

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 467
3236079

BETWEEN COURTNEY BROOKER
Applicant

AND JAPANESE CAR PARTS
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Daniel Church, counsel for the Applicant
Simon Greening, counsel for the Respondent

Investigation Meeting: 21 May 2024 in Auckland

Submissions Received: 28 May 2024 from the Applicant
7 June 2024 from the Respondent

Determination: 31 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Courtney Brooker, was employed by the respondent, Japanese Car Parts Limited (JCP) from 1 August 2022 until 7 November 2022.

[2] Ms Brooker is a 21-year-old young woman whose employment with JCP was her first job outside of her family's business. She had been very enthusiastic about the role when she accepted it as she has a love of Japanese cars.

[3] However, Ms Brooker said she had become so "ground down by JCP" over the 14 weeks she was employed that her physical, mental, and emotional health became seriously adversely impacted. She resigned on 7 November 2023 because she "simply couldn't take it any longer".

[4] Ms Brooker claimed her resignation was a constructive dismissal.

[5] Mr Ali Hassani, who is JCP's sole director and is a fifty percent shareholder, unfairly targeted Ms Brooker in a way that other employees, including her manager, had noticed and commented on, but had failed to stop.

[6] Although some of the unfair and inappropriate actions that are set out in this determination were directly caused by Mr Hassani, the rest occurred because he had instructed other staff to carry out decisions he had made.

[7] Some of the unfair treatment Ms Brooker experienced included, but was not limited to:

- (a) She was not paid correctly and faced a lengthy delay in being paid her wage arrears;
- (b) Her contractual hourly rate was unilaterally reduced by Mr Hassani;
- (c) She was presented with three different employment agreements after she had started work and told to sign them immediately, even though they included terms that had not been discussed with her;
- (d) She was subjected to unfair bargaining. JCP breached its good faith obligations to her and acted in a way that was inconsistent with the trust and confidence inherent in employment relationships;
- (e) She had considerable pressure exerted on her to sign employment agreements that contained unfair terms and Mr Hassani would not meet her in person to discuss her concerns, while blaming her for not having a signed employment agreement;
- (f) She had a probationary period clause unilaterally inserted into her employment agreement which she did not understand the significance of and, despite her raising queries about it, was never explained to her;
- (g) JCP threatened to use the probationary clause in her employment agreement to dismiss her, and commenced a sham disciplinary process against her without providing her with any specific information or documents to support the disciplinary concerns in retaliation for her raising employment concerns;

- (h) She was suspended without pay and told she was not allowed to return to work until she had signed the employment agreement she had been given;
- (i) She was told that if she did not sign the employment agreement JCP wanted her to sign then she would be dismissed;
- (j) She was blamed by JCP for its own breaches (such as its failure to pay her correctly, its failure to give her a written employment agreement before she started work, its failure to respond to her legitimate concerns, and its unjustified suspension of her);
- (k) Her manager told Ms Brooker during a meeting on 19 September 2022 “you’ve been dropped in the shit” and “we need to get him [Mr Hassani] off your back”. However, that did not occur. Instead Ms Brooker was unfairly targeted by Mr Hassani over the duration of her employment;
- (l) She had her ability to work efficiently undermined by software problems that JCP knew were not her fault, but was then blamed for poor output when JCP knew that had been outside her control;
- (m) She was put through an unfair disciplinary process at Mr Hassani’s instigation. Even the manager (who was not Mr Hassani) conducting the disciplinary meeting believed it was unfair, and had stated during the formal disciplinary meeting “this is all bullshit to be honest” and “I have no problem with your work”. Ms Brooker was told during the disciplinary meeting “it is awful what you are having to put up with”. Other staff acknowledged that Ms Brooker was being “picked on” by Mr Hassani;
- (n) She was blamed for difficulties a letter sent to JCP’s neighbouring business had caused when she had not written it, had not sent it, had not reviewed it before it was sent and had not sent it and did not even know if it had been sent;
- (o) She was told to come to work when other employees knew she was genuinely unwell, just so Mr Hassani could see for himself how sick she actually was;
- (p) Work matters were discussed by managers in meetings held in the staff tearoom, which meant staff were coming in and out of the room as

managers were discussing various employment issues with Ms Brooker. That deprived her of the confidentiality she was entitled to;

- (q) She was not given employment documents she had requested, including documents that were relevant to JCP's criticism of her;
- (r) She was discouraged from taking rest breaks, she was told she should take her breaks (including lunch) at her desk, so Mr Hassani could see her there. Then she was criticised and micro managed (including moving her desk) when she insisted on taking her statutory rest breaks away from her desk;
- (s) She was required to use her own phone to do elements of her role, then was criticised for being on her phone during work hours;
- (t) She was required to undertake parts of her job outside, then was criticised for not being at her desk.

[8] Ms Brooker made a number of claims arising from these issues. JCP disputed all of her claims, even when the evidence given by its own witnesses had proved most of her claims. JCP elected to put Ms Brooker to formal proof of every allegation she made, even including where its own documentation or evidence from its own witnesses had proved her claims.

The Authority's investigation

[9] The Authority held a one day in-person investigation meeting in Auckland. Ms Brooker and her mother attended in person, and were questioned about their evidence.

[10] They both impressed the Authority as straightforward, truthful and credible witnesses. Ms Brooker's evidence was also largely supported by documents and transcripts of meetings with managers she had secretly recorded. These transcripts were admissible as they were directly relevant to the Authority's investigation.

[11] Ms Brooker made these recordings because she was concerned about the way JCP had been treating her. The transcripts of the recordings Ms Brooker made validated her concerns.

[12] Mr Shane Voice – Operations Manager, Ms Michelle Voges – Administrator, Ms Amanda Prictor – Administration Manager and who was also the health and safety

representative, attended the investigation meeting in person to give evidence for JCP, and were all questioned about their evidence.

[13] Mr Hassani provided a witness statement, but on the day of the investigation meeting the Authority was advised that he would not be attending. Although it was ultimately his own conduct and instructions to other staff that were of serious concern, Mr Hassani failed to present himself to be questioned by the Authority or cross-examined by Ms Brooker's counsel about his evidence.

[14] At the conclusion of the evidence, the Authority provided the parties with a preliminary indication of its likely findings on each of the claims. A likely outcome was also indicated as falling within the identified range of compensation and penalties for each successful claim.

[15] This preliminary indication was given in the hope the parties could use the Authority's guidance to resolve the matter by agreement given that JCP's own evidence had supported most of Ms Brooker's claims, but that did not occur.

[16] The Authority expressed its view that Ms Brooker had been treated "very unfairly" throughout the duration of her short employment. JCP was also encouraged to ensure it understood and adhered to its employment law obligations as an employer going forward.

[17] Both parties provided written submissions after the investigation meeting.

Issues

[18] The following issues were to be determined:

- (a) Did JCP breach s 63A(2) of the Employment Relations Act 2000 (the Act)?
- (b) Did JCP engage in unfair bargaining regarding Ms Brooker's individual employment agreement?
- (c) If so, what remedy should be awarded?
- (d) Did JCP breach Ms Brooker's employment agreement?
- (e) Did JCP breach its good faith obligations to Ms Brooker?
- (f) Did JCP breach its obligation to provide Ms Brooker with rest breaks?

- (g) Did JCP fail to provide Ms Brooker with her wage and time records upon request?
- (h) Should penalties be imposed on JCP for any breaches that have occurred?
- (i) Should any penalties that may be imposed on JCP be awarded to Ms Brooker as well as, or instead of, the Crown?
- (j) Was Ms Brooker unjustifiably disadvantaged in her employment?
- (k) Was Ms Brooker's resignation a constructive dismissal?
- (l) If so, was her dismissal justified?
- (m) If Ms Brooker's personal grievance claims succeeded, what remedies should she be awarded?
- (n) Should any remedies Ms Brooker may be awarded be reduced on the grounds of contribution?
- (o) What costs and disbursements should be awarded?

Did JCP breach s 63A(2) of the Act?

[19] Section 63A(2) of the Act sets out the obligations on an employer when bargaining with a prospective employee over an individual employment agreement. These include:

- (a) Providing the employee with a copy of the intended employment agreement under discussion;
- (b) Advising the employee that they are entitled to seek independent advice about the intended employment agreement;
- (c) Providing the employee with a reasonable opportunity to seek independent advice on the terms of the proposed employment agreement; and
- (d) Considering any issues the employee may have raised and then responding to those.

[20] For this to occur, the employee needs to be provided with a copy of the intended employment agreement before they have accepted the offer of employment and before they have started work. That did not occur in this case.

[21] Ms Brooker did not receive a written employment agreement before she started work. When it was given to her, she was told to immediately sign it. She did not do so, due to valid concerns she had that some of the terms in it were unfair. That put her at odds with Mr Hassani from the outset.

[22] Mr Hassani interviewed Ms Brooker but did not discuss her terms and conditions of employment, other than her hourly rate of pay. Providing the employment agreement on her first day of work meant Ms Brooker had no opportunity to seek independent advice on it, so was unable to raise the concerns she had about some of the terms until after her employment had commenced.

[23] This process left Ms Brooker in a compromised position because none of the key terms and conditions were discussed with her during her job interview, or at the time the offer of employment was made or before she had started work.

[24] The first time she found out about the terms and conditions that gave her legitimate cause for concern was after she had already started work. That enabled JCP to unfairly pressure Ms Brooker to sign an employment agreement that contained unfair terms that greatly favoured it as the employer.

Did JCP engage in unfair bargaining regarding Ms Brooker's individual employment agreement?

[25] Section 68 of the Act deals with unfair bargaining for individual employment agreements. It provides that bargaining for an individual employment agreement will be unfair if (for the purposes of this case) s 63A of the Act applied but the employee was not given the information or the opportunity to seek advice required by s 63A(2) of the Act.

[26] Section 63A of the Act did apply, and JCP failed to comply with any of the requirements that s 63A(2) of the Act had placed on it as an employer bargaining with an employee for an individual employment agreement.

[27] Section 68(2)(c) of the Act also provides that bargaining will be unfair if the employee is induced to enter into the employment agreement by "oppressive means, undue influence, or duress".

[28] Both of these instances of unfair bargaining applied to Ms Brooker's situation. She was required to sign the employment agreement under duress because she had been

placed on unpaid suspension and told she was not allowed to return to work until she had signed the employment agreement.

[29] JCP also told her that if she did not sign the employment agreement then she would be dismissed. That amounted to undue influence and it was also an “oppressive means” of obtaining her consent to disputed terms and conditions.

[30] JCP breached s 63A(2) of the Act by failing to provide Ms Brooker with a copy of the intended employment agreement, by failing to discuss the proposed terms and conditions of employment with her before she had started work, by failing to advise her of the right to take independent advice about the employment agreement, and by failing to give her a reasonable opportunity to seek advice.

[31] JCP was also reluctant to make the changes Ms Brooker had raised, although it ultimately did so, but only after she had refused to sign the first two employment agreements.

What remedy should be awarded?

[32] The potential remedies for unfair bargaining are set out in s 69 of the Act. Among other remedies, s 69(1)(a) of the Act permits the Authority to award compensation. JCP is therefore ordered to pay Ms Brooker compensation of \$3,000.00 for subjecting her to unfair bargaining over her individual employment agreement.

Did JCP breach Ms Brooker’s employment agreement?

[33] Ms Brooker alleged JCP had breached her employment agreement by paying her a training wage, by unilaterally reducing her hourly rate and by suspending her without pay.

Payment of training wage

[34] JCP paid Ms Brooker a training wage of \$16.96 for the first two weeks of her employment. The training rate was less than the applicable minimum wage of \$21.20. There was no legal basis to pay Ms Brooker a training wage.

[35] JCP’s attempts to blame Ms Brooker for its failure to pay her correctly, because she had agreed during the job interview to receive a training wage, was not accepted. JCP as the employer should have known it was not legally permitted to pay Ms Brooker less than the minimum wage.

Unilateral reduction in contractual hourly rate

[36] Ms Brooker’s contractual rate of pay was \$23.00 per hour. Notwithstanding that, Mr Hassani decided to only pay her \$20.00 an hour for her third week of employment, because he was unhappy with her. However, he never told her that or explained why her wage had been unilaterally reduced. Ms Brooker was therefore left to discover the shortfall in her pay herself.

Suspension without pay

[37] JCP suspended Ms Brooker without pay from 3 to 10 October 2022 when it had not contractual right to do so. JCP breached the terms of employment when it failed to pay Ms Brooker her weekly pay, even though she was ready willing and available to work. Ms Brooker should have been paid her contractual wage rate of \$23.00 per hour for all hours she worked.

Finding

[38] Ms Brooker’s claims that JCP breached her employment agreement succeeded.

Did JCP breach its good faith obligations to Ms Brooker?

The statutory duty of good faith

[39] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. This requires parties in an employment relationship to be “active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative”.¹

[40] The promotion of good faith in all aspects of the employment environment and in employment relationships is one of the key objectives of the Act.² The mutual obligation on parties to deal with each other in good faith overlays the employment relationship. Section 4(1A)(a) of the Act expressly recognises that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence.

¹ Section 4(1A)(b) of the Act.

² Section 3(a) of the Act.

Ms Brooker's claims

[41] Ms Brooker pursued the following standalone breach of good faith claims against JCP, for which she sought a penalty:

- (a) Being non-responsive to her requests for information;
- (b) Failing to provide her timesheets and payslips when requested to do so;
- (c) Unilaterally varying the start times in her employment agreements; and
- (d) Disclosing her private medical information to others.

Was JCP non-responsive to Ms Brooker's requests for information?

[42] The evidence demonstrated a pattern of JCP failing to respond, either in a timely way or at all, to Ms Brooker's legitimate requests for information, documents or to queries that she had raised regarding her contractual terms and conditions of employment.

[43] None of her requests were inappropriate, so good faith required JCP as her employer to provide her with substantive responses in a timely manner. That did not occur.

[44] Ms Brooker raised a number of serious employment concerns which were simply ignored by JCP. That was a breach of JCP's good faith obligations to be "active and constructive in maintaining a productive employment relationship" and were examples of it failing to be "responsive and communicative" to Ms Brooker's legitimate enquiries and concerns.

[45] Ms Brooker's concerns as recorded in an email dated 2 October 2022, her request for copies of documents she had signed and her requests for her time clock records were not responded to by JCP. JCP also failed to address properly or substantively most of the employment concerns Ms Brooker raised in her 13 October 2022 email and in her written feedback dated 27 October 2022, which she had given JCP in response to its disciplinary concerns.

Did JCP fail to provide Ms Brooker with her timesheets and payslips when requested?

[46] On 2 October 2022 Ms Brooker requested "a copy of all documents she had been asked to sign". She subsequently requested copies of her time clock records on 27 October 2022. These were not provided. However, her specific request for copies of

her timesheets and payslips was made on 5 December 2022, after her employment had ended.

[47] This breach of good faith claim did not succeed, because the parties were not in an employment relationship when she requested her timesheets and payslips.

Did JCP unilaterally vary the start times in her employment agreements?

[48] JCP twice unilaterally changed the start time in Ms Brooker's employment agreement. She received three employment agreements, each of which had different start times/hours of work.

[49] These changes were made without any consultation with her. Nor was she notified that these changes had been made. Ms Brooker was therefore left to discover these changes for herself. That was a breach of good faith by JCP.

Did JCP disclose Ms Brooker's private medical information?

[50] During a casual workplace conversation with Mr Voice, Ms Brooker mentioned she had recently been diagnosed with a genetic medical condition. He passed that information on to Ms Voges, Ms Pictor and Mr Hassani.

[51] Mr Hassani then attempted to use that information against Ms Brooker. He raised it as a disciplinary concern, making an unsubstantiated allegation that it had impacted on her attendance (when it had not). He also recorded in a disciplinary letter that she could be dismissed for not disclosing this medical information before she was employed, when she had never been asked about it and it was irrelevant to the position she was offered.

[52] Ms Brooker's medical condition was not relevant to her position or her ability to do the job. It was a breach of good faith for Mr Hassani to attempt to use a friendly informal workplace chat Ms Brooker had with a colleague against her in this way.

Finding

[53] Two out of four of Ms Brooker's standalone breaches of good faith claims succeeded.

Did JCP breach its obligation to provide Ms Brooker with rest breaks?

[54] Section 69ZD of the Act sets out an employee's entitlement to, and the employer's duty to provide, rest breaks and meal breaks.

[55] Section 69ZD(4) of the Act provides that an employee who works more than six hours but less than eight hours is entitled to two 10-minute paid rest breaks and one 30-minute meal break. Section 69ZD of the Act falls within the definition of "employment standards", as defined in s 5 of the Act which meant it is a minimum code entitlement.

[56] Rest breaks are minimum statutory entitlement which JCP was legally required to provide Ms Brooker. Her employment agreement recorded that she was entitled to one paid break of ten minutes if she worked between six and eight hours. That did not meet minimum statutory entitlements.

[57] Ms Brooker was not permitted to take rest breaks for the first two weeks of her employment. When she insisted on taking them, she was told to only take one ten minute rest break per day, as per her employment agreement. She was also discouraged from taking breaks and told that if she did she should take her rest breaks and lunch breaks at her desk.

[58] Mr Hassani had been keeping a close eye on Ms Brooker and would express dissatisfaction to other employees if he saw that she was not at her desk. He even complained that she had taken too many toilet breaks, but no information or evidence has ever been produced to support that allegation.

[59] JCP's witnesses told the Authority that because Mr Hassani would be unhappy if he saw that Ms Brooker was away from her desk, they had encouraged her to stay visibly at her desk in order to avoid Mr Hassani's adverse attention.

[60] Ms Brooker was subjected to unwarranted criticism for defying management by taking her statutory rest breaks away from her desk. She said, "They started pestering me about going outside for my breaks and calling them excessive breaks." There was no credible evidence or records establishing that Ms Brooker had taken excessive breaks. The available evidence provided the contrary.

[61] Ms Voges said she had been monitoring Ms Brooker's breaks and could confirm she had not been taking longer than she was legally entitled to. Ms Voges told

JCP that while Ms Brooker was still employed, and she (Ms Voges) also confirmed that was the case to the Authority when she gave her evidence.

[62] Ms Brooker's claims that JCP had breached s 69ZD(4) of the Act succeeded.

Did JCP fail to provide Ms Brooker with her wage and time records upon request?

[63] The Authority was not satisfied that Ms Brooker made a specific request under s 130(2) of the Act for her wage and time records. Although she had asked for "copies of all documents that she had signed", that was not a specific request for her wage and time records, which were not "documents she had signed".

[64] Ms Brooker's claim that JCP had breached s 130(2) of the Act did not succeed.

Should penalties be imposed on JCP for any of the breaches that have occurred?

[65] Ms Brooker sought penalties for JCP's breaches of:

- (a) Section 69ZD(4) of the Act (regarding rest breaks);
- (b) Good faith obligations to her;
- (c) Her employment agreement; and
- (d) Section 63A(2) of the Act (bargaining for an individual employment agreement).

Penalty assessment factors

[66] When assessing penalties, the Authority must consider the factors set out in s 133(A) of the Act. The Authority was also guided by the Employment Court decisions in *Borsboom (Labour Inspector) v Preet PVT Limited* and *Warrington Discount Tobacco Limited*.³ These penalty assessment factors were summarised by the Court in *Nicholson v Ford*⁴ and *A Labour Inspector v Daleson Investment Limited*.⁵

[67] The Employment Court in those cases confirmed that the relevant considerations, including those specified in s 133(A) of the Act, when assessing penalties could be conveniently summarised as follows:

- (a) Statutory consideration 1 – The object of the Act.

³ [2016] NZEmpC 143.

⁴ [2018] ERNZ 393.

⁵ [2019] NZEmpC 12.

- (b) Statutory consideration 2 – The nature and extent of the breach:
 - identify the nature of the breaches;
 - identify the number of the breaches;
 - identify the maximum penalty available in respect of each identified breach;
 - consider whether global penalties are appropriate.
- (c) Statutory consideration 3 – Whether the breach was intentional, inadvertent, or negligent. This involved assessing severity of the breach;
- (d) Statutory consideration 4 – The nature and extent of any loss or damage;
- (e) Statutory consideration 5 – Steps to mitigate effects of the breach;
- (f) Statutory consideration 6 – Circumstances of the breach and any vulnerability;
- (g) Statutory consideration 7 – Previous conduct;
- (h) Additional consideration 8 – Deterrence;
- (i) Additional consideration 9 – Culpability;
- (j) Additional consideration 10 – Consistency;
- (k) Additional consideration 11 – Ability to pay; and
- (l) Additional consideration 12 – Proportionality of the outcome.

[68] The Authority has therefore assessed penalties in this matter in accordance with the above considerations.

Statutory consideration 1 – object of the Act

[69] Section 3 of the Act sets out the object of the Act. For the purposes of this matter, that includes the following objects which are relevant to this penalties assessment:

- (a) To recognise the implied mutual obligations of trust and confidence in the employment relationship and to require good faith behaviour within that relationship;
- (b) To promote the effective enforcement of employment standards, in particular by a Labour Inspector; and

- (c) By acknowledging and addressing any inherent inequality of power in employment relationships; and
- (d) By reducing the need for judicial intervention; and
- (e) To promote the effective enforcement of employment standards.

[70] JCP took advantage of the inherent inequality of power in the employment relationship, because Ms Brooker was a young, new employee who was entering the workforce for the first time with an employer that was not her family.

[71] The various breaches that JCP engaged in throughout Ms Brooker's employment were inconsistent with its implied duty of trust and confidence and with JCP's statutory duty of good faith.

Statutory consideration 2 – nature and extent of the breaches

(a) Nature and extent of the breaches

[72] JCP's breach of s 69ZD(4) of the Act attracted the imposition of a penalty under s 69ZF of the Act.

[73] Section 4A of the Act provides that a penalty may be imposed for a breach of good faith that met the threshold criteria set out in that section.

[74] The two standalone breach of good faith claims that Ms Brooker succeeded on (being JCP was non-responsive to her requests and it unilaterally varied terms of her employment without discussion or even advising her changes had been made) did not meet the required threshold set out in s 4A of the Act.

[75] These breaches of good faith were not deliberate, serious or sustained. JCP's breaches of good faith were not intended to undermine bargaining, the employment agreement or the employment relationship, so did not attract penalties.

[76] There were other breaches of good faith by JCP that were associated with Ms Brooker's personal grievance claims. Those breaches of good faith have been addressed by distress compensation she has been awarded for her personal grievance claims. They were not pursued by her as discrete penalty claims.

[77] There were three breaches of Ms Brooker's employment agreement which related to the obligation to pay her agreed contractual hourly rate. She was paid a

training wage during her first two weeks of employment, she was paid a reduced hourly rate for her third week of employment and she was put on an unpaid suspension from 30 September to 10 October 2022. These three breaches attract penalties under s 134(1) of the Act.

[78] JCP's failure to comply with s 63A(2) of the Act (regarding bargaining for her individual employment agreement) attracted a penalty under s 63A(3) of the Act.

(b) Maximum penalty available in respect of each of the breaches

[79] Each of the identified breaches allows for a maximum potential penalty of \$20,000.00 per breach, to be imposed on a company, such as JCP.

[80] There is one penalty under s 63A(3) and another penalty under s 69ZF of the Act. There were three breaches of her employment agreement. The total potential maximum penalty for all breaches was \$100,000 (being five breaches x \$20,000 per breach).

[81] However, because all three breaches of Ms Brooker's employment agreement involved the failure to pay her correctly, these breaches will be globalised into one representative breach for the purposes of imposing a penalty under s 134(1) of the Act.

[82] After globalisation, the maximum potential penalties are reduced from \$100,000 to \$60,000, being:

- (a) \$20,000.00 under s 69ZD of the Act for statutory rest break related breaches;
- (b) \$20,000.00 for the three breaches of the employment agreement; and
- (c) \$20,000.00 under s 63A(3) for bargaining for an individual employment agreement breaches.

Statutory consideration 3 – whether the breaches were intentional, inadvertent, or negligent

[83] JCP's rest break related breaches were deliberate, because Ms Brooker had explained what the law required in terms of allowing full time employees like her to take rest breaks away from their desk.

[84] JCP's breaches of the employment agreement (failure to pay Ms Brooker correctly) were deliberate and intentional.

[85] The breaches associated with JCP's bargaining with Ms Brooker for an individual employment agreement breaches were negligent.

Statutory consideration 4 – nature and extent of any loss or damage or gains made or avoided

[86] JCP's breaches of its statutory obligation to allow employees rest breaks, of Ms Brooker's employment agreement and of its bargaining obligations regarding her individual employment agreement were serious because they had fundamentally undermined the employment relationship.

[87] Ms Brooker's assertion of her legal rights and her repeated attempts to get JCP to remedy these breaches put her at odds with Mr Hassani, who unfairly targeted her. That ultimately resulted in Ms Brooker's resignation.

Statutory consideration 5 – steps to mitigate effects of the breach

[88] JCP inappropriately attempted to blame Ms Brooker for its own breaches and to shift the responsibility that it had as an employer, onto her as an employee. That demonstrated that JCP failed to appreciate the seriousness of its breaches or the adverse impact they had on Ms Brooker.

[89] The failure to pay Ms Brooker correctly was mitigated, because she was eventually paid her wage arrears. However, she had to wait many weeks and had to press JCP to ensure she was eventually paid correctly.

[90] The bargaining errors were also eventually mitigated by Ms Brooker signing an employment agreement, but she was suspended without pay and threatened with dismissal before that occurred.

[91] After being deprived of rest breaks during the first two weeks of her employment, Ms Brooker self-managed her rest breaks. She also ignored the pressure JCP put on her to take her breaks at her desk. This assertion of her legal rights caused her to be criticised and unfairly targeted for taking "excessive breaks". when she had not done so.

Statutory consideration 6 – circumstances of the breach and vulnerability of the worker

[92] Ms Brooker was a 21-year-old employee who had only ever worked in her family's business. These breaches were so serious that they contributed to the ending of her employment after only 14 weeks, which was a major setback for her.

[93] JCP failed to appropriately acknowledge its wrongdoing, and has put Ms Brooker to formal proof of each claim. It has adopted an aggressive and adversarial approach towards her.

Statutory consideration 7 – previous conduct

[94] There was no evidence penalties had previously been imposed on JCP.

Additional consideration 8 – deterrence

[95] The breaches that occurred were serious. They started on day one of the employment relationship and contributed to Ms Brooker's resignation after only 14 weeks of employment.

[96] There was a particular need to emphasise to JCP, its director Mr Hassani and to other employers more generally, that the requirement on an employer to meet contractual and statutory obligations must be taken seriously.

[97] Penalties had to be set at a level that was sufficiently high to deter further breaches, to compel JCP to inform itself about its employment law obligations, and to ensure JCP took such obligations seriously going forward so other employees did not have to go through what Ms Brooker has.

Additional consideration 9 – culpability

[98] Factors that increased JCP's culpability included:

- (a) Failure to pay Ms Brooker her wage arrears as soon as it was drawn to its attention;
- (b) Failure to appropriately respond in a timely manner to Ms Brooker's attempts to address the various breaches that had occurred;
- (c) The retribution Ms Brooker suffered (at Mr Hassani's instigation) for requiring JCP to address its various breaches.

Additional consideration 10 – consistency

[99] The Authority recognised it was important that penalties imposed by the Authority are broadly consistent with other cases. The Authority was not provided with any directly comparable cases. The level of penalties imposed was however broadly consistent with those generally imposed for breaches of this nature.

Additional consideration 11 – ability to pay

[100] There was no evidence that JCP was unable to pay penalties. It is still operating in business.

Additional consideration 12 – proportionality of outcome

[101] The Employment Court in *A Labour Inspector v Prabh Limited and Ors* noted that deterrence was the primary consideration when assessing the proportionality or totality factors.⁶

[102] It was therefore important for the Authority to ensure that the total penalties imposed on JCP were proportionate to the severity of the breaches that have occurred, while still acting as a deterrence against future breaches.

[103] This required the Authority to have regard to all of the factors set out in this determination, as well as a need to achieve consistency with other comparable Authority cases.

What penalties should be imposed on JCP?

[104] JCP is ordered to pay total penalties of \$13,000, consisting of:

- (a) \$5,000.00 under s 63A(3) of the Act for the bargaining for an individual employment agreement breaches;
- (b) \$2,000 under s 69ZF of the Act for breaches of statutory rest break requirement; and
- (c) \$6,000.00 under s 134(1) of the Act for the three globalised breaches of Ms Brooker's employment agreement.

⁶ [2018] NZEmpC 110, at [66].

Should any of the penalties be paid to Ms Brooker, as well as, or instead of the Crown?

[105] Ms Brooker has been personally adversely affected by these breaches. To reflect that harm she has suffered, JCP is ordered to pay her \$8,000 of the total penalties imposed on it.

[106] JCP is also ordered to pay the remaining \$5,000 of the total penalties imposed on it directly to the Crown bank account.

Was Ms Brooker unjustifiably disadvantaged in her employment?

[107] Ms Brooker has pursued three standalone unjustified disadvantage personal grievance claims which related to:

- (a) Her suspension without pay;
- (b) The 14 October 2022 meeting; and
- (c) The 27 October 2022 disciplinary meeting.

(a) Suspension without pay

[108] JCP suspended Ms Brooker without pay from 3 to 10 October 2022 because she wouldn't sign the employment agreement it wanted her to sign. She was sent home without pay and told she was not allowed to return to work until she had signed the employment agreement.

[109] This was an inappropriate way of responding to Ms Brooker's legitimate concerns about the unfair clauses in the employment agreement. It highlighted the power imbalance between the parties. JCP financially pressured Ms Brooker (by suspending her without pay until she had signed the employment agreement) in order to force her to do what it wanted.

[110] The decision to suspend Ms Brooker without pay was a unilateral one, which she had no opportunity to comment on. The suspension was procedurally unfair and substantively unjustified.

[111] There was no contractual right to suspend her, because she had not signed an employment agreement.

[112] JCP's claim that there was "a health and safety requirement for her to sign her employment agreement before being allowed back to work" was without merit. Ms Brooker worked in an office based job and there was no credible health and safety risk arising from her not having agreed to the employment terms JCP was trying to impose on her.

[113] Ms Brooker had also been working for JCP for eight weeks without a signed employment agreement without any health and safety concerns having been raised.

[114] Ms Brooker's unjustified disadvantage grievance claim relating to her unlawful suspension succeeded.

(b) The 14 October 2022 meeting

[115] Ms Brooker claimed she was unjustifiably disadvantaged by a meeting JCP held with her on 14 October 2022. She was told at around 4.00pm on 13 October 2022 that she had to attend a meeting as soon as she arrived at work the next day. It was not a disciplinary meeting, as only training and PPE were discussed.

[116] Ms Brooker's claim she was disadvantaged by JCP's lack of responsiveness to the issues she had raised in connection with this meeting did unjustifiably disadvantage her.

[117] However, this disadvantage grievance will not give rise to a separate award of distress compensation. The failure of JCP to be responsive to Ms Brooker has already been penalised by a penalty for a breach of good faith.

[118] The 14 October 2022 meeting was also a significant contributing factor to Ms Brooker's constructive dismissal grievance, so will be adequately compensated by the distress compensation she has been awarded for her dismissal grievance.

(c) The 27 October 2022 disciplinary meeting

[119] Ms Brooker pursued a standalone unjustified disadvantage personal grievance claim relating to the 27 October 2022 disciplinary meeting.

[120] The 27 October 2022 disciplinary meeting did unjustifiably disadvantage Ms Brooker. However, this successful disadvantage grievance will not attract a separate award of distress compensation because it was also a fundamental element of Ms Brooker's constructive dismissal grievance claim.

[121] It would be artificial to attempt to separate out the distress this meeting caused Ms Brooker from the overall distress her constructive dismissal caused her, because these events are so closely connected. The distress compensation Ms Brooker has been awarded for her successful dismissal grievance recognised the distress she suffered in connection with the 27 October 2022 disciplinary meeting.

Was Ms Brooker's resignation a constructive dismissal?

Ms Brooker's claims

[122] Ms Brooker claimed her resignation on 7 November 2022 was a constructive dismissal. She said JCP had repeatedly breached its statutory and contractual obligations to her over the 14 weeks she was employed.

[123] Because her employment was of such short duration (from 1 August to 7 November 2022), all of the breaches that occurred over this period led Ms Brooker to feel she was eventually left with no real option but to resign.

[124] Ms Brooker said the cumulative effect of the unreasonable and hostile treatment JCP had subjected her to during the course of her employment, had reasonably and foreseeably put her in a position whereby she felt she had to resign in order to protect herself from suffering further harm.

[125] Ms Brooker further said that JCP's breaches of its duties to her were sufficiently serious that it was reasonably foreseeable she would not continue working in such circumstances.

The disciplinary letter and meeting on 27 October 2022

[126] On Wednesday 19 October 2022, Ms Brooker was given a disciplinary letter signed by Mr Voice requiring her to attend a disciplinary meeting with him and Ms Voges. The letter stated a potential outcome could be termination of her employment under the probationary period clause.

[127] Attached to the disciplinary letter was a copy of an email in her name (which she did not draft or send) to one of JCP's neighbours raising health and safety issues. No other documentation was provided to Ms Brooker, other than that letter.

[128] The disciplinary meeting was held on 27 October 2022. Ms Brooker attended with her mother. Mr Voice and Ms Voges were present on behalf of JCP.

[129] The disciplinary letter had been drafted by Mr Hassani, who had added Mr Voice's name and signature to the letter. Mr Voice expressed his surprise about that at the beginning of the disciplinary meeting, because he said he had not noticed that the letter had been put in his name until Ms Brooker had pointed that out to him.

[130] The disciplinary letter expressed "serious concerns", recording she had taken 12 days off over the period 1 August to 19 October 2022. However, these days were not identified and no records of her absences or any other information about the absences were provided to Ms Brooker, even though she had asked for proof of those allegations.

[131] Mr Voice was also unable to tell the Authority during the investigation meeting if the 12 days JCP had been concerned about had included days off that had been previously agreed with Ms Brooker at her job interview as approved leave days, the period of her unpaid suspension, or certified sick leave days.

[132] The disciplinary letter and disciplinary meeting involved a range of allegations against Ms Brooker about matters that Mr Voice, as her manager, told the Authority he had not been concerned about, so did not view as "serious disciplinary concerns".

[133] Even though Mr Voice told the Authority that there was nothing in the disciplinary letter that he was concerned about, other than Ms Brooker sometimes being late to work, he nevertheless conducted a formal disciplinary meeting with her on 27 October 2022.

[134] In terms of the 'being late to work issue', Mr Voice acknowledged there had been improvement and he also said there had been insufficient time since the meeting on 14 October 2022 where her lateness had been informally discussed to establish whether or not she was now meeting JCP's expectations.

[135] There had only been three working days between the 14 October 2022 meeting and Ms Brooker being given the disciplinary letter on 19 October 2022. Mr Voice correctly identified that was insufficient time to monitor whether the level of improvement required from Ms Brooker had been obtained before commencing disciplinary action against her.

[136] Ms Brooker specifically asked for her weekly clock in sheets, to dispute the 'late to work' allegations, but these were never provided.

[137] It was surprising given the amount of time JCP had to prepare its evidence, and to summarise its disciplinary concerns regarding the 'being late to work' issue, that its witnesses were still unable to provide the Authority during its investigation with any cogent evidence about the times and dates of concern, or an analysis of the allegedly poor timekeeping problems that it sought to rely on as "serious disciplinary concerns". That failure was unsatisfactory.

[138] The Authority has not set out every allegation in the disciplinary letter and Ms Brooker's response, because Mr Voice who was the investigating manager and decision maker, said that none of the matters recorded in the disciplinary letter were of concern to him, other than Ms Brooker being late to work. He was Ms Brooker's manager, so that can be taken to be JCP's official position on the disciplinary concerns in the disciplinary letter.

[139] Ms Brooker provided detailed written and verbal feedback during the disciplinary meeting. As at the date of her resignation on 7 November 2022, JCP had still not responded to Ms Brooker with its findings on the disciplinary allegations or about her feedback or other concerns she had raised about how she was being treated by JCP. That omission left the possibility of dismissal hanging over Ms Brooker's head, unresolved, right up until the date she resigned.

[140] Ms Brooker's written feedback to the disciplinary allegations raised the following valid concerns that JCP failed to address:

Constant meetings with several superiors in attendance has made me feel bullied and intimidated and the stress over being potentially fired not to mention the stress of other situations I've been put through in work which has made my working environment extremely unpleasant and upsetting.

[141] JCP was not justified in commencing a disciplinary process against Ms Brooker for misconduct, serious misconduct or for poor performance. The Authority accepted Ms Brooker's evidence regarding each of the issues raised as disciplinary allegations.

[142] There should not have been a formal disciplinary process. Even if there had been legitimate concerns, the timing and manner in which they were raised was unjustified. There had been an informal discussion with Ms Brooker on 14 October 2022 which had resulted in improvement, so JCP was not justified in threatening her with dismissal only three working days later.

Summary of JCP's actions/omissions that caused or contributed to Ms Brooker's resignation

[143] By the time Ms Brooker had submitted her resignation, the following had taken place over the 14 weeks she had been employed:

- (a) JCP failed to pay Ms Brooker correctly and then failed to promptly repay her wage arrears;
- (b) JCP pressured Ms Brooker to sign an unlawful deduction from wages consent form;
- (c) JCP shut Ms Brooker out of the workplace without pay until she signed the employment agreement. It also threatened her with dismissal if she did not sign it;
- (d) JCP had unilaterally recorded three different start times in three different employment agreements, while also criticising her for not being at work on time. It failed to provide her with her time clock records when she disputed JCP's lateness allegations;
- (e) JCP embarked on an unjustified disciplinary process in which her manager considered all of the allegations (except the lateness allegations) in the disciplinary letter were not of concern;
- (f) JCP failed to respond to Ms Brooker's feedback or provide her with a disciplinary outcome, thereby leaving the threat of dismissal for unjustified allegations hanging over her in the lead up to her resignation;
- (g) JCP employees had seen Mr Hassani treating Ms Brooker (or causing her to be treated) unfairly and had acknowledged that to her, but they failed to prevent it continuing;
- (h) Mr Hassani had yelled at Ms Brooker for making a mistake. This occurred in the office in front of her colleagues at the beginning of her employment;
- (i) Ms Brooker was told to attend work when she was obviously sick, so Mr Hassani could see for himself how ill she was;
- (j) She was repeatedly subjected to unfair and unjustified criticisms and called into multiple meetings with managers about non-issues or minor issues, in a way that undermined her confidence;

- (k) She had been blamed for sending the health and safety letter to the neighbour that she was not responsible for;
- (l) She had been criticised for her output, when JPC knew that was a reflection of software failures that were not her fault;
- (m) Issues that had been resolved at the beginning of her employment were inappropriately re-activated on 19 October 2022 as formal disciplinary concerns, when her manager (Mr Voice) was not concerned about such matters;
- (n) Supposedly “serious disciplinary concerns” were raised without any supporting documents or information backing up the allegations being presented to her. When Ms Brooker asked for relevant information, it was not provided to her;
- (o) A casual conversation she had about her health had been used to make spurious disciplinary allegations against her and to suggest she could be dismissed for not disclosing medical information at her job interview. Her condition was not relevant to her position, it did not affect her ability to do her job and she was not asked about medical issues during her interview;
- (p) She was blamed for not immediately signing her employment agreement when it contained unfair terms that had not been discussed, negotiated or bargained for and which she had been trying to meet with Mr Hassani to discuss (without success, as he did not meet her despite numerous requests to do so);
- (q) She had been unjustifiably suspended without pay for ten days;
- (r) Mr Hassani had unilaterally reduced her hourly rate from \$23.00 to \$20.00 without even telling her he had done so;
- (s) She was prevented from taking rest breaks for the first two weeks of her employment. Then she was told to limit her rest break to one a day (as per her employment agreement). When she asserted her legal right to take two rest breaks, she was told to have her breaks and lunch at her desk because Mr Hassani wanted to see her sitting there;

- (t) After Ms Brooker raised in writing serious employment concerns on 13 October 2022, JCP retaliated with a disciplinary letter dated 19 October 2022;
- (u) Mr Voice admitted to Ms Brooker that she was being “picked on” by Mr Hassani;
- (v) JCP held meetings about private employment matters with Ms Brooker in the staff lunchroom, where other staff members could, and did, walk in on what should have been confidential conversations;
- (w) Despite Mr Voice acknowledging that Mr Hassani’s disciplinary allegations were “nitpicking”; and “blown out of proportion”, he still conducted a formal disciplinary investigation meeting in circumstances where he considered there was no merit to the disciplinary concerns (other than the lateness allegation, which was a performance not disciplinary issue) that he was discussing with Ms Brooker.

[144] The last straw for Ms Brooker was being ‘iced out’ when she was told to attend work even though she was sick on 2 November 2022. That was the last day she attended the workplace before submitting her resignation via email on 7 November 2022.

[145] When Ms Brooker attended work on 2 November 2022 just so Mr Hassani could see how sick she was for himself, she was initially ignored, then was sent home due to her obvious illness. She remained on unpaid sick leave until her resignation on 7 November 2022.

[146] Ms Brooker told the Authority that it had got to the point she felt that “JCP had won”. She said:

They had consistently mistreated me and made me feel like I had no choice but to resign. I simply could not take it any longer, so I resigned effective immediately.

[147] Ms Brooker confirmed during the investigation meeting that her decision to resign was the cumulative effect of:

The stress over the contract, being stood down without pay, the office dynamics towards me changing, pressure regarding rest breaks, moving my desk, lack of communication, lack of fair treatment, as well as being yelled at and all the false accusations that were made against me.

[148] JCP had acted towards Ms Brooker in a way that was inconsistent with the mutual obligations of trust and confidence. Ms Brooker resigned because of JCP's unreasonable, unjustified and inappropriate treatment of her.

Was Ms Brooker's resignation reasonably foreseeable?

[149] Ms Brooker's decision to resign was reasonably foreseeable.

[150] Ms Brooker put JCP on notice that she was unhappy with the way she was being treated, and that she believed her working situation was becoming increasingly untenable.

[151] Ms Brooker's email of 13 October 2022 referred to the "immense stress and anxiety you have caused me, not mention the humiliation". She also stated, "I would hope to see a positive response back from you to prevent things escalating further". JCP's response was to commence a disciplinary process against her, instead of addressing her legitimate concerns.

[152] Ms Brooker had clearly and repeatedly communicated her concerns to her employer, both verbally and in writing, prior to her resignation. JCP was therefore on notice of how Ms Brooker was feeling about the way she was being treated.

[153] There are a number of statements made by Mr Voice and Ms Voges during the 27 October 2022 disciplinary meeting, which indicated that they saw Ms Brooker's resignation as a possibility, and even that she might contemplate legal action. These are recorded in the transcripts of the recordings of the meeting Ms Brooker made.

[154] JCP should have, and more likely than not did actually foresee, that Ms Brooker would resign rather than continue to put up with the nitpicking and targeting that she had been subjected to throughout her employment.

[155] Ms Pricor acknowledged that she would not want a young member of her own family to go through what Ms Brooker had gone through in the short time she had worked for JCP. Mr Voice also accepted under cross-examination that Mr Hassani's actions had made it untenable for Ms Brooker to continue working at JCP.

Finding

[156] Ms Brooker's resignation was a constructive dismissal. The initiative for the ending of her employment came from JCP, in particular its director, Mr Hassani. Had

JCP met its employment law obligations to Ms Brooker, then she would not have resigned.

[157] Ms Brooker resigned in order to protect herself from the ongoing and inappropriate pressure that JCP (at the instigation and/or on instruction of Mr Hassani) had repeatedly subjected her to. There was nothing to indicate that would not continue had she not resigned.

Was Ms Brooker's constructive dismissal justified?

[158] Justification is to be objectively assessed in accordance with the justification test in s 103A(2) of the Act. This required the Authority to objectively assess whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[159] It should be clear from the information already recorded in this determination that JCP's actions were unjustified and in breach of its statutory good faith obligations under s 4(1A) of the Act.

[160] Ms Brooker's constructive dismissal was substantively and procedurally unjustified.

What remedies should Ms Brooker be awarded?

Mitigation of loss

[161] The Authority was satisfied that Ms Brooker took appropriate steps to mitigate her loss. She is therefore entitled to an award of lost remuneration.

Lost remuneration

[162] Ms Brooker is awarded three months' lost remuneration under s 128(2) of the Act.

[163] Ms Brooker was paid \$23.00 per hour for a 40-hour week, so her gross weekly wage was \$920.00. JCP is ordered to pay Ms Brooker \$11,400 gross, being three months' lost remuneration.

Distress compensation

[164] Ms Brooker gave evidence about feeling ignored, bullied, intimidated and not valued at all, even though she had worked hard while she was at JCP.

[165] Ms Brooker explained how JCP's management had caused her a great deal of humiliation, stress, and extreme anxiety. She said she did not want to resign but "Management created such a toxic environment that I felt I had no choice but to resign to protect my health and wellbeing." She described being adversely affected mentally.

[166] Ms Brooker had to seek medical attention and medication due to the way JCP had treated her. She also had to take stress leave while she was still employed, as a result of the pressure she was under. Ms Brooker told the Authority "I felt the bullying behaviours towards me were relentless."

[167] Ms Brooker and her mother both shared sensitive information about how Ms Brooker's health and wellbeing had been significantly adversely affected by JCP's treatment of her. All of that evidence has not been recorded in this determination, but it was taken into account by the Authority when assessing distress compensation.

[168] Ms Brooker's mother supported her daughter's evidence about the extensive hurt and humiliation she had suffered and described her daughter as being "on a long journey back to becoming the vibrant and confident young woman she once was."

[169] An award of \$25,000 distress compensation was appropriate.

[170] Accordingly, JCP is ordered to pay Ms Brooker \$25,000 distress compensation under s 123(1)(c)(i) of the Act, to compensate her for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her unjustified constructive dismissal.

[171] JCP is also ordered to pay Ms Brooker \$7,000.00 distress compensation for her unjustified disadvantage grievance, arising from her unlawful suspension.

Should Ms Brooker's remedies be reduced on the grounds of contribution?

[172] Having established personal grievance claims, the Authority is required by s 124 of the Act to assess the extent to which Ms Brooker's actions contributed towards the situation that gave rise to her personal grievance, and to reduce remedies accordingly.

[173] Contribution denotes blameworthy conduct which has been proven on the balance of probability. The Authority was satisfied that Ms Brooker contributed to her

constructive dismissal grievance because she acknowledged she had been late to work a number of times.

[174] While the parties disputed the extent of her lateness, it was nevertheless blameworthy conduct that contributed to her dismissal grievance. As an employee, Ms Brooker had an obligation to attend work at the required time.

[175] A reduction of fifteen percent of her award of distress compensation is appropriate to reflect her level of contribution to her successful dismissal grievance. No reduction is to be made to Ms Brooker's award of lost remuneration or to the compensation she has been awarded for her successful unfair bargaining claim.

[176] Contribution is assessed at \$3,750.00, reducing the award of distress compensation from \$25,000.00 to \$21,250.00.

Outcome

[177] Within 28 days of the date of this determination, JCP is ordered to pay Ms Brooker:

- \$3,000.00 compensation under s 69(1)(a) of the Act for unfair bargaining;
- \$8,000.00 of the total penalties that had been imposed on JCP;
- \$7,000.00 distress compensation for her unjustified disadvantage arising from her suspension;
- \$21,250.00 distress compensation for her constructive dismissal grievance (reduced from \$25,000.00 by \$3,750.00 to reflect contribution); and
- \$11,040 gross lost remuneration under s 128(2) of the Act.

[178] Within 28 days of the date of this determination, JCP is also ordered to pay to the Crown bank account the remaining \$5,000 of the total penalties that had been imposed on it.

Costs

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

[180] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Brooker may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum JCP 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.

[181] 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.⁷ The parties are invited to identify and address any such factors in their costs’ submissions.

Rachel Larmer
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1