

Attention is drawn to the orders prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 33  
3041094

BETWEEN                      HST  
                                         Applicant  
  
A N D                              KAG  
                                         Respondent

Member of Authority:            Peter van Keulen

Representatives:                David Beck and Deborah Hendry, counsel for the Applicant  
                                         Jay Lovely, counsel for the Respondent

Investigation Meeting:        15 – 17 July 2019 and 15 August 2019

Submissions Received:        6 September and 4 October 2019 from the Applicant  
                                         26 September 2019 from the Respondent

Date of Determination:        28 January 2020

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

- [1]     HST commenced work as a law graduate with KAG, a law firm, in May 2017.
- [2]     KAG is a specialist family law firm and a large part of its practice includes the provision of family legal aid services.
- [3]     HST's first role with KAG was an administrative role involving case management. HST's administrative role with KAG changed during 2017, as a result of restructuring within KAG.

[4] Ultimately, HST was moved into a legal team at the end of October 2017 and HST worked as a lawyer, with KAG paying for a practising certificate, from 10 November 2017. In January 2018, HST became a certified legal aid provider.

[5] HST suffered with anxiety and stress during work, from July 2017 and this affected her work performance.

[6] Throughout HST's employment KAG managed HST's ongoing work; part of this management was through a formal process. HST was unhappy with how KAG managed her work and performance particularly in the context of the anxiety and stress she was suffering from. HST raised a personal grievance on 1 August 2018 and resigned shortly after on 23 August 2018.

[7] Following her resignation HST lodged claims in the Authority against KAG for constructive dismissal, unjustified action causing disadvantage, discrimination, breach of contract and breach of the duty of good faith.

[8] All of HST's claims are informed by the same complaints; KAG failed to manage her work appropriately by not providing appropriate supervision and engaging in an aggressive and hostile performance management process, then it failed to respond to the concerns when she raised them, becoming more aggressive and hostile such that she felt she had no option but to resign.

[9] KAG denies that it did anything wrong in its management of, and attitude toward, HST.

## **Preliminary matters**

### *Evidence*

[10] In the course of my investigation, counsel for HST asked me to hear from two witnesses who had previously worked at KAG. Both witnesses attended my investigation and gave evidence about their experiences at KAG, including some detail around the circumstances of each of them departing KAG.

[11] Counsel for KAG has objected to the evidence from these two witnesses being considered by me, stating it was irrelevant and merely an attempt to introduce similar fact evidence relating to the culture and working environment at KAG.

[12] Rather than deal with the issues relating to the admissibility of similar fact evidence I will deal with this additional evidence by simply noting that I have considered the evidence and am persuaded that most of it is not necessary nor is it appropriate. I have sufficient evidence from HST and current management of KAG, to be able to determine if employees acted as alleged and if so the impact of that on HST.

*Non-publication*

[13] HST suffered from anxiety at work and, as I have already explained her claim centres on KAG's management her performance in light of her medical condition. As a result I heard evidence about HST's personal medical history particularly during the time she worked at KAG. My analysis requires me to address some of this evidence and in doing so I may cause some hardship to HST by having her otherwise private medical information set out in a publically available document. Given the nature of the medical information that may also impact on her health by causing further concerns for her.

[14] The appropriate way to deal with this issue is to anonymise the HST's identity and prevent any publication of her identity and any of her medical information except that which is necessary to set out in my determination.

[15] I also consider it appropriate to anonymise the name of the law firm HST worked for in order to prevent HST's identity being revealed by association with that firm.

[16] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

- (a) the name of HST, the applicant in the application before the Authority, and any information which may lead to her identification – she is referred to as HST in this determination;

- (b) the details of HST's medical conditions including any current diagnosis and historical assessments, except for anything that I specifically set out in this determination;
- (c) the name of KAG, the respondent law firm and any information which may lead to its identification – it is referred to as KAG in this determination.

### *Facts*

[17] Given the non-publication orders I have made and my views on the relevance of the additional evidence I heard in relation to the culture at KAG I will not outline all of the evidence. So in accordance with s 174E of the Act, my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but for the reasons stated above, it does not record all of the evidence and submissions received.

### *Extension*

[18] This determination, reserved at the conclusion of my investigation, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s 174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174C(3)(b) of the Act.

### **Background**

[19] When HST was studying at University, she was diagnosed with mild anxiety and received support in dealing with her condition. It appears that this support was largely successful in assisting HST with dealing with her anxiety and by the time she graduated HST reported she had few, if any, ongoing issues.

[20] HST first applied for a job at KAG in June 2016. She was unsuccessful at that time and spoke to the manager of KAG to obtain feedback on her application and interview. When she met the manager, HST discussed her anxiety with him, advising him that she had issues

previously but nothing ongoing at that time. HST raised this with the manager to get his advice on how to deal with addressing the issue of anxiety in any future interviews.

[21] In January 2017, HST was preparing to undertake post graduate study and she went back to KAG to discuss suitable research topics given her interest in practising family law. At this meeting there was discussion about a possible internship and subsequently HST was offered a place on an internship programme run by KAG in March 2017.

[22] After completing the internship, HST was interviewed for a role at KAG and was successful, commencing employment in May 2017.

[23] As with all law firms KAG had structures in place to ensure the administrative as well as legal components of client work were carried out effectively and efficiently. HST commenced work in the administrative side of KAG.

[24] In June 2017 HST was promoted to a case manager role, where she had responsibility for administrative work on client files.

[25] HST began her case manager role working for MKL, the principal solicitor at KAG but this changed in July 2017 when HST switched to working with a different solicitor. And then at the end of July 2017 HST's role was changed to Assistant Solicitor; a role which HST says was never properly clarified and she was confused about what was required.

[26] A formal restructuring process was then undertaken by KAG and further change was implemented in October 2017 resulting in HST being appointed to a legal role and working as a lawyer from 10 November 2017.

[27] So, from the outset of her legal career, over the space of around six months, HST's role changed several times. This was during a period of time that was already a busy and stressful time for her; HST describes the work from almost the outset of her employment as being busy and consuming. There was also an issue with behaviour toward HST by a colleague, which HST saw as bullying.

[28] During this time HST became sick. From July 2017 she experienced physical symptoms such as vomiting and diarrhoea. In August 2017 HST took time off work. During this time HST saw a psychologist who expressed concerns about HST being under too much pressure at work.

[29] HST continued to be sick through into October 2017 and was treated by her doctor and psychologist. In late October 2017 HST was diagnosed with abnormal depression and was given appropriate medication.

[30] HST says that during this period of illness she kept MKL informed of what was happening. MKL said she had no recollection of some of these conversations but accepts that she knew of at least one of HST's appointments with her psychologist as KAG paid for it. She also accepts that in a meeting on 24 November 2017 HST told her about the abnormal depression diagnosis.

[31] So, by January 2018 KAG was aware that HST has been diagnosed with abnormal depression, manifesting in stress and anxiety with physical symptoms. HST had raised concerns about bullying from a colleague and concerns about workload, and she had spoken to MKL about her anxiety.

[32] However, it is important to note that HST's claim is not based on anxiety and stress she may have suffered throughout this time up until January 2018. HST did not raise a personal grievance at the time and the grievance she did raise (and this claim which follows that) is based on how her work was managed by KAG after she was promoted to the solicitor role. Put simply this is the background to HST's complaints and sets out how she came to be in the position she was in, in 2018 when she says KAG's management of her work became aggressive, KAG's supervision of her work was lacking and the expectations on her became excessive with her workload increasing dramatically.

[33] In February 2018, having completed two reviews with HST as well as supervising her work on a regular basis, MKL had concerns about HST's file management. MKL set out these concerns in an email dated 20 February 2018, and in my view, this is the start of the performance management that HST complains about.

## **Management of HST's work**

[34] MKL supervised and managed HST after she started practising as a lawyer for KAG. This management included scheduled fortnightly meetings to review work and informal discussions about work when time permitted. This management morphed into a formal performance management process from 20 February 2018 when MKL set out specific concerns she had over HST's work in an email.

[35] The process progressed through a number of meetings and various letters or emails setting out concerns and expectations as well as responses and summaries through until June 2018. As part of the process MKL reduced HST's workload and budget expectations until she was satisfied that HST was able to cope.

[36] Reflecting on the process adopted by MKL and her actions I am satisfied that it was a fair and sound approach to HST's work issues and accommodated her medical issues. The work issues were set out clearly with examples, discussed and then recorded in writing. Solutions were discussed and support was given with work undertaken.

[37] Part of the problem with some of HST's work and the expectations from KAG was that MKL and HST had different views on how much assistance and support HST would need. So, for example HST complained of two occasions where she had to attend to client matters unsupervised and felt underprepared or not ready – however on both occasions MKL believed she had done sufficient work with HST to prepare her for what was required. In both cases HST coped with the attendances, obtaining good results for the client although she described a significant amount of anxiety and adverse reaction on her part.

[38] Another issue with the process was that HST found the formal nature of some of the correspondence intimidating. This was difficult for MKL as there was a need to set out the issues so they could be addressed, a need to set out the way to manage any performance failings and a need to set out the expectations and consequences of not meeting standards. If MKL had failed to do that then HST could have been equally critical of her for the lack of clarity and direction.

[39] I do accept that some of the correspondence was harsh in tone and could have been difficult for HST but it was realistic and necessary and I conclude that MKL acted as a fair and reasonable employer could have acted in the circumstances.

[40] However, the problem for HST and the issue for KAG is that the performance management process conducted by MKL appears to have been carried out in isolation from other management undertaken by KAG. During the course of MKL's supervision of HST other management staff at KAG raised issues with HST.

[41] This includes the CEO reprimanding HST for arriving late to a staff meeting. This was set out in an email of 5 March 2018. Whilst it might seem innocuous and somewhat petty for HST to complain about being reprimanded as she was, I agree with her that the tone of the email and the circumstances of it being sent were harsh. And this type of interaction with the CEO set the tone for the ongoing interactions HST had with the CEO, interactions running alongside her performance management where the CEO appeared critical and was intimidating from HST's perspective.

[42] Another example is that on 16 March 2018 as part of MKL's process with HST, MKL sent HST a detailed letter outlining the meetings they had had and the correspondence exchanged to that point, setting out issues and steps for managing and improving performance in respect of those issues and managing what was a concern at that point about HST's reaction to one of the client attendances referred to above. This included support by removing critical and pressing work enabling HST to take time off work if she needed that.

[43] On the same day the KAG Quality and Support Manager sent HST an email advising her that an audit would be undertaken of all of her files and that HST needed to respond to the email advising that she understood the audit and confirming the time frame for the audit including HST's input and responses. This time frame cut directly across the proposed timing of additional time off offered by MKL in her letter of support. So, at a time when HST needed more support, she got that from MKL but that was undermined by the perceived threat posed by an audit requiring input from her.

[44] Then one week later the CEO sent HST an email dealing with two incidents he was concerned about. The email outlined the incidents and required HST to respond by lunch time the next day so the CEO could consider what would happen next.

[45] Pausing here I wish to add that I am not being critical of KAG for raising the CEO's issues or for feeling the need to undertake an audit of HST's work. Rather it is that these matters were raised in isolation and without reference to MKL's management of HST. There appeared to be no thought of how HST, suffering from anxiety and performing poorly at work, might respond to receiving two rather blunt and somewhat threatening emails from management. In her evidence MKL spoke of managing HST in a holistic way and I appreciate that she tried to do this but the interventions from others at KAG were problematic.

[46] The disconnect between the approach by MKL and KAG management toward HST continued. On 5 June 2018 the CEO had a meeting with HST to discuss billing targets, specifically her performance being below the performance of other junior lawyers. This meeting included the CEO asking HST to comment on what might have been done to avoid the "crisis" and him suggesting to her that she needed to take some responsibility for her own welfare.

[47] It is not clear to me from the evidence I heard what the CEO was hoping to achieve in the meeting. It appeared to conflict with the good work MKL had been doing managing HST's workload and performance - the CEO being critical of HST's billing and budget performance when work had been removed from her to help her cope with anxiety and provide her with more time to understand how to manage her files is inexplicable. The meeting only appeared to undermine the support being given by MKL as HST's recollection of the meeting was that she was lucky to still be employed as any other law firm would have fired her by now.

[48] To compound the confusion for HST, less than one week later she received the final letter from MKL about her performance, this letter reflecting on her improvement and MKL's expectations going forward. MKL's evidence was that she thought her formal performance management of HST was at an end by this time.

[49] Then at the end of July 2018 further issues arose. The CEO raised concerns over a potential data breach with HST and the Quality and Support Manager raised administrative issues on two files with HST.

[50] Again, I cannot be critical of KAG as a firm wanting to address these issues – they were important and significant. However, given the context of HST's health and in particular her anxiety issues and given her prior performance, raising these issues in what appeared to be a confrontational and direct manner caused concern for HST.

[51] HST's response to the CEO's actions in raising his concerns was such that she was sick again and decided to work from home. HST then received the Quality and Support Manager's email which required an immediate response. HST was concerned and felt overwhelmed by this approach.

[52] HST then raised her personal grievance through her lawyer on 1 August 2018. Mr Beck's letter alleged that HST had been performance managed by the CEO and MKL in an intimidating and aggressive manner leaving her feeling unsupported and professionally isolated.

[53] HST was on sick leave during this time and did not return to work. In response to the personal grievance HST, HST's father, Mr Beck and MKL met on 14 August 2018. I will address this meeting in more detail below suffice to say matters were not resolved and on 23 August 2018 HST resigned.

[54] HST's resignation letter recorded her initial complaint of being aggressively performance managed and not supported and added concerns over excessive performance expectations. The letter went on to record that KAG had failed to properly investigate the grievance and had become more aggressive, and then HST referred to behaviour in the 14 August 2018 meeting making any possibility of returning to work untenable.

[55] HST lodged her statement of problem, claiming constructive dismissal, unjustified action causing disadvantage, breach of contract, discrimination and breach of good faith.

[56] Reflecting on the overall management of HST I am not satisfied that KAG treated HST fairly or appropriately given the circumstances i.e. it did not act as a fair and reasonable employer could have acted in all of the circumstances. Given this conclusion I need to determine if any of the claims in HST's statement of problem are made out.

### **Constructive dismissal**

[57] A resignation can amount to a dismissal in certain circumstances. In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*<sup>1</sup> the Court of Appeal set out three categories of constructive dismissal:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

[58] HST relies on the second and third limbs in *Woolworths*.

#### *Course of conduct*

[59] In order to determine if HST has been constructively dismissed relying on the second limb of *Woolworths*, I must consider:

- (a) Did KAG carry out a course of conduct with a deliberate and dominant purpose of coercing HST into resigning; and if so
- (b) Did HST resign in response to that course of conduct?

[60] Having reviewed all of the evidence I conclude that KAG's actions do not constitute a course of conduct that had a deliberate and dominant purpose of coercing HST into resigning.

[61] In particular I believe MKL was supportive of HST and genuinely concerned for her and wanted to help her become a better lawyer who would remain part of the KAG team.

---

<sup>1</sup> [1985] 2 NZLR 372 (CA) at 374-375

[62] The actions of the CEO and Quality and Support Manager were not supportive and as I have already concluded, unjustified. However I cannot conclude that they acted as they did because they wanted HST to resign.

*Breach of duty*

[63] In *Wellington etc Clerical Workers etc IUOW v Greenwich*<sup>2</sup> when discussing constructive dismissal arising out of a breach of duty by an employer which causes an employee to resign, the Court stated:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[64] The Court of Appeal elaborated on this in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*<sup>3</sup>, stating at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been 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.

[65] Therefore, in order to determine if HST was constructively dismissed under the third limb of *Woolworths*, I must consider:

- (a) Was there a breach of duty by KAG as alleged;
- (b) Was that breach of duty sufficiently serious - repudiatory or dismissive - such that it was reasonably foreseeable that there was a substantial risk that HST might resign in response to that; and

---

<sup>2</sup> [1983] ACJ 965

<sup>3</sup> [1994] 2 NZLR 415 (CA)

(c) Did HST resign in response to that breach of duty?

[66] The breach of duty complained of by HST is that KAG performance managed her in an aggressive and intimidating way, did not supervise her work properly and set excessive performance expectations.

[67] I have already concluded that MKL did not act in this way so therefore her actions do not amount to a breach of duty by KAG as alleged. I have concluded that the CEO and the Quality and Support Manager acted unjustifiably when they managed part of HST's performance and this was aggressive and intimidating. However their behaviour does not amount to poor supervision or excessive expectations.

[68] There are two further aspects to the claim for constructive dismissal which are set out in HST's resignation and her statement of problem. HST resigned because:

- (a) KAG did not respond to her concerns raised in her grievance failing to investigate and resolve them, becoming more aggressive and intimidating; and
- (b) MKL's behaviour in the meeting of 14 August 2018 made it untenable for her to return to work.

[69] So, I must consider whether KAG acted as alleged in these two points and if so if this amounts to a breach a duty.

[70] In terms of KAG's response to HST's grievance it responded in writing on 3 August 2018, setting out its preliminary response and agreeing to meet with HST and Mr Beck (as requested in the grievance letter). Mr Beck responded to that on 10 August 2018 and then a meeting was confirmed when Mr Beck and MKL had a short telephone call.

[71] The events of the 14 August 2018 meeting and the subsequent resignation meant that KAG did not do anything further in respect of HST's grievance after 14 August.

[72] I am not satisfied that these events support the allegation that KAG breached a duty by not responding to HST's concerns. Firstly it did respond to the grievance letter and it agreed to meet to discuss further to see how the grievance could be resolved. Then secondly, the events of the 14 August meeting and the resignation then overtook any obligation to continue to investigate and resolve the grievances.

[73] The events that took place in the meeting of 14 August and whether these amount to a breach of duty is less straight forward. The issue with the 14 August meeting is that KAG says MKL did not act as alleged but more importantly it was a without prejudice meeting so HST cannot rely on those discussions outside of that meeting in terms of any claim she makes as they are privileged.

[74] Mr Beck says that HST can rely on MKL's discussions in the 14 August meeting because even if it was a without prejudice meeting the conduct is of a kind that it triggers an exception to the without prejudice rule.

[75] This issue was first raised in my investigation meeting. I heard evidence about how the meeting was convened and what the various participants discussed at the outset about it being without prejudice or not. I was satisfied that it was a without prejudice meeting.

[76] What follows from this is that the discussions that took place in the 14 August meeting are privileged and cannot be relied on.<sup>4</sup> So next I then had to consider whether the alleged statement was an exception to the without prejudice rule. On that basis I heard evidence from the 14 August meeting participants about what allegedly occurred. However I deferred making a decision on whether the exception was made out or not until this substantive determination.

[77] I will now consider whether the conduct amounts to an exception as Mr Beck submits.

---

<sup>4</sup> Section 57 of the Evidence Act 2006 and *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 and *Gary Martinsen v Target International (NZ) Limited* [2019] NZEmpC 89.

[78] In *Morgan v Whanganui College Board of Trustees*<sup>5</sup> the Court of Appeal stated:

[11] The rule protecting without prejudice communications from admission as evidence in Court proceedings is well settled. ...

[12] The law has allowed exceptions to this rule, again based largely on considerations of public policy and we shall return briefly to them. But the guiding precept is that “the Court should be very slow to lift the umbrella [of protection] unless the case for doing so is absolutely plain”.

[Footnotes omitted]

[79] So, the law does allow exceptions to the privilege attaching to without privilege. Two recognised examples of this are where the statements amount to a threat or constitute blackmail.<sup>6</sup>

[80] The statement MKL is alleged to have made was not a threat nor was it blackmail.

[81] Mr Beck submits that the alleged statement by MKL amounts to a breach of the duty of good faith and this should be an exception. I am not satisfied that the statement, if it was made was a breach of good faith. In any event, overall I am not satisfied that the statement is of a nature i.e. absolutely plain, that it should fall to be an exception to the without prejudice privilege.

[82] My finding on this alleged breach of duty is there is no evidence of behaviour or conduct in the 14 August meeting that I can rely on and therefore no basis for me to be satisfied that KAG breached any duty as alleged through MKL’s behaviour in that meeting.

#### *Conclusion on breach of duty*

[83] My overall conclusion on the alleged breaches of duty is that KAG did breach a duty owed to HST by aggressive and intimidating performance management of her through the CEO and the Quality and Support Manager.

---

<sup>5</sup> *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340

<sup>6</sup> *Morgan; and Bradbury and others v Westpac Banking Corporation and others* [2009] NZCA 234.

*Was it reasonably foreseeable that HST might resign in response to the breach of duty?*

[84] It is reasonably foreseeable that an employee might resign in response to a aggressive and intimidating performance management.

*Did HST resign in response to the breach?*

[85] The problem with HST's constructive dismissal claim is she did not resign because of the way she was managed by the CEO and the Quality and Support Manager. She raised this as a grievance on 1 August 2018 but only resigned on 23 August 2018 and in response to the alleged breaches of failing to respond to her grievance and MKL's conduct in the 14 August meeting – neither of which have been established.

*Conclusion on dismissal*

[86] In all of the circumstances I am not satisfied that HST's resignation amounts to a constructive dismissal.

### **Unjustified action**

[87] In managing HST as they did the CEO and Quality and Support Manager caused a disadvantage to HST's terms and conditions of employment. I have already concluded that their actions in doing so were unjustified so HST's grievance for unjustified action causing disadvantage is established.

### **Breach of contract and discrimination**

[88] The allegations that form the breach of contract and discrimination claims are the same as the personal grievances and the claims were argued in the alternative. As the grievances have been resolved with a finding of unjustified action I do not need to consider these claims further.

### **Breach of good faith**

[89] HST has claimed a penalty for an alleged breach of the duty of good faith. The problem with this claim is that the request for a penalty was only raised in counsel's

submissions and this is outside of the 12 month period in which a penalty claim must be raised<sup>7</sup>.

## **Remedies**

[90] As HST is successful with her unjustified action personal grievance I can award her any of the remedies provided for under s 123 of the Act.

### *Reimbursement*

[91] I will not award any amount for reimbursement of lost wages or salary as HST's loss flows from her resignation and not her grievance.

### *Compensation*

[92] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act; compensation for the humiliation, loss of dignity and injury to feelings HST suffered because of KAG's unjustified actions.

[93] What I must do is identify the harm caused to HST by KAG's unjustified actions and the loss she suffered as a result. Then I must quantify that harm and loss.<sup>8</sup>

[94] HST's evidence shows that as a result of the way she was treated by the CEO and Quality and Support Manager, HST:

- (a) Suffered anxiety and felt overwhelmed;
- (b) Experienced symptoms of depression including sleeplessness and disrupted appetite;
- (c) Was physically sick;
- (d) Felt unsupported and isolated and had her self-confidence knocked.

---

<sup>7</sup> Section 135(5) of the Employment Relations Act 2000.

<sup>8</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[95] So, HST is entitled to compensation for the loss and harm caused by the loss of dignity, humiliation and injury to feelings described above. However, some of this loss and harm arose from how she responded to her workload and poor performance at work as well as how she responded to MKL's performance management of her. These are matters which do not form part of her grievance and therefore cannot be loss and harm for which KAG is liable. So, in assessing the loss and harm and quantifying it I have attempted to apportion that between the significant events that occurred.

[96] When quantifying that loss and harm I have also considered the recent decisions of the Employment Court, which provide guidance on the assessments.<sup>9</sup>

[97] I have assessed the level of harm and loss to HST and I quantify the compensation payable for this harm and loss to be \$14,000.00.

#### *Contribution*

[98] As I have awarded remedies to HST, I must now consider whether she contributed to the situation that gave rise to her grievance.<sup>10</sup>

[99] I do not accept that HST contributed to the unjustified actions of KAG. Therefore, there is no contributory behaviour and no reduction in remedies.

#### **Conclusion**

[100] KAG acted in an unjustified manner causing disadvantage to HST. In satisfaction of this grievance KAG must pay HST \$14,000.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[101] All of HST's other claims are dismissed.

---

<sup>9</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>10</sup> Section 124 of the Employment Relations Act 2000.

## **Costs**

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

[103] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority