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Chief of Defence Force v Darnley [2022] NZEmpC 4 (20 January 2022)

Last Updated: 25 January 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2021\] NZEmpC 4](#)

EMPC 359/2020

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | THE CHIEF OF NEW ZEALAND DEFENCE FORCE Plaintiff |
| AND | JULIETTE DARNLEY Defendant |

Hearing: 29–30 April and 26 May 2021 and further submissions filed
on 14
and 18 June 2021 (Heard at Wellington)

Appearances: J Boyle, and C Mao (on 29-30 April 2021), counsel for
plaintiff P McKenzie-Bridle, counsel for defendant

Judgment: 20 January 2022

JUDGMENT OF JUDGE KATHRYN BECK

[1] The Chief of New Zealand Defence Force (NZDF) challenges a determination of the Employment Relations Authority which found that the defendant, Juliette Darnley, was constructively dismissed from her employment.¹

[2] Ms Darnley is an experienced human resources (HR) practitioner. From July 2017 she was a site lead in the NZDF HR Advisory Team. Part of her role was to resolve employment relationship problems.

1. *Darnley v The Chief of the New Zealand Defence Force* [\[2020\] NZERA 440 \(Member MacKinnon\)](#).

THE CHIEF OF NEW ZEALAND DEFENCE FORCE v JULIETTE DARNLEY [\[2021\] NZEmpC 4](#) [20

January 2022]

[3] In late October 2018 NZDF issued a directive entitled “Ex Gratia and Compensation Settlement Payments” (the directive) which was sent to Ms Darnley on 12 December 2018. The stated purpose of the directive was to provide policy guidance for the control and management of ex gratia and compensation settlement payments.

[4] On 28 January 2019 Ms Darnley settled an employment relationship problem on behalf of NZDF. That settlement involved paying the employee six months’ salary in lieu of notice, five months more than her contractual entitlement. Ms Darnley says she did not consider the directive applied to that settlement and so did not follow its process or get approval for the payment in lieu of notice.²

[5] NZDF considered the directive did apply and started an investigation into, amongst other things, whether Ms Darnley had knowingly circumvented the approval process. It ultimately considered that she had and proposed to terminate her employment for serious misconduct.

[6] Before her employment could be terminated, Ms Darnley took up employment elsewhere. Before doing so, she did not give notice to NZDF and only told her colleagues after she had been working for her new employer for two weeks. She claims she was constructively dismissed. She says that by commencing the investigation and alleging serious misconduct when there was no basis to do so, NZDF repudiated its employment agreement with her and it then compounded that repudiation by finding serious misconduct and threatening to dismiss her.

[7] NZDF says that it was Ms Darnley who breached her obligations to it. It says she failed to provide the contractually stipulated one month's notice and failed to act in accordance with her obligations of good faith. It seeks a penalty and repayment of wages it overpaid her in error.

Issues

[8] The issues for the Court are:

2. Ms Darnley did obtain budget approval from the head of department that the employee worked in but not the approval that would have been required under the directive.
 - (a) Was the defendant constructively dismissed by the plaintiff?
 - (b) If so, was it justified?
 - (c) If it was not justified, what remedies if any are available to her?
 - (d) Did the defendant breach her employment agreement and her duty of good faith to the plaintiff?
 - (e) If so, should she pay a penalty?
 - (f) Should the defendant be required to repay the overpayment of wages?

Constructive dismissal

[9] In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* the Court of Appeal accepted that a constructive dismissal could arise in situations such as where:³

- (a) an employer had given an employee an option of resigning or being dismissed;
- (b) an employer had followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty by the employer led an employee to resign.

[10] While Mr McKenzie-Bridle, counsel for the defendant, submitted that elements of each of these three situations were apparent in the way in which the plaintiff treated the defendant on 18 February, 8 April and 13 May 2019, the focus of both parties' submissions (in my view correctly) was on the third category (c) above.

3. *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [\[1985\] 2 NZLR 372 \(CA\)](#), (1985) ERNZ Sel Case 136 at 139.

[11] There was no evidence before the Court that Ms Darnley was ever presented with the option of resigning or being dismissed, and this was not pursued in submissions.

[12] The suggestion that NZDF had followed the course of conduct that it did with the deliberate and dominant purpose of coercing Ms Darnley to resign, was cited as an alternative submission.

[13] There was no evidence that was the case. A constructive dismissal of this type requires proof of intention on the part of the employer. There must be a conscious decision to act in a way that will procure a resignation.

[14] In this case the process was initiated by Group Captain Ward who had only been in the role a few days when she was presented with the situation involving the settlement. She did not know Ms Darnley or her work. There was no basis for her to form the view that Ms Darnley should resign and no evidence that she did form such a view.

[15] It was apparent from the evidence that Group Captain Ward was very committed to the investigation process and prepared to consider serious consequences (including dismissal) based on whatever the process uncovered, but that is not evidence of an intention to coerce a resignation.

[16] The only reference to resignation came from Ms Darnley's representative,⁴ and it did not appear to be met with much enthusiasm by NZDF.⁵

[17] Accordingly, I do not consider that this was a situation where NZDF pursued a course of conduct with the deliberate and dominant purpose of coercing Ms Darnley to resign.

⁴ In a letter dated 29 May 2019 from Mr McKenzie-Bridle to NZDF.

5 Letter dated 11 June 2019 from NZDF to Mr McKenzie-Bridle.

[18] The circumstances of this case require the Court to look into the third category in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd*.⁶ That is, whether a breach of duty by NZDF led Ms Darnley to resign.

[19] The third breach of duty limb was considered further by the Court of Appeal in *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)*.⁷ There, the Court accepted the employee had been constructively dismissed, but added foreseeability to the test in the following way:⁸

In such a case as this we consider that the first relevant question is *whether the resignation is being caused by a breach of duty on the part of the employer*. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is *whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing*: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[20] Thus, the focus of a claim of constructive dismissal is on the employee's motivation for ending the employment; and the test is objective.⁹

[21] Accordingly, the questions for the Court are:

- (a) Were there any breaches of duty by NZDF?
- (b) If so, did that breach or breaches cause Ms Darnley to resign?
- (c) If so, was the breach or breaches of sufficient seriousness to make it reasonably foreseeable by NZDF that Ms Darnley would resign?

⁶ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd*, above n 3.

⁷ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW(Inc)* [1994] NZCA 250; [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA) (emphasis added).

⁸ At [172].

⁹ *Edmonds v Attorney-General* [1998] 1 ERNZ 1 (EmpC) at 13–14.

Did NZDF breach its duty to Ms Darnley?

[22] The events leading up to the end of Ms Darnley's employment are not in dispute.¹⁰

[23] On 4 December 2018 Ms Darnley commenced a disciplinary and performance improvement process in relation to an employee. On 12 December 2018 she was emailed the directive. On 28 January 2019 she reached a settlement with the employee and on 30 January 2019 she requested that the NZDF wages department process the payment under the settlement. On 1 February 2019 that department raised concerns with the settlement not being compliant with delegations.¹¹ However, Ms Darnley advised that delegations had been complied with. Payments were made under the settlement including a payment of six months' pay in lieu of notice, even though the employee's contractual entitlement was one month.

[24] On 7 February 2019 Andrew Thompson (Site Lead Linton) spoke to Ms Darnley to informally gain an understanding of the settlement. He then wrote to Ms Darnley's manager with his understanding and copied his email to Ms Darnley.

[25] On 12 February 2019 Jackie Ward, then Acting Assistant Chief of Defence Human Resources and Group Captain with the Royal New Zealand Air Force, decided to undertake a formal investigation into Ms Darnley's actions. She wrote to her on 18 February 2019 advising of the commencement of the investigation and setting out the allegations. On the same day, terms of reference were provided to Bob Bulman, then Manager HR Service Centre and the investigator.

[26] Investigation interviews took place, including with Ms Darnley. She was provided with the draft investigation report on 27 March 2019 and was asked to comment. On 1 April 2019 she advised she had no comment to make. The investigation report was finalised that same day.

[27] On 8 April 2019 Group Captain Ward wrote to Ms Darnley, informing her of her conclusion that the allegations were proven, and that serious misconduct had

¹⁰ A joint chronology was provided by the parties dated 26 May 2021.

¹¹ In accordance with the directive.

occurred. Consequently, she was now of the view that disciplinary action was necessary. The conclusion that her conduct constituted

serious misconduct did not form part of the draft investigation report provided to Ms Darnley and was not otherwise put to her before. She required Ms Darnley to attend a disciplinary meeting. Ms Darnley and Group Captain Ward met on 15 April 2019.

[28] On 13 May 2019 Group Captain Ward issued a preliminary decision of dismissal on notice. She met with Ms Darnley to deliver that notice on 14 May 2019 and invited comments on the preliminary decision. The following day Ms Darnley went on paid special leave and ultimately did not return. From 27 May 2019 she went from paid special leave to paid sick leave. Ms Darnley's sick leave expired on 13 June 2019 and she was then placed on annual leave.

[29] Ms Darnley engaged legal counsel to support her and advised NZDF accordingly on 15 May 2019. There were various exchanges of correspondence between Ms Darnley's legal representative and NZDF on a number of matters.

[30] Throughout the disciplinary process, Ms Darnley actively sought new employment and attended meetings with a number of prospective employers. She was offered a role with KiwiRail on 28 May 2019 and commenced employment with the company on 24 June 2019. She did not, however, advise NZDF of this. I deal with this issue later.

[31] On 4 July 2019 the parties attended an unsuccessful mediation, and on 7 July 2019 Ms Darnley emailed her colleagues, advising them that she had started a new role with KiwiRail. She did not ever formally resign from NZDF.

[32] Ms Darnley received her final pay on 10 July 2019.

[33] She filed a statement of problem in the Authority on 2 August 2021 alleging constructive dismissal.

[34] Ms Darnley says that NZDF repudiated her employment by acting in the following unfair and unreasonable ways:

(a) On 18 February 2019 NZDF alleged serious misconduct for not following the directive without any reasonable basis to justify that allegation.

(b) On 18 February 2019 NZDF commenced a far-reaching, unnecessary and fundamentally unfair employment investigation which placed Ms Darnley under significant personal and professional pressure.

(c) The investigation established that NZDF harboured historic performance concerns never raised with Ms Darnley. It used the disciplinary process to indirectly address those concerns rather than address its own systemic problems relating to those concerns.

(d) On 8 April and 13 May 2019, having failed to give proper weight to significant mitigating factors identified in the investigation report, NZDF threatened to terminate Ms Darnley's employment for serious misconduct, thereby jeopardising her ongoing employment in her profession.

[35] Ms Darnley maintains that the employment relationship had become irrecoverable by 18 February 2019 at the point Group Captain Ward wrote to her advising of the commencement of the investigation. She says that dismissal was inevitable by 8 April 2019¹² and/or 13 May 2019.¹³

[36] NZDF says its actions were fair and reasonable at all times.

[37] It is helpful to break down these actions into the three key events highlighted by Ms Darnley.

12. The date on which Group Captain Ward wrote to Ms Darnley stating her conclusion that serious misconduct had occurred.
13. The date of Group Captain Ward's preliminary decision to dismiss for serious misconduct on notice.

Was commencing the investigation a breach of duty?

[38] NZDF says that the directive applied to the circumstances of the settlement; the payments met the definition of an ex gratia payment and also met the definition of a severance payment. The apparent failure to follow the directive exposed NZDF to risk and so it was fair and reasonable to commence an investigation into the circumstances of that payment.

[39] The terms of reference of the investigation required that the investigating officer investigate four matters: whether the directive required that the settlement be approved; whether Ms Darnley knowingly circumvented the approval process; whether the settlement exceeded NZDF's financial obligations; and any other circumstances might have contributed to any breach.

[40] These points of investigation were then set out as allegations in a letter to Ms Darnley dated 18 February 2019.

[41] Group Captain Ward says she instigated the investigation because Mr Thompson and Patrick Crowsley, Director Human Resources Service Delivery, recommended it. I accept her evidence on this point.

[42] This is consistent with the correspondence at the time, which stated the reason for an investigation being commenced was their advice – being the two people who conducted the initial fact-finding in the matter. The terms of reference also

refer to the initial fact-finding investigation determining that there was sufficient reason to conduct a formal investigation.

[43] Mr Thompson's email to Ms Darnley's manager does not recommend a formal investigation. However, Mr Crofskey, his manager, does make that recommendation in an email four days later..

[44] Ms Darnley's evidence was that she was told the matter had been "put to bed" and that Mr Thompson's email to her, copying the outcome of his fact-finding,

conveyed that he considered there was "nothing to see here". She says they also had a conversation to that effect.

[45] I do not consider that Mr Thompson's email goes as far as suggested by Ms Darnley. He notes that it "seems pretty simple" but also that he had left the door open for others to discuss further. When asked later about saying there was "nothing to see here" by the investigators, ¹⁴ he accepts he may well have said it, but says it would have been in the context of there being nothing more to see in terms of what happened and that it was now up to NZDF to decide whether she had breached the rules.

[46] To be fair to Ms Darnley, that is a constrained construction to put on that phrase and I accept that having been told "nothing to see here", she was then surprised to find herself subject to a formal investigation. However, Mr Thompson was a peer. He was not in a position to bind NZDF as to how it chose to handle things. I consider it was open to NZDF to commence a formal investigation in the circumstances.

[47] That is, however, not the end of the matter. Ms Darnley's concern was not just with the initiation of an investigation; she takes particular exception to the allegation that she "circumvented the approval process knowing that approvals were required under the CPO Directive and told staff actioning the payment that approvals were not required."¹⁵ She says there was no basis for that allegation.

[48] I agree that this is a serious allegation.

[49] There was nothing in Mr Thompson's email that suggested that Ms Darnley circumvented the process, knowing it applied. The initial fact-finding clearly records that Ms Darnley's view was that the directive did not apply. There is no evidence of Group Captain Ward having any other information in front of her when setting out the allegations she wanted investigated. She was unable, in her evidence, to explain why she made that particular allegation, other than to say that she wanted all of the circumstances of the settlement investigated and that this was a possibility. Her view

¹⁴ In an email dated 25 February 2019

¹⁵ Investigation letter 18 February 2019.

was that she was obliged to put the most serious scenario to Ms Darnley as a matter of fairness.

[50] Mr Boyle, counsel for the plaintiff, submitted that the circumstances and the context of the settlement supported the allegation. That may well have been the case had they not had the report from Mr Thompson which made no suggestion that Ms Darnley acted knowingly. Counsel also suggested that it was a reasonable inference given Ms Darnley's seniority and experience. Again, however, there was no suggestion of that in Mr Thompson's initial fact-finding; and further, when questioned about why she had made the allegation, Group Captain Ward herself did not give that as her reasoning.

[51] There was no evidence of NZDF having a basis for that particular allegation at the time. I do not accept that the allegation needed to be made on a worst-case scenario basis. A full inquiry could have been made into the circumstances of the settlement without making that allegation at the outset. If such an allegation emerged from the investigation process, that could have been dealt with at the time.

[52] While initiating the investigation that was open to NZDF, making a specific serious allegation of that nature, without a basis to do so, is a breach of a duty by it to be active and constructive in establishing and maintaining a productive employment relationship.

Did the letter of 8 April 2019 breach NZDF's duty to Ms Darnley?

[53] The letter of 8 April 2019 was sent by Group Captain Ward after she had considered the investigator's report dated 1 April 2019. In the letter Group Captain Ward states:

... I have concluded that the allegations are proven and that serious misconduct has occurred. Consequently, I am now of the view that disciplinary action is necessary. Disciplinary outcomes in this instance may include a warning or dismissal.

[54] Counsel for Ms Darnley argues that the conclusion could not be reached having regard to the Civil Staff Code of

Conduct,¹⁶ as well as the mitigating factors in the report itself.

[55] The more problematic matter in relation to this letter, however, is that the conclusion was reached without hearing from Ms Darnley first or giving her an opportunity to make the points that Mr McKenzie-Bridle raised once he became involved. He was in the invidious position of making such points in response to a preliminary decision of dismissal based on an entrenched conclusion of serious misconduct.

[56] Mr Boyle has suggested that this was a “preliminary decision”. That is not consistent with the clear wording of the letter: “I have concluded ...”. It was a decision. Further, it was one that NZDF was reluctant to dislodge. When Mr McKenzie-Bridle did raise the issue in a letter dated 29 May 2019, the response from NZDF on 11 June 2019 displayed a clear reticence to engage on that point, redirecting the focus to the preliminary decision to dismiss.

[57] A decision that Ms Darnley’s conduct amounted to serious misconduct and disciplinary action was necessary, including the possibility of dismissal, was clearly one that triggered the operation of [s 4\(1A\)\(c\)](#) of the [Employment Relations Act 2000](#) (the Act), requiring that Ms Darnley be given the opportunity to comment before the decision was made. NZDF failed to give her that opportunity.

[58] Ms Darnley’s failure to comment on the draft report before it was finalised does not excuse NZDF failing to ask for comment at the point when the report by the investigators, and its implications, were being considered.

[59] Ms Darnley’s failure left her in the position of having to take the report and its findings as is, but it did not preclude her from commenting on conclusions to be drawn from that report by the decision-maker.

16. It was argued the finding would support a performance issue or lower level misconduct than serious misconduct.

[60] NZDF’s failure to seek such comment amounts to a breach of duty on its part.

Did the contents of the letter of 13 May 2019 breach NZDF’s duty to Ms Darnley?

[61] After meeting with Ms Darnley on 15 April 2019 and considering her response to the letter of 8 April 2019, Group Captain Ward wrote to Ms Darnley advising her of her preliminary decision on the appropriate outcome. She notes that she had taken into account what Ms Darnley said at the meeting about the report, and her own view that the allegations were proven and amounted to misconduct.

[62] She then advised that her view was unchanged, Ms Darnley’s actions amounted to serious misconduct, and disciplinary action was necessary; in this case it should be dismissal with notice.

[63] Group Captain Ward went on to set out a detailed response to the issues raised by Ms Darnley during their meeting. She also set out further matters that she considered as part of her assessment process. These included Ms Darnley’s level of experience, the nature of her role as a senior HR adviser and people leader, her response during the course of the investigation, her unwillingness to seek help, her decision-making and Group Captain Ward’s inability to have trust in her given the inconsistencies between Ms Darnley’s responses at their meeting and those provided by her during the investigation.

[64] Group Captain Ward then set out her preliminary decision which was based on a culmination of all of the matters set out in her letter. The letter invited Ms Darnley to attend a further meeting to provide any reasons or submissions why she should not confirm her preliminary decision. The meeting was proposed for 16 May 2019 (three days away) but it never took place and NZDF did not act on the preliminary decision.

[65] The defendant says that to treat her actions as serious misconduct, and then rely on them to dismiss her, was grossly unfair. She says the directive was ambiguous, not properly communicated, not well understood and not discussed with her by her manager when it was introduced. She also says the proposed action is particularly unfair when it appears from the investigation report that the directive was issued in

response to concerns about her performance which had never been raised with her. Her submission to the Court was that this was more properly dealt with as a performance matter or, at worst, a potential misconduct (not serious misconduct) issue.

[66] Ms Darnley relies on NZDF’s Code which sets out examples of poor performance,¹⁷ and general misconduct.¹⁸ She is correct that her actions, based on findings of the investigation report, could come within those descriptions. However, the investigators’ findings that Ms Darnley had sufficient knowledge to cause her to adhere to the requirements of the directive and that her explanations for not doing so were not credible mean that it was not outside the bounds of what was reasonable for Group Captain Ward to consider the conduct to be serious misconduct and, thereby, dismissal to be an option.

[67] It does appear that Group Captain Ward gave very little weight to the circumstances and systems failures that were cited in the report as contributing to the breach, or the mitigating factors outlined by the investigators. Such failure could call into question justification down the track. Whether her stance would have continued after receipt of submissions or a further meeting with Ms Darnley and her representative, however, remains to be seen.

[68] That is the difficulty with the plaintiff's claim in relation to this letter – NZDF never acted on it.

[69] Mr McKenzie-Bridle submitted that the inquiry in relation to breach (as it relates to constructive dismissal) can stop at the letter itself, and that what occurred after that was largely irrelevant. However, that does not take into account the full context of Ms Darnley's decision to leave or accept the role with KiwiRail on 28 May 2019. This is the date at which she determined to end her employment with NZDF (even though that was not conveyed to it at the time). Logic dictates that any breach(es) causative of the resignation must have occurred before then. Further, circumstances up until that date are relevant as context when considering both breach and causation.

17 Civil Staff Code of Conduct 2006, cl 34.

18 Clause 36.

[70] Between 13 May and 28 May 2019 Mr McKenzie-Bridle wrote to NZDF requesting further information. Ms Darnley was granted special paid leave until 24 May 2019 and then went on sick leave. NZDF confirmed it was working on providing the information sought. It did not take steps to act on its preliminary decision or even suggest that it might do so.

[71] While Ms Darnley may well have been dubious as to Group Captain Ward's openness to changing her mind, there was nothing in NZDF's actions following the issuing of the 13 May 2019 letter and Ms Darnley deciding to end her employment, that indicated that the preliminary decision was final. It still had not made a final decision by the time Ms Darnley started at KiwiRail on 24 June 2019.

[72] Accordingly, while NZDF's preliminary decision to dismiss was on the tough side given the circumstances and various mitigating factors, it was not final, and it was not outside the bounds of what a fair and reasonable employer could do in all the circumstances. It did not amount to a breach of duty by NZDF to Ms Darnley.

Were there other breaches by NZDF?

[73] The defendant also submitted that the plaintiff's refusal to grant her special leave past 24 May 2019, which then necessitated her going on sick leave, was a breach of its obligations to her. She says it treated her differently and less favourably than others in similar circumstances who were granted leave without question for whatever part of the disciplinary process they needed it for. Ms Darnley did not provide any evidence of other cases where such leave had been granted in this way.

[74] NZDF gave her two weeks' paid special leave (Monday 15 May to Friday 24 May 2019). Ms Carambas, who was at the time employed as Assistant Manager Resources Law for Defence Legal Services, gave evidence for the plaintiff that such leave was at the discretion of the manager. That is consistent with the NZDF Leave (Civil Staff) Policy.

[75] There was no breach of policy and no evidence of disparity of treatment. Refusal to grant special paid leave past 24 May 2019 did not amount to a breach of duty by NZDF to Ms Darnley.

Did the breach or breaches cause Ms Darnley to resign?

[76] In order to establish a constructive dismissal, an unbroken causal nexus must be established between a breach of duty by the employer, and the employee's resignation. In Ms Darnley's case, this requirement poses significant difficulty. At no point did she formally resign her employment.

[77] Even if I had found that the breaches were such that it was foreseeable that Ms Darnley would resign, I do not consider that such breaches caused her to terminate her employment.

[78] The chain of causation was broken by the intervention of Ms Darnley's employment with KiwiRail. Ms Darnley had ample opportunity to resign in reliance on the alleged breaches of duty; she did not.

[79] Accepting employment with KiwiRail is what caused Ms Darnley to end her employment with NZDF when she did. She had been interviewing for alternative roles since just before receiving the draft investigation report on 27 March 2019. I accept that she wanted to avoid the stain of dismissal (a dismissal she would have considered unjustified) on her employment record but that understandable motivation is not enough to sustain a claim of constructive dismissal.

[80] The result of this finding is that Ms Darnley was not constructively dismissed by NZDF.

Were the breaches of sufficient seriousness to make it reasonably foreseeable by NZDF that Ms Darnley would resign?

[81] Even if I had found a causal nexus between a breach of duty and Ms Darnley's resignation, I am not satisfied that, at the date she left her employment with NZDF,

the breaches were of sufficient seriousness that it was reasonably foreseeable that she would resign.

[82] The breaches as found at [52] and [60] above could have been sufficiently serious to make it reasonably foreseeable by NZDF that Ms Darnley would resign but for the meeting between Ms Darnley and Group Captain Ward on 15 April 2019, the content of the 13 May 2019 letter and NZDF's actions following that letter.

[83] On 15 April 2019 Ms Darnley and Group Captain Ward met and, amongst other things, Ms Darnley responded to Group Captain Ward's finding of serious misconduct. Group Captain Ward considered what Ms Darnley said and responded to it in the 13 May 2019 letter. She confirmed her view that Ms Darnley's conduct amounted to serious misconduct and gave further reasons for that view. In that way NZDF went some way towards rectifying its earlier breach in relation to the 8 April 2019 letter.

[84] In relation to the 13 May 2019 letter, NZDF did not act on its preliminary decision. It granted special leave (albeit not for as long as Ms Darnley would have liked), was working to provide information as requested, and showed no sign of making a final decision in the meantime.

[85] In all the circumstances, on 28 May 2019 (the date Ms Darnley accepted the role with KiwiRail) there were no extant breaches of sufficient seriousness to make it reasonably foreseeable by NZDF that Ms Darnley would resign.

Conclusion

[86] While unfairly treated by NZDF at times, Ms Darnley was not constructively dismissed and accordingly her claim of unjustified dismissal fails and the plaintiff's challenge to that finding succeeds.

Unjustified disadvantage

[87] While rejecting the claims based on the constructive dismissal, I have considered whether, pursuant to s 122 of the Act, Ms Darnley has a personal grievance

of a type other than that alleged. In this case, that would be whether some unjustifiable action by NZDF has affected her employment to her disadvantage.

[88] The plaintiff says that any grievance in relation to the 18 February 2019 and 8 April 2019 letters would be outside the 90-day time limit as a grievance was not raised until the statement of problem was filed on 2 August 2019.

[89] The defendant says s 122 is not subject to ss 114 or 115, but provided no authority for that submission. Counsel further submitted that enough was said in correspondence to NZDF on 27 and 29 May 2019 to constitute raising a grievance and, if not, exceptional circumstances would justify bringing a grievance out of time.

[90] I do not accept that s 122 is not subject to s 114 or s 115. All personal grievances are subject to s 114. It is clear from the plain wording of s 122 that a personal grievance must still be alleged by the employee; it is then that the Court may step in and decide that the nature of the personal grievance is actually of another type. It does not give the Court carte blanche to substitute the alleged personal grievance for a new unraised personal grievance.¹⁹ This understanding has been evident in this Court's approach to s 122.²⁰

Was the grievance raised within 90 days?

[91] The word "grievance" was first used by Mr McKenzie-Bridle in his correspondence dated 29 May 2019. In that letter he details (over five pages) his concerns as to the unreasonableness of NZDF's actions and the detrimental effect on Ms Darnley. He refers specifically to the letters of 18 February and 13 May 2019. In his letter Mr McKenzie-Bridle notes that if Ms Darnley resigned, it would amount to a constructive dismissal, but she was seeking an opportunity to resolve the situation on agreed terms. He goes on to note that an alternative to an agreement would be to raise and pursue a personal grievance. Mr McKenzie-Bridle refers to a dispute between the parties and proposes mediation.

19 See *New Zealand Van Lines Ltd v Gray* [1999] NZCA 432; [1999] 2 NZLR 397, [1999] 1 ERNZ 85 (EmpC).

20 See, for example, *ANZ Sky Tours Ltd v Wei* [2021] NZEmpC 76, [2021] ERNZ 261 at [108]–[111]; *Greetham v Lawter (NZ) Ltd* [2020] NZEmpC 174 at [74]; and *Turner v Talley's Group Ltd* [2013] NZEmpC 31, [2013] ERNZ 12 at [12].

[92] A grievance is raised as soon as an employee has made or taken reasonable steps to make the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. The case law makes it clear that there is no specific formula of words to be used; nor is it necessary for the employee to recognise their complaint as a personal grievance. What is required is for the employer to be made sufficiently aware of the grievance to be able to respond to it on its merits, with a view to resolving it promptly and informally, at least in the first instance.²¹

[93] Given the extensive detail provided in the letter dated 29 May 2019, which was sufficient to let NZDF know that Ms Darnley had a personal grievance for either disadvantage or constructive dismissal that she wanted to have addressed, I am satisfied that the provisions of s 114(2) are met. I find that, through this letter, Ms Darnley raised her personal grievance. Accordingly, that captures any grievance within 90 days of that correspondence which rolls back to 31 March 2019.

[94] This does not capture the letter of 18 February 2019 but does encompass the letter of 8 April 2019.

Were there exceptional circumstances occasioning the delay?

[95] Ms Darnley was very clearly stressed and upset by the events at the time and her own personal circumstances, such as the death of her mother. However, this did not preclude her from starting to search for a new job on 27 March 2019 and going for various job interviews. Further, Ms Darnley is an experienced HR practitioner. She was well aware of the 90-day time period.

[96] Accordingly, I do not consider that the delay was occasioned by exceptional circumstances under s 114 and s 115. This is not a case where it is appropriate to grant leave to raise the grievance out of time. The letter of 18 February 2019 does not form part of the conduct to be considered.

21. *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 (EmpC) at [36]; *Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [37]–[38].

[97] I have already found that NZDF's letter of 8 April 2019 amounted to a breach of its obligations to Ms Darnley. While NZDF later took steps to rectify (at least in part) that breach through the meeting on 15 April 2019, Ms Darnley was clearly on the back foot. She was faced with having to try and persuade (unsuccessfully) Group Captain Ward from a view that was already firmly held.

[98] This did put her at a significant disadvantage and, on her evidence, caused her significant upset and stress.

[99] Accordingly, Ms Darnley has a sustainable grievance for unjustifiable disadvantage in relation to the 8 April 2019 letter.

Compensation

[100] Ms Darnley has not lost any earnings in relation to this disadvantage.

[101] She gave evidence as to the effect on her of the plaintiff's conduct. It is difficult to separate out the effects of this breach from those which resulted from the broader investigation and a disciplinary process.

[102] In relation to this particular part of the process, Ms Darnley says she was "floored" and felt like she was being targeted. She says she felt deeply hurt, under mounting pressure and not in a good head space.

[103] Ms Darnley was awarded \$25,000 in the Authority for a constructive dismissal and I have found that there was no constructive dismissal.

[104] The Court has adopted a banding approach to the quantification of an award under s 123(1)(c).²² There are three bands: Band 1 involving low-level loss or damage; Band 2 involving loss or damage in a mid-range; and Band 3 involving high-level loss or damage.

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

[105] I consider Band 1 to be the correct banding given that the analysis is limited to the loss caused by the letter of 8 April 2019. As I have noted, subsequent steps taken by Group Captain Ward and NZDF went some way toward remedying any damage caused by that letter. Any harm suffered by Ms Darnley as a result would have been transitory and minimal. In *Richora Group Ltd v Cheng* Band 1 was assessed

\$0–\$10,000.²³ In all the circumstances, I consider an award of \$6,000 is appropriate.

Contribution

[106] Having found a personal grievance, the Court must consider whether Ms Darnley contributed towards the situation giving rise to that personal grievance and, if those actions require it, reduce the remedies awarded accordingly.²⁴ I adopt the relevant factors for consideration recently summarised in *Maddigan v Director-*

General of Conservation.²⁵

[107] The plaintiff has submitted that any award to Ms Darnley should be reduced by 50 per cent due to her failures in relation to the settlement of the employment matter.

[108] While the grievances I have found are procedural in nature, the s 124 inquiry is not focused on whether Ms Darnley contributed to the procedural failings themselves; instead, it looks at whether she contributed to the situation which gave rise to the personal grievance claim.²⁶ In this case, that situation is the settlement negotiation which gave rise to the investigation.

[109] I agree that it was Ms Darnley's actions that initially placed her in this situation. She has maintained throughout that the wording of the directive was ambiguous and she did not consider it applied. I agree that the directive was not as clear as the plaintiff maintains. However, given the stated background to the directive,²⁷ I also agree that

²³ *Richora Group Ltd v Cheng*, above n 22.

²⁴ [Employment Relations Act 2000, s 124](#).

²⁵ *Maddigan v Director-General of Conservation* [\[2019\] NZEmpC 19](#); [\[2019\] ERNZ 550](#).

²⁶ *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [\[2016\] NZEmpC 136](#); [\[2016\] ERNZ 628](#) at [1979]; citing *Paykel Ltd v Ahlfeld* [\[1993\] 1 ERNZ 334 \(EmpC\)](#) at 337–339.

²⁷ “The NZDF must comply with legislative requirements, demonstrate fiscal responsibility and comply with Government directions and expectations. Recent requests from Audit NZ for information regarding exit payments has highlighted that the PCP must proactively ensure NZDF

if there was uncertainty as to its application, Ms Darnley could and should have checked before proceeding to pay an additional five months' salary in lieu of notice.

[110] Accordingly, I consider that she has contributed to her situation; and a reduction of 10 per cent is appropriate.

[111] Accordingly, Ms Darnley is awarded \$5,400 by way of compensation.

Breach of agreement and good faith by Ms Darnley

Breach of agreement

[112] The plaintiff says the defendant breached her employment agreement in failing to provide it with one month's written notice of resignation.

[113] It is not disputed that the defendant failed to provide the plaintiff with any notice of her resignation, let alone one month's written notice. It is apparent that this was in order to enable her and/or her representative to reach an agreement in relation to the terms of her exit from NZDF. That does not justify or mitigate the breach.

[114] Accordingly, I find that the defendant breached her employment agreement by failing to provide such notice.

Breach of good faith

[115] The plaintiff also says the defendant failed to comply with the duty of good faith under [s 4\(1\)](#) of the Act by:

- (a) failing to advise the plaintiff that she had commenced alternative employment;
- (b) refusing to respond to the plaintiff's direct question about whether she had commenced alternative employment;

is compliant with internal financial delegation policy, and that all forms of settlement payments are what are reasonably expected under the NZDF policy.”

(c) accepting payment of \$1,172.50 for 27 and 29 June 2019 when she did not work and had commenced alternative employment; and

(d) providing a medical certificate which stated that she was unfit for work until 6 July 2019 but then commencing her employment with KiwiRail on 24 June 2019

[116] The plaintiff says those actions, on their own or cumulatively, are serious breaches of the duty of good faith in terms of the obligation not to do anything which is likely to mislead or deceive the employer,²⁸ and to be active and constructive in maintaining a productive employment relationship by being responsive and communicative.²⁹ Ms Darnley provided a medical certificate on 6 June 2019, setting out that she was unfit for work until 6 July 2017. There is no suggestion that the certificate was not accurate when she provided it; nor did it give rise to any obligation preventing her from seeking or accepting new employment.

[117] The real issue lies in the fact Ms Darnley failed to notify NZDF when she commenced employment with KiwiRail on 24 June 2019 and then a few days later compounded that failure by not responding to a question from NZDF asking if she had found another position.

[118] NZDF clearly should have been informed of this development, both at the time she took that position and on inquiry. The failure to do so was a clear breach by Ms Darnley of her good faith obligations to be active and constructive, and responsive and communicative.

[119] Ms Darnley had exhausted her sick leave entitlement as at midday on 13 June 2019. From that point she was utilising her annual leave entitlement which she had been advised would take her to 25 June 2019. On 10 July 2019, she was paid for the days 27 to 29 June 2019 in error. The overpayment amounted to \$1,172.50.

²⁸ [Employment Relations Act 2000, s 4\(1\)\(b\)](#).

²⁹ [Section 4 \(1A\)\(b\)](#).

[120] The plaintiff attempts to attribute the overpayment to the defendant's actions. That argument, however, is not available to it. The overpayment was made on 10 July 2019, after it was aware that Ms Darnley was working at KiwiRail and, in any case, it was in excess of her annual leave entitlement which it had already notified her would expire on 25 June 2019. The overpayment was due to an error on the plaintiff's part, not a breach of good faith. It is an amount that the defendant has said she will repay, and she should do so.

[121] Ms Darnley breached her obligation of good faith by failing to advise NZDF that she was ending her employment with it and had started working somewhere else.

Penalty

[122] Under [s 134](#) of the Act, any person who breaches an employment agreement is liable to a penalty. As I have already noted, the defendant breached her employment agreement by failing to give one month's notice.

[123] Under [s 4A](#) of the Act, a party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty if the failure is deliberate, serious, or if it was intended to undermine the employment relationship. The plaintiff submits that the threshold has been met in this case and a penalty is appropriate.

[124] I agree. The failure by Ms Darnley was deliberate.

[125] There are a number of matters the Court must have regard to in determining the amount of any penalty:

- (a) The nature and number of breaches;
- (b) the severity of the breach;
- (c) means and ability to pay; and
- (d) proportionality.

[126] There are two breaches – one of good faith and one of the employment agreement. However, there is an element of overlap between the two.

[127] The plaintiff accepts this and proposes that the penalties be globalised at

\$10,000. It submits that a penalty of \$1,500 to \$2,500 is appropriate.

[128] The essence of the breach(es) is the failure to notify NZDF that she was leaving to work for someone else.

[129] I accept that the defendant's breaches were serious given the nature of her experience and knowledge in the area of employment relations. She is an experienced HR practitioner and knows what is required of her when ending employment with one organisation and commencing with another.

[130] That said, this was a time of significant stress for her. Much of that stress can be attributed to the, at times, unfair way in which NZDF has managed this process. That does not excuse Ms Darnley's actions, but it is part of the context within which the breaches occurred.

[131] Ms Darnley is in a paid position but there was no evidence of her overall financial circumstances. I will assume that she has the ability to pay a small fine.

[132] The employer did not suffer any significant adverse consequences. It had already notified Ms Darnley of the preliminary decision to dismiss on notice which it had said it did not require her to work. By failing to notify, she deprived it of the opportunity to commence a recruitment process in a timely manner. That is not, however, significant.

[133] Taking all of the factors into account, I consider that a globalised penalty of

\$1,500 is appropriate. Such penalty should be paid to the Crown.

Outcome

[134] The Authority's determination is set aside.

[135] I have found that the defendant was not constructively dismissed by the plaintiff but that she was disadvantaged by its unjustified actions and is entitled to compensation.

[136] The plaintiff is ordered to pay Ms Darnley, within 21 days, the sum of \$5,400 under [s 123](#) (1)(c)(i) of the Act, being \$6,000 reduced by 10 per cent.

[137] I have also found that Ms Darnley breached both her employment agreement and her duty of good faith to the plaintiff and that a penalty is appropriate.

[138] Ms Darnley is ordered to pay, within 21 days, a globalised penalty in the sum of \$1,500, the entire amount to be paid into the Crown Bank account.

[139] Counsel should discuss costs and any associated issues directly in the first instance. If these cannot be resolved by agreement, any relevant application should be filed and served within 21 days, with a response given within a further 21 days.

Kathryn Beck Judge

Judgment signed at 4.50 pm on 20 January 2022