

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 255
3209722

BETWEEN

CELINA CALDEIRA
Applicant

AND

LCNZ PONSONBY PTY
LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: May Moncur, advocate for the applicant
Gordon Frykberg, for the respondent

Investigation Meeting: 1 February 2024 in Auckland

Submissions and
information received: At the investigation meeting

Determination: 2 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Celina Caldeira was employed by LCNZ Ponsonby Pty Limited, which trades as Laser Clinic Ponsonby in Auckland (LCNZ). Ms Caldeira started working part time as a Beauty Therapist on or about 1 June 2022, having previously worked as a clinic manager for LCNZ. When she rejoined the clinic, Ms Caldeira says she felt singled out and mistreated due to her pregnancy. She says she requested flexible start and finish times, was subjected to undue criticism or shaming for health-related absences, even when they were supported by medical documentation. She claims after an incident where she wished to start a shift later, her rostered days of work were reduced from three to two days per week as a type of punishment. She claims she was constructively dismissed and/or unjustifiably disadvantaged in her employment.

[2] LCNZ denies these claims. It says Ms Caldeira's "regular absences" were always treated in good faith and with respect despite her notifications of absence being "last-minute". It says all issues raised by Ms Caldeira were addressed promptly and clearly, and Ms Caldeira resigned to work at another LCNZ Clinic. It says she was offered considerable flexibility with her rostered hours, but her request to arrive later than her colleagues could not be accommodated. LCNZ says Ms Caldeira's agreed hours of work were an average of 15 hours per week in accordance with their employment agreement, and she was offered and accepted additional hours when available. It says it had a business reason for making the roster change it did.

The Authority's process

[3] A witness statement was lodged for Ms Caldeira. LCNZ's director Gordon Frykberg represented LCNZ before the Authority, and provided a statement in the form of an email prior to the investigation meeting. Both witnesses confirmed their statements and answered questions under oath or affirmation at the investigation meeting. The parties were given the opportunity to make submissions at the meeting.

[4] Although LCNZ advised the Authority at a case management conference that LCNZ's clinic manager (the manager) who supervised Ms Caldeira during her employment would attend the Authority's investigation meeting, the manager did not attend.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. Not all evidence or submissions are necessarily referred to but have been considered.

The issues

[6] The issues requiring investigation and determination are:

- (a) whether Ms Caldeira was constructively dismissed;
- (b) whether Ms Caldeira was unjustifiably disadvantaged;
- (c) whether any remedies should be awarded, subject to issues of contribution;
- (d) whether any costs should be awarded.

Background

[7] Ms Caldeira originally worked at another LCNZ clinic and then as a clinic manager at LCNZ Ponsonby for about one year, prior to resigning to return to her home country, Brazil, to visit family. While in Brazil, she asked if she could return to work, and was offered casual employment. There is no dispute Ms Caldeira ultimately accepted an offer of part time work on or about 28 May 2022 on return to New Zealand.

Employment agreement

[8] Ms Caldeira has provided the Authority with an unsigned version of the parties' employment agreement. There is no dispute that the agreement contains the relevant terms. It states Ms Caldeira would perform work duties during "Working Hours and during any additional hours reasonably required" by LCNZ. "Working Hours" was defined as usual working hours as specified in Schedule 1, which stated LCNZ:¹

...will set your hours of work in advance in accordance with a roster and notified to you at least 14 days in advance. You will be provided with an average of **15 hours per week** during the hours of **8:00am-12:00am Monday to Sunday**.

[9] Mr Frykberg says Ms Caldeira was initially adamant that her hours at LCNZ were to be no more than 15 per week, and the agreement documented this.

[10] In relation to sick leave, the agreement stated the employee must notify their supervisor of their intention to take sick leave strictly in accordance with any timeframes set out in policies. No written policies have been provided to the Authority. Schedule 1 of the agreement confirmed Ms Caldeira's entitlement to sick leave was the statutory minimum, being 10 days per year after six months of employment.

[11] The agreement records that no variation of the agreement was valid unless it is in writing and signed by both parties to the agreement.

[12] The agreement provided for a notice period for termination of employment of four weeks.

¹ Emphasis added.

Pregnancy

[13] Ms Caldeira says that after working a few weeks at LCNZ, she found out she was pregnant and advised LCNZ of this. Ms Caldeira says when another staff member resigned, she asked if she could work one of her shifts and was given a shift on Mondays. She said there was no mention of Mondays not being a fixed day or that it was not a permanent day. As a result, her usual hours went from about 15 hours a week over two days to about 24 hours over three days a week on Sunday, Monday and Wednesday. Ms Caldeira says she worked these three days a week from then on.

[14] Mr Frykberg says Ms Caldeira asked for additional hours because she was not receiving enough support from her family. He says LCNZ was happy to assist with an additional day while it completed training with new inexperienced therapists to be able to perform the necessary treatments. It is common ground no variation of Ms Caldeira's hours was recorded in writing.

[15] Ms Caldeira says she received a job offer with a higher hourly rate from another employer. LCNZ agreed to increase Ms Caldeira's wage to \$33 per hour, and she decided to stay with LCNZ. She says LCNZ agreed to give her more flexibility with her hours but that after she agreed to stay this did not happen. LCNZ denies that flexibility was offered and agreed to, although it says "significant flexibility" was actually afforded to her.

20 September 2022 email complaint

[16] Ms Caldeira became concerned about certain issues and on 20 September 2022 emailed Mr Frykberg and the manager. The email recorded there were issues impacting her health and wellbeing, and that she raised her dissatisfaction with the manager two days prior. She raised a concern that she had not been treated fairly or equally to her colleagues, especially with a therapist who was also pregnant at the time.

[17] Ms Caldeira said she was five months pregnant and as everyone knew her pregnancy was high risk for herself and her baby and that she had mental health issues. She stated although she was not being paid for days she was sick, she was "always questioned or shamed about being sick, or have a cold and sharp treatment, like I'm not right to be feeling sick, even when with a doctor note and validation". She said she was

made to feel uncomfortable and guilty for feeling unwell and stated:

Since I have been back at laser clinics Ponsonby, I asked if I could start my shift at 10am, as the traffic in the morning and my morning sickness is worst in the morning (and I'm a part time worker) but had a negative answer, a lot of the times with a say that "[therapist] can't be alone for 1 hour" but this same therapist finishes her shifts every Monday at 4pm and I stay in clinic on my own until 6pm.

[18] In her email Ms Caldeira complained about the same therapist booking clients in a way which affected Ms Caldeira's ability to earn commission, and it had been happening for a while. She asked that this matter be kept confidential as she did not wish it to negatively affect the work environment and hoped a solution could be found.

25 September 2022 meeting

[19] Mr Frykberg responded that it would be good to discuss and on 25 September 2022 he, the manager, the other therapist and Ms Caldeira met. It does not appear Ms Caldeira's request for confidentiality was respected.

[20] Ms Caldeira says she was disappointed by the meeting as management failed to effectively address her concerns and on 27 September 2022 Ms Caldeira sent a follow-up email to management about the meeting expressing concern that the other therapist's behaviour had not been addressed. She also said the "main reason" for the meeting was left aside and she was looking forward to a follow up.

[21] In an email on 28 September 2022 Mr Frykberg emailed Ms Caldeira, copying in the manager apologising if their discussion was not clear enough regarding the issues of concern. The email referred to LCNZ's expectation of mutual respect and communication between everyone, and of LCNZ's fundamental principle that all clients are clients of the clinic, not individual therapists. The email did not refer to or address Ms Caldeira's concerns about her health and wellbeing and being treated differently in relation to her requests for flexibility.

12 October 2022 incident

[22] On Wednesday 12 October 2022 Ms Caldeira sent a text message to the manager and the following records their exchanges:

Ms Caldeira: Hi [manager], I didn't sleep anything... I will get there at 10am.. I checked and just one collum [sic] And just 1 client until then... sorry [7:45am]

Clinic manager: No Celina, because it's only Julie, I am not ...today [7:55am]

I don't want you do this things, because others will learn this things, and you are going in 3months but bad habit will stay. Then please be in clinic 8:45 [7:57am]

Ms Caldeira: I cant make [8:45am]
Im feeling sick
I will be there 10 [8:56am]

I can either be 10 or not go...sorry, not my fault.. I thought Gordon was clear about me need to be well..Im not doing this things to other learn if that is what u are saying [8:59am]

So Im not feeling well still, sorry as you said I cant be 10 I will not go today, better be save [sic] [9:04am]

Clinic manager: You must go. You can't tell last minutes, it's breach of contract. [9:05am]

Ms Caldeira: If im feeling sick of course I can [9:08am]
Lets ask Gordon [9:10am]

Clinic manager: Celina, please don't discuss with me, what ever you want to tell, please contact Gordon. By the contract you must call 2 hours before you start time. Not sleeping enough is not sickness. And you must call either myself or Gordon not sending message. [9:10am]

[23] Ms Caldeira then text messaged Mr Frykberg attaching screenshots of her text exchange with the manager, saying that is how she is spoken to when not feeling well.

Ms Caldeira then messaged the manager as follows:

Ms Caldeira: im not going, and I just msg Gordon
Do not threat
threaten [9:13am]

Clinic manager: I am not threaten you, I just remind you, the contract you sign. [9:14am]

This is the condition every employee must respect [9:15am]

... I believe you are threatening me. [9:16am]

Anyway, I am sorry to tell but sometimes you act like a kids. [9:17am]

I don't like discuss with you, go and sleep [9:19am]

Ms Caldeira: An you act like a dictator [sic], no empathy [sic] for another, unless the other who u like or do what u want, I didn't sleep coz I had nausea[a] all night.. and I thought u would understand [9:20am]

And after this discussion and be treated like that I feel more nausea then ever, super upset to be treated like that...I thought u knew me better [9:25am]

[24] Ms Caldeira and Mr Frykberg then exchanged the following messages:

Mr Frykberg: [Manager] is just doing her job Celina and we all discussed this and the impact it has on everyone
We are doing everything we can to manage your pregnancy and your wellbeing
It is disappointing that we still discussing this and the same situation keeps repeating [9:34am]

Ms Caldeira: It is desapoiting [sic] the way she talked to me and threaten me, she is doing her job talking to the employees like this... I was going today and she made me feel uncomfortable...not even an appologie [sic].. this is no the way to treat staff. I have nothing to discuss, I do not need to explain or justify my self to not be feeling well [9:44am]

[25] At around 10am Ms Caldeira emailed a letter from her midwife to Mr Frykberg, stating the midwife supported “her to take some time off work today as she is feeling unwell”. The letter stated to contact the midwife if additional information was required and gave contact her details.

[26] Ms Caldeira notes she had no bookings that morning before the time she offered to come in. Mr Frykberg refers to Ms Caldeira citing concerns about traffic as being her issue, as she was travelling from Waitakere to Ponsonby to start work at 8.45am. Mr Frykberg gave evidence that at the relevant times LCNZ was very short of staff and it was not possible for Ms Caldeira to start work later. He states even if Ms Caldeira did not have a client booked, a staff member still needed to be available for other critical responsibilities like room setup, answering phone and email messages and appointment confirmation calls.

Ms Caldeira’s hours reduced in next roster

[27] The next day Ms Caldeira says she found out she was no longer rostered to work Mondays from another therapist who called her. Ms Caldeira says she then checked the roster and called Mr Frykberg, who said he had legal advice that she needed to accept the rostering. At the investigation meeting Mr Frykberg maintained the position that the employment agreement entitled LCNZ to change the roster and referred to the 15 hours per week recorded in it.

[28] An email from a “no-reply” email address on 13 October 2022 to Ms Caldeira says a roster had been published for the two weeks beginning 19 October to 30 October

2022. It indeed recorded she had shifts on both Wednesdays and Sundays, but none on the relevant Mondays. Ms Caldeira saw this as a punishment for the incident the day before, but Mr Frykberg's evidence at the investigation meeting was that it was not, and the suggestion he had some "personal vendetta" against her was "bullshit". He explained that LCNZ had been training new staff after a difficult short-staffing period, and as a consequence shift changes were able to be made.

[29] It appears Ms Caldeira removed herself from LCNZ's chat group, because on Friday 14 October 2022 Mr Frykberg sent a text message asking her to please get back on the chat group as it was an "important communication tool". Ms Caldeira did not respond but about an hour and a half later asked if her hours had been reduced.

[30] Ms Caldeira then emailed Mr Frykberg and the manager raising her concern about the reduction of her days and saying LCNZ could not change her pattern of work which had developed without consulting her, regardless of what her contract said. She refers to LCNZ not being caring or considerate of her needs as it said it would be when she received the job offer with another business. She expressed her hope to get her hours back to normal and that she had been in contact with the LCNZ head office. Mr Frykberg responded the same day suggesting they meet after Ms Caldeira's shift on Sunday 16 October 2022, which was agreed.

16 October 2022 meeting

[31] On 16 October 2022 Ms Caldeira, accompanied by her partner, met with Mr Frykberg and the manager. After the meeting Ms Caldeira emailed Mr Frykberg clarifying her main concern was the decrease in her hours without consultation. She referred to the reason given at the meeting for the decrease as being for business profitability/cost saving reasons. The email requests various records including the employment agreement.

[32] The email records that Ms Caldeira's partner read out a statement on her behalf at the meeting. Topics covered were about the sudden decrease in hours feeling like a punishment for being sick on 12 October 2022, and that her sickness was genuine. It also outlined how pregnancy had been hard on her for certain stated medical reasons, and because she had consistent morning sickness and nausea. She referred to her previous request for a bit of flexibility and the option of starting at 10am some weeks ago. The statement referred to having worked Mondays for four months, and that the

roster was put out earlier in the week rostering her to work Monday and was then changed on Thursday after she was sick on Wednesday. In the statement Ms Caldeira explained that English was her third language and if things were not communicated perfectly, she apologised, and that if she had been asked clarifying questions by the manager her needs would have become apparent. She said instead she was sent rude and unkind messages demanding she go to work, which made her anxious and unable to attend.

[33] The statement outlined that she feared an unworkable environment was being created which may force her to quit. She said the reduction in hours was targeted as it was only done to her with no genuine business reason with a colleague now rostered in her place. She expressed concern that taking away hours would impact her payments and parental leave payment entitlements, and ability to pay expenses. She stated she would like to be given the three full days per week that she had worked for months and kindness when she needed to start later due to genuine sickness. She stated she would like further discussion about a starting time of 10am and if that was not possible, then to be treated with kindness and professionalism when she was sick.

[34] It appears the same night Ms Caldeira applied for a job at another LCNZ clinic.

Resignation

[35] On 17 October 2022 Ms Caldeira says she verbally resigned to Mr Frykberg and asked to be released from her four-week notice period. Mr Frykberg's evidence was that he heard about Ms Caldeira approaching the other clinic from that clinic itself, and agreed Ms Caldeira could take on hours at the other clinic during her notice period. He emailed the other LCNZ clinic saying Ms Caldeira had advised she had accepted a job there and Ms Caldeira had asked about leaving LCNZ Ponsonby earlier. He said although that was not possible, he had no objection to her commencing sooner at the other clinic provided Ms Caldeira worked Wednesdays and Sundays during her four-week notice period. Ms Caldeira responded by email confirming the previous night she had applied for the job at the other LCNZ clinic and was awaiting a response. She requested to be released early saying she did not feel comfortable working at Ponsonby anymore.

[36] Ms Caldeira says while she managed to find a position at the other LCNZ clinic, the transition was not without its challenges. She gave evidence that the position was

secured through the intervention of the LCNZ country manager, and necessitated a wage reduction, with the other clinic offering \$28 per hour, \$5 less per hour than at LCNZ Ponsonby.

[37] On 18 October 2022 Ms Caldeira resigned by email stating the situation and unfair treatment had forced her to resign, and the reason was that she requested flexibility to start shifts at 10am due to issues with her pregnancy, and if that had been arranged, she would not have lost days of work and would feel able to attend. She advised her last day of work would be 15 November 2022. Even though Ms Caldeira states she deeply loved her job and relied on the income it provided, the constant lack of understanding, targeted actions, and overall disregard she faced left her emotionally drained. She says the impact on her mental well-being was so profound that, despite needing the job, she felt cornered with no other choice but to resign. She feels that the distressing environment and treatment she endured can best be described as a constructive dismissal.

[38] The evidence demonstrates LCNZ did not provide the documentation requested on 16 October 2022. There is equally no evidence Ms Caldeira followed up that request prior to finishing work at LCNZ.

[39] Mr Frykberg says while Ms Caldeira knew her hours were discretionary with only 15 guaranteed per week, she was offered extra hours after her resignation when available, some of which she took and others she rejected. Ms Caldeira says all that was offered were extra hours if someone called in sick. She did not want those as she wanted security in her hours.

[40] LCNZ complains that Ms Caldeira was frequently late, left early and was unfriendly and unhelpful to other therapists. It says Ms Caldeira raised her concerns on a number of occasions and these were dealt with in a constructive manner.

[41] For the sake of completeness, I note Ms Caldeira has not asserted that her request(s) for flexibility was made pursuant to section Part 6AA of the Act. The emails written by Ms Caldeira do not reference Part 6AA2 and the process set out in the Act to resolve disputes under Part 6AA has not been followed.

Whether Ms Caldeira was constructively dismissed

[42] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches.² It appears Ms Caldeira considers this category applies to her situation.

Earlier issues raised by Ms Caldeira

[43] One of the earlier issues Ms Caldeira raised with LCNZ while she was employed involved the therapist she said was booking clients in a way which affected her ability to earn commission. Although Ms Caldeira's email correspondence with LCNZ on 27 September 2022 shows she was dissatisfied with LCNZ's actions on that point, the evidence does not sufficiently establish a breach of duty in relation to that issue, and in any event the enduring problem for her was around the lack of flexibility afforded to her.

[44] Ms Caldeira also raised with LCNZ that she was not treated fairly or equally compared with the other therapist who was also pregnant at the same time. She believed the therapist was given more flexibility around her start and finish times. The evidence before the Authority on flexibility afforded to the other therapist was limited but did demonstrate some ability to be flexible with another employee's needs. Although Mr Frykberg suggests LCNZ afforded Ms Caldeira with flexibility, when and how has not been sufficiently demonstrated.

12 October 2022

[45] I now turn to the exchanges between the parties on 12 October 2022.

[46] For completeness, I note the Authority has not been shown any policies which expressed how and when leave was to be notified by an employee. It can give no weight to the suggestion in the text messages that Ms Caldeira had not complied with sick leave policies. In any event, although Ms Caldeira had not yet become entitled to paid sick leave at the time the employment relationship problems arose, as a pregnant female

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

employee she was entitled to take up to 10 days' unpaid special leave for reasons connected with her pregnancy under the Parental Leave and Employment Protection Act 1987 (PLEPA). One of the stated purposes of PLEPA is to protect the rights of employees during pregnancy and parental leave, and the Employment Court has long since acknowledged that PLEPA recognises pregnancy can impact on the workplace and that an employer is bound to take account of it if it affects an employee's work performance.³

[47] There is no evidence before the Authority that LCNZ considered its obligations under PLEPA in any way as it related to special leave, which could potentially be taken in half days or even smaller segments for things such as doctors' appointments, illness related to the pregnancy, or even tiredness. Although Ms Caldeira did not frame her texts on 12 October 2022 as a constituting a request for special leave, as an employer LCNZ ought reasonably to have been aware of her entitlements and facilitated special leave for pregnancy related impacts where these were cited, as was the case on 12 October 2022. While Ms Caldeira's request to start later may have impacted LCNZ's resourcing on particular days including on 12 October, it was a resourcing issue LCNZ could reasonably be expected to manage.

[48] Mr Frykberg has submitted care should be taken in interpreting the text messages between the manager and Ms Caldeira. This is because English was neither Ms Caldeira's or the manager's first language, and what is expressed in written form may not reflect what was meant to be conveyed. The Authority accepts that, but even allowing for this, in my view the manner in which the manager responded to Ms Caldeira's text messages was reactive and not appropriate and impacted negatively on Ms Caldeira. Objectively, how the manager responded were not the actions of a fair and reasonable employer.

Change in rostered days

[49] I am not satisfied on the balance of probabilities that Ms Caldeira and the manager reached agreement that Ms Caldeira's hours would permanently increase to include Mondays, with the employment agreement guaranteeing on average 15 hours per week and her shifts being subject to a roster. However, LCNZ should in good faith have first consulted Ms Caldeira before making the significant roster change it did. Ms

³ *Lewis v Greene* [2004] 2 ERNZ 55 at [119].

Caldeira had been working Monday shifts since shortly after her employment resumed. She had a very regular pattern of work that had become the status quo. Good faith requires the parties to be communicative. LCNZ should have discussed the possibility of her shifts being changed and the reasons it was considering such a change with Ms Caldeira. It did not do so.

[50] It is difficult to accept it was a coincidence that Ms Caldeira's regular days of work were changed for the reasons Mr Frykberg says, coming just a day after the freight text exchange and Ms Caldeira's subsequent absence on 12 October 2022. Although the Authority has not seen it, Ms Caldeira advised at the time that a roster had already been issued earlier in the week, and then changed on 13 October 2022. I find in the circumstances the change was more likely than not informed by the manager's concerns about Ms Caldeira's so-called "bad habit", or in Mr Frykberg's own words at the investigation meeting, habit of being "perpetually late". LCNZ clearly harboured concerns about her reliability as it came to attendance at that point.

Breach of rostering term

[51] Schedule 1 of the parties' employment agreement also specifically stated Ms Caldeira's hours of work would be "set in advance in accordance with a roster and notified to you at least 14 days in advance". The evidence showed LCNZ clearly did not give the required notice of the roster change 14 days in advance. The change in hours came as a surprise and gave Ms Caldeira little time to react to the issue than should have been the case.

16 October 2022 meeting and resignation

[52] To its credit, LCNZ proposed to meet with Ms Caldeira on 16 October 2022 after she expressed concern about the reduction in her hours. It gave an explanation for not rostering Ms Caldeira on Mondays, but as I have indicated, that explanation is not accepted.

[53] Rather than await a response to her email of 16 October 2022 and her request for records, Ms Caldeira applied for a job at the other clinic. During her shift on 17 October 2022 it became clear to Ms Caldeira that her request to be rostered on for three days a week again would be not met. There is also no evidence that LCNZ had any intention of addressing Ms Caldeira's requests for flexibility in a way that would meet

its obligations under PLEPA. It was in that context that she resigned on 18 October 2022.

[54] I am satisfied LCNZ's breaches were sufficiently serious to make it reasonably foreseeable that Ms Caldeira may resign. Ms Caldeira repeatedly put LCNZ on notice of her need for some flexibility and the medical issues she was facing in relation to her pregnancy. Her experiences with management on both 12 and 13 October 2022 amply demonstrated nothing was likely to change in that regard. Having previously been a valued and long-serving employee, her unmet requests for understanding and flexibility for pregnancy-related reasons fell on deaf ears, and she was suddenly met by an abrupt reduction in days of work. Her resignation was an unjustified constructive dismissal.

[55] Mr Frykberg says Ms Caldeira was a valued employee and LCNZ was very willing to work with her and look after her. However, even where an employer wants an employment relationship to continue, it may also still have constructively dismissed an employee because of its conduct towards the employee.

Whether Ms Caldeira was unjustifiably disadvantaged

[56] How the actions giving rise to Ms Caldeira's unjustified disadvantage personal grievance claim differed from those giving rise to her constructive dismissal claim were not articulated by her advocate. As I have found the unjustifiable dismissal claim has been proven I do not consider there is a basis to consider the disadvantage further.

Remedies

[57] Because I have found Ms Caldeira has a personal grievance for constructive dismissal, she is entitled to a consideration of remedies.

Compensation

[58] Ms Caldeira says her tenure at LCNZ was characterized by continuous unfair treatment and the emotional and psychological distress she experienced while employed, the effects of which continued after she left employment. She believes the cumulative stress undoubtedly contributed to significant mental health issues she experienced and contributed to her baby being born underweight, although no medical evidence has been provided in relation to these claims.

[59] Considering the distress experienced by Ms Caldeira around the time leading up to her resignation and the evidence of the ongoing effects on her and the general range of awards in other cases, an appropriate amount of compensation under s 123(1)(c)(i) of the Act is \$20,000.

Lost wages

[60] The evidence provided in relation to Ms Caldeira's small claim for lost wages was very limited and I am not satisfied there is a sufficient basis to make an award.

Contribution

[61] Under the Act I am required to consider whether to reduce remedies where the actions of the employee contributed toward the situation that gave rise to the grievance or grievances. Although LCNZ complained about Ms Caldeira's lateness to work, and her text messages on 12 October 2022 were not entirely constructive, the cause of the grievance can be attributed to the actions LCNZ and accordingly no reduction in remedies is made under s 124 of the Act.

Outcome

[62] Ms Caldeira has established a personal grievance for constructive dismissal. Within 21 days of the date of this determination LCNZ Ponsonby Pty Limited is to pay Celina Caldeira \$20,000 under s 123(1)(c)(i) of the Act.

Costs

[63] At the conclusion of the investigation meeting, Ms Caldeira asked the Authority to determine costs based on the daily tariff amount.

[64] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act. The power is discretionary with its use governed by principles. These include that costs will usually follow the event and the discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience.

[65] Ms Caldeira was the successful party and is entitled to a contribution to her costs. The starting point is the Authority's daily tariff of \$4,500 for the first day of an investigation meeting. The investigation meeting took half a day resulting in a pro-rated amount of \$2,250. No increase or reduction was suggested as appropriate, nor do I see any basis for that.

[66] Within 21 days of the date of this determination LCNZ Ponsonby Pty Limited is also ordered to pay Celina Caldeira \$2,250 in costs and reimburse her the Authority application of fee of \$71.55.

Sarah Blick
Member of the Employment Relations Authority