

NOTE: This determination contains orders prohibiting publication of certain information at [7], [10], [95] and [96]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 523
3337780

BETWEEN

ODETTE WHITTER
Applicant

AND

JANE WINSTONE
RETIREMENT VILLAGE
LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Padmi Wickramasinghe, counsel for the applicant
Morgan Powell, counsel for the respondent

Investigation Meeting: 15 May 2025 in Whanganui and 13 June 2025 by AVL

Submissions: Up to 17 July 2025

Determination: 26 August 2025

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] At the investigation meeting on 13 June 2025, I invited counsel to make submissions on whether non-publication orders were appropriate under cl 10(1) of sch 2 of the Employment Relations Act 2000 (the Act). I have considered these submissions in light of the Court's judgment in *MW v Spiga Ltd*.¹

[2] Submissions for Ms Whitter sought non-publication of sensitive medical information, including mental health aspects of impact evidence, with reference to

¹ *MW v Spiga Ltd* [2024] NZEmpC 147.

potential impacts on future employment once Ms Whitter is fully recovered. Ms Whitter did not seek non-publication of her own name.

[3] Submissions for Jane Winstone Retirement Village Limited (JWRVL) sought non-publication of the names of parties and witnesses, given the nature of allegations Ms Whitter has made against JWRVL's witnesses. JWRVL also said that it was likely Ms Whitter and other witnesses' identity would become known, even if their names were anonymised if job descriptions or location of JWRV were published.

[4] The Authority Officer advised the representatives my preliminary view was that I considered the nature of evidence presented in this matter, including the nature of allegations raised, medical information including references to mental health issues² and discussion about the potential for specific adverse consequences, meant it was appropriate to prohibit publication of the names of and any other identifying information about all witnesses in relation to this matter, including medical information and impact evidence. I had proposed all witnesses be referred to in this determination by randomly generated identifiers, with the name and location of JWRVL also prohibited from publication.

[5] Had this approach been adopted, I would not have considered it necessary to prohibit publication of job titles, as Ms Whitter and other witnesses should not have been able to have been identified by their job titles given non-publication of JWRVL's location. I also advised I did not consider non-publication of the identity of Ryman Healthcare Limited (RHL), the owner of JWRVL, was necessary given it operates numerous retirement villages throughout New Zealand.

[6] JWRVL advised it agreed with my preliminary view. Ms Whitter strongly objected to my preliminary view, saying she did not want her name hidden and it felt wrong to her that JWRVL's witnesses should not have their names published, as she thought that would mean that would mean they would be able to "hide from what they have done". Ultimately, Ms Whitter advised she would abide by my decision on non-publication.

[7] Having considered carefully the responses to my preliminary view, I am persuaded Ms Whitter is aware of the potential consequences of her name being

² The nature of allegations raised means some reference to mental health issues is necessary in this determination, however, details have been omitted with only general references to mental health made.

published and actively requests it is not subject to a non-publication order. I accept her position, including the earlier proposal that medical information, including references to mental health issues and discussion about the potential for specific adverse consequences, should be subject to non-publication orders. This non-publication order also applies to any evidence including impact evidence which refers to that medical information. An order is made accordingly at paragraph [95] below.

[8] In reaching this view, I reconsidered the earlier submissions for JWRVL seeking non-publication particularly of Lisa Puklowski's name and job title, Village Manager of JWRV³, and noting the potential for harm to her mental wellbeing if named in this determination. JWRVL had also said it considered it was in Ms Whitter's interests to not be named.

[9] I acknowledge Mrs Puklowski's evidence of the challenges of these proceedings for her, as she presented at the investigation meeting. In terms of the Court's judgment in *MW v Spiga Ltd*, I am not satisfied, however, sufficient evidence has been provided that "specific adverse consequences could reasonably be expected to occur", such that they "justify a departure from open justice in the circumstances of the case".⁴

[10] I decline to make the non-publication orders requested by JWRVL and do not consider there are any grounds to not publish RHL's name, job titles of witnesses or the location of JWRV. I do, however, make an interim order prohibiting the publication of the names of the parties and witnesses, including the name and location of JWRVL, for a period of 28 days from the date of this determination at paragraph [96] below.

Employment relationship problem

[11] Ms Whitter was employed by JWRVL initially as an Activities Coordinator from April 2014, having previously been a volunteer. JWRVL operates a retirement village complex, with a range of care levels, and is a wholly owned subsidiary of RHL. When Ms Whitter's employment ended in February 2024 she was employed as an Activities and Lifestyle Coordinator.

³ The abbreviation JWRV is used in limited places in this determination to identify the retirement village, as opposed to the legal entity JWRVL.

⁴ Above n 1, at [88] and [89].

[12] Ms Whitter claims she was unjustifiably disadvantaged in her employment by several actions on behalf of JWRVL, unjustifiably constructively dismissed by JWRVL and that JWRVL has breached its duty of good faith to her.

[13] JWRVL says it did not unjustifiably disadvantage Ms Whitter, Ms Whitter's resignation does not amount to an unjustified constructive dismissal, and it did not breach its duty of good faith to Ms Whitter.

The Authority's investigation

[14] Ms Whitter's statement of problem and submissions identified both JWRVL and RHL as respondents, with the statement in reply asserting JWRVL was Ms Whitter's employer. Submissions on behalf of the respondents said they were from JWRVL and RHL, confirming JWRVL was Ms Whitter's employer and a wholly owned subsidiary of RHL. Given the employment agreements in evidence all identify JWRVL as Ms Whitter's employer, I have identified JWRVL as the respondent for the purposes of this determination. RHL are referred to as required for example where RHL policies apply for JWRVL or where RHL employees provide support to JWRVL employees.

[15] As part of the Authority's investigation process a case management conference was held on 27 February 2025 with Ms Whitter, who was at that time self-represented, and Nikki Careford, People and Culture Manager of RHL, as representative for JWRVL. There was discussion during that conference of Ms Whitter's notebook, which she said contained the details of when she says she worked extra hours and overtime is due. Mrs Careford undertook for JWRVL to consider any evidence provided and if it established JWRVL had not paid Ms Whitter for all hours it should have, then there was a commitment to rectify this. There was also discussion of the possibility Ms Whitter would obtain representation, which occurred shortly prior to the investigation meeting.

[16] While Ms Whitter provided notebook entries in March 2025, JWRVL's witnesses raised issues with alleged discrepancies between those entries and JWRVL's records. I indicated these records and the weight to be placed on them would be matters to be considered through the investigation meeting, submissions and in this determination.

[17] For the investigation meeting written witness statements were lodged by Ms Whitter, Ms Whitter's mother and a friend of Ms Whitter. For JWRVL written witness statements were lodged by Mrs Puklowski, Mrs Careford and two managers at JWRV.⁵

[18] At the first day of the investigation meeting Ms Whitter, her supporting witnesses, Mrs Puklowski, Mrs Careford and one of JWRV's managers answered questions, under oath or affirmation, from me and from counsel. At the conclusion of the first day, I timetabled for the provision of JWRVL and RHL policies, and other documents which had been referred to during evidence, as well as the hearing of evidence from the other manager at JWRV. The second day of the investigation meeting was held by AVL, when the other manager at JWRV answered questions, under affirmation, from me and from counsel. Follow-up questions were asked of Mrs Careford, Mrs Puklowski and Ms Whitter related to the JWRVL and RHL policies, and other documents provided.

[19] At the conclusion of the investigation meeting, I timetabled for submissions to be provided and identified a number of points I considered it would be helpful for submissions to address, including inviting the parties to consider applications for non-publication orders. Following the investigation meeting the Authority Officer provided, at my direction, a written version of issues to be addressed in submissions. Counsel provided submissions in accordance with timetable directions made at the conclusion of the investigation meeting.

[20] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[21] The issues requiring investigation and determination are:

- (i) Was Ms Whitter unjustifiably disadvantaged in her employment by JWRVL, including consideration of:
 - matters related to a performance improvement plan (PIP);
 - allegations of verbal abuse;

⁵ While I have not granted permanent non-publication orders over the names of witnesses, I have chosen not to name Ms Whitter's mother or friend, and two managers at JWRV. I do not consider it in the public interest to name those individuals.

- failure to pay Ms Whitter overtime; and
 - failure to allow Ms Whitter to leave work when unwell?
- (ii) Was Ms Whitter unjustifiably constructively dismissed by JWRVL?
- (iii) Whether JWRVL has breached its duty of good faith under s 4 of the Act to Ms Whitter?
- (iv) If JWRVL's actions were not justified (in respect of disadvantage or dismissal), or JWRVL breached its duty of good faith to Ms Whitter, what remedies should be awarded, considering:
- compensation under ss 123(1)(c)(i) and (ii) of the Act; and
 - reimbursement of lost wages under ss 123(1)(b) and 128(2) of the Act, or arrears under s 131 of the Act?
- (v) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Whitter that contributed to the situation giving rise to her grievances?
- (vi) Should penalties be imposed on JWRVL under s 4A of the Act for breaching its duty of good faith under s 4 of the Act to Ms Whitter?
- (vii) Should non-publication orders be made under cl 10(1) of sch 2 of the Act?
- (viii) Should either party contribute to the costs of the other party, including filing fees?

[22] Submissions for JWRVL raised concerns about additional issues being raised in submissions for Ms Whitter. In response Ms Whitter said the issues were either contextual or had been invited to be addressed in submissions. Given the nature of the potential additional issues, I do not consider these need to be formally identified and have addressed the points raised where relevant to the issues originally identified.

Was Ms Whitter unjustifiably disadvantaged in her employment by JWRVL?

Test of justification

[23] For Ms Whitter's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires:

- a. her employment, or one or more conditions of her employment, to have been affected to her disadvantage; and
- b. this was due to some unjustifiable action by JWRVL.

[24] In assessing this, I must apply the test of justification under s 103A of the Act, being whether JWRVL's actions, and how JWRVL acted, were objectively what a fair

and reasonable employer could have done in all the circumstances at the time the actions occurred.

[25] In reaching my conclusions about Ms Whitter's claims, s 103A(3) requires that I consider:

- a. having regard to the resources available to it, did JWRVL sufficiently investigate before taking action;
- b. did JWRVL raise concerns that it had with Ms Whitter before taking action;
- c. did Ms Whitter have a reasonable opportunity to respond; and
- d. did JWRVL genuinely consider Ms Whitter's explanation or comments.

[26] I may also take into account any other factors I think are appropriate (s 103A(4)). I must not determine an action to be unjustifiable where there were defects in JWRVL's process that were minor and did not result in Ms Whitter being treated unfairly (s 103A(5)).

[27] A fair and reasonable employer is expected to comply with its statutory obligations which include good faith obligations and particularly the requirement for both parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.⁶ When an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees, the employer is required to provide the affected employees with access to relevant information and an opportunity to comment on the information before the decision is made.⁷ Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action because "a fair and reasonable employer will comply with the law".⁸

Approach to each disadvantage claim

[28] Ms Whitter raised four distinct disadvantage claims. I have considered the first claim separately, followed by the other three claims together for reasons which will become apparent. I have set out submissions of the parties, considered evidence

⁶ Section 4(1A)(b) of the Act.

⁷ Section 4(1A)(c) of the Act.

⁸ *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ at [65].

provided before reaching conclusions on first disadvantage claim separately, followed by the other three claims together.

Was Ms Whitter unjustifiably disadvantaged in relation to the PIP?

Submissions of the parties – Was Ms Whitter unjustifiably disadvantaged in relation to the PIP?

[29] Ms Whitter says, when considered in light of RHL's *Performance Management and Improvement Process* policy (PMIP policy) which applies to JWRVL, the process of raising performance concerns with her and the process related to the PIP was inadequate and defective.

[30] Specifically, Ms Whitter raised concerns regarding:

- a. Whether sufficient evidence was provided to support JWRVL's concerns with her performance, including provision of complaints or the details of a Care Centre Relatives Survey (CCRS), and the lack of a job description being attached to Ms Whitter's most recent employment agreement;
- b. Whether she was responsible for issues identified in the Activities function based on the CCRS, given another worker was partially responsible for that function;
- c. Whether the CCRS was robust enough to raise performance concerns and whether a corrective action process which included placing Ms Whitter on a PIP was warranted based on the CCRS results;
- d. Failures to consult and seek feedback on the proposed PIP, and to provide adequate time for Ms Whitter to complete the PIP while performing scheduled work;
- e. Lack of clarity over expectations in the PIP and how they were to be assessed, and deficiencies in meetings to review the PIP, including failures to have a witness present, to record minutes and to allow opportunities to respond to allegations or assessments of progress; and
- f. The extension of the PIP and addition of further allegations or expectations at the intended end of the PIP period.

[31] JWRVL said

- a. It acted reasonably when raising concerns with Ms Whitter and placing her on the PIP;

- b. Issues related to alleged deficiencies of Ms Whitter's most recent employment agreement and the lack of a job description, or ambiguity in Ms Whitter's job description, should be disregarded as these issues were not raised until submissions;
- c. It was reasonable to consider the decline in CCRS results needed to be raised with Ms Whitter;
- d. While Mrs Puklowski acknowledged minor procedural faults, such as not providing a draft PIP prior to the first PIP meeting, failing to have someone present to take minutes and adding a direction following the final PIP meeting, there was no prejudice arising and her direction to Ms Whitter was a reasonable instruction;
- e. Significant investment was made in the PIP process, with Ms Whitter having adequate opportunity to provide feedback on the PIP and progress;
- f. Mrs Puklowski's evidence about the PIP process was more plausible than Ms Whitter's evidence; and
- g. To the extent defects are found in the PIP process, these were minor in nature and overall the process was in substance fair and reasonable.

Analysis – Was Ms Whitter unjustifiably disadvantaged in relation to the PIP?

[32] While the first claim before me is for an unjustified disadvantage in relation to Ms Whitter being placed on a PIP and how the PIP was implemented, the summary of requirements in relation to a dismissal following a PIP process, in *Yan v Commissioner of Inland Revenue (CIR)*, is helpful to consider:⁹

... the factors identified in *Trotter v Telecom* (which largely mirror or are subsumed within the statutory considerations set out in s 103A(3)) provide a useful framework for analysis and it is convenient to summarise them at the outset:

- a) Did the employer in fact become dissatisfied with the employee's performance?
- b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?
- c) Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?
- d) Was the employee given a reasonable time to attain the required standards?
- e) Following the expiry of a reasonable time:

⁹ *Yan v Commissioner of Inland Revenue (CIR)* [2015] NZEmpC 36 at [3]. Citation omitted.

- i) Use of an objective assessment of measurable targets?
- ii) Fairly putting tentative conclusions before the employee?
- iii) Listening to the employee's explanation with an open mind?
- iv) Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).
- v) Exhausting all remedial steps including training, counselling and exploring redeployment.

[33] I am satisfied based on Mrs Puklowski's evidence that she did become dissatisfied with Ms Whitter's performance and sought to raise concerns informally in the first instance. I accept Mrs Puklowski's evidence she adopted this approach based on it having been, in her view, successful in the past in addressing other issues.

[34] I do not consider however JWRVL has complied with its PMIP policy and find how Ms Whitter's PIP was implemented was not consistent with the actions of a fair and reasonable employer, for the following reasons. I also accept Ms Whitter was disadvantaged by JWRVL's actions.

[35] Mrs Puklowski's actions in commencing the performance management process appear to be consistent with JWRVL's PMIP policy, with her advising Ms Whitter there were concerns she wished to discuss, which were then documented in a letter of 27 November 2023 which Ms Whitter accepted she was given. This letter described in broad terms the concerns Mrs Puklowski wished to discuss, confirmed the time for a meeting, advised Ms Whitter of her right to have a support person present and that the meeting would provide Ms Whitter "the opportunity to explain/discuss these incidents/concerns and consider together with you what action/support is required as part of a performance improvement plan".

[36] JWRVL acknowledge that there was no witness at the meetings both to initiate the proposed PIP on 29 November 2023 and then to assess progress with the expectations in the PIP, which appeared to have occurred on 13 December 2023, 3 January 2024 and 17 January 2024. This is a clear breach of JWRVL's processes as set out in the PMIP policy which states in relation to the first meeting for a PMIP process:

When meeting with the employee:

- Always have the employee's supervisor in the meeting with you to take minutes and contribute where appropriate
- Minutes should be recorded on Meeting Minutes Form – Employee ...

[37] JWRVL's PMIP policy is also clear for review meetings that there should be someone present to record the minutes.

[38] I do not accept JWRVL's submissions this did not prejudice Ms Whitter, particularly given the dispute over what was said at and how both Mrs Puklowski and Ms Whitter acted during the initial meeting and review meetings. Neither do I accept this was a minor procedural defect in JWRVL's process which did not result in Ms Whitter being treated unfairly, in terms of s 103A(5) of the Act.

[39] Having reviewed the various versions of the PIP, while these were extensive and involved numerous concerns, however, I am not satisfied the concerns were all readily comprehensible or involved an objective critique of Ms Whitter's work. While the expectations and action required in the initial PIP were generally more objective statements of standards which were expected to be reached, it was not fully clear to me how these would have addressed the concerns raised or would have been objectively assessed. For example, one concern raised was "An energetic, joy-filled atmosphere has not been created for residents", which I am not clear of how this would have been objectively assessed. The lack of objectively assessable expectations was repeated in the assessment of progress on 13 December 2023, which included an observation or expectation of "Execute an atmosphere of joy and laughter within the lounge".

[40] The PIP review documents also became overly long, as each review was added to the preceding version of the PIP, rather than recording actions as being complete and then focussing on residual actions. I consider this more likely than not contributed to Ms Whitter not fully comprehending what was required in relation to the PIP and her view that she had completed all the requirements of the PIP by late January 2024, as the expanded PIP review documents lacked clarity over what issues were live or closed, and what had been discussed at each review meeting.

[41] Most significantly, I also consider JWRVL blurred matters towards the end of the PIP process, when Mrs Puklowski raised an additional concern about whether the activities room was untidy, which JWRVL said was a reasonable direction. This was recorded in a letter dated 7 February 2024, which referred to a review of the PIP on 17 January 2024 with the overall assessment "you have not met some of the expectations agreed to in the plan". There were also statements in that letter:

As agreed, your PIP has been extended for a further two weeks in order to provide you with a final chance to improve and meet all

expectations/requirements. Your final review date is now set for Thursday 29 February 2024. ...

As part of your two-week extension, **it is a requirement that the activities room is tidied**, as outlined in the PIP. [emphasis added]

Please note should you fail to meet expectations by 29 February 2024 your employment may face disciplinary action and your employment may be in jeopardy.

[42] While I accept the direction made by Mrs Puklowski (emphasised in bold above) appears capable of being a lawful and reasonable instruction, I do not agree that it was fair or reasonable of JWRVL to include this instruction in a letter about the PIP in the manner it was. Ms Whitter's PIP was coming to a conclusion, with indications the PIP process may be about to move to a disciplinary process. Adding an additional element was not fair or reasonable, and Ms Whitter was disadvantaged in her employment by JWRVL adding this matter to the PIP.

[43] In addition, I do not consider the letter of 7 February 2024 was consistent with the requirements of JWRVL's PMIP policy which states in relation to review meetings:

If the employee's performance does not improve as required – contact your line manager and HR to discuss potential disciplinary action. This will follow the same format as if you were considering disciplinary action for misconduct (provision of information, advice about representation, meeting to the employee's response before any decisions are made, etc.).

[44] Mrs Puklowski appears to have attached an updated PIP to the letter of 7 February 2024, which firmed up her assessment that Ms Whitter had not met the expectations in the PIP. While JWRVL's submissions that the PIP was not completed are correct, I consider this was part of the context which led to Ms Whitter's resignation, which I return to at paragraphs [63] to [79] below.

[45] For completeness, I make the following observations on matters raised, where I do not consider findings are necessary or where I accept any defects in JWRVL's process were minor and did not result in Ms Whitter being treated unfairly, in terms of s 103A(5) of the Act. Firstly, reliance by Mrs Puklowski on the CCRS as grounds for performance concerns may have been problematic, given it appeared Mrs Puklowski reached the conclusion Ms Whitter was responsible for the results, without enquiring into whether there may have been combined responsibility with the other Activities and Lifestyle Coordinator. I also consider it would have been preferable for details of these concerns to be more clearly raised with Ms Whitter. Connected, I do not consider findings on the robustness of the CCRS are required, as I have not placed any weight on the CCRS.

[46] I also do not consider it appropriate to place any weight on the alleged deficiencies of Ms Whitter's most recent employment agreement and the lack of a job description, or ambiguity in Ms Whitter's job description. These issues were not clearly raised until the investigation meeting and I consider it would be prejudicial to make separate findings in relation to these issues. In any event, a finding Ms Whitter was unjustifiably disadvantaged has been established without reliance on this evidence.

[47] I have also chosen to not make credibility findings, which I was invited to do by JWRVL. This is because I do not consider credibility findings necessary, given my findings that JWRVL has not complied with its PMIP policy and how Ms Whitter's PIP was implemented was not consistent with the actions of a fair and reasonable employer. These findings are not dependent on credibility findings about what was discussed during the PIP initiation or review meetings.

Outcome – Ms Whitter was unjustifiably disadvantaged in relation to the PIP

[48] For the reasons set out above, I find Ms Whitter was unjustifiably disadvantaged in relation to how the PIP was implemented, including failures by JWRVL to fully comply with its PMIP policy and the addition of a matter to the PIP on 7 February 2024 with insufficient investigation or process. I consider the disadvantage arose through Ms Whitter's employment being less secure due to JWRVL's failures.

Was Ms Whitter unjustifiably disadvantaged in other respects?

[49] I have chosen to group the following grounds for unjustified disadvantage claims for reasons which will become apparent:

- a. allegations of verbal abuse;
- b. failure to pay Ms Whitter overtime; and
- c. failure to allow Ms Whitter to leave work when unwell.

Submissions of the parties – Was Ms Whitter unjustifiably disadvantaged in other respects?

[50] Ms Whitter says there were a number of incidents where she was subject to verbal abuse amounting to bullying at work, considering the WorkSafe NZ definition of bullying being "repeated and unreasonable behaviour directed to a worker or a group of workers that can lead to physical and psychological harm". The alleged behaviour by Mrs Puklowski involved comments about furniture, instructions Ms Whitter does not sit when reading the newspaper to residents of JWRVL and family members, not

talking to Ms Whitter for a few days, and making an abusive phone call to Ms Whitter outside work hours.

[51] Ms Whitter said she was permitted to work in excess of her ordinary hours of work, with Mrs Puklowski and one of the JWRV managers aware of this, but there were no processes or policy for paying overtime. Ms Whitter says she raised this on occasion and was told she would not be paid overtime. She says she kept records of extra hours from March 2023 and her records should be accepted, as records provided by JWRVL are not accurate and do not reflect the hours she actually worked. Ms Whitter said her records should be accepted based on a failure of JWRVL to keep records, as provided under s 132 of the Act.

[52] Finally, Ms Whitter said one of JWRV's managers refused to allow her to go home early on one occasion when she was unwell.

[53] JWRVL denies bullying Ms Whitter and says to the extent it accepts some of the interactions raised by Ms Whitter may have occurred, they did not occur in the manner alleged and do not meet the threshold of bullying. For example, JWRVL say it was reasonable and consistent for Mrs Puklowski to remind Ms Whitter of the requirement when reading the newspaper to remain standing and to move amongst residents. JWRVL also say messages sent after (or connected to when) Mrs Puklowski was alleged to have called Ms Whitter outside work hours were not consistent with the alleged abusive or aggressive call having occurred.

[54] JWRVL raised a number of concerns about the consistency of Ms Whitter's records of hours worked with its record of hours paid, including there being days when extra hours were claimed when Ms Whitter was on leave, and other records saying she was on leave when it recorded her as having worked. JWRVL raised questions about the verifiability of Ms Whitter's records and the lack of clarity over what overtime would have been for. For these reasons, combined with Ms Whitter's acknowledgement she did not formally submit requests for the overtime now claimed despite knowing the process to do so, JWRVL says it would be highly prejudiced in its ability to respond to the claim for overtime. JWRVL pointed also to Ms Whitter having made a number of claims for overtime, which were paid, saying the claims for unpaid overtime were not supported by sufficient evidence. JWRVL denied its records were inaccurate and said Ms Whitter's notebooks should be disregarded as being unreliable. JWRVL also said a

summary document attached to submissions for Ms Whitter amounted to new evidence and should be disregarded.

[55] Finally, the manager at JWRV denied requiring Ms Whitter to stay at work when unwell. JWRVL say it is implausible in the context of a retirement village with vulnerable residents that it would require an unwell worker to remain at work.

Analysis – Was Ms Whitter unjustifiably disadvantaged in other respects?

[56] I do not consider Ms Whitter has established that she was otherwise unjustifiably disadvantaged by JWRVL's actions.

[57] To the extent there was underlying friction in the relationship between Ms Whitter and Mrs Puklowski due to the PIP process, I consider it plausible Ms Whitter felt she was unfairly treated, however, I am not satisfied the incidents complained about occurred or meet the standards of unfair or unreasonable behaviour which amount to bullying. While it was accepted Mrs Puklowski told Ms Whitter to stand when reading the newspaper to residents, this appears to be a reasonable instruction. While I consider it plausible Mrs Puklowski could have called Ms Whitter outside work hours and forgotten about this, the contemporaneous messages do not support that being an abusive phone call. I do not consider there is sufficient evidence that these incidents were repeated and unreasonable behaviour directed at Ms Whitter. I find this element of Ms Whitter's disadvantage claim is not established on the evidence presented.

[58] I am also not satisfied Ms Whitter's notes of hours worked are reliable enough to displace JWRVL's records, given the evidence that Ms Whitter did on some occasions claim and was paid overtime. To the limited extent there was evidence Ms Whitter may have been present at JWRVL outside of work hours, I am not satisfied JWRVL knew or should have known Ms Whitter was working overtime, or that Mrs Puklowski or any of the JWRV managers refused to pay Ms Whitter overtime.

[59] To the extent Ms Whitter said she worked overtime at home, I do not consider JWRVL could have known about this. In these circumstances, I do not accept Ms Whitter has established JWRVL failed to keep or produce required records, which prejudiced Ms Whitter's ability to bring an accurate claim for overtime, or that I should accept Ms Whitter's claim to overtime based on her notes of hours she said she worked but was not paid for.

[60] I have not placed any weight on the document Ms Whitter provided with submissions regarding hours and records, although I recognise it was provided with an intention of responding to a point I requested be addressed in submissions. I consider, however, this arguably represented new evidence which it would be prejudicial to place any weight on given earlier opportunities to provide documentary evidence and to respond to JWRVL's evidence on hours worked.

[61] Finally, there was some confusion between the witnesses over what date Ms Whitter claimed she was not permitted to go home early when she was unwell. Ms Whitter and the JWRV manager involved initially referred to clearly different dates. I accept, however, it is implausible or inconceivable in the context of a retirement village with vulnerable residents that JWRVL would require an unwell worker to remain at work.

Outcome – Ms Whitter was not unjustifiably disadvantaged in other respects

[62] For the reasons set out above, I do not consider Ms Whitter has established that she was otherwise unjustifiably disadvantaged by JWRVL's actions.

Was Ms Whitter unjustifiably constructively dismissed by JWRVL?

The legal approach to a constructive dismissal

[63] A constructive dismissal occurs where an employee appears to have resigned but the situation is such the resignation has been forced or initiated by an action of the employer.

[64] The Court of Appeal in *Wellington Clerical Union v Greenwich* stated:¹⁰

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. ...

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

¹⁰ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

[65] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:¹¹

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[66] Submissions for Ms Whitter were clear that her constructive dismissal claim was based on breaches of duty by JWRVL which were said to have led her to resign. The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged, which is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.¹² In determining that, all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[67] Ms Whitter has the burden of establishing her resignation was a dismissal.

Submissions of the parties

[68] Ms Whitter says “she was treated highly unfairly during the performance review period resulting in [her feeling] she cannot remain in her employment and had severe and adverse impact on her mental and emotional health”. She said JWRVL “breached their good faith obligation by failing to advice clearly and timely manner [sic] about what she has done wrong”.

[69] Ms Whitter claims actions of JWRVL from August 2023 including during the PIP process were “serious breaches of [JWRVL’s] statutory obligations and their own policies for performance management. ... These actions have made it reasonably foreseeable to [JWRVL that Ms Whitter] could no longer tolerate working under these conditions”. Ms Whitter then referred to matters on 7 February 2024, including the letter of that date when Mrs Puklowski raised an additional concern about whether the

¹¹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

¹² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

activities room was untidy (discussed at paragraphs [41] to [44] above), which Ms Whitter says was the last straw leading to her resignation.

[70] Ms Whitter referred to the Court's judgment in *O'Boyle v McCue* which stated:¹³

... last straw events may not in and of themselves provide a justification for an employee to resign constructively; rather, such events need to be assessed carefully in the context in which they arose, with a view to determining whether or not a series of events has ultimately resulted in a breach of duty.

[71] JWRVL says Ms Whitter has failed to establish its actions amount to the threshold required for constructive dismissal based on a breach of duty. Instead, JWRVL says it had acted in an "appropriate and professional manner [with Mrs Puklowski investing] considerable time in working with [Ms Whitter] to help her succeed in her [PIP]". JWRVL says Ms Whitter "made the choice to resign her position in circumstances where [JWRVL] had not made any suggestion, much less a decision (or even an initial/indicative decision), that it would be terminating [her] employment". Finally, JWRVL says any deficiencies in the PIP process were not sufficient to amount to repudiation of Ms Whitter's employment.

Analysis

[72] There is no dispute that Ms Whitter resigned from her employment or that Mrs Puklowski asked her to consider her resignation overnight. This is clearly a situation where I am required to assess whether breaches of duty by JWRVL were of sufficient magnitude to amount to repudiatory conduct which was of such magnitude to make it reasonably foreseeable Ms Whitter would resign.

[73] Ms Whitter appears to genuinely believe she had completed the requirements of the PIP as at the end of scheduled review period, with her witness statement recording she thought she had completed "almost all of the original actions" from the PIP. She also said in her witness statement she thought the PIP from 17 January 2024 was not properly updated. Having reviewed that version of the PIP, I consider it was not completely clear. Although incomplete, the signed version of the PIP from 17 January 2024 neither expressly states a further review date nor that the PIP had been completed. This was not the end of the process, however, as it was followed by at a minimum the meeting on 7 February 2024 where Ms Whitter initially resigned.

¹³ *O'Boyle v McCue* [2020] NZEmpC 175 at [185].

[74] I have found at paragraphs [34] to [44] and [48] above that Ms Whitter was unjustifiably disadvantaged in relation to how the PIP was implemented, including failures by JWRVL to fully comply with its PMIP policy. I consider this is sufficient to establish breaches of duty by JWRVL.

[75] I further consider, while there is some lack of clarity over what was discussed at the meeting between Ms Whitter and Mrs Puklowski on 7 February 2024, the letter of that date was clear that an additional issue was being added to Ms Whitter's PIP in relation to tidying the activities room. The letter also included an updated version of the PIP which clearly stated Ms Whitter was not meeting expectations. This did not appear to be the version of the PIP from the prior meeting on 17 January 2024 and it was not signed, in contrast to the earlier versions provided. This calls into question whether or how clearly Mrs Puklowski had communicated to Ms Whitter in January 2024 that the PIP process was being extended.

[76] While Mrs Puklowski said she had sought advice on adding the additional concern to the PIP at this time and said doing so was intended to allow her to provide further support to Ms Whitter, I consider JWRVL's actions in this respect were not those of a fair and reasonable employer. This is both due to the blurring of the scheduled end of the PIP process, which was due to conclude in January 2024, and due to Mrs Puklowski's failure to investigate the additional issue adequately. When asked at the investigation meeting how she established Ms Whitter was responsible for the activities room not being tidy enough, Mrs Puklowski said the room was only used by two people and Ms Whitter worked most of the days, with the inference it was obvious she was responsible. There was no evidence of adequate investigation into this issue or consideration of whether the other worker who used the room could have had some responsibility. Rather, the letter presented the addition of this issue as a *fait accompli*, with no evidence Ms Whitter had the opportunity to respond to the concerns during the meeting on 7 February 2024.

[77] Another element of dispute in Ms Whitter and Mrs Puklowski's evidence about what was discussed during the 7 February 2024 was how Ms Whitter resigned, with Ms Whitter saying she wrote a resignation note at the review meeting but Mrs Puklowski saying she verbally resigned. Both agreed Mrs Puklowski asked Ms Whitter to think about whether she would resign overnight. This suggests the meeting had a degree of

intensity, meaning it would have benefited significantly from a witness being present and minutes having been taken.

[78] On balance and notwithstanding the lack of minutes for this meeting, I am satisfied JWRVL's breaches were sufficient to amount to repudiatory conduct of such magnitude it was reasonably foreseeable Ms Whitter would resign. Whether she resigned verbally or in writing is not material, nor is which date resignation occurred on. For completeness, I have not treated what occurred as a "last straw" event.

Ms Whitter was unjustifiably constructively dismissed

[79] For the reasons set out above, I find Ms Whitter was unjustifiably constructively dismissed by JWRVL due to breaches of duties in relation to how Ms Whitter's PIP was implemented, including failures by JWRVL to fully comply with its PMIP policy and the addition of a further matter to the expectations in the PIP at the meeting on 7 February 2024.

Did JWRVL breach its duty of good faith under s 4 of the Act to Ms Whitter?

[80] Submissions for Ms Whitter described alleged breaches of good faith in a manner which overlapped significantly with the claims of unjustified disadvantages and unjustified constructive dismissal. Penalties were sought based on the alleged breaches being both deliberate, serious and sustained, and intended to undermine the employment relationship, with reference to ss 4A(a) and 4A(b)(iii) of the Act. A separate penalty was sought in relation to the non-provision of a job-description, with reference to ss 65(2)(a)(ii) and 65(4) of the Act.

[81] JWRVL said it had not breached any obligations owed to Ms Whitter or any breaches would fall far short of the threshold for the ordering of penalties. JWRVL also objected to a penalty being sought in relation to the alleged non-provision of a job-description, given this was not raised until the investigation meeting, and referred to penalties which can only be sought by a Labour Inspector.

[82] I do not consider separate findings of breaches of the duty of good faith are appropriate in this case, given the significant overlap with the claims of unjustified disadvantages and unjustified constructive dismissal, which have been established. I am also not satisfied the evidence establishes any breaches by JWRVL were either deliberate, serious and sustained, or intended to undermine the employment

relationship, as required under ss 4A(a) and 4A(b)(iii) of the Act for a penalty to be appropriate.

[83] I also decline to consider a penalty in relation to the alleged non-provision of a job-description, given this was not raised until the investigation meeting, after the 12-month period for a penalty claim to be raised under s 135(5) of the Act.

What remedies should be awarded to Ms Whitter?

[84] Having determined Ms Whitter was unjustifiably disadvantaged in relation to how the PIP was implemented and unjustifiably constructively dismissed, I need to consider what remedies should follow. Submissions for Ms Whitter sought unspecified amounts of compensation for hurt and humiliation under s 123(1)(c)(i) of the Act, lost wages under ss 123(1)(b) and 128 of the Act, and compensation for loss of benefit under s 123(1)(c)(ii) of the Act. No submissions were made in relation to contribution under s 124 of the Act.

[85] Ms Whitter advised she has not been able to work since she left JWRVL and is undergoing ongoing treatment, with hopes of returning to the workforce at some time next year. She described symptoms associated with her mental health because of what happened to her at JWRVL in some depth. Ms Whitter's mother and friend both provided corroborating evidence of the impacts they observed on Ms Whitter, although acknowledged in response to questions that they had not observed Ms Whitter's interactions at JWRVL or personally interacted with anyone from JWRVL.

[86] Submissions for JWRVL said there was a lack of appropriate medical evidence substantiating impact on Ms Whitter from its actions, referring to the Court having emphasised "the need to establish a causal connection between the unjustified actions of the employer and the injury to feelings, loss of dignity and/or humiliation suffered".¹⁴ JWRVL said Ms Whitter had contributed to the situation giving rise to their grievances by misconstruing single instances of behaviour as a pattern of behaviour, and by resigning when JWRVL had not indicated any intention to take any action based on the PIP.

[87] I am satisfied Ms Whitter has been relatively significantly impacted by what happened to her at JWRVL and specifically the actions which led to findings she was

¹⁴ *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [60].

unjustifiably disadvantaged and unjustifiably constructively dismissed. Ms Whitter's impact evidence was at times stark, particularly when talking about medical treatment and mental health symptoms, with the medical records provided supporting a connection to Ms Whitter's work issues and the ending of work. I accept the evidence of both Ms Whitter's mother and friend was in the nature of supporting evidence, based on what they observed outside of JWRVL. Their evidence was consistent with Ms Whitter being relatively significantly impacted by the PIP process.

[88] I observe Mrs Puklowski in particular presented her evidence also in an honest and sincere manner, describing her intent as being to support Ms Whitter to improve her performance, and repeatedly saying she thought Ms Whitter was comfortable with the process. Regrettably, I consider the process Mrs Puklowski adopted had significant impacts on Ms Whitter, even though this was not her intent.

[89] I have considered the evidence of impact on Ms Whitter and fix the amount of compensation under s 123(1)(c)(i) of the Act which she is entitled to at \$25,000 taking into account other comparable cases in the Authority and Court, subject to consideration of contribution. As there was overlap between the events underlying Ms Whitter's successful unjustified disadvantage and unjustified constructive dismissal claims, I consider a combined award of compensation is appropriate.

[90] In terms of lost wages, no specific quantum was sought. I am not satisfied there is sufficient evidence to justify any award other than the three months provided for under s 128(2) of the Act. I order JWRVL to calculate and pay Ms Whitter three month's ordinary time remuneration, plus a further eight per cent for annual holiday pay¹⁵ and employer Kiwisaver contributions, if relevant.¹⁶ Orders are made accordingly.

Should remedies be reduced under s 124 of the Act for blameworthy conduct by Ms Whitter that contributed to the situation giving rise to her grievances?

[91] I am also required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Ms Whitter that contributed to the situation giving rise to her grievances.

¹⁵ Section 23 of the Holidays Act 2003.

¹⁶ Pay slips were not provided, so I do not have evidence of whether Ms Whitter was receiving employer Kiwisaver contributions, however, if she was then I consider these form part of her lost wages or other money lost under s 123(1)(b) of the Act.

[92] The Court summarised the key principles relating to contribution as follows:¹⁷

the Court *must* consider whether there ought to be a reduction for employee contribution whenever it is satisfied that a personal grievance has been established. Two steps must be taken:

- First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- Second, an assessment of whether the employee's actions 'require' a reduction in the remedies that would otherwise have been awarded.

[93] I do not consider Ms Whitter contributed in a blameworthy way to the situation giving rise to her grievances. Her successful grievances are based on how the PIP was implemented, including failures by JWRVL to fully comply with its PMIP policy and the addition of a further matter to the expectations in the PIP at the meeting on 7 February 2024. These are not matters which Ms Whitter was responsible for. No reductions in remedies are appropriate.

Orders

[94] For the above reasons I order Jane Winstone Retirement Village Limited (JWRVL) to within 28 days of the date of this determination:

- a. Calculate and pay Odette Whitter three month's ordinary time remuneration under ss 123(1)(b) and 128 of the Employment Relations Act 2000 (the Act), a further 8% for holiday pay, and employer Kiwisaver contributions, if relevant; and
- b. Pay Ms Whitter \$25,000 compensation under s 123(1)(c)(i) of the Act without reduction.

[95] Under cl 10(1) of sch 2 of the Act I prohibit publication of medical information, including references to mental health issues and discussion about the potential for specific adverse consequences, and any evidence including impact evidence which refers to that medical information.

[96] Under cl 10(1) of sch 2 of the Act I also make an interim non-publication order over the names of the parties and witnesses for a period of 28 days from the date of this determination. At the end of the 28 days, unless there is a further order of the Authority or Court, this interim order will lapse and there will be no restriction on publication

¹⁷ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [39] (citation omitted, in which the Court referred to *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 and *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at [179]).

beyond that outlined in paragraph [95] above. This determination will not be published until the end of the 28-day period or further order of the Authority or Court.

Costs

[97] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[98] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Whitter may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum JWRVL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[99] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.¹⁸

[100] As the investigation meeting for this matter took one full day in person, followed by approximately one and quarter hours for the hearing by AVL, my preliminary view is the notional daily rate for the first day and a quarter of the notional daily rate for an additional day is the appropriate starting point for a determination of costs.

[101] Ms Whitter was, however, only represented for part of the proceeding, so any application for costs should represent a reasonable contribution to the costs she actually incurred and reimbursement of the filing fee of \$71.55.

Shane Kinley
Member of the Employment Relations Authority

¹⁸ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1