

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 34
EMPC 107/2024**

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

BETWEEN RUIDONG XU
 Plaintiff

AND PIONEER EDUCATION &
 IMMIGRATION SERVICES GROUP
 LIMITED
 Defendant

Hearing: 9 October 2024
 (Heard at Auckland)

Appearances: Plaintiff in person
 J Harrop, counsel for defendant

Judgment: 4 March 2025

JUDGMENT OF JUDGE KATHRYN BECK

[1] These proceedings involve a non-de novo challenge to a determination of the Employment Relations Authority.¹

[2] In the Authority, Ruidong Xu brought a claim for unjustifiable dismissal and unjustifiable disadvantage against Pioneer Education & Immigration Services Group Ltd (Pioneer). The Authority found that the dismissal was unjustified but rejected Mr Xu's disadvantage claims.

¹ *Xu v Pioneer Education and Immigration Services Group Ltd* [2024] NZERA 102 (Member Loftus).

[3] Mr Xu was awarded three months' lost earnings.² The Authority Member declined to exercise his discretion to increase the amount. He found, on the evidence, that Mr Xu made no attempt to mitigate his loss in New Zealand, instead choosing to return to China and being delayed in doing so by reason of the COVID-19 pandemic.³

[4] Mr Xu also made a range of claims for reimbursement of money lost as a result of the dismissal. The Authority did not make any awards in this regard on the basis that the bulk of them appeared to relate to Mr Xu's decision to return to China and that any medical costs related to a relationship breakup rather than the dismissal.⁴

[5] While the Authority accepted that hurt must emanate from the dismissal, and despite psychiatric reports being provided, it considered there was little direct evidence of the effect the dismissal had on the plaintiff, given the simultaneous impact of the loss of a personal relationship and the effect of COVID-19. It awarded Mr Xu \$15,000.⁵

[6] Mr Xu has challenged the findings in relation to remedies.

[7] He says that there is a substantial amount of evidence to show that he made numerous attempts to mitigate his loss prior to returning to China. He says he would not have returned to China but for the dismissal. In relation to reimbursement, he says the amounts sought by him relate to losses incurred as a direct result of the unjustified dismissal; these losses were supported by evidence.

[8] In relation to the compensation payment, Mr Xu says that the evidence, including a general practitioner's medical notes and two psychiatrists' reports, illustrates that the hurt and humiliation he suffered warranted an award significantly higher than that awarded by the Authority. He seeks \$50,000 in compensation, or at least \$35,000, which was the sum initially offered by Pioneer in correspondence.⁶ He also asks for interest on the lost earnings and lost reimbursement.

² At [49].

³ At [41].

⁴ At [43].

⁵ At [45]–[47].

⁶ The offer was made in open correspondence.

[9] Mr Xu does not challenge the findings in relation to unjustified dismissal or unjustified disadvantage, and there has been no cross-challenge. Accordingly, it is the remedies that are the focus of this proceeding.

Issues

[10] This is a non-de novo hearing and is limited to assessing whether the Authority erred in fact or in law in:

- (a) finding the plaintiff was entitled to an award of three months' wages, as opposed to his actual lost remuneration;
- (b) finding the plaintiff was not entitled to the sums claimed by him under s 123(1)(b) of the Employment Relations Act 2000 (the Act);
- (c) finding the plaintiff was entitled to an award of \$15,000 compensation under s 123(1)(c)(i) of the Act, as opposed to the higher amount sought by him; and
- (d) failing to award interest on the sums awarded.

Facts

[11] Mr Xu was employed by Pioneer as a student counsellor from March 2019. His responsibilities included education consultancy work and also immigration advice, subject to him obtaining an appropriate provisional licence to practise as a licensed immigration adviser (LIA). He obtained a variation to his essential skills work visa to enable him to work for Pioneer.

[12] As Mr Xu was not fully licensed as an LIA, approval was required from the Registrar of Immigration Advisers for him to give immigration advice in his role. The rules required that any provisionally licensed immigration adviser must have a supervision agreement in place with a fully licensed immigration adviser and that the agreement must be approved by the Registrar of Immigration Advisers.⁷ Mr Xu and

⁷ Licensed Immigration Advisers Code of Conduct 2014, cls 11–13.

Mr Zhu, the sole director of Pioneer, entered into a supervision agreement. This created obligations on Mr Zhu's part to Mr Xu as follows:

- 7.5 provide direct supervision on the basis that he has supervision, leadership and management experience
- 7.6 provide direct supervision for RUIDONG:
 - 7.6.1 accept responsibility for the quality of RUIDONG'S work by: ensuring RUIDONG is operating within the scope of [his] individual knowledge and skills
 - 7.6.2 monitoring all documentation and correspondence to clients, the Minister of Immigration, Immigration New Zealand, the Immigration and Protection Tribunal and other relevant organisations
 - 7.6.3 maintaining oversight of RUIDONG'S handling of immigration matters

[13] This agreement was signed on 11 March 2019.

[14] Mr Xu considers he was a good and diligent employee. Certainly no performance or conduct issues were ever raised with him. Mr Zhu gave evidence that Mr Xu's attitude at work was not perfect but that it was manageable. Mr Zhu also indicated that other aspects of Mr Xu's performance were of a high quality.

[15] It was therefore a significant surprise to him when he returned from leave in January 2020 to be told by Mr Zhu that, due to personal reasons, and in particular the birth of his fourth child, he no longer had the capacity to meet his supervision obligations to Mr Xu; there was therefore no longer a role for him with Pioneer.

[16] Mr Zhu said that, at the meeting on 7 January 2020, he explained his situation to Mr Xu and talked about the birth of his fourth child and family situation. Another factor also affecting him was that his father had been diagnosed with terminal cancer. This was placing significant personal pressure on him and his family. However, he did not disclose this to Mr Xu at the time.

[17] There is some debate as to whether, at the 7 January 2020 meeting or at a subsequent meeting on 9 January 2020, Mr Xu was offered the opportunity to refocus

on the education consultancy side of his role. Mr Xu says this offer was not made at that time; Mr Zhu said it was. I deal with this issue further below.

[18] Mr Xu worked out his notice period and finished with Pioneer on 28 January 2020.

[19] Mr Xu provided the Court with an overwhelming amount of evidence as to the efforts he made to secure employment within New Zealand after his termination. He made numerous applications, copies of which were provided. The applications were primarily for work as an immigration adviser but also related to legal secretary and university research assistant roles. He was able to gain interviews but was unsuccessful in obtaining a position.

[20] On 23 March 2020, after being unsuccessful in finding employment in New Zealand, he booked flights to China and began to look for jobs there. Those flights were cancelled on 30 March 2020 and 17 April 2020 due to COVID-19. He then resumed looking for jobs in New Zealand, but without success. Again, he has been able to provide a significant amount of evidence in support of his further efforts to find employment. He says his preference was to remain in New Zealand and that if he had found a position here, he would have stayed.

[21] Mr Xu raised his personal grievance in April 2020. The parties agreed to attend mediation but were unable to do so until June 2020. It was unsuccessful.

[22] On 22 June 2020, Mr Xu booked a third flight to China. He says that he kept looking for jobs up until his departure and that his plan was to stay in New Zealand if he could find a job.

[23] He was unsuccessful, and as he saw no hope of finding employment in this country, he flew to China on 24 August 2020. On arrival in China, Mr Xu went into quarantine for two weeks at his own expense.

[24] He then commenced looking for work and was able to secure employment as an English tutor. That role commenced on 20 November 2020.

Is Mr Xu entitled to more than three months' lost remuneration?

Did Mr Xu attempt to mitigate his loss?

[25] Mr Xu seeks an order that he be paid lost remuneration up until when he was able to find employment on 20 November 2020. The Authority declined to exercise its discretion to increase the award of lost remuneration under s 128(3) of the Act. It found that Mr Xu made no attempt to mitigate his loss in New Zealand, instead choosing to return to China.⁸

[26] That is clearly incorrect. Mr Xu has produced a significant amount of evidence illustrating his efforts to find alternative employment before returning to China. He says it was not his choice to return to China and that but for his dismissal and inability to find employment, he would have remained in New Zealand.

[27] Mr Harrop, counsel for Pioneer, noted that Mr Xu stopped applying for jobs between 23 March 2020 and 19 April 2020, after Mr Xu had first booked to return to China. However, Mr Xu had applied for a number of positions by then, and he resumed applying promptly once his flight had been cancelled. Further, New Zealand was going through a level four COVID-19 lockdown during that period. It was entirely reasonable for Mr Xu to have stopped applying for jobs between those dates.

[28] I do not consider that there can be any criticism levelled at him in relation to his attempts to mitigate his loss. The Authority erred in its finding that he had made no attempt to mitigate his loss.

Was Mr Xu offered alternative employment?

[29] Although I have found that Mr Xu made attempts to mitigate his losses, it is also necessary to consider a further issue relating to mitigation that was addressed by the parties.

[30] Pioneer says that, at the time of Mr Xu's dismissal, it offered him a continuing role with it that focused on education. It submitted that Mr Xu could have completely

⁸ *Xu v Pioneer Education and Immigration Services Group Ltd*, above n 1, at [41].

mitigated his loss by accepting that alternative employment. Mr Xu says that no such offer was made but that he would have accepted it if it had been offered.

[31] Mr Harrop submitted that the Authority determined that Mr Xu was offered alternative employment by Pioneer.⁹ He submitted that Mr Xu has not challenged that part of the determination and that the Authority's finding therefore cannot be relitigated as part of this challenge.

[32] I do not accept Mr Harrop's submission. Mr Xu's statement of claim indicated that he wished to challenge the Authority's finding that he had made no attempt to mitigate his loss in New Zealand.¹⁰ The statement of defence filed on behalf of Pioneer suggested that Mr Xu could have avoided dismissal if he had accepted the offer allegedly made by Pioneer. Taken together, the pleadings clearly put the issue of mitigation before the Court for determination, including any issues surrounding the alleged offer.

[33] Accordingly, I consider that the Court is able to make its own finding on this issue based on the evidence before it. I have had the benefit of hearing directly from Mr Zhu and Mr Xu.

[34] Mr Zhu said that, at the first meeting on 7 January 2020, and again in later discussions, he offered Mr Xu the opportunity to remain at Pioneer in an education role.

[35] Mr Xu denied that he was ever offered the opportunity to stay on as an education consultant, let alone that he declined such an offer. He says the message throughout was that Mr Zhu was terminating the employment relationship. He says he would not have rejected such an offer had it been made – he had no problem with performing education consultancy work, which was the basis on which his visa was initially granted.

⁹ At [30]–[31].

¹⁰ At [41].

[36] The best evidence of what occurred is the emails that were exchanged between Mr Xu and Mr Zhu at the time.

[37] In an email sent to Mr Xu on 7 January 2020, Mr Zhu stated: “As explained today, I think I am not capable to fully supervise your practical process from now on, due to the arrival of my fourth child on 1st of Jan 2020.” He also noted that he would explain this to the Immigration Advisers Authority once Mr Xu was ready and had finalised recent applications in one to three weeks’ time. He said he would take over the pending cases for all his clients. There is no reference to the opportunity to remain employed and refocus on education consultancy.

[38] On the same day, Mr Xu emailed Mr Zhu, asking “Could you please confirm whether you are to terminate my employment with Pioneer, and if so, for what reason.”

[39] Mr Zhu replied later that day, stating:

This is to confirm the following notices are listed for your reference:

1. This is the official notice according to employment agreement clause 12, a three-week notice to be given. The ending date is 28th of Jan 2020.
2. The reason for termination of employment was explained today, majorly due to my limited time strength and capability, which cannot cater your needs of long-term career development.
3. I offered three-week full salary payments to cover up the notice period as a favor. Trust you will complete the request tasks as discussed today by the end of the period. If you complete the handovers at any time prior 28th of Jan 2020, your payments are still covered till the end and you are free to take a leave in due.
4. A reference letter will be provided once you hand over the remaining tasks.
5. The restrictions at clause 15 are waived, which includes the distance restriction of 15 KM, compensation of \$2000 NZD and also Three-month time period.

I suggest you to apply a new temporary visa ASAP during the transfer period and all the best to your next career platform.

[40] Again, there was no mention of Mr Xu staying on in a refocused educational role.

[41] On 9 January 2020, Mr Xu emailed Mr Zhu, referring to Mr Zhu's decision to terminate his employment, setting out his concerns with that decision, and outlining the impact on him. He attempted to persuade Mr Zhu to reconsider whether he was able to continue to supervise him. He also outlined the impact the decision had had on him over the previous few days in terms of his inability to sleep, along with feelings of stress, frustration and pain. He concluded by saying:

I hope you will carefully consider what I have said above and please let me know if you have changed your idea or have other things that you'd like to let me know. I am looking forward to hearing from you and I sincerely wish I could continue being of service to the company for the long run.

[42] There was nothing in this email to indicate that Mr Zhu had offered Mr Xu the ability to refocus on education and remain in employment with the company. On the contrary, Mr Xu's statement about wishing he could continue in employment is strong evidence that there was no such offer at that point.

[43] Accordingly, I do not accept Mr Zhu's evidence that he made such an offer on 7 January 2020.

[44] Later that day, on 9 January 2020, Mr Zhu says that he responded in an email to Mr Xu. He confirmed his decision that he was unable and unwilling to supervise him in his practice. He noted that, considering Mr Xu's strong willingness to keep working at Pioneer, "we can schedule a meeting to discuss variation of working scopes." He suggested a time and further noted:

According to several colleague's feedback about the cooperation experiences with you, as the director and employer, I think its worthy to make some adjustment as well, if you still consider Pioneer is a good place to grow with. There is no right or wrong from emotional side, that's why I advised and encouraged you to make some changes in our past meetings, from team synergy building aspects. From performance side, I think you done your best to the level what you can do.

[45] Mr Zhu says that in subsequent discussions, he offered for Mr Xu to stay and focus only on education advice while keeping the same income package. He says that Mr Xu declined as he did not wish to continue just doing education consultancy work.

[46] The evidence is not entirely clear as to whether Mr Xu received Mr Zhu's email. That is an issue that was noted as being disputed in a letter from Pioneer's legal counsel on 16 April 2020. However, nothing hangs on the letter itself. Although it refers to a potential discussion about the variation of working scopes, that does not itself constitute an offer and does not entail that Mr Zhu did in fact subsequently make an offer.

[47] Mr Xu accepted that the parties met on 9 January 2020 to discuss the situation further but denies that Mr Zhu offered him an education role.

[48] There is no correspondence or follow-up emails referring to an offer of ongoing employment or any discussions about such an offer.

[49] In answer to questions from Mr Xu in Court, Mr Zhu accepted that it was his practice to record the contents of meetings and important discussions in writing. He accepted he had not done so on this issue.

[50] I prefer the evidence of Mr Xu that no offer was made on 9 January 2020. I consider it more likely than not (particularly given his email to Mr Zhu stating how he felt about his employment being terminated and asking him to reconsider) that, had he received such an offer, he would have accepted it.

[51] I also consider that the suggestion in Mr Zhu's email that there were some concerns about Mr Xu's interaction with others, and possibly some performance concerns, is consistent with Mr Xu not being offered ongoing employment. I note that the email from the representatives for Pioneer dated 16 April 2020 stated that the termination of Mr Xu's employment was because of "a combination of concerns regarding [his] performance and the fact that Mr Zhu did not feel comfortable supervising [him] any longer".¹¹ I consider that also supports Mr Xu's position that he was not offered ongoing employment; it is unlikely that Mr Zhu would make such an offer in those circumstances.

¹¹ Pioneer's representative suggested that this statement was made as a result of a misunderstanding by the representative as to the reasons for the dismissal. However, there is no evidence in later correspondence of the misunderstanding being corrected.

[52] Accordingly, I find, on the balance of probabilities, that Pioneer did not make an offer of ongoing employment that would have enabled Mr Xu to mitigate his loss.

[53] Having found that there was no failure on Mr Xu's part to mitigate his loss, the question is whether he is entitled to more than three months' earnings.

What lost remuneration is Mr Xu entitled to?

[54] When an employee has lost remuneration as a result of a personal grievance, they are entitled to either the sum of that lost remuneration or three months' lost wages, whichever is lesser. However, the Authority and Court may exercise a discretion to order an employer to pay more than three months' lost remuneration where a greater sum has been lost.¹²

[55] The Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang* set out a number of relevant principles guiding the exercise of that discretion, including:¹³

- (a) A full assessment of financial loss sets the upper limit on an award of compensation, but there is no entitlement to full compensation.
- (b) The concept of unjustifiable dismissal is flexible, and a full compensation approach may be disproportionate to the nature of the wrong and inappropriately damaging to an employer.
- (c) The assessment of loss must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in the employee's employment being terminated.

[56] Mr Xu has asked for lost reimbursement up to 20 November 2020 when he found alternative employment in China. As his employment ended in January 2020, the period for which lost remuneration is sought to be recovered exceeds three months.

¹² Employment Relations Act 2000, ss 123(1)(b) and 128; and *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [18]–[20].

¹³ *Sam's Fukuyama Food Services Ltd v Zhang*, above n 12, at [24]–[26]; and *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [70]–[83].

Therefore, it is necessary to consider whether an extended award of lost remuneration should be granted.

[57] Mr Harrop submitted that the length of time sought is too remote from the dismissal and that the reasons for Mr Xu's failure to find alternative employment are mixed. He submitted that Pioneer had good reasons for dismissing Mr Xu and that dismissal was inevitable in 2020, either as a result of Mr Zhu's personal situation or as a result of the impact that COVID-19 had on immigration advisory work. He argued that the pandemic was a serious intervening event and that the full effect should not be visited upon the employer.

[58] If a fair process had been followed, Mr Xu may have continued in his role or else may have been redeployed to the education role which Mr Zhu claims to have offered him. However, he may still have been dismissed.

[59] Further, as a result of COVID-19, 2020 was an uncertain year for everyone. Mr Zhu's evidence was that, once the New Zealand border closed, Pioneer had some immigration advisory work with people still in the country but that the immigration work in general plummeted. It is therefore possible that Mr Xu's role may have been terminated, or his hours and wages reduced, as a result of COVID-19 if he had remained employed by Pioneer.

[60] In light of the possible contingencies that may have arisen, I accept Mr Harrop's submission that Mr Xu is not entitled to full compensation up until 20 November 2020. On the other hand, Mr Xu applied for a range of positions. He remained diligent in seeking employment despite what must have been disappointing results. It is appropriate to exercise the discretion in his favour. I consider that he should be entitled to six months' lost wages.

[61] The defendant, having already paid three months' wages, is ordered to pay a further sum of three months' lost wages to Mr Xu.

[62] The finding of the Authority is set aside and this judgment stands in its place.

Is Mr Xu entitled to recover other money lost as a result of his dismissal?

[63] The Authority did not make any award for other money lost as a result of Mr Xu's unjustified dismissal. The Authority Member's reasoning was that most items claimed by Mr Xu related either to his decision to return to China or to medical costs related to stress caused by COVID-19 and the breakup of his relationship.¹⁴

[64] In his statement of claim, Mr Xu set out his claim seeking reimbursement of lost monies as follows:

Lost benefits	licence fee	NZD 2039.33
	LIA supervision	NZD 3,150
Job-seeking related cost		NZD 136.46
Consultation with psychiatrist not covered by insurance		NZD 220
Returning to China	Airfare for the third, final flight to China	NZD 1909.6
	checking in an extra bag	NZD 105
	SkyBus fare for travelling to the airport	NZD 17
	Bus fare for travelling to the previous house to pack up personal belongings	NZD 7.1
Quarantine in China		RMB 5,944
Cost for returning to Guangdong		RMB 793
VPN services		RMB 980
Legal consultation fee		NZD 575
Application to the ERA		NZD 71.56
Election to the Employment Court		NZD 204.44

[65] He made submissions in support of each of these items. It is necessary to deal with each separately.

[66] Mr Xu claims compensation for loss of the LIA licence fee. The basis for the claim is that that was a cost that was met by Pioneer as part of the terms of his employment. However, I do not accept that Mr Xu suffered any loss in relation to this item. The licensing fee had already been paid by Pioneer. It expired on 23 July 2020. Mr Xu had no need of a licence after that point. No amount is payable by Pioneer.

¹⁴ *Xu v Pioneer Education and Immigration Services Group Ltd*, above n 1, at [43].

[67] Mr Xu also seeks compensation for the value of the supervision that he would have received had he remained employed. He has calculated the amount by reference to the number of sessions he would have had with Mr Zhu, multiplied by the amount he says it would have cost to have an independent person supervise him.¹⁵ His reasoning for this is that the supervision had a monetary benefit to him and he has lost that benefit.

[68] I do not consider this to be recoverable. The real loss is the supervision itself, not a nominal fee that he was never charged. Mr Xu could have argued that, when he was dismissed, he lost a chance to become a fully licensed immigration advisor.¹⁶ However, as noted above, I have exercised my discretion to award more than three months' wages. I consider that the increased award of wages covers any loss suffered under this head. No further amount is payable by Pioneer.

[69] Mr Xu also seeks compensation for costs in relation to his job search. He travelled to and from Hamilton by bus for two interviews, and by bus and Uber taxi to and from another interview. I consider that Mr Xu is entitled to the costs associated with travelling to and from Hamilton. He only incurred those costs as a result of his dismissal. However, I do not accept that he is entitled to the other travel costs claimed, which amounted to about \$20. I consider that such travel costs would have arisen on a day-to-day basis, even if he had remained employed. Therefore, Mr Xu is only entitled to a further payment of \$117.98.

[70] Mr Xu also claims costs associated with his return to China on the basis that he would not have returned to China but for the dismissal. Given that this was his homeland and he only had a temporary working visa, I do not consider he can pass this cost on to the employer. Under the terms of his visa, he was always going to have to return to China. While I accept that the timing was earlier than he had planned or desired, this is a cost he was going to incur at some point in any case.

¹⁵ However, I note he chose the rate of \$150 per hour for supervision when the evidence he produced said the two most common used hourly rates for supervision were \$50 and \$100 per hour.

¹⁶ See *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC) at [99]–[126].

[71] The defendant also argued that the costs of returning to China are too remote. I agree. Having determined that Mr Xu is only entitled to six months' lost wages, the nexus between the grievance and the costs claimed is too remote as they fall outside that period, which ends on 28 July 2020. The various costs relating to his return to China are not the responsibility of the employer. No amount is payable by Pioneer.

[72] Mr Xu claims psychiatrist consultation fees of \$220. He says that those fees arose as a result of needing to relieve the mental distress caused by the dismissal. I consider that he is entitled to recover those fees from Pioneer. They are clearly caused by the grievance. I deal with this in more detail below.

[73] He also claims costs arising in relation to the Authority's determination and these proceedings. In particular, he seeks to recover the filing fees he paid to the Authority and the Court as well as legal fees he paid to an employment lawyer when preparing his case in the Authority. However, those claims relate to costs and ought to be considered in that context.

[74] Accordingly, I find Mr Xu is entitled to an additional \$337.98 in compensation for money lost as a result of his dismissal, being \$117.98 for attempting to find alternative employment, and \$220 for the costs of consultation with a psychiatrist.

[75] The finding of the Authority is therefore upheld in part.

What compensation under s 123(1)(c)(i) is Mr Xu entitled to?

[76] The Authority awarded Mr Xu \$15,000 by way of compensation under s 123(1)(c)(i) of the Act. Mr Xu seeks for that award to be increased to \$50,000.

[77] The Court has adopted a banding approach to the quantification of awards under s 123(1)(c) of the Act.¹⁷ The three bands were recently updated in *GF v Comptroller, New Zealand Customs Service*:¹⁸

¹⁷ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67]; and *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

¹⁸ *GF v Comptroller, New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [162].

- (a) band 1 – low-range loss: \$0–\$12,000;
- (b) band 2 – mid-range loss: \$12,000–\$50,000;
- (c) band 3 – high-range loss: \$50,000 or more.

[78] In support of his claim for increased compensation, Mr Xu provided medical evidence. Pioneer argued that the mental distress suffered by Mr Xu was as a result of a combination of factors, including the breakup of his personal relationship and COVID-19. It says that it should not be held liable for his mental condition in its entirety.

[79] I have some sympathy for this submission. However, the information contained in the medical reports supports the fact that there was significant distress caused by the dismissal and the loss of employment.

[80] The notes from his general practitioner and letters from a psychiatrist support his claim that he was very worried and reluctant to return to China. He was stressed by the reasons for his dismissal, which caused him to doubt himself and lose self-confidence. He did not sleep well, had a reduced appetite, lost weight, felt anxiety around finding employment, and suffered from depression. His general practitioner described him as suffering acute stress. She noted that this was impacting his relationship.

[81] It is clear that Mr Xu suffered serious distress as a result of the loss of his employment and the way in which he was dismissed and that his condition continued for some time. Frankly, it is rare to have such comprehensive medical evidence in support of such a claim.

[82] I accept that his distress was partially caused by the loss of his relationship and exacerbated by COVID-19. However, the medical reports also indicate that Mr Xu's dismissal placed stress on his relationship. Given that the starting point of Mr Xu's distress was the unjustified dismissal, it is not possible to make a clean distinction between any of the factors which were contributing to his condition. He had no

previous history of mental health issues. While not all of the damage can be laid at Pioneer's door, a significant amount can.

[83] I agree with Mr Xu that he is entitled to more than the \$15,000 awarded by the Authority. Having reviewed recent authorities, I am satisfied that this case falls towards the upper end of band 2 set out above.¹⁹ That is because the impact on him was both moderately serious and reasonably long lasting.

[84] I consider that an award of \$35,000 is fair in all the circumstances of this case. The finding of the Authority is set aside.

Interest

[85] Mr Xu said he claimed interest in the Authority but that it did not exercise its discretion to award it to him, nor was it dealt with at all in the determination. It is not clear why this was not dealt with in the determination or why the discretion was not exercised. Mr Xu now seeks interest on any lost earnings or lost money awarded.

[86] The Court has a discretion to award interest in any claim for the recovery of money.²⁰ However, there are two factors which indicate that interest should not be awarded in this case.

[87] First, the Authority took two and a half years to issue its determination.²¹ Accordingly, to award interest from the date the cause of action arose would not be equitable insofar as Pioneer is concerned. Pioneer also paid the amounts ordered promptly. Second, Pioneer made a very reasonable offer to settle these proceedings at an early date. The final open offer to Mr Xu on 22 February 2021 was three months'

¹⁹ *CBA v ONM* [2019] NZEmpC 144, [2019] ERNZ 382; *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219, [2020] ERNZ 495; *Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174, [2022] ERNZ 847; *Baillie v Chief Executive, Oranga Tamariki – Ministry for Children* [2022] NZEmpC 233, [2022] ERNZ 1201; *Henry v South Waikato Achievement Trust* [2023] NZEmpC 20, [2023] ERNZ 55; *Pact Group v Robinson* [2023] NZEmpC 173, [2023] ERNZ 682; and *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133.

²⁰ Employment Relations Act, sch 3 cl 14; and *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123, [2018] ERNZ 355 at [89]–[94].

²¹ The investigation meeting took place on 12 August 2021, with final submissions received on 30 August 2021. The determination was then issued on 23 February 2024.

pay and \$35,000 as compensation under s 123(1)(c)(i). If that offer had been accepted, Mr Xu would have had access to the sums awarded by the Authority and the majority of the sums now awarded by the Court at a much earlier date.

[88] Therefore, Mr Xu is not entitled to interest on the lost remuneration.

Outcome

[89] Mr Xu has been largely successful in his challenge. The Authority's finding in relation to lost earnings is set aside. The Authority's finding in relation to money lost as a result of the dismissal is set aside in part. The Authority's finding in relation to pain and humiliation is set aside. This judgment stands in the place of those findings.

[90] In addition to the sums that have already been paid, Pioneer is to pay Mr Xu the following sums within 21 days of the date of this judgment:

- (a) Three months' lost wages;
- (b) \$337.98 in compensation under s 123(1)(b);
- (c) \$20,000 in compensation under s 123(1)(c)(i).

[91] Mr Xu had paid the sum of NZD 15,074 into Court as security for costs. That money should now be released to him together with any interest earned on receipt of bank account details from him. The Registry is directed accordingly.

Costs

[92] Mr Xu has been largely successful and may be entitled to costs.²² As noted above, he sought to recover the filing fee paid by him in these proceedings. He also sought to recover costs related to the Authority proceedings.

²² "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[93] In the event the parties are unable to agree on costs, the plaintiff will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the defendant having a further 14 days within which to respond. Any reply should be filed within a further seven days.

[94] As the Authority invited memoranda on costs but did not make any orders, it seems that no costs were sought in the Authority.²³ If Mr Xu wishes to pursue the costs sought in relation to the Authority proceedings, he ought to address why costs are being sought now for the Authority proceedings when none were sought previously.

Kathryn Beck
Judge

Judgment signed at 4.50 pm on 4 March 2025

²³ *Xu v Pioneer Education and Immigration Services Group Ltd*, above n 1, at [51].