" or "*constructive*", contrary to the mutual good faith obligations set out in s 4(1A)(b) of the Act.

[131] Mrs Tua in her email to Mrs Sa'ena-Brown on 19 October 2020 stated that she wanted to keep the appointment for a second disciplinary meeting, but that did not occur.

No second disciplinary meeting

[132] Gold Star unilaterally decided not to hold a second disciplinary meeting. It did not consult with Mrs Tua about that and it did not advise her of its decision. Instead Gold Star unexpectedly just sent Mrs Tua an undated dismissal letter on 21 October 2020.

[133] Mrs Tua was told that Gold Star had decided to dismiss her on four weeks' notice, so she had time to complete the outstanding student assessments that she had already been paid a 'piece work rate' for in advance of the work being done.

⁷ The Authority was given a copy of Gold Star's handwritten notes.

[134] Mrs Tua's last day of work was to be 18 November 2020, but she went on sick leave after the disciplinary meeting on 19 October 2020 and did not return to work.

Disciplinary findings

[135] Mrs Sa'ena-Brown told the Authority she had concluded that eight of the nine disciplinary allegations had been proven. The one allegation that was not proven involved not advising schools of placements in a timely manner, because Mrs Tua's explanation to that was accepted. The disciplinary outcome letter did not set out or explain these findings.

Dismissal letter

[136] The reasons for Mrs Tua's dismissal were recorded in the undated letter Gold Star sent Mrs Tua on 21 October 2020, that stated:

1. Failure to attend the prescribed place of work without approval, namely:
 - Not informing your employer that you intended to take leave from your place of work for cultural activities on the 12, 13 and 14 October
 - Not requesting leave for absences on the 15 and 16 October
 - Arranging work scheduled by the employer that coincided with this absence, when instructed not to do so, and without advising the employer
 - Not gaining approval from the employer to work from an alternative location.
2. Not providing a record, or any notification, to the employer for these absences from your place of work, thereby providing incorrect notice of your attendance time.
3. Repeated failures to follow the employer's lawful and read simple instructions.

Deficiencies in the disciplinary outcome letter

[137] The disciplinary outcome letter did not set out:

- (a) Mrs Tua's explanations to the nine disciplinary allegations;
- (b) Gold Star's view of Mrs Tua's explanations;
- (c) What conclusion Gold Star had reached on each separate disciplinary allegation;

- (d) What facts Gold Star had relied on in when deciding disciplinary allegations had been proven;
- (e) What it considered the “*repeated failures to follow lawful and reasonable instructions*” were;
- (f) What specific disciplinary allegations had been treated as serious misconduct and why;
- (g) Why none of the disciplinary concerns had been treated as performance issues or misconduct;
- (h) Why the 27 October 2020 meeting had been unilaterally abandoned by Gold Star, without any communication about that with Mrs Tua;
- (i) Why Mrs Tua had been deprived of an opportunity to address it on the appropriate disciplinary sanction.

Material concerns about Mrs Tua were never put to her to respond to

[138] Gold Star had a number of concerns about Mrs Tua, that were material to its decision to dismiss her, which were never put to her to respond to. That was a fundamental breach of natural justice and of good faith requirements.

[139] If Mrs Tua did not know what Gold Star was actually concerned about then she obviously had no opportunity to address those concerns before she was dismissed. That resulted in significant unfairness to her, so s 103A(5) of the Act does not apply.

[140] Mrs Sa’ena-Brown advised the Authority that the following matters (none of which were raised with Mrs Tua) caused her to conclude that Mrs Tua should be dismissed. Mrs Sa’ena-Brown believed Mrs Tua had:

- (i) Deliberately concealed she was in Taipa the week commencing 12 October 2020;
- (ii) Engaged in “*wilful disobedience*”;
- (iii) Deliberately been obstructive to Gold Star’s interests;
- (iv) No remorse or contrition for her actions;
- (v) Not acknowledged that she had done anything wrong;

- (vi) Demonstrated that she could not work unsupervised;
- (vii) Been dishonest and had put forward a “*litany of lies*” to mislead and deceive Mrs Sa’ena-Brown into falsely believing she (Mrs Tua) was in Auckland when she was in Tapia.

Authority’s findings on substantive justification

[141] A fair and proper process assists an employer to arrive at a decision that is justified. The procedural deficiencies and errors in this matter fundamentally undermined Gold Star’s ability to justify its dismissal of Mrs Tua.

[142] The Authority finds that (with reference to the disciplinary allegations summarised at paragraph [123] above:

- (a) Disciplinary allegations (a) and (b) involved misconduct, that should have been dealt with by a graduated warning process. They were not capable of being viewed by a fair and reasonable employer as instances of serious misconduct;
- (b) Disciplinary allegations (c), (d),(e) and (g) involved performance issues, that needed to be addressed in accordance with the Performance Management clause in Mrs Tua’s employment agreement. They were not capable of being viewed by a fair and reasonable employer as instances of serious misconduct;
- (c) Disciplinary allegation (f) was not proven, so could not justify dismissal;
- (d) Disciplinary allegation (h), being the failure to attend work in Auckland Region the week of 12 October 2020, was proven because Mrs Tua had worked from her home in Taipa that week. Although this was conduct that a fair and reasonable employer could potentially have viewed this type of conduct as serious misconduct. However, Gold Star’s failure to comply with natural justice or good faith requirements fundamentally undermined its ability to fairly or reasonably conclude that this was an instance of serious misconduct, instead of misconduct. Gold Star was therefore unable to justify its conclusion that this allegation amounted to serious misconduct justifying dismissal;
- (e) Disciplinary allegation (i) was not proven on the facts, so could not result in a serious misconduct finding. The evidence established Mrs Tua had worked her contractual 40 hours during the week of 12 October, so she was not obliged to

have notified Mrs Sa'ena-Brown that she (Mrs Tua) was unavailable to work that week.

[143] The Authority finds that Gold Star's failure to undertake this type of careful analysis of the disciplinary allegations, evidence relied on and Mrs Tua's explanations to the disciplinary concerns was not what a fair and reasonable employer could have done in all the circumstances. Gold Star therefore failed to meet requirements of the s 103A(2) justification test in the Act.

Authority's findings on the reasons given in the dismissal letter

[144] The dismissal letter set out three reasons for dismissal, namely:

- (a) Reason 1 – Failure to attend the prescribed place of work without approval:
 - (i) The first two findings that supported that conclusion (not informing of intention to take leave 12-14 October and not requesting leave for 15 and 16 October) were not factually correct. Mrs Tua had worked that week, so had not taken leave, so did not have to request or notify anyone she was on leave.
 - (ii) The third finding that support that conclusion (arranging work scheduled by the employer when instructed not to do so, without advising the employer) was also factually incorrect. Mrs Tua was not expressly told she was not permitted to rearrange the appointment (although that was what Mrs Sa'ena-Brown had intended to convey) or that doing so would be treated as serious misconduct. Mrs Tua also advised Mrs Sa'ena-Brown that she had rearranged the 16 October meeting, so the finding that Mrs Tua had arranged work “*without telling her employer*” was factually incorrect.
 - (iii) The fourth finding (not gaining employer's approval to work from another location) was proven. However, Mrs Tua's explanation that she believed her employment agreement gave her the flexibility to ‘work from home’ (even if she lived outside Auckland was not adequately addressed during the disciplinary process. Nor did Gold Star properly consider whether this was misconduct or serious misconduct.

- (b) Reason 2 - not providing records or notification of absences:
 - (i) This finding was not factually correct. Mrs Tua was not absent from work, because she was working from her home in Taipa. Her attendance times were therefore not incorrect, so that finding cannot support the conclusion that serious misconduct had occurred. Record keeping concerns were performance issues, not instances of serious misconduct.
- (c) Reason 3 – The “*repeated failures to follow the employer’s lawful and reasonable instructions*”:
 - (i) The “*repeated failures*” were not identified or adequately explained. This was also not put forward as a specific disciplinary allegation.

[145] During the Authority’s investigation meeting Mrs Sa’ena-Brown explained the third reason for the dismissal (repeated failures to follow lawful and reasonable instructions) involved Mrs Tua:

- (a) Moving the appointment with G;
- (b) Failing to update spreadsheets; and
- (c) Failing to deliver and complete assessments to standard.

[146] Contacting G after being told not to was a breach of a lawful and reasonable instruction. However, failing to update spreadsheets or deliver and complete assessments were performance issues, that were not capable of being treated as serious misconduct.

[147] Mrs Sa’ena-Brown’s own evidence therefore did not support the conclusion that there had been “*repeated failures to follow lawful and reasonable instructions*”, as required by the employment agreement, for such conduct to have been capable of amounting to serious misconduct.

[148] Mrs Tua’s contacting of G after being told not to was therefore either a performance issue or (more likely) a misconduct issue, that needed to be addressed by a graduated warning process. It was not conduct that justified dismissal in the first instance.

[149] The Authority finds that the reasons Gold Star set out in the dismissal letter could not have fairly or reasonably have supported a conclusion that serious misconduct had occurred,

or that dismissal was within the range of responses that were available to a fair and reasonable employer in all the circumstances.

Substantial unfairness – s 103A(5) of the Act

[150] Mrs Tua had no opportunity to address Gold Star about its disciplinary findings, she was not heard on the appropriate disciplinary sanction, she had no opportunity to reflect on her conduct and/or take advice before she was dismissed.

[151] If there had been a second disciplinary meeting Mrs Tua would likely have corrected Gold Star's incorrect conclusions that she had not worked on 12, 13, 14, 15 or 16 October 2020, and had not applied for leave for those absences.

[152] That was factually inaccurate. Had that error been corrected then the first two disciplinary allegations under item 1 and item 2 in the outcome letter would not have been found to have been proven, thereby creating a less serious situation, and likely a less serious disciplinary outcome.

[153] Providing Mrs Tua with that opportunity may have resulted in her gaining a better understanding of what she had done wrong, and why. That in turn could have enabled Mrs Tua to have had an opportunity to apologise, express remorse and/or provide undertakings about her future conduct to address Mrs Sa'ena-Brown's belief that Mrs Tua had been deliberately deceptive and dishonest, so could not be trusted to work unsupervised.

[154] These substantive and procedural failures meant Gold Star was unable to justify its decision to dismiss Mrs Tua. How Gold Star had acted, and its actions, were not what a fair and reasonable employer could have done in all the circumstances.⁸

[155] These procedural fairness and natural justice errors were so fundamental and had such a potentially adverse effect on the outcome that s 103A(5) of the Act did not apply. The Authority is therefore not prevented from finding that Mrs Tua's dismissal was unjustified.

⁸ Section 103A(2) of the Act.

What, if any, remedies should Mrs Tua be awarded?*Mitigation of loss*

[156] An employee who has been dismissed has an obligation to attempt to mitigate their loss by obtaining alternative employment. Mrs Tua's evidence about mitigation of loss was minimal. She did not discharge the required evidential burden of establishing she had appropriately mitigated her loss, thereby breaking the chain of causation between her dismissal and any loss she claimed to have suffered.

Lost remuneration

[157] Mrs Tua obtained new employment in March 2021, so she sought an award of lost wages of 18 weeks and 6 days. She calculated that amount as \$3,628.80.

[158] This claim did not succeed. The Authority considered it highly unlikely that Mrs Tua's employment would have continued in the face of a reasonable and lawful instruction from Mrs Sa'ena-Brown that Mrs Tua was required to be present in Auckland between 8.30 am and 4.30 pm Monday to Friday.

[159] Mrs Tua said in September that she would resign if she had to be in Auckland, so it was likely that such an instruction would have resulted in her resignation. Added to that were legitimate performance concerns that Mrs Sa'ena-Brown needed to address with Mrs Tua arising from serious deficiencies in the quality of Mrs Tua's work, and complaints from schools and clients, that needed to be addressed.

[160] The evidence led the Authority to conclude that it was very unlikely Mrs Tua would have continued working for Gold Star in such circumstances, had she not been unjustifiably dismissed. For those reasons, even if Mrs Tua had appropriately mitigated her loss, her lost wages claim would still not have succeeded, because it was unlikely her employment would have continued.

[161] Accordingly, Mrs Tua's claim for an award of lost wages did not succeed.

Distress compensation

[162] Mrs Tua gave evidence about the significant shock, hurt, embarrassment, frustration and distress she had suffered. She said she felt absolutely blindsided by Mrs Sa'ena-Brown.

[163] Mrs Tua had to see a doctor for help with sleeping and other issues that she attributed to her unjustified dismissal. Mrs Tua said that she became a recluse, and lost her confidence in whanau and social environments. She was supported by regular visits with a health and wellbeing support person and was later advised to see a therapist.

[164] Mrs Tua is awarded \$15,000 distress compensation for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustified dismissal.

Contribution

[165] Section 124 of the Act requires the Authority to consider whether Mrs Tua contributed to the situation that gave rise to her personal grievance, and if so to reduce remedies accordingly.

[166] Contribution denotes blameworthy conduct that has been proven on the balance of probabilities. In this case Mrs Tua had a high level of contribution to the situation that resulted in her unjustified dismissal.

[167] Mrs Tua led Mrs Sa'ena-Brown to believe that she would be honouring her employment agreement by being present in Auckland from Monday to Friday, within the normal business hours of 8.30 am until 4.30 pm. She failed to appropriately disclose that she intended to work one week in Auckland and one week from her home in Taipa.

[168] Mrs Tua also rescheduled 16 October 2020 meeting in circumstances where Mrs Sa'ena-Brown had set out that she expected Mrs Tua to be at the meeting. Mrs Tua also contacted G after Mrs Sa'ena-Brown told her not to.

[169] The manner in which Mrs Tua responded to Mrs Sa'ena-Brown's legitimate work related communications (by repeatedly making unfounded accusations of bullying) was highly unsatisfactory, contrary to her good faith obligations and undermined the employment relationship.

[170] Mrs Tua's failure to appreciate the difference between working for herself as an independent contractor (with high levels of freedom and autonomy) and working for Gold Star as an employee (subject to the direction and control of Mrs Sa'ena-Brown) caused problems. It led to Mrs Tua resisting Mrs Sa'ena-Brown when she attempted to exercise her management prerogative regarding Mrs Tua's work activities.

[171] Mrs Tua's award of distress compensation should be reduced by 30 percent under s 124 of the Act to reflect her contribution to the situation that gave rise to her dismissal grievance. Accordingly, the amount of distress compensation that Gold Star is ordered to pay Mrs Tua is reduced from \$15,000 to \$10,500 under s 124 of the Act.

Outcome

[172] Gold Star's dismissal of Mrs Tua was procedurally and substantive unjustified.

[173] Mrs Tua did not appropriate mitigate her loss and her lost remuneration claim did not succeed.

[174] Within 28 days of the date of this determination, Gold Star is ordered to pay Mrs Tua \$10,500 distress compensation under s 123(1)(c)(i) of the Act.

What, if any, costs and disbursements should be awarded?

[175] Mrs Tua as the successful party is entitled to a contribution towards her actual legal costs.

[176] The parties are encouraged to resolve costs by agreement. However, if that is not possible then Mrs Tua has 14 days within which to file costs submissions, then Gold Star has 14 days within which to file its response. Costs will not be considered outside of this timetable, without the prior leave of the Authority.

[177] The Authority is likely to adopt its usual notional daily tariff approach to costs. This matter involved a half-day investigation meeting, so the notional starting point for assessing costs is \$2,250. The parties are invited to identify any factors they say should result in adjustments being made to that notional starting tariff, to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority