

**Attention is drawn to an order prohibiting publication of parties' identification details.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 689  
3343620

BETWEEN

AXE  
Applicant

AND

QVM  
Respondent

Member of Authority: David G Beck

Representatives: Claudia Serra and Gemma Greville advocates for the Applicant  
Rachel Webster, counsel for the Respondent

Investigation Meeting: 20 and 21 August 2025

Submissions Received: 4 and 17 September 2025 from the Applicant  
11 September 2025 from the Respondent

Date of Determination: 29 October 2025

---

**DETERMINATION OF THE AUTHORITY**

---

**Prohibition from publication**

[1] Since the Authority investigation meeting of 20 and 21 August 2025, an interim non-publication order has been in place pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (the Act) preventing identification of the parties. The applicant has made submissions that this order be made permanent. The Respondent opposes the non-publication order.

[2] To assess the application for continued non-publication I need to be satisfied of a sound basis for the exercise of the Authority’s discretion as non-publication may depart from the important principle of open justice.

[3] The full Employment Court in *MW v Spiga Ltd*<sup>1</sup> held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirms the Supreme Court decision of *Erceg v Erceg*.<sup>2</sup> The majority in *Spiga* set out a general twofold test for assessing applications for non-publication, i.e.:

- (1) Firstly, there must be “reason to believe that the specific adverse consequences could reasonably be expected to occur.”
- (2) Secondly, the “Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.” The Court said this part is a weighing exercise and that equity and good conscience may be involved.<sup>3</sup>

[4] The applicant seeks ongoing non-publication asserting there is a significant and demonstrable risk of hardship to the applicant’s professional reputation, future employability, and personal privacy as counterweight to any public interest in their identification. The order is sought to protect the applicant’s reputation and future career interests should they be associated with disputed conduct issues the determination has to traverse that includes reference to private health matters.

[5] The applicant contends such orders are becoming more commonplace where it is not in the public interest to name an applicant. Overall, the harm associated with publication was seen as likely to be exacerbated due to the nature of the former employer’s business and the prominence of the business in the community - factors seen as potentially impacting the applicant’s future employability.

[6] The applicant acknowledges that the respondent may wish to openly discuss the determination once published and is of the belief that naming the respondent will allow this. Further, the applicant is not opposed to the facts of the case being published only their

---

<sup>1</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

<sup>3</sup> Above n 1 at [88] and [89].

identity. However, they contend that the negative impact of publication is not speculative but may prove an impediment to future employment.

[7] In contrast, the respondent's counsel opposed the order being made suggesting granting non-publication of the parties' identity would offend against the principle of open justice and the threshold to displace this is high. The respondent suggests the applicant's concerns are the ordinary consequence of litigation and nothing specific has been established as extraordinary or compelling enough to justify suppression. For example: on the privacy of health-related matters the respondent suggests the dispute involves a routine challenge to a medical certificate for sick leave sought that would not involve the disclosure of personal medical information that may justify suppression on a privacy basis (*Spiga* was cited as a comparator that involved more delicate health issues). The notion of the impact in a small community was also rejected by the respondent as being contrary to the public interest principle regardless of location.

[8] The respondent also suggests the applicant by making a police complaint and an application for hardship to withdraw retirement savings early, placed some aspects of the dispute in the public domain and thus the respondent may be exposed to reputational risk should a "one-sided narrative" be publicly circulated. Further, the respondent suggests publication will provide important context and clarity to the disputed issues that the respondent suspects have already been to a limited extent, discussed in the community.

[9] The respondent seeks to avoid speculation and potential reputational damage and asserts public interest is engaged on both sides and it would be inequitable to suppress one party's identity while naming the other. However, the submission also noted the respondent has "a direct reputational interest in publication".

### **Assessment**

[10] While I am not wholly convinced that the suggested adverse consequences highlighted could reasonably be expected as there was some evidence that the applicant had secured alternative employment and, I am not convinced of any compelling need to protect the applicant's privacy on the potential disclosure of health related matters, I nevertheless am not convinced of a compelling case of public interest in the disputed matter is made out or any

danger to the respondent's reputation established. The fact is this relatively young applicant was not dismissed for any form of misconduct nor were they facing any investigation of anything at the time of their resignation. The applicant chose to leave the respondent's employ and normally that would be of no public interest.

[11] On the respondent's submissions, I struggle to reconcile the idea that naming them (which they vigorously sought both during the investigation meeting and in submissions) and not the applicant, creates unfairness. If they wish to generally have their perspective on the dispute publicly aired and impliedly vindicated, naming the applicant on the facts, is not necessary. I was not persuaded by the suggestion that the applicant has already made public certain facts in dispute – a police complaint is by its nature confidential and so is an application to withdraw superannuation funds.

[12] However, I have resolved to allow any challenge by the respondent to my decision. I will also not specifically highlight certain facts that may identify the parties by location or type of business in the following determination.

### **Finding on application for non-publication**

[13] I am convinced an order of non-publication of the applicant's identity but not the respondent identity is appropriate. However, given the respondent considers this approach to be inequitable and has a right to challenge this decision and has impliedly signalled they may do so, I order continued interim non-publication of the applicant and respondent's identities as not doing so would render any challenge moot.

### **Order**

[14] Pursuant to Clause 10 of schedule 2 of the Act, I grant a continued interim non-publication order prohibiting the publication of the identity of both the parties to this employment relationship problem and use randomly identified letters to denote the parties.

[15] The terms of the continuing interim order are:

- (a) This interim order is to stay in place for 28 days commencing from the day after the date of this determination, to allow the respondent to file a challenge to this aspect of my determination if they so wish.
- (b) If the respondent files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.
- (c) If the respondent does not file a challenge to the interim non-publication order in this determination, then the interim order will lapse and be replaced by a continuing order that prevents only the publication of the applicant's identity.
- (d) In the interim, the parties are identified by randomly generated letters. The Applicant as AXE and the Respondent as QVM.

[16] I also use designated positions to denote those who gave evidence during the investigation meeting and, I have redacted parts of evidence where specific detail is unnecessary.

### **Employment relationship problem**

[17] AXE was employed by QVM in their workshop from January 2021 until 4 March 2024 when the employment ended in disputed circumstances.

[18] AXE has claimed they were unjustifiably dismissed in a constructive manner. AXE's advocate in submissions, has placed reliance upon the third limb of categories of potential constructive dismissal identified by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* (a breach of duty by the employer leads an employee to resign).<sup>4</sup>

---

<sup>4</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

[19] AXE also claimed they were the subject of employer actions and omissions that caused them to be disadvantaged during the period of employment. These are said to include:

- A failure on specified occasions to provide paid sick leave entitlements.
- The creation of a hostile working environment and failure to constructively resolve identified concerns.
- A failure to pay appropriate compensation for availability in on-call and/or standby situations.

[20] QVM says that AXE's resignation did not amount to a constructive dismissal as they understood AXE resigned voluntarily on notice to pursue personal business interests. Any breach of resolution obligations was denied as they claim AXE at the time of the dismissal, had access to and was using dispute resolution mechanisms.

[21] QVM contend that no breaches of duties that could amount to unjustified disadvantages occurred and, assert that no statutory or employment agreement entitlements are at issue. On the issue of the lack of a statutorily compliant availability provision, QVM say they operated a voluntary on call roster involving no compulsion.

### **The Authority's investigation**

[22] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence. I, likewise, have carefully considered the submissions received from both parties and refer to them where appropriate and relevant.

[23] AXE gave evidence at the investigation meeting and for QVM I heard from the company's sole Director; General Manager; Workshop Manager and Contracts Manager.

### **Issues**

[24] The Authority must determine the following issues to resolve the unjustified dismissal claim:

- (a) Did QVM engage in actions or omissions that breached any obligations owed to AXE?
- (b) Was AXE dismissed and if so, was the dismissal justified?
- (c) By having an ‘on-call’ roster, were QVM operating an availability provision inconsistent with the provisions of s 67D of the Act?
- (d) If any of AXE’s claims are established what remedies should follow?
- (e) If AXE is successful in all or any element of their claims should the Authority reduce any remedies granted because of contributory conduct?
- (f) How costs are to be dealt with.

*The dismissal*

[25] AXE says they resigned in response to breaches of duty by QVM and that the resignation is therefore a constructive dismissal.

[26] To determine the predominant constructive dismissal claim, established case law <sup>5</sup> suggests the Authority must address:

- (a) Were there any breaches of duties owed by QVM?
- (b) Was any breach of duty sufficiently serious that it was reasonably foreseeable that AXE might resign in response; and
- (c) Did AXE resign in response to any breach of duty?

*Justification*

[27] If I find that QVM constructively dismissed AXE, I then have to consider whether the dismissal was justified. This would shift the onus to QVM to demonstrate their actions or omissions were justified and in accord with s 103A of the Act (Justification test) and consistent with good faith obligations.

---

<sup>5</sup> *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

## **Background events pertaining to the alleged breaches of duty**

[28] AXE served a general engineering apprenticeship and worked in a previous allied role for 6 years before commencing employment with QVM, in January 2021. AXE recalled initially discussing terms of engagement with the Workshop Manager and says they made clear a preference to work only 40 hours per week so they could pursue other interests. However, AXE acknowledged the formal job offer documentation came from the General Manager and they did not raise any issue about how the working hours were expressed in the employment agreement provided and then agreed upon.

[29] The role was permanent and subject of an individual employment agreement. There was no job description.

[30] AXE's role was described as reporting to the engineering Workshop Manager. The relevant agreement clauses impacting on this employment relationship problem are:

### **6. HOURS OF WORK**

6.1 The Employee's normal hours of work each week shall be 40 hours per week, between the hours of 6:00 am and 6:00 pm, Monday to Saturday. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties.

[31] In addition, the hours of work clause guaranteed 40 hours pay per week regardless of available work, provided the worker attended the workplace. The remuneration section expressed pay at an hourly rate (initially \$29 and then progressively rising to \$35.62 at the time the employment ended) for all hours including overtime. It had no provision concerning availability to respond to work outside normal working hours and no 'on call' provision.

[32] It emerged the expectation of QVM workshop employees, despite the hours of work clause above, was that they would work 50 hours per week, 7 am – 5:30 pm with a 30-minute lunch break, Monday to Friday.

[33] The employment agreement preamble detailed the employer should generally: “Act as a good Employer in all dealings with the Employee”, act in good faith and provide a “safe and healthy working environment”.

[34] For the worker the preamble noted they must: “Comply with all reasonable and lawful instructions provided to them by the Employer” and expressly incorporated company policies by stating at clause 1.3 v: “The employee shall”:

Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time ....

[35] A Code of Conduct was provided with the employment agreement and at clause 2.7 it stated:

#### 2.7 Absence

Employees who cannot attend work because of personal illness or emergency are to notify their Manager or Supervisor as soon as possible on the day of absence. When the employee returns to work absent time should be either recorded on their timesheet or on a leave application form. All other absences must have prior approval in writing from the Manager. A medical certificate may be required at the Company’s discretion.

#### *Emerging issues*

[36] QVM’s Workshop Manager says they had no issues with AXE’s progression in the job and their technical skills. In early August 2022, the Workshop Manager viewed AXE as capable enough to work without supervision and placed AXE by agreement on an “on – call” roster to service client requirements outside normal working hours. However, the Workshop Manager says there were ongoing issues with AXE’s attendance and timekeeping. The Workshop Manager recalled AXE’s initial hours were the same as others in the workshop, being:

- a) Monday to Thursday shifts at 7:am and finishing at 5:30pm.
- b) Friday shift beginning at 7:am and finishing at 5:00pm.

[37] The Workshop Manager recalled several informal discussions with AXE toward the end of 2021 about AXE arriving 10 – 20 minutes late in the morning for a 7 am start, often without notification. The Workshop Manager says they tried to counsel AXE around sleep

issues and use of energy drinks and eventually around June 2022, it was verbally agreed AXE could start at 7:30 am. AXE says that this was due to fatigue issues of the long working hours. The Workshop Manager rejected this analysis noting they had many conversations about timekeeping and was aware that AXE was spending time on a personal engineering project outside work hours. The Workshop Manager says the earlier start time still did not resolve timekeeping matters and despite them adopting a flexible approach they got the impression that AXE was not reciprocating by making up for lateness at the end of the day. The Workshop Manager says they also had to informally counsel AXE for recording incorrect start times on timesheets but acknowledged no formal disciplinary issue arose.

[38] In addition, the Workshop Manager says AXE had a poor overall attendance record and would regularly be absent on a Friday and a Monday on sick leave and that if they were busy this placed a strain on the small workshop team. The Workshop Manager described AXE as a 'good engineer' despite frustrating attendance issues that they in hindsight, acknowledge were not formally managed or documented.

#### *Change of working hours*

[39] Evidence showed AXE approached the General Manager in April 2023, seeking to alter working hours still believing they had only agreed to a 40-hour working week. A 24 April diary entry of the General Manager recorded the request was declined due to a shortage of workshop staff at the time.

[40] AXE followed up with a letter of 1 May 2023, to the General Manager putting a formal proposition they work a nine-day fortnight (taking Friday off every second week). The letter alluded to agreed participation in the on-call roster further restricting available personal time and explained they were seeking time away from work at QVM to pursue a personal project for ongoing career prospects.

[41] The General Manager's evidence was the above request was initially declined as the workshop was too busy, but they say they were open to reconsidering the situation. AXE then put a further proposal in October, that they work 40 hours, Monday to Thursday (7am - 5:30pm). This was agreed and took effect from 9 October 2023. On 24 January 2024, AXE

retrospectively endorsed the change by initialling a change to clause 6.1 of the employment agreement to confirm the working week as Monday to Thursday. Evidence also disclosed in the interim, AXE registered a company on 22 December 2023 and is described as sole director/shareholder. AXE says the company is not yet commercially trading and is being used for a developmental project.

*Concerns expressed by QVM about sick leave usage*

[42] In a “Staff News Bulletin” of February 2022, the QVM Director indicated:

There are still individuals running out of sick leave and annual leave regularly, while there are many staff who never get sick. Those with high sick leave will be approached individually and privately. Please remember sick leave should not be treated as annual leave. It is there when you and your family needs it. This Company has always provided additional support to those in need who have a background of using their sick leave carefully.

[43] In the next edition (March) of the staff news bulletin under a heading “Sick Leave”, the Director announced that they:

... have a new policy that requires “employees who apply for sick leave while within their resignation notice period, will be required to provide a medical certificate from a Registered Medical Practitioner”. The conditions of the Holidays Act will apply regarding the way that the sick leave is treated.

[44] By early 2024, the Director indicated that sick leave usage was still at issue and an avowedly tougher stance was adopted. In the February 2024 staff news bulletin over a heading dealing with health and safety performance indicators, the Director indicated the new approach as:

All sick leave is now being reviewed at the highest level of the company, and some will be challenged or declined based on sick leave history and individual case merit.

[45] The above statement operationally meant the Director put in place a system that they personally approved or declined the payment of sick leave entitlements.

*Approval of sick leave dispute*

[46] AXE says their first knowledge of accessing paid sick leave being a problem was in early 2024, when co-workers apprised them of having paid sick leave declined and AXE

was aware of the Director's statement above. AXE says their unease was confirmed when they texted the Workshop Manager before their shift starting to say they had a migraine headache and took a day off sick on Monday 29 January. In AXE's next pay slip the day was marked unpaid with a note that said:

Please note as per [The Director's] instruction your sick leave for 29/1 has been changed to unpaidleave [sic]. Please contact [the Director] if you wish to discuss this further.

[47] AXE did not immediately contact the Director but recalled a workshop staff meeting with the General Manager on or around 14 February, where AXE raised a concern about the sick leave approval policy potentially causing health and safety issues should people feel they could not access paid sick leave and, being told it was the Director's decision and nothing could be done. The General Manager's recall of the meeting was that AXE did raise the sick leave issue and says AXE generally challenged the legality of the Director's statement. The General Manager says in recalling the informal meeting, his response was QVM would adhere to the Holidays Act and if paid sick leave was declined a reason or contact point would be provided to discuss the decision and that the workers impacted should follow instructions detailed on payslips.

[48] The General Manager says they discussed AXE's concern (and others) about the 29 January sick leave day not being paid with the Director and, was told they had spoken to AXE about a pattern of absences as the reason for declining the paid sick leave. The Director had said AXE was not happy with the decision, but it remained unaltered.

[49] AXE sought advice from the Citizens Advice Bureau and disclosed a letter of 16 February that provided website links on the Holidays Act and mediation as a suggested dispute resolution option. The letter confirms AXE had also discussed concerns about the wider work environment at QVM and the letter writer noted AXE had disclosed a desire to resign and find another job.

[50] AXE then called the Director on 14 February, to discuss not being paid on 29 January. Before the call AXE contacted QVM's in house payroll administrator and, was told they had 6 days available paid sick leave. AXE says up until this point they had had very little interaction with the Director.

[51] The content and tone of the call of 14 February was disputed. AXE says the Director called back and was immediately hostile wanting to know how their cell-phone number had been obtained and when advised they had contacted payroll, AXE says the Director claimed sick leave was discretionary, not a right, and launched into an abusive rant, calling employees “thieving cunts” and blaming us for costing the company thousands. AXE says when they explained their perspective, the Director said he would not put up with threatening behaviour and said AXE could take them to Court if they did not like the decision. AXE says they hung up the call and were shocked by the reaction.

[52] The Director says they merely apprised AXE of the reasoning behind the new approach to sick leave approvals and alluded to AXE’s poor attendance record and impact on co-workers. The Director recalled telling AXE he had not provided evidence of illness as they were now required to do so (for any claim of sick leave) and denied the abusive language used. The Director conceded they did swear but was otherwise professional in the communication and that swearing was commonplace communication but says they did not and never used, the ‘C’ word or tolerated it from others.

[53] AXE then met with the General Manager after the call and related concern about the conversation and the impact upon them. AXE says the General Manager was unhelpful, simply noting it was the Director’s prerogative. The General Manager recalled AXE saying they were ‘not in a good space’ and says they suggested AXE get medical help and if not able to attend work they should supply a medical certificate. AXE left work after the meeting with the General Manager and attended a GP appointment that they say was to discuss a non-work-related injury and the stress of the conversation with the Director. This resulted in AXE providing a medical certificate covering the next three days. AXE also says they sought early resolution assistance from the Mediation Service to try and resolve the sick leave dispute, but the following events overtook this.

[54] Upon returning to work on 26 February, AXE says the payroll administrator advised the Director had not yet decided whether they would be paid for their recent absence, so AXE resolved to meet with the Director. AXE approached the Director on Wednesday 28 February, at around 10 am at QVM’s local office. As they approached the office AXE noticed the Director was talking to another worker (the Contracts Manager) and had just left

an office and proceeded toward a corridor T intersection where AXE was positioned. AXE stopped the Director to discuss their sick leave concerns. AXE covertly recorded the exchange saying given the past aggressive comments they needed a record of the interchange. The Authority was provided the recording and an agreed transcript of the short exchange (just over a minute) it reads as follows:

How's it going?

[Good]

Just wondering what's happening with pay this week.

You're not getting paid.

Not getting paid?

Nope

At all?

And I'm in a meeting and I'm already late.

So I'm not getting paid at all?

You're not getting paid for those sick days no.

Right.

Right – y – you know that's illegal don't ya?

No. What you're doing is illegal.

No.

I'm not standing here having an argument with you now, you've just hunted me down you've seen me come in and you've come over here, that's wrong to start with. You want to talk to me, make a fucking appointment. I'll come and see you when I've finished with my meeting. Piss off.

[55] The interchange was witnessed by the Contracts Manager who says the Director then inappropriately pushed past AXE and continued down the corridor. AXE then walked off and the Contracts Manager although conceding there was unacceptable physical contact did not check to see if AXE was ok.

[56] The Contracts Manager recalled the Director then instructed they write out what had occurred and give a statement to the General Manager. The Contracts Manager complied with this request shortly after the exchange, describing in their statement an “incident” in the office corridor. They described ending the discussion with the Director who left the room first to be “confronted” by AXE in the middle of the corridor. They described a brief discussion (omitting any detail of such) and then the Director “clearly in a hurry and brushed [AXE] aside to get past. Both appeared annoyed but no yelling or screaming”. The Contracts Manager was not at the time questioned further about their statement.

[57] The Director later that day (28 February), typed up their version of the interchange in a file note timed at 12:30 pm. The note largely followed the agreed transcript except the Director claimed after the initial exchange and then telling AXE they had to set up an appointment, AXE “continued to argue with me and was blocking my way. So, I pushed [AXE] out the way and said: “Fuck off I will see you after the meeting”.

[58] The Director’s file note says after the meeting they went to the workshop at 11:45 am to find AXE and was told (by the Workshop Manager) AXE had left saying they were going to see their lawyer and it was unclear if AXE was coming back or not.

[59] I listened to the provided recording of the 28 February incident and note the transcript is accurate. The tone of both parties is terse, and the Director was abrupt, but no raised voices were used. However, the Director used firm language and gave no indication their decision to not pay AXE’s sick leave was up for debate and the Director appears agitated toward the end of the conversation - firmly telling AXE to “piss off” with a slightly raised voice. I do, however, note the Director told AXE they would “come and see you” after finishing the meeting they had scheduled. The latter disclosed the Director was intending to discuss the matter further with AXE and would seek them out.

[60] Objectively, given the power imbalance between the parties and the language used by the Director and the pushing AXE aside, I find it was understandable AXE would be shaken by the exchange. In giving evidence, the Director claimed they had an ‘open door’ policy and were approachable, but they contradictorily appeared affronted by AXE turning up at the office in dirty overalls and not having made a prior appointment. The Contracts

Manager also described the Director who they recalled meeting afterwards later in the day, as being “annoyed that [AXE] had instigated and aggravated the situation”. Immediately after the incident, the Contracts Manager says AXE seemed “frustrated”.

### **The aftermath**

[61] The Workshop Manager says on 28 February AXE returned to the workshop around 10:20 am and appeared “highly agitated, visibly upset, and loudly talking over people”. The Workshop Manager then recalled AXE saying something along the lines of they had had enough were not coming back and were off to consult a lawyer. The Workshop Manager recalled asking AXE for keys and other company property but not receiving the keys. The Workshop Manager says they were unaware of the nature of the dispute until the General Manager told them later that AXE had gone home about a sick leave issue. The Workshop Manager recalled the Director arriving at around 11:45 am and advising them AXE had left saying they were going to see a lawyer.

[62] AXE in contrast, says they were very upset by the interchange and after returning to the workshop and apprising another worker of what had happened, they had a brief conversation with the Workshop Manager, packed up their tools and left.

[63] AXE then visited a local police station, and a disclosed NZ Police acknowledgment form records the date of 28 February and the incident being reported by AXE at 11:06 am. AXE was provided with a case file number but says they did not follow the matter up with the police.

[64] AXE then called the General Manager at around 1:30 pm and related what had happened. The parties had a different recollection of this call. AXE says when they detailed what had happened in the interchange with the Director, no support was offered or any real response. The General Manager says AXE seemed calm and related they had been assaulted and had laid a complaint with the local police (AXE accepted this was so) and said they would not return to work until they obtained legal advice. The General Manager suggested AXE seemed to feel because of the treatment by the Director, returning to work was the last thing they were considering. AXE says they backgrounded the issue of paid sick leave being

declined and the incident earlier that day (describing being “physically shoved”) and suggested the experience had been belittling and disrespectful of them.

*AXE details employment relationship problem*

[65] AXE says they then resolved to detail concerns to the General Manager to ensure they were ‘on the record’. AXE emailed the General Manager at 3:44 pm on 28 February. The email first thanked the General Manager for taking their earlier call then related they were “extremely shaken and bewildered” by the encounter with the Director and after suggesting the sick leave issue had been live during the previous week, they described the day’s incident as an aggravating factor. AXE then detailed the highlights of their recollection of the 20 February call from the Director and their reasoning for not paying sick leave, referring (in summary) to:

- The “Thieving cunts” comment.
- The suggestion we are using sick leave as an extension of annual leave.
- Habitual sick leave is at issue.
- Sick leave is for broken bones.
- Sick leave is not a right, it is discretionary.

[66] The email referred to AXE having discussed on call obligations, saying “I did that as a favour to the company despite it not being in my contract” and being told by the Director to “Fuck off” if they did not like what the Director told them to do. AXE then detailed what sick leave they thought was outstanding as not paid despite latterly providing a medical certificate.

[67] AXE then summarised concerns and stated:

I will remain away from work for the remainder of the week in order to reconcile what has happened and consider my options, one of which is resigning.

Once I have made a decision I will let you know.

[68] AXE provided the Authority with proof of their contact with the Mediation Service's early resolution service on the morning of 29 February and then at 1:30 pm an email to QVM's General Manager seeking a response.

[69] I note AXE did not at this time disclose the existence of the recording of the 28 February incident (not disclosing the recording until 16 December 2024 after making an application to the Authority that referenced it).

*Initial QVM response*

[70] The General Manager says they were otherwise pre-occupied at work and responded at 5:46 pm, suggesting they would respond by close of business on Friday 1 March. The General Manager's evidence was QVM do not have a human resources department, and they dealt with HR issues (in consultation with an in - house legal counsel and the Director), by responding with an emailed letter of 1 March. The letter is headed "Alleged Employment Relationship Problems" and is noted as a response to AXE's 28 February email. The letter commences with a somewhat obtuse suggestion the writer was unaware that AXE was seeking a response to the concerns raised before setting out what QVM perceived the issues to be, i.e. (in summary and in the order presented):

- QVM's refusal to pay AXE for sick leave on two occasions.
- On call work obligations.
- Utilisation of AXE's sick leave balance.
- Physical encounter with [the Director].

[71] The letter under headings following the above themes, then proceeded to contest AXE's allegations. This consisted of first claiming QVM understood its legal obligations where the Holidays Act "allows Employers to challenge some aspects of sick leave" describing this as where QVM "do not consider the employee is actually sick, then they will decline the application for sick leave".

[72] The letter then proceeded to suggest QVM had in the alternative, granted leave without pay but AXE could also apply for annual leave to cover the declined sick leave. The 'on call' issue was categorised as AXE agreeing to be part of a team who undertook and

were appropriately compensated, for sharing an additional task. The utilisation of sick leave and its purpose was then described, and it was noted if AXE had been declined sick leave it was because QVM “do not accept that you have applied to use sick leave for the purpose that it is issued”.

[73] The: “Physical encounter” with the Director was then described as not being witnessed by the letter writer but acknowledged as AXE describing it as an assault but given the matter was before the police, QVM was “unable to discuss the event and suggest the Police be allowed to complete their investigation without interference”.

[74] The letter then under a heading: “Resolving employment relationship problems” stated it was essential matters be resolved “or alternatively agree to go our separate ways”. Reference was then made to AXE’s employment agreement containing employment problem resolution provisions and AXE was asked to “consider the clause and define your preferred option”.

[75] The letter finished by noting AXE had described being “shaken, stressed and exhausted” and QVM encouraged AXE to seek support from a doctor. No offer of assistance from QVM was provided.

[76] The General Manager’s evidence at the investigation meeting was while the allegation of assault was “very serious” they initially felt the best thing to do was give AXE some space to “recover from the event” and time to “reconcile” their position. The option of AXE taking annual leave was portrayed as a solution while they worked through the issues and that AXE should nominate a dispute resolution option.

[77] The General Manager also noted AXE had already indicated they had been to the police and QVM was expecting contact from them. The General Manager then explained physical assault allegations were “not unheard of in our industry” and when advised of police involvement they usually send the parties home to cool down and then talk to both parties the next day to gain an understanding of what lead up to an incident. The General Manager says internal disciplinary investigations had been suspended in the past pending the outcome of a police investigation.

[78] The General Manager noted the police did not make any subsequent contact with QVM and they did not contact the police, suggesting AXE's resignation three days later did not give them time to contact the police or continue the investigation they had incidentally already started.

### **Resignation and notice period dispute**

[79] In the interim, by email of 4 March 2024 at 3 pm, in response to the above letter, AXE tendered a resignation on two weeks' notice identifying a last working day as 18 March. AXE in the email, described the General Manager's response as not directed at supporting them and noted: "You not being prepared to look into the assault by [the Director] or even comment on it is washing your hands of the matter".

[80] The General Manager responded at 5:25 pm the same day, suggesting it may be best for AXE's health that they do not return to the workplace and if they were willing to give up their notice period AXE could finish on 28 February with QVM agreeing not to enforce the notice period. There was no suggestion to AXE they reconsider their decision to resign and no indication the alleged assault was already under investigation.

[81] AXE by email of 7 pm on 4 March, indicated they had gone to their GP that day and were providing an attached medical certificate for the next two weeks.

[82] In response by letter of 6 March, the General Manager signalled QVM "cannot accept your resignation with a notice period of 2 weeks sick leave" and stated QVM "will only accept your resignation without notice". Further the General Manager indicated:

As of 5 pm 4 March your employment with [QVM] will cease. We accept your inability to work your notice period and agree not to enforce a deduction in-lieu of notice.

[83] I find that the above response was an unjustified act that brought the employment relationship to an end during the notice period.

[84] On 7 March by way of a letter from their advocate, AXE raised a personal grievance alleging broadly that they had been constructively dismissed.

[85] The parties then attended a mediation, but the matter remained unresolved and on 3 December 2024, AXE made an application to the Authority.

### **Assessment of whether breaches of duty have been established**

[86] The first issue is whether QVM acted in a fair and reasonable manner, including regarding statutory provisions, pertaining to their concern about AXE's ongoing use of sick leave. A central issue was the QVM Director's belief that withholding or challenging paid sick leave on suspicion that it is being inappropriately used, was a policy consistent with the provisions of the Holidays Act. This also involves a question of the reasonableness of the Director latterly stating a medical certificate be provided for all AXE's sick leave absences regardless of duration.

[87] The first observation I make, is in managing concerns about AXE's sick leave usage, QVM did not adopt a formal progressive warning approach that would normally be expected in such situations. There was limited evidence without documentation that AXE had been counselled on several occasions about lateness and sick leave usage. However, the former concern had led to a change in working days and agreed start times which objectively showed QVM to be flexible in accommodating AXE.

#### *The relevant Holidays Act provisions*

[88] In submissions, QVM asserted that their actions in declining payment of sick leave were a justified application of a lawful approach described as a "proactive sick leave verification policy". In examining this premise, I must have regard to s 68 of the Holidays Act 2003 enabling an employer to require proof of sickness for an initial absence spanning three consecutive days but only by first informing the employee as early as possible, that proof is required and by agreeing to pay for obtaining the proof (medical certificate).<sup>6</sup>

[89] There was no provision in AXE's employment agreement that allowed QVM to depart from the permitted statutory framework and despite claiming their policy was not unreasonable (essentially giving QVM's Director the right to challenge sick leave requests at their discretion) it in my view, fatally did not specifically include an indication QVM

---

<sup>6</sup> Holidays Act 2003, s 68(1A).

would reimburse the cost of the medical certificate.<sup>7</sup> QVM advanced a submission that acknowledged this omission but made the point it was a minimum entitlement that could not be contracted out of and that AXE was aware of that entitlement. I find that it could equally be stated that QVM knew of the requirement that if they asked for a medical certificate for an absence of under three days they were required to pay for the medical certificate and the worker should not be put in a position of having to try and enforce their own statutory entitlement. The QVM submission is disingenuous.

[90] Objectively, I find the introduced policy or better described series of edicts, of withholding payment of a sick leave entitlement even where a medical certificate is provided and, then requiring the worker to challenge the decision is not in accord with the Holidays Act and essentially is a harsh and oppressive approach. I note, the Employment Court's then Chief Judge, in *Harrison v Tuckers Wool Processors Ltd* considered a similar provision contained in a collective contract allowing the employer to decline to accept a medical certificate, to be harsh and oppressive and struck the clause out.<sup>8</sup>

[91] Here QVM go a step beyond by them simply reserving a right to decline to pay the sick leave regardless of any proof being sought and even when proof was provided, QVM's Director imposed their decision based on the spurious ground that because AXE had a past record of utilising all their sick leave entitlement, it must not be genuine. I also note in the latter sick leave request that AXE made during their notice period, no regard was had to the likelihood that a stressor was identified as the actions of the QVM Director.

[92] I do accept that the current statutory provision (introduced in 2010), is more permissive for an employer but consider QVM's approach went beyond that what is permitted. I do note s 68(2) of the Holidays Act contemplates an "agreement" can be formed to allow provision of a medical certificate to support beyond entitlement sick leave but no such agreement was apparent here and AXE had available unused sick leave at the time of the dispute.

---

<sup>7</sup> See *Seon v Sungsoo Hong & Hae Kyung Um Partnership t/a Tokyo Express* [2018] NZERA 115 that found the employers misrepresentation of s 68 of the Holidays Act provisions constituted an employer breach of the duty of fair treatment owed to the worker involved.

<sup>8</sup> *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418.

## **Finding**

[93] In concluding QVM's approach was harsh and oppressive and not in accord with the Holidays Act, I acknowledge an employer is in a very difficult position when trying to control excessive sick leave usage and the pattern of AXE's usage did raise some legitimate questions. However, QVM used a blunt approach that I have found lacks statutory credibility and was also not objectively the act of a fair and reasonable employer. A fair and reasonable employer could have taken a formal approach of setting out their concerns in writing, meeting to discuss concerns and then monitoring sick leave usage on an ongoing basis. This could in some legitimate circumstances have led to the use of progressive warnings. I observe in this situation QVM appear to have established AXE's pattern of absences as being of legitimate concern.

[94] I also note the impact of withholding a paid sick leave entitlement had a significant impact on AXE's ability to meet ongoing living expenses. Once the dispute was brought to QVM's attention they did little to nothing to alleviate this situation in a timely fashion.

### *AXE challenging their paid sick leave entitlement being declined*

[95] Related to the above finding is the second broad issue of how the QVM Director handled communication with AXE when they sought to engage on the sick leave policy as instructed to do so, and the discourse around the decision to withhold the payment of sick leave AXE had used.

[96] From the conflicting evidence of the 14 February phone exchange between AXE and QVM's Director, I find it more likely than not, based on the character of later exchanges and the Director's firm belief in the correctness of their view of the Holidays Act (reiterated during the investigation meeting), that the Director sought to justify their policy and its application to AXE, in a significantly robust and colourful manner. The fact was, after the call the matter remained unresolved and the QVM Director then took an unaltered approach when they declined AXE's second period of sick leave. This inevitably led to the 28 February incident.

[97] I find that while AXE approached the Director on 28 February without an appointment, the discourse AXE engaged in (from listening to the recording) was not confrontational. I, however, find the Director was objectively and unnecessarily hostile and curt with AXE and the Director then pushed past AXE in an objectively aggressive manner while using directed abusive language. The Director thereafter took no steps to apologise for this behaviour.

[98] I have carefully considered that AXE surreptitiously recording the exchange without the Director's consent and that this could be regarded as not an act of good faith or worse, an attempt to 'set up' the Director but in the circumstances reject that analysis. While not ideal and it could have been avoided if AXE had had a more formal meeting with a support person present. AXE's decision to record the exchange was understandable given the tenor of the previous telephone conversation and the firmness of the Director's approach. I also note that the Director's policy expressing their intention to 'challenge' workers taking sick leave thus encouraged the approach being made by AXE and objectively there was an imbalance of power in requiring such a process be used merely to access a statutory entitlement.

[99] I reiterate, on carefully listening to the recording, I also reject any suggestion AXE engaged in provocation or adopted a confrontational approach. The Director was clearly impatient during the exchange and firm in their stance on declining to pay a sick leave entitlement. There was nothing to suggest (including from the Director's comments made during the investigation meeting) that this stance would have changed had AXE remained in the workplace and further engaged with the Director later in the morning of 28 February.

[100] I accept that AXE should have disclosed the fact of the recording earlier in the dispute as this may have provided the Director with the opportunity to reflect upon the exchange, but I note the Director did make an immediate file note that was selective in recall and objectively self-serving.

[101] Once it then became apparent that AXE was upset by the exchange, an understandable response, I do not find QVM acted in a constructive manner. They had an

opportunity to reflect on their approach to managing sick leave concerns but decided to pursue an approach that defended an unsustainable breach.

[102] Objectively the letter of 1 March in response to AXE's 28 February email, was not timely and combative for the circumstances. QVM was facing an allegation their director had physically assaulted a worker in an exchange that had been witnessed yet this fact was either downplayed or ignored as QVM communicated a concern that it was now a police investigation. A more constructive approach would have been an apology by the Director and an offer to meet. This would have taken the heat out of the situation as it was apparent that the alleged physical assault was not a serious one but in all the contextual circumstances it should have been plain that AXE had suffered a degree of distress and had an understandable expectation that the Director would not behave so unreasonably and then aggressively.

[103] Instead, the response letter was ambiguous and in suggesting perhaps the parties "agree to go our separate ways", dismissive. No offer was made to restore AXE's sick leave pay and no specific support offered.

### **Finding on breaches**

[104] I find the actions of the QVM Director and the omissions of QVM after the incident unjustifiably disadvantaged AXE and placed their job on a less secure footing. They were objectively not the actions of a fair and reasonable employer. The breaches are made out and as a result it was reasonably foreseeable that AXE would resign rather than as suggested, engage in a voluntary and strategic early resignation. There was nothing in the immediate response to the 28 February incident that would suggest QVM were intent on resolving matters in a constructive manner. QVM compounded matters by their actions during AXE's notice period.

### **Conclusion on personal grievance claims**

[105] QVM's actions and omissions were unjustified and overall have resulted in:

- (a) AXE suffering a disadvantage in their employment relationship.

(b) AXE resigning in circumstances where it was foreseeable by QVM that this would result from their actions and omissions, so, AXE was dismissed and, I find the dismissal was unjustified in all the circumstances.

(c) As an alternative I find on the facts, AXE was dismissed during their notice period and that was an unjustified dismissal in all the circumstances.

### **The on-call standby payments dispute**

[106] There was no provision in AXE's employment agreement or expressed expectation they make themselves available to return to work to complete after hours tasks as required by s 67D of the Act if an employer operates an availability provision.

[107] The QVM's workshop had developed an agreed and documented policy that predated AXE's employment (and the enactment of s67D) that provided a payment of a minimum number of hours (two) if a worker agreed to return to work to complete work after their normal hours. Although the workers were placed on a roster to share the load there was no payment for mere availability.

[108] The policy that was recorded by minutes of a 20 December 2014 meeting confusingly refers to a "standby payment" of \$20 per day (later increased to \$40) to "be paid on a daily basis for the mechanic/Engineer who will be on call" but then it refers to the standby payment only being paid when the worker is called out outside their normal hours.

[109] The evidence established AXE took part in an 'on call' roster and the roster operated on the basis that others could fill in if a person chose to not make themselves available (which at times AXE did not). However, in categorising this as a standby payment QVM committed themselves to paying the workers for their availability on the roster.

### **Finding**

[110] I find that regardless of the voluntariness or alleged compulsion, QVM should pay AXE as per their own policy a standby payment of \$40 for every day AXE was rostered to

be on call. This arguably would be consistent also with the provisions of s 67D of the Act that QVM should look to 'tidy up' as part of new employment agreements or existing variations for existing workers they expect to be on standby as the policy provided to the Authority stated: "Standby will be as and when required, determined by the company's business".<sup>9</sup> I accept QVM's evidence that AXE was called out 5 days out of 45 occasions that they made themselves available. I find AXE is owed the \$40 allowance for each of those remaining 40 days amounting to \$1,600.

### **Remedies**

[111] As AXE is successful in establishing their personal grievance claims I turn to remedies available under s 123 of the Act.

### **Compensation for hurt and Humiliation**

[112] AXE gave evidence of the stress caused by the withholding of his sick leave pay and what they considered humiliating and demeaning treatment by QVM's Director when they attempted to raise what was a legal entitlement. In addition, AXE detailed the impact of the dismissal on their personal circumstances and ability to meet living costs on a short-term basis. AXE described a sense of isolation and shame in having to seek assistance with basic living expenses.

[113] Against the above, I found AXE to present as a reasonably robust and confident character even though AXE says their job hunting was difficult as they had lost the ability to trust employers, and this has impacted self-esteem and confidence.

### **Finding**

[114] Considering the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, and considering the harm caused by the breaches, I find that AXE's evidence warrants compensation of \$16,000 under s 123(1)(c)(i) of the Act.

---

<sup>9</sup> QVM's [Location] Workshop Call Out Policy 5 January 2015.

## **Lost wages**

[115] AXE provided evidence that they commenced alternative employment on 15 April 2024 and seeks lost wages for the period from their last working day at QVM (4 March 2024) to the commencement of new employment in the amount of \$8,548.80 gross being six weeks' pay at \$35.62 per hour for 40 hours per week. In addition, AXE seeks the reimbursement of 6 Days unpaid sick leave in the amount of \$1,790.76. gross.

## **Finding**

[116] I find the lost wages and unpaid sick leave amounts as calculated above should be awarded.

## **Contribution**

[117] Section 124 of the Act states that I must assess the extent to what, if any of AXE's actions contributed to the situation that gave rise to the personal grievances and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>10</sup>.

[118] In the circumstances I do not find AXE contributed to the circumstances giving rise to their personal grievance. There was insufficient evidence to show that AXE had abused their sick leave entitlement and although the unauthorised recording during the 28 February incident was not an act of good faith, it did not contribute to the circumstances that gave rise to the personal grievance. The causative factors lay with the actions of QVM's Director.

## **Orders**

[119] QVM breached duties owed to AXE and I have found that AXE has established they were unjustifiably disadvantaged and unjustifiably dismissed and QVM must pay AXE:

---

<sup>10</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

- (a) \$16,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000 for the unjustified action; and the sum of:
- (b) \$10,339.56 gross arrears of wages pursuant to s 123(1)(c)(ii) Employment Relations Act.
- (c) \$1,600 gross compensation for unpaid standby occasions.

### **Costs**

[120] Costs are reserved.

[121] The parties are encouraged to resolve any issue of costs between themselves.

[122] If the parties are unable to resolve costs, and an Authority determination on costs is needed, AXE 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 QVM will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[123] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>11</sup>

David G Beck  
Member of the Employment Relations Authority

---

<sup>11</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)