IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 127
EMPC 344/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CARRINGTON RESORT JADE LP First Plaintiff
AND	CARRINGTON HOLIDAY PARK JADE LP Second Plaintiff
AND	WILLIAM TAN Third Plaintiff
AND	IVA MARIA GRANT Defendant

Hearing:	8–9 May 2024 (Heard at Whangārei)
Appearances:	W Tan, agent for first and second plaintiffs, and in person as third plaintiff Defendant in person
Judgment:	17 July 2024

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Iva Grant was successful with regard to claims which were investigated by the Employment Relations Authority.[1] She established that she had been a permanent employee, and not a casual employee, for the first and second plaintiffs at various times; that holiday pay was outstanding; and that she was unjustifiably dismissed.

1 *Grant v Carrington Resort Jade LP* [2023] NZERA 485 (Member Dumbleton).

Remedies were awarded. The Authority also awarded penalties against each of the plaintiffs because it considered they had obstructed and delayed its investigation.

[2] The plaintiffs then brought a de novo challenge on the basis that each and every finding made by the Authority was erroneous. They asserted that at all times Ms Grant was a casual employee; that she was not owed holiday pay; that she was not unjustifiably dismissed; and that penalties were wrongly imposed in the circumstances.

[3] The plaintiffs also submitted that an application for a strike-out order which they had filed not long before the investigation meeting, and which was ultimately dismissed by the Authority, was not heard properly; it was asserted that the entire statement of problem should have been dismissed.

[4] For her part, Ms Grant's case was that all the Authority's findings were correct.

[5] I begin by outlining the contents of the Authority's determination in some detail because, as noted, the parties presented their cases with reference to the various elements of the determination. I note, however, that since the challenge has been brought on a de novo basis, the Court is not required to decide whether the Authority was right or wrong on any legal or factual issue. The Court must reach its own conclusions on the evidence and submissions presented.

The determination

[6] The Authority began its determination by considering procedural matters that had occurred prior to the investigation meeting. These included the fact that Carrington Resort Jade LP (Carrington Resort) and Carrington Holiday Park Jade LP (Carrington Holiday Park) had breached formal directions given by the Authority, requiring them to provide wage and time records, and holiday and leave records, to enable Ms Grant's relationship problem to be fully investigated. It had also been alleged that William Tan, who is the general manager of the foregoing companies and chief executive officer of the parent company, had aided and abetted the Carrington

companies' breaches of good faith, to a degree rendering him liable to a penalty under s 4A of the Employment Relations Act 2000 (the Act).[2]

[7] The Authority also referred to the fact that although a statement in reply for the two Carrington companies and Mr Tan had not been filed within the timeline that had been imposed, it was nonetheless considered.

[8] The Authority recorded that a strike-out application had been made on behalf of Carrington Holiday Park and Mr Tan on 15 March 2023, about eight months after the statement of problem had been served. Although the application suffered from excessive and unexplained delay, it had been considered with the Authority finding it had no factual or legal merit.[3]

[9] The first factual issue that was addressed by the Authority related to the employment arrangements by the two Carrington companies. Noting that there was no dispute as to the relevant dates, the Authority found that Ms Grant worked as an employee of Carrington Resort from 19 October 2019 until about 30 November 2020,[4] and that she had received amounts of pay on each of 50 weeks in that period. She had entered into an individual employment agreement (IEA) which provided for casual employment.[5]

[10] On or about 30 November 2020, Ms Grant commenced new employment with Carrington Holiday Park. The records showed the start date of 30 November 2020 with a first pay date of 6 December 2020. They showed she finished on 19 December 2021. A new IEA had been signed with that company, which provided for her employment as a casual cleaner/housekeeper.[6]

[11] On 19 December 2021, Ms Grant had been offered employment back at Carrington Resort, which she accepted. Her first pay date was shown in relevant records as 26 December 2021, with the last pay date being 22 May 2022. On 18 May

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2 At [4].
3 At [17].
4 At [22].
5 At [18].
6 At [19] and [23]–[24].

2022, a dismissal letter had been written and signed by Mr Tan, giving her one day's notice which was to be paid in lieu. No reason for this action was given, although reference was made to a clause in the first casual agreement entered into with Carrington Resort.[7]

[12] The Authority then noted that there was no written IEA for Ms Grant's second period of employment with Carrington Resort; that is, from December 2021 to May 2022. It found that the IEA for the first period of employment with Carrington Resort was no longer in force or effective after Ms Grant resigned in November 2020 to work for Carrington Holiday Park. At that point, there was a new IEA with a different employer. It determined that the original October 2019 IEA was not revived when Ms Grant worked for a second time for Carrington Resort. At best, the terms of the original IEA could be implied into those of an oral IEA entered into when she returned to Carrington Resort, where the terms were not inconsistent.[8] But this was not resumed employment arising from the original engagement. There had been no transfer of employment between the Carrington companies. With each change, Ms Grant had formally resigned and accepted an offer of new employment.[9]

[13] The Authority then went on to consider the question of whether, in reality, Ms Grant's employment was casual or permanent. It said this would be important when it came to consider the justification for her dismissal, and as to her claims for annual holidays and paid public holidays.[10]

[14] After considering the applicable principles in *Rush Security Services Ltd (T/A Darien Rush Security) v Samoa*,[11] the Authority considered the evidence as to the status of Ms Grant's employment. Relying primarily on the wage and time records which had ultimately been placed before it, the Authority found that in the second period of employment with Carrington Resort, the matter was put beyond doubt. Ms Grant had worked every week from December 2021 to May 2022, usually for at least

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7 At [26].
8 At [28].
9 At [29].
10 At [30]–[32].
11 *Rush Security Services Ltd (T/A Darien Rush Security) v Samoa* [2011] NZEmpC 76, [2011] ERNZ 529 at [25].

four days.[12] These days of work were rostered each week in advance, with a copy of the roster displayed to the staff the previous week.[13]

[15] The Authority also referred to the evidence of Ms Grant's direct manager at the time, Ms Waters, who said she had offered Ms Grant employment for the second period with Carrington Resort for a minimum of 20 hours per week, to be worked over four set days – Wednesday, Thursday, Friday and Saturday. Ms Waters made up a roster for each week in which between 24 and 30 hours were usually required to be worked. She considered Ms Grant was not a casual employee, and would have been retained if there was any need to reduce staff. Although there was a casual employment engagement sheet made out in the name of Ms Grant, which was the last page of the 2019 written IEA, it had not been used in the second period of employment when Ms Waters was the direct manager.[14]

[16] The Authority then said the same or very similar housekeeping patterns were followed during Ms Grant's period of work for Carrington Holiday Park.[15]

[17] It also noted that her employment did not terminate during COVID-19 lockdown periods. She did not, at such times, become a casual employee after being a part-time permanent employee. Neither was she employed on a fixed or limited term basis.[16]

[18] In short, for the entire period from 2019 to 2022, she was a part-time permanent employee, albeit under three separate IEAs, two of which were written and one which was unwritten.[17]

[19] It followed that her ultimate dismissal by Carrington Resort could not be justified on the basis that she had been employed under a casual employment agreement, as had been asserted by the plaintiffs.

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12 *Grant v Carrington Resort Jade LP*, above n 1, at [36].
13 At [36]–[37].
14 At [37]–[40].
15 At [41].
16 At [42].
17 At [43].

[20] The Authority went on to note that, even if she had been a casual employee, the relevant period of engagement would have been for a period of at least four days, Wednesday to Saturday, and her termination, as later referred to, on Wednesday 18 May 2022 would have been a dismissal prior to the period of rostered employment ending. In that event, the actions of Carrington Resort would still have to meet the statutory test of justification.[18]

[21] The Authority next considered leave entitlements. It determined that Ms Grant had been correctly paid by the Carrington companies for public holidays, as required by the Holidays Act 2003 (the HA). No further public holiday entitlements were due.[19]

[22] However, the position with regard to annual holiday pay was a different matter. The Authority recorded that Ms Grant had received an eight per cent loading for annual holiday pay. It found that, if she was not a casual employee, the payment of eight per cent was in breach of the HA whenever her employment continued for longer than 12 months.

[23] Her first employment at Carrington Resort was for about 14 months; her second employment with Carrington Holiday Park was for 12 months; and her third period of employment with Carrington Resort was for about five months.

[24] The Authority found that a calculation could be made of Ms Grant's entitlement to four weeks' leave on pay in each employment over 12 months, that is the first and second periods of employment, and that the Carrington companies would be required to pay that.[20]

[25] The Authority went on to make the necessary calculations, determining that for the first period of employment with Carrington Resort, annual holiday pay of $1,828.73 (gross) was payable to Ms Grant, with interest thereon from 30 November 2020 until the date when payment was made in full.

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18 At [45].
19 At [53].
20 At [57].

[26] With regard to the second period of employment with Carrington Holiday Park, the company was ordered to pay annual holiday pay of $1,443.60 (gross), with interest thereon from 19 December 2021 until the date when payment was made in full.

[27] No liability for annual holiday pay arose in respect of the final period of employment, with Carrington Resort, since it was for a period that was less than 12 months.

[28] The Authority then turned to consider the allegations concerning Ms Grant's dismissal.

[29] The Authority recorded that, on Thursday 12 and Friday 13 May 2022, Ms Grant, with another employee, worked at a Carrington Resort house (house 49), preparing it for guests. On the Friday she was approached by Mr Tan, who began to question her pointedly about the time being taken to clean the house. He said she had taken too long.

[30] Soon after, Ms Grant reported the encounter to Ms Waters. She complained she had become aware Mr Tan had been at the house examining it on the Thursday without making his presence known to her. She regarded him as "creeping about".[21]

[31] She then gave Ms Waters a written breakdown of all the work she had undertaken at house 49 in carrying out the written instructions given to her to undertake that work on 12 and 13 May 2022.

[32] In the following week, on Tuesday 17 May 2022, which was Ms Grant's day off, she was told by Ms Waters that Mr Tan had instructed that her pay, due later that week, was to be held back. This was to enable a check to be made of the time Ms Grant had taken to clean house 49.

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21 At [74].

[33] Ms Grant was disturbed by this and asked Ms Waters to arrange a meeting with Mr Tan. She said she would not return to work until it was arranged as she felt "singled out and wrongly accused of falsifying my timesheet".[22]

[34] On the morning of Wednesday 18 May 2022, Ms Grant asked Ms Waters by email for confirmation by 1 pm that her wages would be paid as usual and without deduction. She said it was her understanding that an employer could not withhold wages without the consent of an employee, or at least a discussion with them.[23]

[35] Ms Grant advised Ms Waters she would be happy to meet with Mr Tan and discuss his concerns about her timekeeping, which had surprised her and caused her stress and anxiety. She hoped there had simply been a misunderstanding on his part and that an amicable conclusion could be reached.

[36] When Ms Waters emailed Mr Tan asking him to meet with Ms Grant, he replied stating he had no time to do so. Ms Grant then asked if she could go to the office to see him, and Ms Waters agreed.

[37] At about 12.30 pm, Ms Grant and her partner, Hugh Cotter, as a support person, entered the Carrington Resort reception area and saw Mr Tan talking to a contractor. When he had finished, Ms Grant asked Mr Tan if they could speak. Mr Tan said he did not have time and that she should make an appointment. When he walked away to his office, Ms Grant and Mr Cotter followed.

[38] The Authority found that there was a heated exchange of words which took place over several minutes. The meeting was recorded by Mr Cotter, without Mr Tan's knowledge to begin with; a transcript had been produced.[24]

[39] During the meeting, Mr Tan responded to Ms Grant several times, saying she could "sue" him. He also said he was about to terminate her contract.[25]

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22 At [77].
23 At [78].
24 At [83].
25 At [85].

[40] The Authority found that, during the meeting, it was arranged that Mr Tan would meet Ms Grant on Friday 20 May 2022 at 10 am. The meeting ended when Mr Tan asked Ms Grant to leave, saying he had no time then for her. She confirmed she would attend the Friday meeting, before departing.

[41] Mr Tan had given evidence that, during this heated meeting, Mr Cotter acted in a way that made him fear he was about to be physically assaulted. Mr Cotter's conduct, he said, had included rolling up his sleeves to display tattoos covering his arms. In the statement in reply, the plaintiffs had alleged there had been threats of violence from Mr Cotter and Ms Grant, both of whom, it was claimed, had "stormed" into Mr Tan's office. The plaintiffs said the decision to dismiss was made because of this threatening conduct.[26]

[42] Later, Mr Tan requested payroll to process Ms Grant's timesheet as submitted. The Authority recorded that Ms Waters had advised Mr Tan that the time recorded was justified.[27]

[43] After Ms Grant and Mr Cotter had left Mr Tan's office, he prepared and signed a four-line dismissal letter addressed to Ms Grant. It advised only that she was dismissed with one day's pay in lieu of notice in accordance with "the signed casual employment agreement". No reasons for dismissal were given.

[44] At the same time, Mr Tan signed the trespass notice he had printed from an online form. It was addressed to Ms Grant and warned her to stay off the Carrington estate and Whatuwhiwhi Top 10 Holiday Park indefinitely. She was warned she could be fined up to $1,000 or imprisoned for up to three months if she entered those places. The notice was expressed to be effective from that day, 18 May 2022.[28]

[45] Mr Tan then instructed his staff to deliver the letter and notice to Ms Grant. The documents were left pushed into a fence at an incorrect address. The occupant of that property, who worked at Carrington Resort and knew Ms Grant, rang her

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26 At [86].
27 At [80].
28 At [87]–[88].

to advise there was an envelope meant for her. When Ms Grant asked for it to be opened, she learned from her colleague that she had been dismissed and trespassed.[29]

[46] Since she had not been personally served, Ms Grant went to work on Thursday 19 May 2022, hoping she could talk to Mr Tan about what had happened the previous day. She did not see him, and Ms Waters showed no sign that she was aware of her dismissal.[30]

[47] Mr Tan told Ms Waters about the dismissal at 4.35 pm on the Thursday. Ms Waters then commiserated by text with Ms Grant who asked her to find out from Mr Tan what the grounds of termination were. Ms Waters exchanged emails with Mr Tan, who told her that she should ask Ms Grant what the grounds of termination were. It is evident that even by this time, the documents had not been served on Ms Grant.

[48] Later that day, Ms Waters sent Ms Grant copies of the dismissal letter and trespass notice, as given to her by Mr Tan.[31]

[49] On Friday 20 May 2022, Ms Grant was visited at her property by two men from Carrington Resort who gave her an envelope containing the two documents. Ms Grant said she felt numb on receiving them. Mr Cotter was not served with a trespass notice. Ms Grant did not return to work or attend the meeting which had previously been arranged for 10 am that day.[32]

[50] On Monday 23 May 2022, Ms Grant emailed Mr Tan seeking an explanation for the "extreme measures" he had taken. She gave an outline of relevant events, concluding her message by saying Mr Tan had not allowed for an opportunity to engage in any sort of mediation process. Mr Tan did not reply.[33]

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29 At [89].
30 At [90].
31 At [93].
32 At [94]–[96].
33 At [97].

[51] In the following section of the determination, the Authority considered whether the dismissal was justified. It found that it seemed to be a spontaneous action, which was taken without consultation, warning or notice of any kind. Mr Tan's indication, given during the heated Wednesday meeting, that he was considering termination was the only sign that dismissal was in the wind.[34]

[52] In all the circumstances, any legitimate performance or conduct concerns held about Ms Grant could only have been to do with her timekeeping for the work at house 49, or with her allegedly threatening or intimidating behaviour during the heated meeting.[35]

[53] Dealing with the first statutory consideration under s 103A(3) of the Act, the Authority assessed whether the employer had sufficiently investigated the allegations prior to dismissal. The timekeeping issue had been investigated, with Ms Waters and Mr Tan eventually approving Ms Grant's pay. This issue could possibly have been investigated at the proposed Friday morning meeting, but the Wednesday dismissal and trespass notice were actions of the employer that effectively cancelled that meeting.

[54] No allegation about threatening or intimidating conduct was made or investigated before the dismissal.

[55] The Authority said Ms Grant was aware Mr Tan had concerns about her timekeeping at house 49. She addressed those concerns with Ms Waters who, in turn, advised Mr Tan there was no basis for them. They were not raised as a prelude to the possible dismissal which, for Ms Grant, came quite out of the blue.[36]

[56] Nor were any concerns raised about Ms Grant's conduct during the heated meeting on the Wednesday. No opportunity had been given to the employee to respond prior to any decision being made. The decision to dismiss was unheralded and unexpected.[37]

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34 At [103].
35 At [104].
36 At [107].
37 At [109].

[57] As no explanation from the employee was sought, it could not be said that it was genuinely considered. The employer had not left itself in a position where it could even hear any explanation from Ms Grant.[38]

[58] The Authority went on to conclude that the dismissal was unjustified. Viewed objectively, there was little, if anything, about the dismissal that resembled the actions of a fair and reasonable employer. There was little or no procedure and, to the extent that it could be said a procedure had been followed, it was overwhelmingly unfair to Ms Grant. Thus, the personal grievance for unjustified dismissal had been established.[39]

[59] The Authority went on to consider remedies. It outlined Ms Grant's personal circumstances, finding she was a dignified and articulate woman in her mid-sixties who was proud of her work ethic. She had strong and close connections with the Karikari Peninsula through her Ngāti Kahu ancestry. In particular, she served as treasurer of the Karikari marae. The evidence satisfied the Authority that Ms Grant had experienced deep and prolonged suffering, mentally and physically, from a dismissal that was carried out suddenly and swiftly, and without any warning or explanation. That suffering was also deliberately bolstered by Mr Tan when he issued a trespass notice.[40]

[60] The Authority went on to consider the exacerbating features, which included baseless and fanciful accusations made by Mr Tan about Ms Grant and which included patronising and offensive remarks about her.[41]

[61] Mr Tan had dismissed as a fabrication nearly everything Ms Waters had said in favour of Ms Grant, making allegations which she denied when the Authority put them to her.

[62] The Authority had been presented with a testimonial from the Karikari marae chairperson, Professor Mutu, who wrote of the esteem in which Ms Grant was held by

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38 At [110].
39 At [111]–[113].
40 At [115]–[117].
41 At [119].

members of her large marae. It commented on her scrupulous honesty and integrity while in the role of treasurer, and her hard work for the community.[42]

[63] The dismissal and trespass notice also caused Ms Grant anguish. The notice was expressed to apply indefinitely. It forbade her from entering Carrington Resort and the Whatuwhiwhi Top 10 Holiday Park. Ms Grant's whakapapa through her Ngati Kahu ancestry connects her to the 3,000 acres of land occupied by the resort. Her house was on the road adjacent to it, and to travel anywhere she had to pass by it. The Authority found she has mana whenua status which was disregarded by Carrington Resort, to her shame and embarrassment.[43]

[64] Reasons for the dismissal had not been provided when requested, despite the statutory obligation to provide them under s 120 of the Act. The Authority found that to be dismissed was distressing to Ms Grant, but to be contemptuously denied a reason for it was even more so.[44]

[65] The Authority found that it seemed likely Mr Tan was prejudiced against Ms Grant because she was a person of strong character, who was willing to assert her rights whenever necessary, as well as those of whānau such as a young cousin who had been employed at Carrington Resort. It seemed that Mr Tan did not like the idea that she had standing and respect in the local community where she was a marae representative, as Mr Tan had pointedly mentioned in the plaintiffs' statement in reply. He criticised her for using this position to "weigh in as a vocal person". He seemed to have felt challenged and, in response, dismissed Ms Grant and banned her from the land and premises of the Carrington companies.[45]

[66] Ms Grant had been seriously harmed by the actions of her employer and its general manager who would not provide a reason for taking her job from her, and committing her to financial stress and insecurity.

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42 At [125].
43 At [126].
44 At [128].
45 At [129].

[67] After considering relevant authorities, Carrington Resort was ordered to pay compensation of $29,000 to Ms Grant.[46]

[68] The Authority went on to consider reimbursement of wages. Ms Grant had made reasonable attempts to find other work. Carrington Resort was ordered to pay lost wages of $9,137.83 (gross) for the three-month period following her dismissal, and interest on that sum from 21 August 2022 (the end of the three-month period) until full payment was made.[47]

[69] Finally, the Authority considered the various penal issues which were before it, ultimately ordering that each of the plaintiffs was liable for penalties for breaching orders and directions the Authority had made.

Application for strike-out

[70] An aspect of the plaintiffs' challenge relates to the finding made by the Authority when it dismissed the application for strike-out. Mr Tan submitted that the issue was not properly considered, and that the application should not have been dismissed.

[71] I must consider the matter afresh. Before outlining the grounds of the application, it is necessary to refer briefly to context.

[72] The plaintiffs failed to comply with numerous directions for the filing of documents and a statement in reply. On 29 September 2022, the Authority repeated earlier directions for the filing of these materials, but also set down an investigation meeting in Kerikeri on 4 May 2023. Further directions as to the filing of documents were made on 24 November 2022. A compliance order was made on 22 February 2023, requiring the outstanding documents to be filed by 15 March 2023. On each occasion, there was confirmation of the fact that the investigation meeting would take place on 4 May 2023.

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46 At [134].
47 At [139]–[140].

[73] On 15 March 2023, the plaintiffs filed some of the records which had been requested, a statement in reply and an application for strike-out which was supported by two affidavits.

[74] I was told that there was then a telephone directions conference with the Authority Member, who determined that the application for strike-out would be heard at the upcoming investigation meeting.

[75] I turn to the substance of that strike-out application. Carrington Holiday Park and Mr Tan sought to be removed as respondents. In the alternative, there was an application to strike out the entire amended statement of problem.

[76] It is convenient to consider the last of these requests first. It was brought under sch 2 cl 12A of the Act, which is in the following terms:

> **12A Power to dismiss frivolous or vexatious proceedings**
>
> (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
>
> (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[77] The application, signed by Mr Tan on behalf of the respondents, contended that Ms Grant's application fell within the parameters of the clause. He said her case had no real prospect of success. The termination of her casual employment agreement was due, he said, to the seasonality of the respondents' business levels, and took into account the fact that she was "incapable of performing such duty, let alone the act and behaviour of threatening the management with violence."

[78] The application went on to assert that the claims made by Ms Grant on various issues were not based on fact and had no merit. The sole purpose of her claim was to harass and injure the employer. The claims were frivolous, advanced in bad faith, and based on insufficient grounds. Mr Tan alleged that the claims for loss of wages and holiday pay were founded on an "imaginary hypothetical non-existent agreement."

[79] This was said to be a blatant act of abuse of process and the Authority's system, and constituted a good example of an employment advocate who was incompetent. This was a reference to the advocate who represented Ms Grant during the early stages of the proceeding, but not at the investigation meeting. Mr Tan asserted that the advocate had no professional training, acted with no moral ethics, brought a claim that should not have been brought, and made claims against incorrect parties with malicious intent. He went on to say that this approach was so as to provide a financial gain for the representative.

[80] As noted, the application for strike-out was heard at the investigation meeting. Normally, such an application would be heard on an interlocutory basis because the point of doing so is to bring a doomed proceeding to an end if the application is granted, without the opposing party having to face the process of fully resisting such a claim. However, from time to time, such applications are heard at a substantive hearing if necessary.

[81] In this instance, it was appropriate for the Authority to hear the matter at the long established investigation meeting. Otherwise, it would have led to undue delay in investigating and resolving the employment relationship problem. It is reasonable to infer, in light of the history, that the application for strike-out may well have been a late attempt to derail the hearing of the substantive claims.

[82] In the Court, I was not asked to consider this aspect of the matter as an interlocutory application. In any event, both parties' cases were presented on a dual basis, intertwining submissions about the strike-out application as well as the substantive issues that arose from Ms Grant's claims. A single hearing at which all the appellate issues could be addressed was accordingly appropriate.

[83] The plaintiff's challenge asserts that the Authority did not deal with the application for strike-out properly. I must consider, therefore, the merits of the application.

[84] I begin by summarising the approach which is required under cl 12A by an Authority considering an application for strike-out. These were examined fully by Chief Judge Inglis in *Lumsden v SkyCity Management Ltd*.[48]

[85] She analysed the language used in the clause in detail, concluding that the Authority's power to dismiss a proceeding was limited. The threshold was high. Dismissing a proceeding is a serious step, and one not to be taken lightly. It could cut off a claim at the knees, and because of its draconian effects and having regard to the scheme and purpose of the legislation, was to be reserved for clearcut cases.[49]

[86] The Chief Judge also found that a matter is not frivolous simply because it has no reasonable prospects of success. Something more is required. A matter is frivolous where it trifles with the Authority's processes, lacking the degree of seriousness required to engage the attention of the Authority. A matter may be said to trifle with the process where it was impossible to take it seriously,[50] or the proceeding was silly or lacked seriousness.[51]

[87] I also note that the assessment must focus on the pleading raising the claim (or, if an application to strike out a statement of defence is under consideration, that document). It is a well established proposition for the purposes of these applications that pleaded facts are assumed to be true.[52] That means the focus here must be on the content of the amended statement of problem. Could it be said that the pleaded facts in that document amounted to a claim that was frivolous and vexatious, so that the unusual step of striking the proceeding out should be taken?

[88] I have examined the amended statement of problem in detail. First of all, it describes the problem or matter that Ms Grant wished the Authority to resolve, which included the disclosure of relevant records; then she said she wished the Authority to investigate and determine whether there had been an unjustified dismissal, and/or whether holiday pay and statutory holiday pay were due. Interest was sought. Also

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48 *Lumsden v SkyCity Management Ltd* [2015] NZEmpC 225, [2015] ERNZ 389.
49 At [39].
50 At [37].
51 At [48].
52 For example, *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

sought was a penalty for inappropriate conduct by Carrington Resort and Mr Tan up to the time of dismissal, and for the failure to comply with orders and directions of the Authority. Then the document went on to describe these claims in more detail.

[89] It is obvious that all the substantive claims were well within the jurisdiction of the Authority to resolve by way of an investigation. The amended statement of problem outlined a series of employment relationship problems that it was appropriate for the Authority to consider.

[90] I am well satisfied that the claims that were advanced by Ms Grant could in no way be described as falling within the description of being frivolous or vexatious so that the proceeding should have been struck out. Her claims did not amount to trifling with the Authority's processes.

[91] Moreover, it was not frivolous and vexatious to join Carrington Holiday Park or Mr Tan as respondents. As far as Carrington Holiday Park was concerned, there was a live issue as to whether that entity owed the sums claimed against it. As far as Mr Tan was concerned, there was a live issue as to whether the asserted breaches should be the subject of a penalty against him.

[92] For all these reasons, I conclude that the proceeding should not have been struck out, and the application should have been dismissed. This aspect of the challenge fails.

Was Ms Grant a casual employee or a permanent employee?

[93] There were three phases of employment, as correctly described by the Authority. The first was with Carrington Resort, for which Ms Grant signed an IEA which described the fact that casual employment would be undertaken. The second was with Carrington Holiday Park, there being a signed IEA in similar terms. The third was with Carrington Resort where there was no written IEA. It is the employer's responsibility to provide an intended agreement for signature.[53] Carrington Resort failed to discharge this obligation.

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[53] Employment Relations Act 2000, s 63A(2).

[94] There are many cases which have considered whether an employee was retained on a casual basis or a permanent basis. A well-known example is *Jinkinson v Oceana Gold (NZ) Ltd.*[54] There, Judge Couch undertook a comprehensive analysis of relevant New Zealand and overseas authorities on the topic. After discussing the content of s 6 of the Act, which describes the meaning of "employee", the Judge said:

> [37] The other significant aspect of the definition in s 6 is the direction in subs (2), and amplified in subs (3), about the manner in which the Authority and the Court are to decide whether there is a contract of service between the parties. The decision must be based on the "real nature of the relationship" between the parties. All relevant matters are to be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative. *In this case, the fact that the parties have described Ms Jinkinson's employment as "casual" is one of the relevant matters to be taken into account but the more important inquiry must be into the true nature of the relationship. If the result of that inquiry is that the nature of the relationship is at odds with the label given to it by the parties, substance should prevail over form.*

[95] Judge Couch went on to state that it was important to understand what is meant by the terms "casual" and "ongoing" or "permanent". He said that whatever the nature of the employment relationship, the parties would have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lay in the extent to which the parties had mutual employment-related obligations between periods of work. If the obligations existed only during periods of work, the employment would be regarded as casual.

[96] In *Jinkinson*, the Court identified indicia developed in Australian cases to determine the question, which were:

(a) the number of hours worked each week;

(b) whether work was allocated in advance by a roster;

(c) whether there is a regular pattern of work;

(d) whether there is a mutual expectation of continuity of employment;

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[54] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC) (emphasis added).

(e) whether the employer requires notice before an employee is absent or on leave; and

(f) whether the employee works to consistent starting and finishing times.

[97] In the subsequent judgment of *Samoa*,[55] Chief Judge Colgan found that these criteria were helpful, and went on to refer to a decision of the Federal Court of Appeal in Canada, *Roussy v Minister of National Revenue*,[56] where the Court said:

> In other words, if someone is spasmodically called upon once in a while to do a bit of work for an indeterminate time, that may be considered as casual work. If, however, someone is hired to work specified hours for a definite period or on a particular project until it is completed, this is not casual, even if the period is a short one.

[98] He also cited *Bank of Montreal v United Steelworkers of America*,[57] where the Canadian Labour Relations Board wrote:

> What is a genuine casual employee? In the notion of casual work. there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable, only part-time work is automatically created: the employee is not a casual worker but a part-time one. …
>
> Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee.

[99] I proceed on the basis of these principles.

[100] For the purposes of each of the three periods of employment, the Court has detailed time and pay records. It is apparent that Ms Grant worked for each and every week during each period of employment; the only exceptions were occasions where, in one instance, she was described as being on "sick leave"; and on another, where she was "on holiday"

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55 *Samoa*, above n 11, at [28].
56 *Roussy v Minister of National Revenue* (1992) 148 NR 74 (FCA) at [7].
57 *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044 (CLRB) at [37]–[38].

[101] There is no doubt that on some occasions, the daily hours worked, and the particular days of the week which were worked, varied, but the point is that there was a consistent expectation on the part of each employer that she would be available, and a consistent expectation on her part that she would work weekly. For instance, the Carrington Holiday Park records note, for the week of 5 April 2021, that Ms Grant was "usually rostered". The evidence is that a roster was established for each working week, in the prior week, and this included reference to Ms Grant.

[102] During each of the first two periods of employment with the Carrington companies, there was a COVID-19 lockdown period in the relevant location. Ms Grant was paid according to the rules that governed the provision of a wage subsidy from Work and Income New Zealand. The inference that can be taken from this fact is that but for the lockdown period, the relevant employer would have anticipated Ms Grant being available to work. There is no suggestion in the evidence before the Court that the employer took the position that, as a casual worker, she would likely not have been employed during those periods, and therefore not entitled to the wage subsidy. Moreover, the Carrington Holiday Park record of persons entitled to the COVID-19 wage subsidy identified several casual employees. Ms Grant was not one of them.

[103] The Court was informed by Darlene Boyce that during the second period of employment, Ms Grant was offered a role at the Carrington Holiday Park that would have been permanent. This offer was made in March/April 2021. Mr Tan submitted that this demonstrated that she preferred, therefore, the flexibility of a casual work arrangement, rather than a permanent work arrangement.

[104] I do not agree. The decision not to accept the offer did not relate to her status of being either casual or permanent, but was due to the number of hours she would work and therefore the income she could obtain, her wish to work on consecutive days,[58] and her preference for the type of work she was undertaking rather than the type of work she was being offered.

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[58] As at March/April 2021, Ms Grant had worked on average five days per week at Carrington Holiday Park for 5.45 hours per day. She was offered three days per week at four hours per day.

[105] Her position was entirely understandable. I do not accept Ms Boyce's evidence that Ms Grant said she preferred a casual arrangement. This episode does not assist the analysis.

[106] I have examined the written IEAs for the first two periods of employment. On the whole, the provisions contained in them described a casual work arrangement, but there are some provisions which do not, and which might be interpreted as confirming that there were mutual obligations sufficient to create an ongoing employment arrangement. The provisions which would apply to an external restructuring, which could affect "the Employee's continued employment", were included.[59] However, this provision could, in theory, have applied to a casual arrangement, and I do not regard its inclusion as being a significant pointer one way or the other.

[107] More important is the reality of the employment arrangements. For the first two work periods, the records give rise to an inescapable conclusion that Ms Grant worked according to a roster on a part-time basis in each and every week except when she was away for one week and during the COVID-19 lockdowns. She obviously considered the arrangement was permanent, giving two weeks' notice to Carrington Holiday Park. She did not rely on the agreement to say she wanted the arrangement to terminate "immediately".

[108] Coming on to the third period of employment, there was no written IEA. Mr Tan argued that, given the pattern of previous IEAs, it must be inferred that, upon Ms Grant returning to Carrington Resort, the document which had applied in the first period of employment would now apply again.

[109] However, there is no evidence that the parties agreed to such a course. The evidence which was before the Authority was to the effect that Ms Waters offered employment with Carrington Resort for a minimum of 20 hours per week, to be worked over four set days; that is, no offer of casual employment was made. The roster was routinely issued in the previous week, usually between 24 and 30 hours per

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[59] Clause 12.2 of the written IEA with Carrington Resort, and cl 9 of the written IEA with Carrington Holiday Park.

week. Evidence of this practice was confirmed by Ms Grant and not refuted by Mr Tan.

[110] I also find there is no evidence to suggest that employment would take place under the earlier Carrington Resort IEA.

[111] After termination, Mr Tan requested the return of Carrington uniforms and keys from Ms Grant. The fact that she held these items is another factor tending to confirm regularity of work for Carrington Resort.

[112] Standing back, it is clear that the realities of the employment relationship were those of a permanent part-time employment arrangement, and not a casual employment arrangement, at all times. Mr Tan may now say he believes the written IEAs confirm otherwise. The Court, however, has to undertake an objective analysis of the real nature of the relationship. I am satisfied there was an ongoing and permanent arrangement in each of the three periods of employment.

[113] This element of the challenge is accordingly dismissed.

Holiday pay claims

[114] The only live issue now relates to the holiday pay findings that were made in respect of the first period of employment with Carrington Resort and the second period of employment with Carrington Holiday Park.

[115] I asked Mr Tan whether he accepted the accuracy of the arithmetical calculations undertaken by the Authority on the basis of the relevant companies' MYOB records. He said he did not. I invited him to explain why not and/or to provide an alternative analysis. He did not do so.

[116] I am satisfied that the calculations undertaken by the Authority are correct. I have been presented with no reason to suggest a different calculation is appropriate.

[117] This element of the challenge is accordingly dismissed.

Unjustified dismissal issue

First issue: alleged fabrication of timesheets

[118] The chronology for this aspect of the employment relationship problem, as described by the Authority and set out earlier, was confirmed in the evidence presented to me, and does not need to be repeated.

[119] The first question is whether, as Mr Tan asserts, Ms Grant fabricated her account as to the work she undertook on 12, 13 and 14 May 2022.

[120] Ms Grant's evidence as to her activities was detailed and plausible. She was in effect instructed by her manager to undertake a deep clean of house 49. She began doing this with a fellow staff member on 12 May 2022, and largely completed the task alone on 13 May 2022. She uplifted cleaning items she had used on 14 May 2022.

[121] This account is verified by a document she prepared soon after, as well as an email from her manager, Ms Waters, to Mr Tan as requested by him.

[122] Mr Tan made vague assertions suggesting he had witnessed a lack of activity. It is unclear when this was or what the circumstances were. However, his main point was that the house did not require cleaning because it had not been recently occupied. Ms Grant gave uncontested evidence that this was not the case, as occupants had been in the premises for a wedding during a public holiday in the previous month. She said the house had been cleaned in a cursory way at the time, but needed to be properly cleaned thereafter.

[123] In her confirmatory email to Mr Tan, Ms Waters fully outlined these details. She confirmed house 49 needed a spring clean which is why she instructed Ms Grant to undertake this task. Amongst other problems, there had been evidence of rodent activity.

[124] Mr Tan did not reveal his concern to Ms Grant when he said he first witnessed the problem on 13 May 2022. Ms Grant said the next day, he approached her when she was having a lunch break. She said he addressed her forcefully as to why the

cleaning operation was taking two days and inquired when guests had last used the unit. He declined her offer to be shown around the property and did not wish to discuss with her the details of her work. Ms Grant found the exchange intimidating and said it led to her preparing the written account referred to earlier.

[125] In his closing submissions, Mr Tan said there had been a "quiet season" at Carrington Resort and that Ms Grant was accordingly attempting to inflate her hours by attending house 49 without justification. The time records do not support this assertion. Ms Grant had originally been offered at least 20 hours per week at Carrington Resort; she worked well in excess of that minimum amount for every week in 2022 up until the week in question. Mr Tan alleged Ms Grant worked for Carrington Resort "intermittently" but reference to the contemporaneous time records shows that is also incorrect. I also note that Ms Waters countersigned Ms Grant's timesheet for the period 11–14 May 2022, summarising her hours as being 13.75 for houses, 12 for villas and 1.75 for a winery. This evidence tends to confirm a range of housekeeping responsibilities, and not only in respect of Carrington houses.

[126] Returning to the chronology of mid-May 2022, what is significant is that, while at first Mr Tan told Ms Waters and a payroll staff member that Ms Grant's pay should be withheld for the days in question, after the heated exchange on 18 May 2022, he decided to authorise payment of the wages in question. I infer he realised he had no proper basis for withholding the wages.

[127] The substance of Mr Tan's concern related to the fact that Ms Grant had been given the instruction to work at house 49 at all. She could hardly be blamed for having done what she was told to do. Indeed, on the evidence before the Court, the instruction was appropriate.

[128] I conclude that the step of threatening to withhold pay, as relayed to Ms Waters and the payroll staff member, was not the action of a fair and reasonable employer. As Ms Grant promptly told Mr Tan, this was not a legal option. Such a step would have been contrary to s 4 of the Wages Protection Act 1983. Nor were Mr Tan's suspicions as to the fabricating of timesheets justified.

Second issue: meeting with Mr Tan

[129] The second issue relates to what occurred on 18 May 2022 when Ms Grant and her partner, Mr Cotter, attempted to meet and discuss the decision to withhold her pay, which was the position at the time of the incident. Mr Tan has made much of the circumstances, suggesting that Ms Grant and/or Mr Cotter yelled and shouted at him, and that he felt physically threatened. In the statement of claim, it was alleged that Mr Tan was threatened by violence, and that Ms Grant and Mr Cotter had stormed into the resort office.

[130] Mr Cotter recorded what occurred. The initial part of the recording is somewhat unclear because there were a number of people in the foyer area who were conversing, and there is a degree of overtalking.

[131] The listener can, with care, establish the exchanges that took place between Ms Grant and Mr Tan when they were in the foyer.

[132] There is no evidence to suggest that Ms Grant and Mr Cotter "stormed in".

[133] The thrust of the initial exchange related to Ms Grant asking to speak with Mr Tan and pointing out to him that it was illegal to withhold her wages. Mr Tan was defensive and attempted to avoid the issue by stating that he did not have time to speak with Ms Grant at that stage.

[134] Later in the conversation he suggested that he was within his rights to decide to withhold wages, telling Ms Grant that she should sue him if she had a contrary view. The respective points of view were repeated on both sides with, eventually, Ms Grant referring to the work she had carried out at house 49, stating that Mr Tan had been "creeping around", and that he had not presented himself when he was on the premises on the first of the three days that Ms Grant worked there. Mr Cotter had limited input into the conversation.

[135] Then Mr Tan said, in response, that "I'm about to terminate your contract – that's it", and shortly after that, "I'm considering terminating your agreement." When Ms Grant asked why this was, he said that he would let her know in due course and

then said it was "because of this ongoing attitude, Iva". She queried this, asking when they had last spoken. It was her position that they had not conversed for many months. Mr Tan said he did not have time for such a discussion. The parties parted with Mr Tan confirming that he would speak to Ms Grant two days later, at 10 am.

[136] Although each party spoke firmly to the other, I am not persuaded that the exchange was inappropriate as far as Ms Grant and Mr Cotter were concerned. There is no reliable evidence of any physical actions by them being directed towards Mr Tan. Once they left the foyer and entered his office, he was seated at his desk which separated him from them. Voices were not raised to the level where it could be concluded Mr Tan was about to be assaulted; nor did the language used suggest such a possibility.

[137] Mr Tan, on behalf of the employing party, reacted inappropriately by not de-escalating the problem which had arisen by discussing it constructively. Rather, he suddenly announced he was about to terminate Ms Grant's employment agreement due to her "attitude", which was a provocative statement in the circumstances. In the statement of claim, it was alleged Ms Grant "had a history of threatening the management, using her title of being one of the local marae's representatives to weigh in as a vocal person."

[138] The steps which followed this meeting are verified by texts and documents created at the time.

[139] Mr Tan authorised payment of the wages he had initially said would be withheld.

[140] Next, he prepared a dismissal letter which stated that under "clause 12.1 of the signed casual employment agreement", one day's notice of termination was being given. The letter stated that Ms Grant would be paid for one day in lieu of the notice period. He also prepared a trespass notice which stated she was to stay away from the Carrington Estate and Whatuwhiwhi Top 10 Holiday Park indefinitely; a breach of the warning could result in a fine of up to $1,000, or imprisonment of up to three months.

[141] However, this material was not served on, or brought to the attention of, Ms Grant by Mr Tan or representatives on his behalf, either on that day or the following day, Thursday 19 May 2022.

[142] Late on the Thursday, Mr Tan told Ms Waters about the dismissal. It was she who informed Ms Grant of that fact. Because Ms Grant was unaware of this step, Ms Waters asked Mr Tan what the grounds of dismissal were. He told her that she should ask Ms Grant, stating the documents had been served on her the previous day. They had not. Mr Tan then provided copies of the dismissal letter and trespass notice to Ms Grant. He also told Ms Waters to have company property returned via a third party, after which her final pay (one day of work for that week, and one day in lieu of notice) could be processed.

[143] Ms Grant was personally served with the document on the morning of 20 May 2022, prior to the time of the prearranged meeting. She did not return to work or attend that meeting.

[144] On Monday 23 May 2022, Ms Grant emailed Mr Tan, seeking an explanation for the measures he had undertaken, and giving an outline of relevant events. No response was given.

[145] On the question of whether the steps taken by Mr Tan on behalf of Carrington Resort were those of a fair and reasonable employer, it is first to be noted that his assertion that he was able to dismiss Ms Grant on the basis of the terms of a casual agreement she had entered into for the first period of employment was erroneous, as discussed earlier.[60] There was no written agreement at the time, and the reality of the employment arrangements was that Ms Grant was a permanent employee.

[146] Ms Grant was entitled to reasonable notice. One day was not, in the circumstances, reasonable notice. No assertion of serious misconduct had been raised, which might have justified summary dismissal following a proper process which was procedurally fair if a serious allegation was made out.

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[60] Above at [108]–[110].

[147] Secondly, there was no substantive or procedural justification for the termination on any basis.

[148] Mr Tan wrongly accused Ms Grant of fabricating her time records. He also exaggerated the circumstances of the conversation in the Carrington Resort foyer and in his office. He was not threatened. At the time he said termination would take place because of Ms Grant's "attitude". This was plainly a kneejerk reaction to a conversation Mr Tan did not want to have. I find he knew Ms Grant was correct in stating it was illegal to indicate a deduction would be made from her wages unless she consented, which plainly was not the case.

[149] Mr Tan has also alleged that Ms Grant had a history of threatening him, and had used her status as one of the local marae's representatives to "weigh in as a vocal person". This was a reference to her advocacy for a niece who had worked on a long weekend for one of Carrington's employers. When she was not paid for this work, Ms Grant advocated for her. Initially, Mr Tan claimed he did not know who the worker was. Later, he agreed to pay her, using bank details the niece had provided independently to the employing company. The evidence suggests her advocacy was entirely reasonable.

[150] Standing back, I accept Ms Grant's account. A fair and reasonable employer could have investigated any concerns held as to work done in a constructive way, allowing a response to be given and then considered. But that did not occur. There was no attempt to undertake a fair process with regard to any of Mr Tan's asserted concerns prior to the dismissal. A peremptory notice was not justified.

[151] Furthermore, serving a trespass notice on Ms Grant was, in the circumstances, not the step of a fair and reasonable employer. It too was provocative and unjustified.

[152] Finally, the failure to provide reasons for the dismissal, even when asked for on Monday 23 May 2022, was also unjustified.

[153] In summary, the dismissal was not a step a fair and reasonable employer could have taken, whether considered from a substantive or procedural perspective.

[154] The challenge to this aspect of the Authority's determination is accordingly dismissed.

Remedies

[155] The next issue relates to remedies.

[156] Mr Tan's position on this topic was that Ms Grant was not entitled to remedies because the termination was justified. He did not address any submissions to the quantum findings which had been made by the Authority.

[157] I have already summarised the conclusions reached by the Authority both as to compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings, and under s 124 as to reimbursement of wages.

[158] As to the first of these topics, the Authority detailed the evidence with which it had been provided, which was supported by many positive references, which attested to her integrity and honesty. As noted by the Authority, Ms Grant has strong and close connections with the Karikari Peninsula. Her whakapapa is to this area, through Te Whānau Moana and Te Rorohuri which are hapū of Ngāti Kahu. Ms Grant belongs to Karikari marae and has previously served as its treasurer. The Karikari marae was formally established in 2001 to represent and look after the mana whānau and their ancestral lands of Karikari beach and surrounding areas as far as Cape Karikari.[61]

[159] It is apparent from the evidence that Mr Tan's conduct in causing Ms Grant to be dismissed peremptorily and without proper cause or adequate process led to stress and humiliation.

[160] The serving of a trespass notice on her was particularly regrettable. Ms Grant has a whakapapa connection to the land on which the subject events occurred. The

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[61] See letter of 3 April 2023 of Professor Margaret Mutu, who has been chairperson of the Kerikeri Marae since 2004.

evidence is that the resort occupied 3,000 acres of land which holds great cultural significance to Ms Grant, her hapu and iwi. She holds mana whenua status in connection with the area. Mr Tan's unwarranted serving of a trespass notice with respect to the land where the events occurred was high-handed and unnecessary. It contributed significantly to the humiliation, loss of dignity and injury to feelings she suffered.

[161] I am satisfied that an award of $29,000 for compensation is entirely appropriate.

[162] Turning to the question of reimbursement of wages, the Authority calculated that lost wages for a period of three months following the dismissal should be $9,137.83 plus interest from 21 August 2022 until full payment had been made. No submissions were made to suggest the arithmetical approach adopted by the Authority was incorrect and I adopt it.

[163] Finally, on the topic of remedies, it is necessary to consider whether compensation or lost wages should be reduced due to contributory fault. Again, the Authority outlined this issue in depth and I have been presented with no submissions that would justify my reaching a contrary conclusion.

[164] The sequence of events that led to the unjustified dismissal was solely due to the conduct of Mr Tan on behalf of Carrington Resort, and not due to the actions of Ms Grant. Accordingly, no reduction is necessary.

Penalties for good faith breaches

[165] The Authority recorded that Ms Grant had sought a penalty against Mr Tan for aiding and abetting a breach of good faith on the part of the company respondents. However, it found that the Act does not provide for a penalty to be claimed against a person who aids or abets a breach of a provision of the Act such as the good faith obligations in s 4. It was pointed out by the Authority that s 4A provides for a penalty but liability is not expressed to extend beyond "a party to an employment relationship". Mr Tan himself was not the employer, so that a penalty on this basis could not be awarded.

[166] No penalty claim had been made against the Carrington companies in respect of s 4 liabilities. That was not a problem that could be cured by the Authority.

[167] No relevant application was made to the Court which would suggest it had jurisdiction to award a penalty under this head. Accordingly, issues under s 4 must be set to one side.

Penalty for breach of Authority directions

[168] There were also difficulties with claiming a penalty for breaching directions or orders of the Authority. It was pointed out the appropriate penalty claim would have been against the Carrington companies for breach of s 130(2) of the Act, which relates to requests for wage and time records. Instead, the penalty had been sought for failing to provide the records at the direction of the Authority.

[169] Again, no penalty could be awarded. There was no relevant application made which would suggest the Court had jurisdiction to award a penalty under this head.

Penalty for obstructing or delaying the Authority

[170] The position was different in respect of the issue as to whether a penalty should be imposed for obstructing or delaying the Authority in its work.

[171] The Authority outlined the various requests that were made for records to be filed, with which there was not compliance. It was noted that the plaintiffs had been expressly notified by the Authority in its directions that they were obstructing its investigation and failed to act in good faith.

[172] The Authority said there were 10 months of delay from the date the statement of problem first raised the requirement to provide a copy of the records until they were finally produced.[62]

[173] It noted that other information had been specified for production but was not produced. Obstruction and delay also occurred when Mr Tan failed to take part in an

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62 *Grant v Carrington Resort Jade LP*, above n 1, at [169].

audio-visual conference, of which he had been notified, for the purpose of taking evidence. This was a continuation of the investigation meeting on a date and time to which he had agreed. The Authority did not accept his explanation that there were technical problems. Similarly, there was no attendance of the respondents at mediation at an earlier point in the chronology. Ms Grant had connected to the link but Mr Tan had claimed technical difficulties. Again, the Authority did not accept this.

[174] For these reasons, the plaintiffs were found to have obstructed or delayed the investigation. No sufficient cause for inaction had been shown.

[175] On these facts, I am also satisfied that there was obstruction and delay on the part of the plaintiffs.

[176] The various criteria of s 133A(a) of the Act are relevant to the assessment of a penalty. These matters were considered in detail by the Authority. No submissions were made on behalf of the plaintiffs contesting the reasoning process.

[177] The Authority referred to other cases where similar problems had arisen, noting that penalties had not been claimed for breaches in those other instances, so none had been ordered. Accordingly, I place the issues that were raised in other cases to one side.

[178] The Authority found that the plaintiffs' obstruction or delay had been closely connected to the enforcement of employment standards in the facilitation of objectives about them under the Act.[63]

[179] Next, the plaintiffs had caused delay and disruption to an investigation and its progression to a conclusion in an efficient and economic manner.[64] No reason had been given for the failure to provide wage and time records, and it was to be inferred that the failure was deliberate.[65]

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63 At [180].
64 At [181].
65 At [182].

[180] The Authority accepted there had been no financial gain which arose from the breaches.[66]

[181] Then, the Authority found that neither the Carrington companies nor Mr Tan had made amends in any way for their inactivity.

[182] When considering deterrence and culpability, the Authority noted that Carrington Resort appeared to be a well resourced tourism and leisure enterprise in the Far North, where it was one of the larger employers in an area suffering from limited employment opportunities. Mr Tan held himself out as being qualified in law. These factors, the Authority said, raised the level of culpability.

[183] The Authority went on to consider ability to pay, stating that it had no information to suggest the Carrington companies had funding constraints. Mr Tan's ability to pay a penalty was not known.

[184] Inability to pay, however, is not now an issue because the judgment sum awarded by the Authority, including the penalties, were paid into Court in response to an application for stay of execution brought by the plaintiffs.[67] There is a relatively modest interest liability to which I will refer shortly, but in the absence of any express evidence as to impecuniosity on the part of either relevant plaintiff, there is no live issue as to inability to pay that liability.

[185] After taking all matters into account, the Authority directed that the appropriate penalty should be $10,000 in total – $4,000 for each Carrington company and $2,000 for Mr Tan.[68] Ms Grant was directed to receive $3,000 in respect of the penalties imposed on the Carrington companies and $1,000 in respect of the penalty imposed on Mr Tan.[69]

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66 At [183].
67 Minute 8 November 2023 at [5].
68 *Grant v Carrington Resort Jade LP*, above n 1, at [201].
69 At [204].

[186] I have carefully reviewed the reasoning process of the Authority and consider it to be sound. I adopt it. The penalties imposed represent a fair outcome for the problems that arose during its investigation process.

Result

[187] The challenges brought by the plaintiffs are dismissed.

[188] The sum of $51,467.72 paid into Court by the plaintiffs, and interest earned thereon, are now to be paid by the Registrar to the defendant.

[189] The sums paid into Court were net of interest. As noted earlier, the Authority ordered that Carrington Resort was to pay interest on lost wages of $9,123.83 and annual holiday pay of $1,823.73 from 30 November 2020, and that Carrington Holiday Park was to pay interest on annual holiday pay of $1,443.60 from 19 December 2021, all as calculated using the civil debt calculator[70] under the Interest on Money Claims Act 2016.[71] I order the plaintiffs to now pay these amounts within 14 days of the date of this judgment. Any issues as to the correct amount are to be resolved by the Registrar.

Ms Grant represented her own interests at the hearing. However, if she incurred professional costs with regard to her successful opposition to the plaintiffs' challenges, she may file a costs application, supported by any necessary documentation, within 14 days of the date of this judgment. The plaintiffs should file and serve any memorandum in response within a further 14 days. I will resolve any issues thus arising on the papers.

B A Corkill
Judge

Judgment signed at 11.30 am on 17 July 2024

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70 Ministry of Justice "Civil Debt Interest Calculator" <www.justice.govt.nz>.
71 *Grant v Carrington Resort* LP, above n 1, at [206].