

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 335
3243959

BETWEEN

JOYCE WISHART
Applicant

AND

IDEA SERVICES LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Emily Griffin, Counsel for the Applicant
Guido Ballara and Saadi Radcliffe, Counsel for the
Respondent

Investigation Meeting: 8 February 2024 in Masterton

Submissions and further
information: Up to 23 May 2024

Determination: 7 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joyce Wishart was employed by Idea Services Limited (ISL) from March 2008 until she resigned on 12 January 2023. Mrs Wishart was employed as a support worker based in the Wairarapa region, with the majority of her work performed at a residential care facility providing care to a number of people supported by ISL (known as persons we support or PWS) at a specific address in Carterton, although she also worked at other locations in the Wairarapa.

[2] Mrs Wishart initially raised claims she had been unjustifiably disadvantaged and then unjustifiably constructively dismissed by ISL due to its actions in changing the location of her employment. During the presentation of submissions Mrs Wishart's claim of unjustified disadvantage was withdrawn given the overlapping circumstances

for her claims, meaning this determination is focussed on her unjustified constructive dismissal claim.

[3] ISL denies that it unjustifiably constructively dismissed Mrs Wishart, saying it had the contractual ability to change the location that Mrs Wishart worked, it followed a fair and reasonable process in doing so and Mrs Wishart retired of her own choice.

Non-publication order

[4] I issued an interim non-publication order under clause 10 of the second schedule of the Employment Relations Act 2000 (the Act) on 26 September 2023 prohibiting publication of the names of and any other identifying information about any PWS provided services by ISL or any member of a PWS' family, who is or may be referred to in this matter.

[5] At the commencement of the investigation meeting I made that non-publication order permanent under clause 10 of the second schedule of the Act, as I am satisfied a good reason exists for making a non-publication order, being protecting the privacy of PWS and their family members. I have referred to one PWS and a member of their family in this determination by the initials ZPT and WDQ, which bear no resemblance to their actual names. I have not referred to addresses where Mrs Wishart provided support to PWS including ZPT to further protect their privacy.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged for Mrs Wishart by herself, Linda Deans (a union organiser for E tū) and Jacqueline Phillips (an advocacy worker). For ISL written witness statements were lodged from Patricia Claydon (Area Manager), Judy Ashby (Service Manager) and Helen Sinclair (National Manager Quality for IHC New Zealand Inc). All witnesses answered questions, under oath or affirmation, from me and from counsel for Mrs Wishart and ISL. Counsel also provided written submissions, which were presented by AVL on 4 March 2024, with further information having been provided by ISL on 22 February and 23 May 2024 as directed at the investigation meeting.

[7] As permitted by s 174E of 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

- [8] The issues requiring investigation and determination were initially:
- (a) Whether ISL unjustifiably disadvantaged or unjustifiably constructively dismissed Mrs Wishart due to its actions in changing the location of her employment?
 - (b) If ISL's actions were not justified (in relation to disadvantaging and/or dismissing Mrs Wishart), what remedies should be awarded, considering:
 - (i) Compensation under s 123(1)(c)(i) of the Act;
 - (ii) Reimbursement of lost wages under s 123(1)(b) of the Act; and
 - (iii) Compensation for loss of employment benefits and future earnings under s 123(1)(c)(ii) of the Act (subject to quantification).
 - (c) Should either party contribute to the costs of the other party?

[9] As noted at paragraph [2] Mrs Wishart's claim of unjustified disadvantage was withdrawn during the presentation of submissions and it is not considered further in this determination other than as context for Mrs Wishart's claim that she was unjustifiably constructively dismissed.

Relevant law

Test of justification

[10] In assessing Mrs Wishart's claim she was unjustifiably constructively dismissed I must apply the test of justification under s 103A of the Act, being whether ISL's actions, and how ISL acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[11] In reaching my conclusions about Mrs Wishart's claim, s 103A(3) requires that I consider:

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

[12] 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 ISL's process that were minor and did not result in Mrs Wishart being treated unfairly (s 103A(5)).

The legal approach to a constructive dismissal

[13] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Mrs Wishart claims she was constructively dismissed as a result of ISL's actions in requiring she change the location where she performed work supporting PWS, which she says it was unable to do. While she acknowledges agreeing to a change in work location following complaints from ZPT and WDQ, she says that she objected to having to do so and considered this was punitive action against her.

[14] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated:¹

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.

[15] 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:²

- (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.

[16] Submissions for Mrs Wishart relied on the third situation described by the Court of Appeal in *Woolworths*, being that breaches of duty by ISL led her to resign.

[17] 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 is to firstly conclude whether

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

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

the resignation has been caused by a breach of duty on the part of the employer.³ 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.

[18] Mrs Wishart has the burden of establishing her resignation was a dismissal.

Was Mrs Wishart unjustifiably constructively dismissed due to ISL’s actions in changing the location of her employment?

What was the reason for Mrs Wishart’s resignation?

[19] Mrs Wishart says she resigned due ISL’s unfair actions in requiring her to move from the house where she had performed the majority of her work for ISL to another location. While she acknowledged starting work at a new working location, she says she “felt unhappy and didn’t settle down” at the new location and claims that requiring her to move locations was a breach of duty by ISL and that it should not be able to rely on her change of work location. She further described being fearful that if an incident occurred her employment would have been less secure.

[20] The context for Mrs Wishart’s views is a series of matters over the course of 2022 where the evidence from both Mrs Wishart and her witnesses and from ISL’s witnesses is consistent. The key question which I need to consider, other than making findings of fact on a small number of matters where the evidence was disputed, is whether ISL’s actions were fair and reasonable, or whether they amounted to a breach of duty sufficient to cause her resignation. With this in mind, I set out below in some detail the chronology of events that unfolded over 2022 and early 2023, which are the basis for Mrs Wishart’s claims. I have noted points where the evidence was disputed in this chronology.

[21] The first incident was a complaint from WDQ to Mrs Claydon in January 2022, which was raised with Mrs Wishart and resulted in an arrangement where Mrs Wishart would receive further coaching and mentoring, and another support worker would take over the key contact person role for ZPT. A further complaint from WDQ to Mrs

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

Claydon was received in March 2022. Regular catch-ups were arranged between WDQ and Ms Ashby at that time.

[22] A subsequent complaint from WDQ to Mrs Claydon by text message was sent on 8 July 2022 and followed up in an email from WDQ to Ms Ashby on 9 July 2022. From correspondence between WDQ and Mrs Claydon on 12 and 13 July 2022 it appears this complaint was resolved with no action being taken. This correspondence suggested Mrs Wishart was clear her role was to support ZPT and Mrs Claydon considered there were no outstanding issues between Mrs Wishart and ZPT.

[23] A meeting occurred between support workers including Mrs Wishart from the house where ZPT lived, Mrs Claydon and Ms Deans on 29 July 2022, where the support workers raised welfare concerns about ZPT and concerns about WDQ. Ms Deans raised the idea that an advocate could be arranged to meet with ZPT and subsequently provided Mrs Wishart with contact details for Ms Phillips.

[24] Arrangements were made for Ms Phillips to meet with ZPT, which occurred briefly on 23 August 2022, followed by Ms Phillips attending a team meeting of support workers including Mrs Wishart from the house where ZPT lived, Mrs Claydon and Ms Ashby. This was followed on 7 September 2022 by Ms Phillips meeting with ZPT along with another support worker, who had become the key contact person for ZPT. Ms Ashby advised WDQ that this meeting had occurred and what had been discussed.

[25] On 15 September 2022 Mrs Claydon wrote to a number of support staff including Mrs Wishart raising a privacy concern about information which had been provided about a PWS.

[26] On 3 October 2022 Mrs Claydon wrote to ZPT recording that she had “heard your complaint regarding the support you have been receiving from [Mrs Wishart], and that you feel unsafe at [the house where ZPT lived] when she is there”. The complaint was said to have been made on 2 October 2022 in the presence of WDQ and an assurance was provided that “we take this seriously and are following our process around this”, referring also to a commitment to “investigate the concerns you have raised”.

[27] On 6 October 2022 Mrs Claydon wrote to Mrs Wishart raising “potentially serious concerns” about the sharing of private information with Ms Phillips “through non-[ISL] sanctioned channels in spite of [Ms Ashby and Mrs Claydon] warning staff

that personal information cannot be shared without the consent of the individuals concerned”. Mrs Claydon request a meeting to hear Mrs Wishart’s explanation, noting that these were “potentially serious allegations [and] if serious misconduct on your part is determined it may result in disciplinary action up to and including dismissal”.

[28] Mrs Wishart and Ms Deans met with Mrs Claydon on 13 October 2022 where Mrs Wishart provided explanations that she had only spoken to Ms Phillips at the meeting on 24 August 2022 and that her arranging the advocate to visit was something that had been discussed at the meeting on 29 July 2022, which Mrs Claydon had been present at.

[29] Mrs Claydon wrote to Mrs Wishart on 11 November 2022 providing her “preliminary view is that Allegation 1 can be upheld but given your contact with the advocate was done with the knowledge of management, there will be no further disciplinary action taken in regards to these allegations unless new information comes to light”. Allegation 1 was that information had been disclosed about a PWS and another person without their consent. This letter concluded with the comment that “I consider this matter closed”.

[30] On 25 November 2022 Mrs Claydon initiated the process of proposing changes to Mrs Wishart’s schedule of work, requesting a meeting to discuss this on 30 November 2022. The proposal involved a change to the location Mrs Wishart would perform work. Mrs Claydon said “I want to stress that this is not a punitive measure, it is as a result of a business decision that I need to make, to ensure continuity of service can be provided to [ZPT] a person we support in line with our obligations”.

[31] Mrs Claydon met with Mrs Wishart on 30 November 2022 to discuss this proposal, with Ms Ashby, Ms Deans and two other support workers present. Mrs Claydon said at this meeting the proposal was about keeping Mrs Wishart safe and “nothing to do with her work practice”. Reference was made to ZPT spending time away from the house where she lived. This meeting developed into what I would describe as a stand-off where Mrs Wishart said she would not be moving house, then Mrs Claydon adjourned the meeting to speak with HR, before advising she hadn’t “heard anything to change my decision”. Mrs Claydon then asked Mrs Wishart if there were other schedules that she may be interested in and advised that ISL would “give the required 4 weeks’ notice”.

[32] This was followed by a letter from Mrs Claydon to Mrs Wishart on 6 December 2022 providing a number of locations from which Mrs Wishart could choose an alternative schedule requiring a response by 14 December 2022. Mrs Claydon advised that “If I do not hear from you by then, I will allocate one of the options and provide 4 weeks’ notice”.

[33] By this time ZPT was staying away from the house where she lived and Mrs Claydon was in separate discussions with WDQ about whether any payment should be provided for the costs associated with that, with a request for that to be considered having been first raised by WDQ on 16 October 2022.

[34] On 13 December 2022 Ms Deans advised Mrs Claydon that Mrs Wishart did not wish to accept any of the options for a proposed alternative schedule and said “I do not feel I have been given sufficient reasons to warrant a move”. This response ended with the statement “This process has been very stressful and I believe unfair, and is taking a toll on my health”.

[35] On 16 December 2022 Mrs Claydon advised Mrs Wishart that she considered sufficient reasons had been disclosed at the meeting on 30 November 2022 and advised that Mrs Wishart would need to accept one of a number of alternative schedules, but would not be rostered to work at the location she had been working. The significance of this decision was emphasised by the statement that it had been reviewed and was supported by ISL’s Regional Manager and Chief Operating Officer. It was clear that Mrs Claydon considered there had been a relationship breakdown between Mrs Wishart and ZPT, and that Mrs Claydon was choosing to prioritise the interests of ZPT. Mrs Claydon reiterated that “The move is not punitive ... we have never substantiated or upheld previous complaints made about your conduct ... This move is also about us wanting to ensure you have a safe working environment”.

[36] On 16 December 2022 Mrs Claydon also wrote to WDQ advising that ISL considered:

as the relationship has broken down and [ZPT] has also indicated she does not feel safe when [Mrs Wishart] is on duty, we have made the decision to work with [Mrs Wishart] to arrange for her to complete her work hours elsewhere in [ISL].

[37] Mrs Claydon also advised that ISL had decided to offer (what appears to be an ex-gratia) payment to WDQ to reflect the situation where they were caring for ZPT. This payment was expressly stated to be “In recognition of the time over recent weeks

that you have supported [ZPT] whilst we work through the situation regarding [Mrs Wishart] ...”.

[38] On 20 December 2022 Ms Deans forwarded a letter raising Mrs Wishart’s unjustified disadvantage grievance (dated 14 December 2022) and asserting that ISL’s actions were not those of a fair and reasonable employer, and that she was being required to move work locations for an unstated reason. Mrs Claydon emailed Ms Deans on 23 December 2022 rejecting the alleged disadvantage and reiterating that Mrs Wishart schedule would be changing in the new year as previously advised.

[39] On 22 December 2022 Ms Ashby emailed Mrs Wishart to record a conversation they had earlier that day, where Mrs Wishart had agreed to accept an alternative location for work, with an orientation period. Mrs Wishart was then on scheduled annual leave from 23 December 2022 until 10 January 2023.

[40] After working one shift on 11 January 2023, Mrs Wishart resigned by email on 12 January 2023 saying “I have lost all passion for this line of work” and saying that events had “caused many issues to my health and wellbeing”.

[41] Ms Ashby responded that day by calling Mrs Wishart to arrange to meet with her to discuss her resignation, which occurred at a café the next day, 13 January 2023. Ms Ashby provided a file note of that discussion, which included the comments that at Mrs Wishart’s new work location:

... everyone had been really lovely to her, but she felt she was close to retirement so would like to resign, and didn’t want to continue at another house, [Mrs Wishart] also said she would like to drop the grievances she had and just move on.

[42] Whether Ms Ashby’s file note was accurate was disputed by Mrs Wishart at the investigation meeting, which I return to at paragraph [57] to [59] below.

Was Mrs Wishart’s resignation caused by breaches of ISL’s duty?

[43] An employer is required to behave in good faith towards an employee. The duty of good faith (under s 4 of the Act) requires that parties do not do anything that misleads or deceives each other or is likely to do so.

[44] ISL submitted its actions, “why, how, and what it decided, were all within the scope of [Mrs Wishart’s] terms and conditions of employment”. ISL also submitted Mrs Wishart’s choice to move to another location “extinguished, or broke the chain of

causation in relation to, her claim of (alleged)breach of duty”. ISL said Mrs Wishart resigned as she was close to retirement and wished to “drop the grievances she had and just move on”.

[45] ISL also submitted its actions did not constitute an unjustified disadvantage to Mrs Wishart, broadly speaking saying that her employment was in the Wairarapa area with the specific location able to be changed and that in proposing to do so ISL acted fairly and reasonably. ISL said it provided clear reasons and always told Mrs Wishart it had not found fault in her actions, rather it wanted to ensure she had a safe working environment and considered, balancing the interests between Mrs Wishart and ZPT, that rescheduling Mrs Wishart’s working arrangements, particularly the place of work, was the better option. ISL said doing so was “all about maintaining its employment relationship with [Mrs Wishart]”.

[46] Submissions for Mrs Wishart said her transfer to another site, which she did not agree with and which she considered involved punishment from an incomplete investigation into a complaint or other undisclosed reasons, was procedurally unfair and therefore not the actions of a fair and reasonable employer.

[47] I find Mrs Wishart’s resignation was due to ISL’s actions in transferring her to another work location.

[48] I accept ISL had a broad contractual power to change work schedules on notice under the collective agreement (CA) between it and E tū, taking into “consideration the needs of the employee(s) concerned and the service”. While the provisions of the CA were not expressly referred to in written communications at the time there were clear references to four weeks’ notice, which is the period referred to under cl 5.3.1(b) of the CA for “significant changes to an established schedule”.

[49] Ms Deans’ evidence was the proposal was a significant change and she said a service review would be needed under the CA. In response to questions from ISL’s counsel Ms Deans acknowledged however this was not unambiguously a situation where a service review would be needed and that ISL were entitled to make decisions

about schedule changes. She also said that if ISL did so then a union member could challenge that decision, which is what has happened here.

[50] I consider the failure of ISL to expressly refer to the contractual provision it relied on to propose a schedule change was only a minor procedural fault that in itself would not have made ISL's actions unfair or unreasonable.

[51] Where I consider ISL's actions fall short is in proceeding to utilise the provisions of the CA against a background of unsubstantiated complaints and a live complaint involving Mrs Wishart. I do not consider that a fair and reasonable employer would have utilised this ability in the way ISL did, particularly where Mrs Wishart was saying she considered broader issues involving ZPT and WDQ needed to be addressed. Those issues overlapped with the live complaint about Mrs Wishart to such an extent that I consider ISL needed to resolve the full spectrum of issues including the complaint, prior to invoking its contractual ability to change Mrs Wishart's schedule.

[52] I do not accept however submissions for Mrs Wishart that she was not aware of the reasons why ISL was proposing she change the location of her workplace. Mrs Claydon clearly communicated her view there had been a relationship breakdown between ZPT and Mrs Wishart, and that something needed to change. Mrs Claydon's view may well have been reasonable but given the ongoing statements that ISL had not upheld any complaints about Mrs Wishart's conduct, so to was Mrs Wishart's refusal to agree to change her work location.

[53] I acknowledge Mrs Claydon faced a very difficult situation and presented earnestly that she needed to make a choice between the interests of ZPT and Mrs Wishart, however, do not consider that diminishes the duty of ISL to act as a fair and reasonable employer to Mrs Wishart. ISL had progressed a number of investigations involving Mrs Wishart and I consider that a fair and reasonable employer would have resolved the complaint about her from ZPT. Mrs Claydon had told ZPT when acknowledging the complaint that ISL were "following our process around this", which I infer means it intended to investigate the complaint. It did not do so when I consider a fair and reasonable employer would have done so.

[54] As a consequence, I consider ISL's actions were an improper use of its contractual power to change schedules, which it utilised to bypass the difficult situation

of needing to address the complaints about Mrs Wishart. I find that ISL actions in improperly utilising this power amounts to a breach of ISL duty to Mrs Wishart.

[55] I further consider it was understandable Mrs Wishart felt that her trust and confidence in ISL had been eroded, given she had been subject to a number of complaints that had not been substantiated, yet her interests were being deprioritised over ZPT's. I consider ISL potentially exacerbated these feelings though its finding in November 2022 that an allegation of breach of privacy had been upheld in circumstances where Mrs Wishart's contact with an advocate occurred with Mrs Claydon's knowledge. While no further disciplinary action was said to be taken, the timing of that finding and its proximity to the proposal that Mrs Wishart's schedule and location of work be changed mean it was understandable Mrs Wishart felt she was being punished, when she had been told she had done nothing wrong.

[56] ISL also submitted Mrs Wishart's acceptance of a change of work location broke the chain of causation. I do not consider that to be the case. Mrs Wishart had objected vociferously to changing her location of work, over a period of time. She had raised a personal grievance about the proposed change and at the time of her work location change, shortly prior to Christmas leave, that was clearly still a live grievance. I consider ISL clearly knew that Mrs Wishart was still objecting to its requirement that she change work location and her actions cannot be viewed as a genuine acceptance of a new work location. Viewed in totality, I do not consider it fair and reasonable for ISL to rely on her starting work at a new location, where she then resigned after only one day of work, to extinguish her unjustified constructive dismissal claim.

[57] I was also asked to consider whether Ms Ashby's account of what was discussed with Mrs Wishart after she resigned was more likely than Mrs Wishart's account, including whether Mrs Wishart signalled she was retiring and dropping her grievances in order to move on. Submissions for ISL emphasised Mrs Wishart had rhetorically asked, at the investigation meeting, why she couldn't change her mind and said that, combined with Ms Ashby's contemporaneous notes, made Ms Ashby's account more likely. ISL acknowledged in submissions Mrs Claydon and Ms Ashby did not check if Mrs Wishart had withdrawn her disadvantage grievance at the time, but said her acceptance of the schedule change and conduct at her farewell meant it was reasonable

to conclude she was moving on and confirming her grievance had been withdrawn was not needed.

[58] Submissions for Mrs Wishart in relation to this point emphasised Mrs Wishart's letter of resignation was clear she was resigning and did not mention retirement. While it was acknowledged there may have been "jokey" comments at her farewell, it was said Mrs Wishart "did not retire, she loved her job and didn't want to leave".

[59] I do not consider ISL's actions were those of a fair and reasonable employer in not formally following up with what was said to be Mrs Wishart's withdrawal of her disadvantage grievance at coffee with Ms Ashby. Mrs Claydon was engaging formally with Mrs Wishart's union representative about that grievance and ISL accepted the alleged statements to Ms Ashby were not followed up on, in contrast to the immediate recording in email by Ms Ashby of Mrs Wishart's acceptance of a change to location.

[60] In these circumstances, I am not convinced Mrs Wishart did in fact either say that she wished to retire or clearly and unambiguously withdraw her disadvantage grievance when she met with Ms Ashby and in any event she clearly raised an unjustified constructive dismissal claim subsequently. I do not consider it fair and reasonable to allow ISL to rely on the alleged withdrawal of Mrs Wishart's grievances to assert that the chain of causation was broken.

Was Mrs Wishart's resignation reasonably foreseeable?

[61] Having reached the above finding, I am required to consider whether Mrs Wishart's resignation was reasonably foreseeable.

[62] ISL submitted it was not reasonably foreseeable that Mrs Wishart would resign given it had addressed her concerns, had repeatedly told her it had not found fault with her actions, and it reasonably believed she had accepted the change to her work location. ISL said what it "said and did was all about maintaining its employment relationship with [Mrs Wishart], and she knew that, or reasonably ought to have".

[63] Submissions for Mrs Wishart can be summarised with the statement ISL "knew that [Mrs] Wishart was not happy at being transferred, did not want to, and had notified her displeasure and reluctance to transfer. [Mrs] Wishart's resignation was not unforeseen".

[64] I accept the submissions for Mrs Wishart. She had clearly and vociferously objected to the proposal to change her work location and while the unjustified disadvantage raised on her behalf did not expressly signal that resignation was being considered by her, it sought “withdrawal of the requirement for her to transfer to an alternative house” and suggested mediation. When this was rejected, I find it was reasonably foreseeable that Mrs Wishart would resign.

[65] Submissions for ISL also said that Mrs Wishart should have sought “to resolve her alleged constructive dismissal via mediation”, referring me to an Employment Court judgment in *New Zealand Institute of Fashion Technology v Aitken*.⁴ I do not consider that the facts of this case are fully analogous to those considered by the Court in *Aitken*, although acknowledge that there could be considered to be an element of a dispute about whether ISL had the contractual ability to change Mrs Wishart’s schedule.

[66] Neither party appeared to suggest however that this matter was a dispute and I consider this is a situation where Mrs Wishart was clearly raising unjustified disadvantage and then unjustified constructive dismissal claims based on a breach of duty, which I have found established. I prefer and consider this is more analogous to the approach of the Court in *O’Boyle v McCue*, where it found:⁵

In short, the established breach of duty was serious enough to cause a reasonable employee to resign. This was not the position in *Aitken*.

[67] I also note that mediation was proposed on Mrs Wishart’s behalf when raising her unjustified constructive dismissal claim, accepted by ISL when it rejected that claim and occurred. While I am appropriately not aware of whether a dispute was raised during the confidential mediation process, I consider that opportunity to consider a dispute was available to the parties and the timing of mediation does not prevent Mrs Wishart from advancing her unjustified constructive dismissal claim.

[68] For the reasons set out above, I find that ISL unjustifiably constructively dismissed Mrs Wishart.

What remedies should be awarded to Mrs Wishart in relation to her unjustified constructive dismissal?

[69] Having determined that Mrs Wishart was unjustifiably constructively dismissed, I need to consider what remedies should follow. Mrs Wishart has sought

⁴ *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 at [66].

⁵ *O’Boyle v McCue* [2020] NZEmpC 175 at [276].

compensation for hurt and humiliation under s 123(1)(c)(i) of the Act, three months' lost wages under s 123(1)(b) of the Act and associated benefits.

[70] Submissions for Mrs Wishart said she experienced stress, distress and ill-health, and that ISL “had broken my trust and I didn’t feel safe working for [ISL] anymore”. Mrs Wishart provided medical evidence she was being treated for ill-health from at least late October 2022, which was submitted aligned with the start of the process leading to her grievances. These matters were said to support an award for compensation of close to \$50,000, with reference to Court judgments including *GF v Comptroller of the New Zealand Customs Service*⁶ where compensation of \$25,000 was awarded, but it was submitted Mrs Wishart’s suffering was much greater than that in *GF*. Submissions for Mrs Wishart also said her claim for lost wages was limited to three months and associated benefits for that period of time.

[71] Submissions for ISL were Mrs Wishart did not mitigate her lost wages and did not establish evidence of this, pointing to her evidence that she had not applied for any other jobs⁷ and was in receipt of a pension, being consistent with her alleged comments about retiring. This was said to have broken the chain of causation such that a claim for lost wages was not available to her. In relation to compensation, ISL submitted that Mrs Wishart’s evidence was non-specific and was not raised at the time, and evidence of distress could “only warrant a very modest compensatory award”.

[72] While not explicit in Mrs Wishart’s claim for lost wages, I take submissions on her behalf to be reference to s 128 (2) of the Act and have considered the Employment Court’s judgment in *Xtreme Dining Ltd v Dewar* where it said “ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss”.⁸

[73] In this case, I consider Mrs Wishart’s actions were reasonable in choosing to not continue with her role with ISL at the new location and to instead resign, claiming constructive dismissal. While I do not doubt ISL wanted her to stay at a new location, I do not consider this or the fact she did not apply for other jobs breaks the chain of causation, given the impact that Mrs Wishart says the circumstances had on her trust and confidence in ISL. I consider Mrs Wishart is entitled to lost wages and any

⁶ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [153] to [164].

⁷ With reference to *Allen v Transpacific Industries Group Ltd* [2009] 6 NZELR 530 at [78].

⁸ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at [104].

associated benefits, which I take to mean holiday pay and any ancillary payments such as Kiwisaver, for a period of three months.

[74] I also consider Mrs Wishart is entitled to compensation under s 123(1)(c)(i), which I fix at \$15,000 taking into account other comparable cases in the Authority and Court, subject to consideration of contribution. While Mrs Wishart provided some medical evidence of the impact of the events leading up to her employment ending on her, I am not satisfied there was direct evidence of impacts as significant as was claimed on her behalf. Neither do I accept ISL's submissions this was a case where a very modest award was appropriate. In my assessment, there were moderate impacts on Mrs Wishart of the events leading up to her employment ending.

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mrs Wishart that contributed to the situation giving rise to his grievance?

[75] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mrs Wishart that contributed to the situation giving rise to his grievance.

[76] Submissions for Mrs Wishart were that as she was repeatedly told she was not at fault, there could be no contribution. Submissions for ISL were that Mrs Wishart had "contributed in a significantly blameworthy way ... such as to justify at the very least a substantial (if not complete) reduction to any remedy awarded". ISL said Mrs Wishart "unreasonably failed to recognise" she had been told she was not at fault, was "combative and obstructive" and walked away from her employment instead of engaging in good faith.

[77] I do not consider that Mrs Wishart has materially contributed to the actions of ISL which I have found to be unfair and unreasonable, leading to her resignation and claim of unjustified constructive dismissal. Having been told she was not at fault, I consider she was reasonable in vociferously holding her ground and rejecting ISL's proposal she change her work location. I do not consider she contributed to the primary fault I have found in ISL's action in asserting its right to change Mrs Wishart's schedule in the way that ISL did, where there was a background of unsubstantiated complaints and a live complaint involving Mrs Wishart (as discussed at paragraph [47]).

[78] I decline to make any reduction on account of contribution.

Summary of outcome

[79] I have found:

- a. Mrs Wishart's resignation was due to ISL's actions in transferring her to another work location;
- b. ISL's actions in utilising its contractual power to change Mrs Wishart's schedule or work location were not the actions of a fair and reasonable employer given the background of unsubstantiated complaints and a live complaint involving Mrs Wishart;
- c. ISL's actions were a breach of duty to Mrs Wishart and it was reasonably foreseeable that Mrs Wishart would resign in response; and accordingly
- d. Mrs Wishart was unjustifiably constructively dismissed by ISL.

Orders

[80] For the above reasons I order that Ideas Services Limited [ISL] pay Joyce Wishart:

- a. compensation for lost wages under ss 123(1)(b) and 128 of the Employment Relations Act 2000 for the period of three months and any associated benefits, including holiday pay and any ancillary payments such as Kiwisaver on those lost wages; and
- b. compensation under s 123(1)(c)(i) in the amount of \$15,000 without deduction.

[81] ISL is ordered to calculate and pay Mrs Wishart these amounts within 28 days of the date of this determination.

Costs

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

[83] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mrs Wishart 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 ISL 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.

[84] 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.⁹

Shane Kinley
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1