

NOTE: This determination contains an order prohibiting publication of certain information at [1] and [113].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 534
3243559

BETWEEN	AKO First Applicant
AND	CJV Second Applicant
AND	DGE Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Adrian Plunket, advocate for the Applicant Myriam Mitchell, counsel for the Respondent
Investigation Meeting:	10 April 2024 in Hastings
Submissions and further information Received:	Up to 14 August 2024 from the Applicant Up to 14 August 2024 from the Respondent
Determination:	5 September 2024

DETERMINATION OF THE AUTHORITY

Non-publication

[1] The Authority made non-publication orders under clause 10 (1) of schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting publication of the name and identifying details of the applicants (AKO and CJV), an employee referred to but who did not give evidence (QEU) and the employer (DGE).

Employment Relationship Problem

[2] AKO and CJV were both employed by DGE from 6 December 2021. They are married and AKO was employed as a general farm hand and CJV as the station cook. They were both required to live on the property and there were written service tenancy agreements attached to their individual employment agreements (IEA).

[3] AKO and CJV both resigned on 11 February 2023. AKO was assaulted by another employee at work and both AKO and CJV claim their resignations should be treated as constructive dismissals due to the way their employer handled the workplace assault. They both claim compensation, lost wages, and penalties for breaches of good faith and of DGE's health and safety obligations.

[4] DGE says AKO and CJV were supported after the assault, resigned of their own free will and have no constructive dismissal claim. Adequate controls were put in place to manage the health and safety risks arising and AKO and CJV had obligations to raise their concerns and they did not. DGE says it did not know how they were feeling. It did not know about the verbal altercation the day before the assault or that AKO had panic attacks after the assault. DGE says it is AKO and CJV who have breached their good faith obligation to be communicative with their employer. An employer could not be expected to take action when it did not know the full picture.

[5] DGE also separates AKO and CJV's claims and says CJV's claim must fail because she was not the victim of the assault. Because of this her resignation could not have been foreseeable and therefore she cannot be found to have been constructively dismissed.

[6] DGE's evidence was that it was in a difficult position in that it had to manage conflict between two employees. In the event DGE's actions are found to be unjustified, it submits AKO and CJV contributed to the situation they found themselves in by failing to report important health and safety information to DGE.

The Authority's investigation

[7] For the Authority's investigation, written witness statements were lodged from AKO and CJV, and a friend and family member. For DGE, the Station

Manager, and Station Supervisor, both gave evidence. All witnesses gave oral evidence and answered questions under affirmation from me and the parties' representatives. The representatives provided written and oral closing submissions and further written submissions on non-publication.

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

The issues

[9] The issues requiring investigation and determination were:

- (a) What were the reasons for AKO and CJV's resignations?
- (b) Were the resignations caused by a breach of duty to AKO and CJV?
- (c) If there was a breach of duty was it of a serious nature that would mean it was reasonably foreseeable that AKO and CJV would not be prepared to continue to work?
- (d) Was there also a breach of the employment agreement between the parties?
- (e) Were the penalty claims commenced within the statutory timeframe and, if so, should penalties be awarded?
- (f) Have AKO and CJV contributed to the situation they found themselves in and, if so, should any remedies awarded be reduced?

AKO is assaulted at work

[10] There is no dispute between the parties that on 24 January 2023, QEU, another employee of DGE, assaulted AKO at work while they were out working on the farm. Both the station manager and supervisor on behalf of DGE, accepted it occurred and that it was serious and unacceptable behaviour by one employee towards another.

[11] There had been an earlier incident between QEU and AKO several weeks earlier in December. AKO says QEU shouted at him using swear words and told him he was useless and that he should look for another job. The station manager took steps to address the December incident with both employees although AKO says he got the impression the station manager did not take it seriously and that AKO was blamed in some way for what happened. AKO says he was told QEU was “just very passionate” and formed the view his complaint about QEU was brushed off.

[12] The station manager confirmed the steps he took to speak to both employees, told QEU he was not speak in that manner to AKO and checked in with them both before Christmas and no further concerns were raised so he was of the view any workplace issues between them had been resolved.

[13] The day before the assault there was another incident involving shouting and inappropriate language directed again at AKO and AKO described QEU as being in a rage and throwing tools and equipment. AKO did not tell the station manager about that until after the assault had occurred the next day.

[14] AKO’s evidence of the assault was that it involved at least one physical punch to the head that knocked him off the quad bike he was sitting on with several further blows to his head while he was on the ground. The matter was never investigated and QEU did not give evidence so it was not possible to ascertain exactly what happened but DGE accepted it was serious and unacceptable.

[15] AKO was injured and in shock and after what he says was an unprovoked physical assault. He immediately left and drove home which was some distance from where he and QEU had been working on the farm. AKO and CJV met with the station manager straight away to report the incident. The station manager told them QEU had already contacted him, handed in his notice and was leaving the station. The station manager says he gave no timeframe to AKO and CJV but from this point on they believed QEU would be leaving at the end of a two-week notice period. They are certain the station manager told them QEU was leaving in two weeks and the decisions they made about whether to stay or resign were based on that timeframe and the assurances they say the station manager gave them that QEU’s departure from the farm was imminent.

[16] The next day, AKO confirmed with the station manager he felt okay to work. AKO was working alone and says he became fearful about where QEU might be and became very anxious. His evidence was that he had what he now refers to as a panic attack that day. He managed to get through the day, but at the end of the day when speaking with CJV, they both decided that in view of how they were feeling given from their perspective the seriousness of the incident and the unprovoked nature of it, they would tender their resignations.

[17] They met with the station manager at his house that evening and conveyed their intention to resign. The station manager said he did not want them to resign. He offered AKO time off and away from the farm and invited them both to think about their decision until after the weekend. CJV said the station manager again reassured them QEU was leaving in two weeks and at the end of the meeting she made a direct point of repeating to the station manager that if QEU stayed, they were leaving, just so it was clear that they did not feel safe if QEU remained on the farm.

[18] The station manager accepts he was aware of AKO and CJV's positions, that if QEU stayed they would go, but denies he gave them any time frame for when QEU would leave the farm. His evidence was that he did not know where they got the idea it would be in two weeks.

[19] While AKO was away from the farm, and AKO and CJV were yet to confirm whether they wished to withdraw their resignations, The station manager phoned CJV and asked how AKO was. He also gave CJV the option to stay even if AKO left. It was not in dispute that CJV loved her job and DGE was very pleased with her work.

[20] After several days the AKO and CJV met with the station manager again on 30 January. They had decided to stay. It was clearly a difficult decision for them. They gave evidence of how the assault weighed heavily on them as a family and affected how safe they felt in their own home and at work. Both their positions had service tenancy agreements attached to their IEAs because it was a requirement they live on the property.

[21] However, at that point they believed QEU was leaving in two weeks and then their concerns about safety and security would be alleviated. CJV says they

reiterated again to the station manager at that meeting that if QEU stayed they would go.

[22] At some point between that meeting with AKO and CJV on 30 January (when they decided to stay based on the fact QEU would soon be leaving) and 9 February 2023, the station manager met and received new information from QEU that led to discussions with the station supervisor about allowing QEU more time to leave the farm. The new arrangement was not only an open-ended time frame for QEU to leave the farm, but from AKO and CJV's perspective, a far more empathetic approach towards QEU. AKO and CJV were not permitted to know any of the reasons why due to the need to maintain QEU's privacy.

[23] The station manager explained that QEU was still leaving but DGE was willing to give them time to find a new job and place to live. The changed arrangement was also endorsed by the DGE management committee and discussed at its meeting on 1 February. QEU was to keep working with the condition that he stay away from AKO and CJV and away from the back end of the farm.

[24] The station manager said in his written evidence:

I agreed to this arrangement as I considered my response to have been the only one which would not have endangered one of the parties, given the 12 km distance between the parties and the fact that QEU was having personal issues and had nowhere to go.

[25] What was not known until the investigation meeting was that QEU, in fact, never left the farm and remains an employee of DGE.

The station manager tells AKO about the extended timeframe - 9 February

[26] 9 February 2023 was the day the station manager updated AKO about the extended timeframe given to QEU at the workshop during the workday. AKO came back to the workshop that day because he started to feel unsafe during the day and told the station manager how he was feeling when he saw him at the workshop. AKO said he was shocked when the station manager then told him the DGE management committee had now decided that even though QEU was to leave, there was no specific time period for his departure. The station manager also alluded to QEU's circumstances as the reason for the change but told AKO he could not speak to AKO about QEU's circumstances. No evidence was given

about the specific circumstances but significant health concerns were alluded to during the Authority's investigation.

[27] The station manager made passing reference to the position DGE was taking in relation to QEU when he later accepted AKO and CJV's resignation. His email stated:

We felt due to the circumstances within QEU's life (that I'm not obliged to share with you) that giving him the time to find a new job was the right decision, (instead of instant dismissal) which he was well underway doing.

[28] AKO explained he was devastated, confused and overwhelmed with anxiety about QEU remaining on the farm and continuing to work.

[29] Both AKO and CJV say at that point they could no longer trust their employer with their safety. From their perspective there was evidence of support for QEU but not for them. It is also their position they had been promised QEU was leaving in two weeks and with the change to an open-ended time frame, a promise to them had been broken. With no end date and having told the station manager how strongly they felt and the stress they were under due to feeling unsafe, they say they were left with no option but to resign.

AKO and CJV resign

[30] They emailed their resignation seeking to leave earlier than their contractual notice period in their individual employment agreements of one month:

We are handing in our notice as of today and as in our contract we would like to give you a month's notice as required but under the circumstances we would appreciate it if we could leave sooner if agreed to by both parties.

Both of us are extremely upset and disappointed that we have been put in this position where we feel we have to leave. After the physical punch from QEU we were both told they would be leaving in two weeks only to find out yesterday (Thursday) that he is now being allowed to stay on the condition that he look for a new job with no notice or timeframe, which has also been supported by the board.

The stress that we have been through caused by this whole situation in the last few weeks has added to our decision to leave. The decision has not been easy as we have really enjoyed being here along with our kids, who are also feeling the impact of what QEU has done.

[31] The station manager replied accepting their resignation and informed them because it was a busy time of the year and they could not find a replacement cook, AKO could leave during his notice period, but CJV would need to stay on and work out her full month's notice. The station manager confirmed they would be kept separate from QEU by having them work at different ends of the farm.

[32] They agreed to proceed in that way. What transpired was Cyclone Gabrielle hit, the start date for the new cook was pushed out. They eventually left the station on 11 March 2023. CJV says they could not leave because the roads were blocked. The station manager says they agreed to stay of their own volition.

The parties disagree on the time frame given to the AKO and CJV

[33] A key part of the parties' evidence and submissions was about whether The station manager told AKO and CJV that QEU would be leaving in two weeks. AKO and CJV both gave evidence they were told two weeks. Their evidence is supported by the emails sent at the time and CJV's handwritten note.

[34] The relevant excerpts from the note are as follows:

24 January [the station manager] came and saw AKO and myself. He informed us [QEU] had quit and given two weeks notice.

25 January We went and saw [the station manager] after work and informed him of our decision but after a discussion and confirmation that [QEU] would be leaving in two weeks we said we would confirm our notice on Sunday.

We never saw [the station manager] on Sunday. Stated in this meeting if QEU stays we leave.

30 January Had a meeting with [the station manager] at the Cookhouse. We had decided to stay as long as QEU was leaving.

9 February Then the [station manager] said he would keep AKO in the loop and informed him that QEU was allowed to stay (working) with no notice and or time frame but had to find a job.

[35] AKO's evidence about what the station manager said to them on the day of the assault was as follows:

[CJV] called [the station manager] from the cookhouse and left him a message saying "you need to get down to the cookhouse now". Shortly after [the station manager] arrived and I explained to him the attack in detail. [the station manager] said that was absolutely unacceptable behaviour. Then [the station manager] said [QEU] had already rung him and was still angry over the phone.

Also [the station supervisor] said that [QEU] had told him that he had done something bad and he had quit and had given his two weeks notice. [the station supervisor] said if he had not quit and handed in his notice he would have obviously lost his job anyway.

[36] The station manager said he never gave an indication as to the timeframe. The station manager's written evidence recorded what he told AKO and CJV immediately after the assault as follows:

I also told him that [QEU] had already been in touch with me to let me know he had punched AKO and that he knew it was the wrong thing to do and he'd handed in his notice and was leaving the Station when he had found another job to go to.

[37] In answer to a question from me about whether QEU was stood down the station manager expanded his evidence about the steps he took. The station manager explained QEU was not stood down because he had leave booked Thursday, Friday and the following Monday and was leaving the farm to go away. The assault happened on a Tuesday. In effect his evidence was that there was no need to take any action other than have QEU work down the other end of the farm for one day because then he was not back until the following Tuesday after his leave and QEU was, at that stage, leaving because he had resigned.

[38] In his written evidence the station manager recorded he told QEU to stay away from AKO and CJV, to stay down the other end of the farm and if he needed tools or equipment, he was to ask the station manager to take them to him. He was not to come up to the cookhouse end of the farm. It seems more likely from the evidence I heard the conditions were set out clearly after QEU came back from leave but I accept QEU was instructed at the outset to stay away from AKO which meant staying at the other end of the farm.

[39] The station manager's oral evidence was that he met QEU when he came back from his leave (either on Sunday 29 or Monday 30 January) and QEU's situation had changed for reasons he did not disclose in order to protect QEU's privacy. It was evident this was the conversation where it was either communicated by QEU that he needed more time or the station manager decided to give him more time, and not insist that he leave straight away.

[40] This is different from the station manager's written statement which gives the impression from the start that the plan was to give QEU time to work out his

notice. The Board minutes were provided to the Authority and confirm there was a meeting on 1 February and simply record “recent issue between the two generals is being worked through”.

[41] The station supervisor gave evidence suggesting DGE always gives employees who are leaving 30 days to be out of the farm accommodation, and this is regardless of the situation or what the service tenancy agreement provides for. That does not automatically mean that was what AKO and CJV were told or in a situation involving serious misconduct, a different approach could not be taken.

[42] What emerges from this is that there was a change in approach from DGE towards QEU sometime after the station manager spoke to QEU and gained further information about his personal circumstances. Based on what the station manager learned he spoke to the station supervisor and the Board was informed. From that point on it was agreed QEU be given additional time.

[43] I find it more likely than not AKO and CJV were given an indication QEU would be leaving the farm either in two weeks. Either way they were given the impression QEU’s departure was imminent. The station manager’s own email accepting AKO and CJV’s resignations set out above confirms there was a change. He refers to moving from QEU’s “instant dismissal (which he was well underway)” to giving QEU time to find a new job as being the right decision in the circumstances given QEU’s situation.

[44] Two weeks was up on or about the 9 February and AKO and CJV were working on the basis of the information they were given by the station manager, that QEU was leaving imminently, and they believed that meant within two weeks of the incident. They were not provided with any information to suggest that plan would change, and their views were not sought so when they were informed on 9 February that there was now an open-ended timeframe for QEU to leave the farm, they say this caused them to resign.

[45] 10 February was two weeks after the assault occurred and they made the decision to withdraw their first resignation on the basis they only had to wait another week before QEU would be gone.

Constructive dismissal

[46] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign.

[47] The Court of Appeal in *Auckland Shop Employees v Woolworths (NZ) Ltd* set out three non-exhaustive categories of constructive dismissal:¹

- (a) An employer gives the employee a choice between resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer leads an employee to resign.

[48] Mr Plunket submits this matter falls in the third of these, the breach of duty category. He submits the duties breached were a failure to provide a safe workplace flowing from the individual employment agreement and the implied duty and a breach of good faith by breaking the promise that QEU would leave the farm two weeks from the date of the assault.

[49] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to then assess whether the breach of duty by DGE was of sufficient seriousness to make resignation reasonably foreseeable.²

[50] AKO and CJV have the burden of establishing their resignations were actually constructive dismissals.

¹ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, [1985] ACJ 963 (CA).

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

What were the reasons for Mr and CJV's resignations?

[51] In their evidence AKO and CJV provide two reasons for their resignations. Firstly, the assault left them both feeling very stressed and unsafe and secondly, there was a broken promise as to when QEU was leaving the farm. Once the arrangement changed between QEU and DGE, they said they felt they could not trust their employer to consider their needs or safety and consequently, it was not possible for them to continue living at the farm under those circumstances.

[52] They agreed to withdraw their first resignation based on their understanding that they only had to wait a couple of weeks before their safety concerns would be alleviated because QEU was leaving. They resigned almost immediately after being informed QEU's departure was no longer imminent. Having been told the management committee had endorsed this approach without speaking to them, they lost trust in DGE and formed a view that QEU was being favoured over them. They had also made their position clear that if QEU stayed they would go. After being told that had changed they resigned.

Were the resignations caused by a breach of duty by DGE?

The duties of fair dealing, good faith and to provide a safe workplace

[53] DGE had a duty to deal with AKO and CJV in good faith and be active and constructive in maintaining a productive employment relationship. There is also an implied duty on employers to be fair and reasonable. Other implied duties such as the duty not to damage the relationship of confidence and trust between and employer and employee and the duty to provide a safe workplace stem from that overriding duty. There was also a contractual duty to provide a safe workplace stemming from the specific provisions in the IEAs.

[54] I do not accept DGE did not know how the assault impacted on both AKO and CJV or that they did not feel safe. The station manager accepted in his evidence they knew AKO's mental health was not good just by virtue of the assault happening. DGE also knew the level of distress they were under because they approached the station manager the day after, wanting to tender their resignations immediately based solely on the fact AKO had been assaulted by a co-worker. On at least three occasions they conveyed verbally to the station

manager that if QEU stayed they would go. The station manager did not deny they told him that.

[55] In the ordinary course of events, it was accepted by DGE an employment investigation would have been conducted. The station supervisor's health formed part of the reason no employment investigation undertaken but ultimately it was decided no investigation would be carried out in light of QEU's imminent departure.

[56] That meant no objective fact finding or enquiry was made into the circumstances of, or the seriousness of the assault, although DGE accepts it was serious. The station manager's written statement states he was unaware there was more than one punch until he saw AKO's statement. This means it was unlikely DGE could know whether the decisions it was making in relation to extending QEU's notice period and providing a safe workplace were appropriate and/or fair and reasonable decisions for it to make in those circumstances.

[57] QEU was able to talk directly to the station manager about their circumstances and that information and perspective was also provided to the station supervisor and the management committee. No opportunity was given to AKO and CJV to provide their views and perspectives before the management committee endorsed the station manager's plan to extend QEU's notice period. Had AKO and CJV's position been communicated to the management committee, it would have been evident that what was being proposed was a change to the initial plan. This directly impacted on them, given their very clear stated position that they felt so unsafe that if QEU stayed they would go.

[58] QEU's privacy was also not a complete answer to justify not consulting with AKO and CJV before decisions were made that affected them. This was not a case where limited information was provided. They were told no information could be provided and it appeared this was also the rationale why they were not updated until 9 February. The management committee minutes and evidence suggest the decision was made by 1 February.

[59] Employers failing to take steps to protect employees from harm in the workplace, once the employer was aware of the harm, have given rise to findings of constructive dismissal. For example, in the case of *Turk's Poultry Farm Ltd*

v Adkins a failure to take steps to protect an employee from future sexual harassment by a co-worker was found to be a constructive dismissal.³ The Court held that the employee was entitled to expect that, once the employer was aware of the ongoing harassment, he would take appropriate action. This expectation flowed legitimately from the implied term to maintain the relationship of trust and confidence.

[60] Similar to *Turk's Poultry Farm Ltd v Adkins*, DGE knew about the assault and accepts it was serious and knew it was not going to investigate the incident and knew AKO and CJV did not feel safe. Their very definite and final position was articulated on three occasions and DGE was aware AKO's mental health was not good.

[61] I find in these circumstances more was required by DGE to discharge its obligations towards AKO and CJV. Once DGE was on notice they did not feel safe if QEU remained at work, they were entitled to expect their employer would take meaningful action to address their concerns, which could include consultation and updating them with new information including proposals to changes to the original plan. Instead, DGE did the very thing AKO and CJV had said would result in them leaving their employment.

[62] I am satisfied DGE's actions fell short of what a fair and reasonable employer could have done in the circumstances and these failures breached the duty of good faith and the implied duty not to seriously damage and destroy the trust and confidence inherent in an employment relationship. These breaches caused AKO and CJV to resign.

Health and safety breaches

[63] The IEAs between the parties provided explicit health and safety duties including the general duty to provide and maintain a safe work environment for employees and others in the workplace. There were also contractual and implied obligations on DGE to take reasonable and practicable steps to provide AKO and CJV with safe working conditions.

³ *Turk's Poultry Farm Ltd v Adkins* [1996] 1 ERNZ 34 (EmpC).

[64] The point DGE makes is that sufficient health and safety controls were in place to address the identified risks arising after the workplace assault. The station manager described the risk as being further endangerment to the parties so I take that to mean he had identified at least one risk which was of further conflict between QEU and AKO. This resulted in the instruction to QEU to stay at the other end of the farm and not to approach the cook house, AKO or his family.

[65] DGE also says it could not have been expected to respond to matters it was not aware of and suggest instead that AKO breached his good faith obligation to be communicative by not reporting important health and safety information. DGE is referring to the verbal incident the day before the assault and AKO's evidence he suffered a panic attack at work the day after the assault.

[66] It was not in dispute that the instruction to QEU to stay up the other end of the farm was ignored on at least one occasion, so it is likely this was insufficient to manage the risk of further contact with AKO and CJV. As a health and safety control, it relied on QEU following the instruction. On being informed it had been breached, the station manager could not point to any steps he took other than to speak to QEU and tell him not to do that again.

[67] It is submitted on behalf of AKO and CJV that DGE knew from the time of recruiting it was breaching its duty to provide a safe workplace. I do not accept the evidence was that clear, but at the time the instruction to QEU to stay away from them, there was sufficient information available to DGE to indicate a pattern of conduct by QEU towards AKO. These were the concerns AKO and CJV say they articulated to the station manager on more than once occasion when they set out their position that if QEU stayed they would go.

[68] There was also no discussion with AKO and CJV to elicit their views about workplace safety in light of the assault and before the instruction to have QEU stay away was decided on. It transpired that was the only measure put in place to ensure the workplace was safe in the aftermath of the assault. Given QEU did not comply with the instruction and no further steps were taken, I find it was insufficient in the circumstances of such a serious assault.

[69] Noting no employment investigation was to be undertaken and that AKO and CJV were not consulted, the full facts could not be known to DGE so it could not realistically have considered all risks arising or have known what was appropriate to put in place.

[70] Not providing an effective method to deal with a workplace hazard has also resulted in findings that an employer has failed to provide a safe workplace and this has resulted in a constructive dismissal.⁴

[71] I have found above the one health and safety measure in place (the instruction to stay away from one end of the farm) was insufficient in the circumstances. It follows there was a breach of the duty to take all reasonable and practicable steps to provide AKO and CJV with safe working conditions and to consult with them as to what a safe working environment might look like. I find that breach was also causative of their resignations.

Were the breaches so serious that resignation was reasonably foreseeable?

[72] I am satisfied AKO and CJV's resignations were caused by DGE breaching its duty of good faith and fair dealing towards them. The duty to provide a safe workplace was also breached.

[73] In these circumstances I accept their evidence that remaining in the workplace became untenable once it became evident DGE was unwilling to consider their position, to consult with them to seek their views or to deal with the assault. This amounts to breaches by DGE with the combination of both breaches (fair dealing and to provide a safe workplace) elevating the seriousness. The circumstances AKO and CJV found themselves in were so serious that it was reasonably foreseeable they would resign.

[74] I do not accept the submission from DGE that CJV's constructive dismissal claim must fail because she was not the victim of the assault and therefore her departure was not foreseeable. To the contrary, an unresolved, assault on a family member in her workplace, that is not going to be investigated or formally addressed by DGE, with QEU remaining in the workplace, with no consultation with AKO and CJV, is a situation in which it would be foreseeable

⁴ See for example *IUOW and Electric Power Board and*

CJV would leave due to unresolved concerns. Her concerns were both about her own safety and that of her family and both at home and at work. CJV's IEA also recorded that it was a requirement that the Station Cook reside at the property so she had limited options.

[75] Although I note after they resigned AKO and CJV agreed to stay for a longer period with no other safety measures in place other than the instruction to QEU to stay away, this came about because DGE declined CJV's request to leave immediately (and not work out her notice) so she could leave with her family and then Cyclone Gabrielle occurred. This was raised in submissions by DGE as evidence AKO and CJV considered the safety controls in place to be sufficient.

[76] I do not accept that submission. In considering the breaches of duty by DGE the focus is on the time the decisions were made about safety and the single control put in place. Cyclone Gabrielle was a needs must situation and agreeing to remain on the farm due to unforeseen events such as the cyclone do not equate to the actions of DGE being any less of a breach at the time those decisions were made. Arguably not releasing CJV to leave with her family in the circumstances was also a further example of a breach of the duty of fair dealing but this point was not raised as part of the claim.

[77] AKO and CJV have made out their claim for constructive dismissal.

Was the constructive dismissal justified?

[78] AKO and CJV were both entitled to feel safe in the workplace and their employer had both contractual and implied duties to provide a safe workplace. They were also entitled to have a serious assault in the workplace addressed appropriately by their employer, including adequate safety arrangements while both parties remained on the farm. The assault was not addressed, the safety measure was not adequate and there was no consultation with AKO and CJV about any of the steps DGE intended to take. They formed the view there was bias on the part of their employer towards the other employee and given the lack of consultation or provision of information about what DGE intended to do and was doing, this was a reasonable position for them to reach.

[79] Applying the test of justification in s 103A of the Act, on an objective basis, DGE's conduct at or about the time of the dismissal, given the serious nature of the workplace incident that had occurred, is not how a fair and reasonable employer could have acted in all the circumstances.

Remedies

Compensation

[80] AKO and CJV seek compensation for humiliation, loss of dignity and injury to feelings caused by their grievances. Their evidence was that as a consequence of DGE's actions and inactions, they both suffered stress and impact on their mental wellbeing. AKO gave evidence about the unfairness arising from how they were treated as opposed to how the other employee was treated. He felt unsafe because the assault was unprovoked which compounded his safety concerns. He lost trust in his employer to ensure he was safe. This had a direct impact on his mental health knowing QEU was also on the farm working and because he formed the view QEU's circumstances were given priority over his. Knowing the QEU remained on the farm, it appears that view was correct.

[81] CJV was unequivocal that she had communicated their position to the station manager on three occasions, that they felt so unsafe that if QEU stayed they would go. The impact on her ability to trust her employer once it did the one thing she had been saying would lead to them resigning caused her hurt and humiliation. She did not want to leave the farm or her job but she also did not want her husband to feel unsafe. They both had concerns for their school age children who lived on the farm with them.

[82] The evidence from family and friends was consistent with their evidence as to the impact on them caused in part by the fact of the assault but also their loss of trust in their employer to make decisions with their safety in mind or to genuinely support them and that flowed directly from how DGE chose to deal with the assault.

[83] DGE submitted correctly that compensation can only be awarded for the effect on the employee of the grievance⁵ and that the Authority cannot award compensation for mental harm from the assault because s 317(3) of the Accident

⁵ *Paykel v Ahlfeld* [1993] 1 ERNZ 334 at [342].

Compensation Act 2001 would act as a bar to that. AKO and CJV's evidence necessarily touched on the assault, but I have found above the reason for their resignation was DGE's actions and inactions in light of a serious assault in the workplace. This is distinct from the impact of the physical assault. The evidence suggested that but for the assault they would have stayed as they both loved their jobs and had they felt supported after the assault they would not have resigned.

[84] Given my findings above, considering the finding of unjustified dismissal and the stress and injury to feelings experienced by AKO from the failures by DGE to take sufficient steps after a serious workplace assault and the general range of awards in similar cases, I consider an appropriate award under s 123(1)(c)(i) of the Act to be within band two and in the amount of \$20,000.00.⁶

[85] I consider an appropriate award for CJV to be \$18,000.00. There was a corresponding impact on her in the workplace from DGE's failure to consult and the resulting perception of bias towards QEU compounded by workplace safety issues being identified but not adequately addressed in the context of a serious assault in the workplace.

Lost wages

[86] AKO and CJV sought 13 months lost wages, up until the date of the investigation meeting. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration. Their employment ended on 11 March 2023.

[87] DGE submitted AKO and CJV had obligations to mitigate their losses by seeking alternative employment and to establish this by producing evidence of loss of income and it should not be left to the Authority to speculate or guess citing *Allen v Transpacific Industries Group Ltd* in support of this.⁷

[88] AKO and CJV gave limited evidence of their situation up until the investigation meeting. They had a two-week planned holiday initially and AKO commenced new employment on from 3 April on a casual basis. His evidence was that he was not fit to go back to work straight away and needed a break to

⁶ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162] and

⁷ *Allen v Transpacific Industries Group Ltd* EmpC Auckland AC 20/09, 4 May 20089 at [48].

mentally recover. I note from the Inland Revenue (IR) records of earnings they both had new work from early April. There was no suggestion AKO would not have continued to be employed but for the incident with QEU.

[89] I accept reimbursement is appropriate in these circumstances where there has been an unjustified dismissal and the loss is a consequence of that. I was provided with IR records for the 16-week period up to the end of June 2023. With reference to *Maddigan v Director-General of Conservation*,⁸ I am satisfied it was reasonable to recommence work within several weeks and that direct evidence of the steps taken to find work was not required.⁹

[90] An award for four months is appropriate. While the assault itself was not attributable to DGE, it was clear DGE's failure to respond appropriately had a profound effect on AKO and CJV and extended the losses caused by grievances beyond the three-month time frame.

[91] Comparing AKO's income over the 16 weeks after his employment ended at DGE, with the income he received after dismissal I calculate his loss to be \$13,098.37.¹⁰ Comparing CJV's income over the same time period with the income she received after dismissal I calculate her loss to be \$12,094.17.¹¹

[92] Reimbursement for the loss of the benefit derived from having accommodation and food included in the employment package was also claimed but based on estimates for example of market rentals at that time. The value of "accommodation and keep" in the IEA was not broken down and was referred to as being for taxation purposes. In light of that there is insufficient evidence to make an order for loss of benefit.

Penalties

[93] Penalties were sought for breach of good faith and that action was commenced within 12 months.

[94] It was submitted that not responding to the assault in the workplace as a fair and reasonable employer could have in the circumstances and breaking the

⁸ *Maddigan v Director-General of Conservation*

⁹ *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28 at [67].

¹⁰ $16 \times \$948.02 = 15,168.32$. $15,168.32 - \$2,069.95 = \$13,098.37$.

¹¹ $16 \times \$1005.71 = \$16,091.36$. $16,091.36 - 3,997.19 = \$12,094.17$.

promise as to when QEU was leaving the farm were breaches of the IEAs and failures to act in good faith. It was also submitted the good faith breaches were deliberate, serious and sustained and intended to undermine the employment relationship.

[95] In relation to the breach of good faith egregious bad faith is not required under s 4A of the Act before a penalty can be awarded¹² and the Authority must be satisfied the failures were deliberate, serious and sustained, or that it was intended to undermine the employment relationship.¹³

[96] The combination of the lack of consultation, and failure to ensure the workplace was safe together with doing the one thing that AKO and CJV said would cause them to resign means that I conclude DGE's actions were intended to undermine the employment relationship with AKO. The telephone call with CJV making it known that DGE wanted to explore the option of her remaining employed if AKO resigned and the evidence that QEU remains on the farm makes it more likely than not that DGE acted intentionally.

[97] The maximum penalty against a company is \$20,000.00 and with two breaches the starting point would be \$40,000.00. I have had regard to the matters I am required to in s 133A of the Act in determining an appropriate penalty. The objects of the Act, including to support good faith behaviour and the involvement of DGE in the breach, the intentional nature of the breach and the significant and negative impact of it on AKO and CJV, and the need to deter future conduct of this sort are relevant in the circumstances of this case.

[98] I conclude the breach of good faith was intentional and there are no mitigating factors. I also weigh the issue of vulnerability after a workplace assault that was accepted as being serious and unacceptable by DGE but not addressed adequately. There was no relevant previous conduct for consideration. I am not aware of the financial situation of the company. I have considered other similar penalty awards in other cases. A fair penalty for two breaches is one globalised penalty of \$12,000.00, with \$2,000.00 payable AKO, \$2,000.00 payable to CJV, and the remainder payable to the Crown.

¹² *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179 at [60].

¹³ Employment Relations Act 2000, s4A.

[99] In relation to breach of contract under s134 of the Act for failing to provide a safe workplace, I consider there is considerable cross over with the conduct that led to the breach of good faith and to the award for compensation and accordingly I decline to award a separate penalty.

Contribution

[100] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. I have found above that DGE had enough information to know how AKO and CJV were feeling so this was not a situation where there was a failure to communicate important health and safety information. The second incident was known to the DGE at the time it put the health and safety control in place.

[101] The underlying reason for the dismissal was a serious assault in the workplace and the failures by DGE in addressing that situation is what led to AKO and CJV's dismissals. They have therefore not contributed to the personal grievance.

Non-publication

[102] An interim prohibiting publication of the name of other employee who was not a witness in the Authority's investigation was made. A subsequent application was made for permanent non-publication of QEU and the employers name on the basis that naming the employer could identify QEU.

[103] AKO and CJV did not oppose a permanent non-publication order for the other employee but did oppose the order extending to the employer's name.

[104] AKO and CJV both sought non-publication orders of their names and identifying details on the basis they have concerns for their safety due to the unresolved nature of the workplace incident. They were also concerned about future employment. They opposed the name of DGE being withheld. It was submitted on their behalf that the public interest in knowing about employers who have erred serves both educative and deterrence function. These are an important aspects of public interest and ones that are not displaced by the other employee's circumstances in this case.

[105] They also submit that having been successful, non-publication should be granted (as it is in the Tenancy Tribunal) to mitigate risks to their personal and professional lives if their names are published.

[106] The respondent did not oppose AKO and CJV application for non-publication.

[107] An order of non-publication, either interim or permanent, is a departure from the fundamental principle of open justice. The standard for departure has been described as a high one but the risk of harm to an individual has been accepted as a sound reason for the presumption of open justice to be displaced.

[108] The Court recently considered the test for granting non-publication orders in *MW v Spiga Limited* confirming the fundamental importance of the general rule of open justice unless there are sound reasons for departing from that rule. There must first be a reason to believe specific adverse consequences could “reasonably be expected to occur” and secondly the Authority must undertake a weighing exercise and consider whether those adverse consequences justify a departure from open justice in the circumstances of the case. A number of factors that may be relevant in the weighing exercise were set out for consideration.¹⁴

[109] It was submitted by DGE publicly naming QEU would cause reputational harm and stress and that was likely to cause significant emotional and psychological harm. This was alluded to in a general sense. No evidence or specific detail was provided to the Authority but I was invited to infer a level of seriousness. The fact QEU did not give evidence is a factor that strongly supports the making of a non-publication order.

[110] I was satisfied in the particular circumstances of this case that the presumption of open justice could be displaced in relation to QEU. They did not give evidence and I accept the adverse consequences referred to could reasonably be expected to occur should they be identified.

[111] I have extended the non-publication order to the name of DGE on the basis QEU remains employed and that is referred to in the determination. It has also been accepted that non-publication of additional information may be

¹⁴ *MW v Spiga Limited* [2024] NZEmpC 147 at [82] – [96].

appropriate if the publication of that information would undermine the original orders by providing other ways of identifying an individual and this is such a case.

[112] Given the unresolved issues and the nature of the workplace incident I accept AKO and CJV's evidence of the specific adverse consequences if their names were published and that these could reasonably be expected to occur. They gave honest evidence of the impact on them and of their ongoing concerns for their safety which I accept. I consider this outweighs the presumption of open justice in relation to publication of their names.

[113] Under clause 10 of schedule 2 of the Act non-publication orders are made in relation to both applicants (AKO and CJV), the employee who did not give evidence (QEU) and the employer (DGE).

Summary of orders

[114] DGE is ordered to pay AKO:

- (a) Compensation in the amount of \$20,000.00.
- (b) Lost wages in the amount of \$13,098.37.

[115] DGE is ordered to pay CJV:

- (a) Compensation in the amount of \$18,000.00.
- (b) Lost wages in the amount of \$12,094.17.

[116] A penalty is awarded against DGE in the amount of \$12,000.00 with \$2,000.00 payable to AKO and \$2,000.00 payable to CJV and the remainder payable to the Crown.

Costs

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

[118] If the parties are unable to resolve costs, and an Authority determination on costs is needed, AKO and CJV may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum DGE will then have 14 days to

lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[119] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁵

Sarah Kennedy-Martin
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1