

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH
I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 524
3038892

BETWEEN ROCHELLE KELLAND
Applicant

AND WHITESTONE CHEESE COMPANY
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck and Deborah Hendry, Counsel for Applicant
Phillip de Wattignar, Advocate for Respondent

Investigation Meeting: 2 and 3 May 2019 at Oamaru

Submissions received: From the applicant: 16 May 2019
From the respondent: 29 May 2019

Determination: 10 September 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Rochelle Kelland was unjustifiably dismissed.**
- B Rochelle Kelland was not unjustifiably disadvantaged.**
- C Taking contribution into account Whitestone Cheese Company Limited is ordered to pay to Rochelle Kelland:**
 - (i) The sum of \$4,420 gross being reimbursement of lost wages under s 123(1)(b)(i) of the Employment Relations Act 2000.**

(ii) The sum of \$17,600 without deduction being payment of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

D There is no award for a penalty for a breach of good faith to either party.

E Costs are reserved and failing agreement a timetable has been set.

Employment Relationship Problem

[1] Rochelle Kelland commenced work for Whitestone Cheese Company Limited (Whitestone Cheese) on 29 July 2013 as a dispatch assistant. She was party to an individual employment agreement that she signed on 25 June 2015. At the material time in 2018 she was working between 20 to 30 hours per week for Whitestone Cheese receiving \$17 per hour.

[2] On 6 July 2018 there was an exchange between another employee, X, and Mrs Kelland.

[3] On 9 July 2018 X and Mrs Kelland attended a meeting with her manager and Debbie who undertakes human resource and pay functions at Whitestone Cheese. X and Mrs Kelland apologised to each other although X's apology was limited to the way that she had spoken but not for what she had said to Mrs Kelland. Meeting notes were taken however Mrs Kelland did not receive a copy of them.

[4] On 24 July 2018 Mrs Kelland raised with Debbie concerns that she continued to feel no-one was talking to her in the workplace. She may have used the word isolated. The Chief Executive Officer of Whitestone Cheese Simon Berry became involved. Mrs Kelland was advised to go home as she was upset. Mrs Kelland said to Mr Berry that she felt that she was being punished and excluded by going home but Mr Berry reassured her that that was not the case and that he was going to undertake some investigations into her concerns.

[5] After that day Mrs Kelland only returned to attend the meetings that were held before the employment relationship ended.

[6] On 27 July 2018 Mrs Kelland, her husband Steven, Mr Berry and Mr de Wattignar met. Mrs Kelland recorded the meeting and subsequently a transcript has been provided.

[7] Shortly after the meeting Mrs Kelland received a letter from Mr Berry that provided, amongst other matters, that he had formed a view from reviewing a video of 6 July 2018 and information other dispatch staff had provided that it was Mrs Kelland's actions and behaviours that contributed towards the situation in dispatch that day. He stated in the letter that Mrs Kelland's actions showed that she was not able to contribute to working together in a harmonious and cooperative manner and that her behaviour was the cause of others not wanting to work with her. He set out in the letter that it appeared her future employment with the team was no longer tenable but wanted to hear from her about any proposals or alternatives she may want him to consider, and she was asked to come and see him on 30 July 2018. She was advised that she was welcome to bring her husband Steven or any other support person she wished to bring.

[8] Mrs Kelland asked her Aunt Dawn, a retired solicitor, from another city in New Zealand to assist her. Dawn wrote directly to Mr Berry on Sunday 29 July 2018. She wrote that she was unable to attend the meeting the following day in person but was happy to do so by telephone link. She wrote that she believed Mrs Kelland had become the victim of workplace harassment and bullying and set out some background as to why she had reached this view. She set out, amongst other matters that Mrs Kelland wished to be able to continue to perform her duties as she has done over the previous five years. She wrote that any action that Mr Berry may contemplate to alter her current employment would, in the circumstances, be completely without justification.

[9] On 30 July 2018 there was a further meeting which Mrs Kelland attended with her husband, her Aunt Dawn attended by telephone and Mr Berry attended with his personal assistant. At the meeting Mrs Kelland was given an opportunity to comment on some video footage and there was some focus by Mr Berry on an exchange between Mrs Kelland and her manager on 6 July 2018 on the footage.

[10] On 30 July 2018 Mrs Kelland received a letter advising, amongst other matters, that she had an opportunity to comment on the video footage. Mr Berry set out in the letter that he did not believe her explanations gave any reassurance that it was safe for her to come back to work, and that the conclusions remained that:

- (a) Your behaviour is the cause for others no longer wanting to work with you;

- (b) Your disruptive behaviour contributes to a feeling of overall unease in the workplace;
- (c) We also do not see it as a situation where it would be possible to repair the relationship between you and co-workers.

[11] There was a statement that there was a view on the part of Mr Berry that the company may not be able to continue her employment given her reluctance at both meeting to accept any responsibility. It was stated before making a final decision there was reference to a preparedness to hold a “without prejudice” discussion with Dawn.

[12] On 31 July 2018 Mrs Kelland received the following letter from Mr Berry:

Dear Rochelle,

Further to our recent meetings to hear an explanation for your recent behaviour, I have considered your responses and conclude that:

- Your behaviour is the cause for others no longer wanting to work with you.
- Your disruptive behaviour contributes to a feeling of overall unease in the workplace;
- We also do not see it as a situation where it would be possible to repair the relationship between you and co-workers.

Considering your reluctance to accept any responsibility for the situation including your behaviour towards your line Manager we have no reassurance from you that this disruptive and aggressive behaviour will not continue in the workplace.

Therefore, the decision has been made to terminate your employment effective immediately. As per your contract, 4 weeks will be paid in lieu of termination date, final payment will be made including any statutory obligations at our next pay run on August 8th 2018.

Should there be any personal items of yours at the workplace, then please advise me directly and I will arrange for them to be delivered to you.

Yours sincerely,
Simon Berry
CEO

[13] Mrs Kelland says her dismissal was procedurally and substantively unjustified in that she had raised issues about co-worker bullying but there was no willingness to resolve the issues.

[14] Mrs Kelland also says that she was suspended in a manner that was not justified or procedurally fair.

[15] Finally, Mrs Kelland says that Whitestone Cheese did not act in good faith in that it failed to properly disclose all documentation and material that led to her dismissal.

[16] Whitestone Cheese does not accept that Mrs Kelland was suspended and/or dismissed unjustifiably. It does not accept that the process it carried out was disciplinary in nature. Whitestone Cheese says that the dismissal was substantively and procedurally fair. It does not accept that there is a basis for a penalty to be awarded for breaches of good faith or any of the remedies sought. Whitestone Cheese counterclaims and seeks a penalty from Mrs Kelland for a breach of good faith for the covert recordings of the disciplinary meetings.

[17] By way of remedy Mrs Kelland seeks reimbursement of lost wages, compensation, a penalty for a breach of good faith and costs.

[18] This determination was issued outside the three month timeframe after receiving the last information from the parties. I record the Chief of the Authority has decided s 174C(4) of the Act has been met.

The Issues

[19] The issues for determination by the Authority are as follows:

- (a) Was Mrs Kelland suspended from her employment?
- (b) If Mrs Kelland was suspended from her employment then was her suspension procedurally and substantively justified?
- (c) How did the employment relationship end?
- (d) If the relationship ended by dismissal, then what were the reasons for dismissal?
- (e) Was there a full and fair investigation into the matters that formed the reasons for dismissal?
- (f) Could a fair and reasonable employer have concluded serious misconduct?
- (g) Was the decision to dismiss Mrs Kelland what a fair and reasonable employer could have done in all the circumstances?

- (h) If the dismissal was unjustifiable and/or the suspension was unjustifiable then what remedies should be awarded and are there issues of contribution and mitigation?
- (i) If there were breaches of the duty of good faith, then do the breaches meet the standard required for a penalty to be awarded?

The test of justification

[20] The Authority is required to consider the justification of the actions of Whitestone Cheese during the period Mrs Kelland was not at work but on full pay, and the justification of Mrs Kelland's dismissal.

[21] Matters involving justification require the application by the Authority of the justification test in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in all the circumstances. Under the test the Authority is required to consider, on an objective basis, whether the actions of Whitestone Cheese and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the employment ended.

[22] There are four procedural fairness factors set out in s 103A(3) of the Act. Procedural fairness requires that concerns are raised with Mrs Kelland and that she has a reasonable opportunity to respond to them and have her explanation considered genuinely by Whitestone Cheese. The Authority may take into account other factors as appropriate and must not determine a dismissal unjustified solely because of defects in the process if they were minor and did not result in Mrs Kelland being treated unfairly.

[23] Whitestone Cheese could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Was Mrs Kelland suspended from her employment?

[24] On 24 July 2018 it is more likely that Mr Berry, having seen that Mrs Kelland was upset, told her that she did not have to stay at work but would still be on full pay whilst he investigated the cause of her concerns that she was being isolated in the workplace. Although

Mrs Kelland did question whether she was being punished, Mr Berry reassured her she was not. I accept that he concluded that Mrs Kelland was in agreement with what he proposed at that time. In her oral evidence Mrs Kelland said that at that time she thought Mr Berry was being compassionate although she was still concerned. In the circumstances I am not satisfied that what was proposed on that date was not an action open to a fair and reasonable employer.

[25] After that date the reason why Mrs Kelland was to stay away from work changed. At the first meeting on 27 July 2018 Mrs Kelland expressed that she wanted to return to work.¹ Mr Berry responded along the lines that she could not because there was “too much conflict.” When Mrs Kelland’s husband suggested that Mrs Kelland was being punished by “getting separated” Mr Berry responded “I’ve got to separate someone Steve, I can’t take the whole team out and leave Rochelle in there, they’re getting on fine now.”²

[26] At the second meeting on 30 July 2018 it becomes clearer that Mr Berry regarded Mrs Kelland as suspended from work. Dawn, who attended that meeting by way of telephone, asked if Mrs Kelland could continue to work in the meantime following a discussion at the meeting about the possibility of mediation.³ Mr Berry responds, amongst other matters, that that would be untenable. Dawn then asks if he wants to put Mrs Kelland on stress leave. Mr Berry responded “..... we won’t even call it stress leave, I’ll just leave her on pay, it’s just basically a suspension while we go on the investigation....”⁴

If Mrs Kelland was suspended from her employment, then was her suspension procedurally and substantively justified?

[27] Clause 13.3 of Mrs Kelland’s employment agreement provides for suspension as below:

In the event the Employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the Employee, and considering the Employee’s views, suspend the Employee on pay whilst the investigation is carried out.

¹ Transcript of the first meeting 27 July 2018 at page 11

² Transcript of the first meeting 27 July 2018 at page 12

³ Transcript of second meeting 30 July 2019 at page 13

⁴ Transcript of second meeting 30 July 2019 at page 13

[28] This clause has to be considered in circumstances where Whitestone Cheese, in final submissions, does not accept that it dismissed Mrs Kelland for misconduct. Mr Berry confirmed in his evidence that he had not conducted a disciplinary process before Mrs Kelland was dismissed. I accept that there was discussion of suspension at both meetings held with Mrs Kelland after 24 July 2018, with the first of these meetings being at a time when Mrs Kelland was already away from work. Mr Berry heard from Mrs Kelland, her husband and her support person Dawn that she wanted to return to work and/or should be placed on stress leave. Notwithstanding this, Mr Berry did not decide that Mrs Kelland could return to work. On 27 July 2018 he advised he wanted to investigate and remained concerned about conflict in the workplace if Mrs Kelland returned. On 30 July 2018 he advised an intention to maintain the suspension on the basis that mediation may take place and she should not return before that.

[29] I find that a fair and reasonable employer could have, in all the circumstances, suspended Mrs Kelland from the workplace on full pay. The process was not perfect but, objectively assessed, was not to the point where it could be concluded that it was unjustified. The grievance about the suspension is not made out.

How did the employment relationship end?

[30] Mrs Kelland was dismissed from her employment summarily but with payment of four weeks' notice.

What were the reasons for dismissal?

[31] Mr de Wattignar said that the reasons for dismissal were given in the letter of dismissal of 30 July 2018.

[32] In his oral evidence Mr Berry said that the reason for dismissal was that there was bullying behaviour on the part of Mrs Kelland and that it damaged the relationships with the team. He concluded that Mrs Kelland was blaming other people. He further said in evidence that there were a "multiplicity of concerns." He referred to Mrs Kelland being aggressive toward her manager and a label that she placed on her chest that stated "F*** me over." He stated that Mrs Kelland had intimidated X.

[33] The statement in reply suggests incompatibility was the reason for dismissal. I accept that the evidence supports that Mr Berry had concluded that there was bullying on the part of Mrs Kelland leading to incompatibility.

[34] I find that these all these matters formed the reasons for dismissal read in conjunction with the matters raised in the letter of 30 July 2018.

Was there a full and fair investigation into the matters that formed the reasons for dismissal?

[35] Mrs Kelland, having raised her concerns about being isolated in the workplace on 24 July 2018, received a call from Debbie on 26 July to come to a meeting on 27 July 2018 to be given the results of Mr Berry's investigation. No allegations were put to Mrs Kelland to answer at that first meeting on 27 July 2018 with knowledge that her employment may be at risk. She was not told in advance what the concerns were and her expectation of the meeting was that she would be told the results of investigations into her concerns.

[36] Shortly following that meeting Mrs Kelland received a letter from Mr Berry that it appeared that her further employment with the team is no longer tenable. The basis for this view was not specifically set out and was generally put. Further that it was Mrs Kelland's behaviour that had caused others no longer wanting to work with her.

[37] The letter refers to Mr Berry reviewing a video however at the time she received the letter Mrs Kelland had not seen the video. There is also reference to a review of information other dispatch staff had provided although, as I shall set out, Mrs Kelland had not seen the information that was recorded in writing from other staff who had been interviewed. Mrs Kelland was invited to make any proposal or alternative at a meeting on 30 July 2018. Mr de Wattignar places some weight on her failure to do so. Mr Berry did confirm in his evidence that he did not consider Mrs Kelland could be relocated to another area. However there was some discussion in the second meeting about mediation and Mrs Kelland stated that she had apologised to her manager and X.

[38] Even allowing for some dispute from Mr Berry about the accuracy of the transcribed recording it is clear that Mr Berry referred to complaints from other employees in the context

of alleged bullying for the first time at the second meeting. In all likelihood he led Mrs Kelland to conclude that he had a file of these complaints. When asked to disclose copies of the complaints to Dawn at the meeting he was not prepared to do so because he considered they were confidential to the team members and he was concerned issues may arise if Mrs Kelland was to return to work. Mrs Kelland was not provided with a full record of Mr Berry's investigation and discussions with other employees in the team before dismissal. Disclosure confirmed that there were interviews conducted with employees and statements made were recorded in writing. This failure to disclose was not in accordance with the obligations of good faith including to provide access to information relevant to the continuation of employment to an employee for comment.

[39] Mr Beck also emphasised the failure by Mr Berry to show Mrs Kelland a full video of the material events at the second meeting on 6 July 2018. Mr Berry provided stills and opened up to parts of the video on different tabs on his computer. I accept that could result in an inadequate opportunity for response and may result in inappropriate weighing of only aspects of what was a longer exchange. However Mrs Kelland did appear from the transcribed record of the second meeting to be able to respond to what was shown to her on the video.

[40] The focus of the issues on the video was Mrs Kelland's exchanges with her manager on 6 July 2018 and some gesticulating by Mrs Kelland towards her manager with her finger. Further that Mrs Kelland placed on her chest a label which read "F*** me over" for a short time that day. I am unable to conclude with any certainty what investigations Mr Berry carried out with Mrs Kelland's manager about what transpired on the video. Her manager was on leave after 19 July 2018 and during the investigation. The manager in evidence said she talked briefly to Mr Berry on the phone during that time about the process he was undertaking and that he felt Mrs Kelland's behaviour was inappropriate. Prior to her leave the manager had not escalated any concerns to Mr Berry about Mrs Kelland's conduct towards her and a fair and reasonable employer could have been expected to have investigated further with her to establish the level of seriousness to be attributed to the gesticulating and the label.

[41] In conclusion I find that the process adopted by Whitestone Cheese was fundamentally unfair and did not satisfy the requirements in s 103A(3) of the Act of sufficiency of

investigation, concerns being clearly put with a reasonable opportunity for response before dismissal and a genuine consideration of that response. There were also breaches of the overarching obligations of good faith that impacted directly on the fairness of the process.

Could a fair and reasonable employer have concluded serious misconduct?

[42] The procedural failings including a failure to provide relevant material to Mrs Kelland during the disciplinary process were of such a nature that I do not find a fair and reasonable employer could safely conclude there was bullying on the part of Mrs Kelland.

[43] I accept that Mr Berry was concerned to see Mrs Kelland's interactions with her manager with her finger pointing close to her face and the manager standing back. He told Mrs Kelland at the meeting on 30 July that he could not have that sort of behaviour in the work place. The transcript show that Mrs Kelland agreed with him. Fairness requires the interactions be viewed in context of what appears on the video to be a robust exchange on the part of Mrs Kelland and her manager. Mrs Kelland's explanation was that her manager was also swinging her arms when an earlier issue was raised with her about hours of work. One part of the video does show that, and Mrs Kelland also standing back during that part of the exchange. I could not be satisfied that there was sufficient further investigation with the manager in light of Mrs Kelland's explanations about the exchange on 6 July 2018 and/or that the whole video was considered in context. The procedural unfairness about that was such that I do not find a fair and reasonable employer could conclude misconduct of a serious nature in relation to the interaction with the manager.

[44] Mrs Kelland said that she put a label on herself because she felt frustrated that her manager would not discuss why she had not been working the previous day. It was only on for a short time. The manager confirmed in evidence that she did not read what was on it. I am not satisfied that a fair and reasonable employer could conclude that was serious misconduct.

[45] Mr Berry was faced with a challenging situation with these interactions between the team members. There was a need to address the matter. At the end of the second meeting he indicated that he was considering mediation but there was then a prompt change of heart and Mrs Kelland was dismissed the next day. In his oral evidence Mr Berry said that he had

concluded that Mrs Kelland could not go and work anywhere else although Whitestone Cheese has five different departments and 77 employees. He also concluded mediation would not work.

[46] There are some very rare cases where employment has justifiably been terminated on the basis of incompatibility. I do not find this was a situation where Mr Berry could conclude serious misconduct based on incompatibility. The only earlier attempt to resolve matters had been a meeting on 9 July 2018 which was focused on interactions between X and Mrs Kelland. Matters appeared to have been resolved at that stage but then Mrs Kelland complained that she continued to feel isolated. There was no warning given to Mrs Kelland that Whitestone Cheese felt she was incompatible before 27 July 2018 and she did not have an opportunity to see if she could improve working relationships. A circumstance in this case was that Mrs Kelland had considerable stress at home because of a serious and ongoing medical issue confronting her husband. Her work colleagues were aware of this, as was Mr Berry.

[47] Mrs Kelland was not provided with copies of her colleagues concerns in their self-assessment surveys to respond to, or other information obtained by Mr Berry, to enable a fair and reasonable employer to safely conclude that she was solely responsible for the deterioration in the relationships. The process adopted was fundamentally flawed.

[48] I do not find that a fair and reasonable employer could conclude serious misconduct on the basis of incompatibility on the part of Mrs Kelland.

Could a fair and reasonable employer have reached the decision to dismiss?

[49] I have found fundamental procedural failings impacted on any conclusion a fair and reasonable employer could have made about conduct.

[50] A fair and reasonable employer could not, in all the circumstances, have reached the decision to dismiss. Options including mediation and/or relocation to another department that had not been pursued or properly considered.

[51] Mrs Kelland has made out her grievance that she was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Lost Wages

[52] Mrs Kelland seeks lost wages until the date of the investigation meeting. Her employment was terminated on 31 July 2018 but she received a payment equivalent to four weeks' notice. When dismissed there is an obligation on an employee to attempt to mitigate any loss. Mrs Kelland accepted that she did not look for many other roles. She explained that Oamaru is a small town and that she was worried that news of her termination may have spread, although accepted that she had no evidence about that. Mr Berry was adamant that had not occurred and I accept that there is no evidence that it did.

[53] There were applications by Mrs Kelland for roles provided in the bundle of documents. The first is for a driving role on 31 January 2019 and the second is on 1 February 2019.

[54] There was no other evidence of Mrs Kelland applying for any roles before January 2019.

[55] Section 128(2) of the Act provides that the Authority must, where it finds a personal grievance and an employee has lost remuneration as a result of the grievance, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months ordinary time remuneration.

[56] The Authority may, in its discretion, under s 128(3) order an employer to pay to an employee a sum greater than that in s 128(2) of the Act.

[57] Mrs Kelland's actual loss was greater than 3 months lost wages. I am not minded to exercise my discretion and award a sum greater than three months lost wages as I am not satisfied that the loss beyond that was as a result of the personal grievance and not the failure to make applications for roles. I cannot be satisfied and do not take notice, as Mr Beck submits I should, that Oamaru has limited employment opportunities for unskilled workers. I do however weigh that Mrs Kelland felt a significant loss of confidence because of her dismissal, a sense of confusion about why she was dismissed having initiated the process by bringing her own concerns to her employer and a fear, even if there was no evidence to

support the fear, that things may have been said about her in the community. This impacted on her confidence to apply for other roles. I accept that these matters justify an award of 3 months lost wages notwithstanding the lack of evidence of mitigation for the initial period, and taking into account that Mrs Kelland was paid for four weeks by Whitestone Cheese.

[58] I have averaged out the hours Mrs Kelland worked per fortnight in 2018 to 24 July 2018. In doing so I have not taken into account the fortnight for 23 January or 15 May 2018 as the hours seemed unusual. I have concluded an average of 50 hours per fortnight or 25 hours per week.

[59] Subject to any issues of contribution Mrs Kelland is entitled to be reimbursed for lost wages assessed for 13 weeks at \$17 per hour and 25 hours per week. That is the sum of \$5,525 gross.

Compensation

[60] Mrs Kelland seeks a compensatory sum for humiliation, loss of dignity and injury to feelings. The Authority heard evidence about the effect of the dismissal from Mrs Kelland and her two children, one a senior high school student and the other at university.

[61] I accept that the dismissal had a significant impact on Mrs Kelland. She felt she had let her family down, particularly her children, and there were resulting financial consequences for the family as she was the sole income earner. Her confidence diminished and she suffered shingles. I do weigh, as Mr de Wattignar submits I should, that there was already considerable stress in the household. Balanced with that Mrs Kelland said in evidence her job provided an escape from the home environment and it was a role that she very much enjoyed. Both of Mrs Kelland's children had worked for Whitestone Cheese in the past during the holiday time. Although she attributed the fact they did not continue to work for the company to her own dismissal there was no clear evidence to establish that.

[62] Mrs Kelland felt unable to immediately tell her son, a university student, that she had lost her role. He said in evidence that when he returned for a break he found his parents "at each other's throats" and that his mother had mood swings, was aggressive and crying and not sleeping. At one point he shifted out because it was so upsetting and stayed with a friend. He

gave evidence that Mrs Kelland had had to borrow money from him and others to get by. Mrs Kelland's daughter in her evidence said that she felt her mother could not deal with anything and that she had to "tiptoe around anything to do with money." She said that her mother could not hide her emotions and cried a great deal and that her mother and father stayed at home and did not go anywhere, including as a family.

[63] It was clear that Mrs Kelland continued with these emotions for a considerable period after dismissal. I do weigh that there was already existing stress within the home.

[64] I find, subject to issue of contribution, a suitable award for compensation is the sum of \$22,000.

Contribution

[65] Under s 124 of the Act where the Authority determines that an employee has a personal grievance it is required, in deciding the nature and extent of the remedies, to consider the extent to which the employee contributed to the situation that gave rise to the grievance and if required reduce remedies that would otherwise have been awarded.

[66] Mr de Wattignar submits there should be a significant reduction for Mrs Kelland's behaviour on 6 July 2018 and actions on 24 July 2018.

[67] It is not until this point of considering contribution that the Authority needs to assess, on the standard of the balance of probability, whether what was alleged to have occurred did in fact occur. Mrs Kelland raised issues of concern that she was being isolated and that started the process that led to her dismissal. On investigation Mr Berry considered it was Mrs Kelland with whom the team had concerns and she was dismissed.

[68] The exchanges on 6 July 2018 played a significant part in what followed. The Authority heard from a number of employees about what occurred including X. I find it likely that Mrs Kelland did come to work that day in an agitated state and became concerned about why she had not been called into work the previous day. On the balance of probabilities I find that she made a comment to X along the lines that the only reason X was hired was "because the company thought [Mrs Kelland] had cancer." She also made another comment to X that X took to be a negative comment on her choices as a parent. I am satisfied

that Mrs Kelland continue to attempt to engage further with X and X finally made a comment to Mrs Kelland to stop any further engagement. Mrs Kelland found that comment offensive and unacceptable. It was and I will not set it out. There were apologies but, as set out, the matter did not really resolve.

[69] On analysis I find a causal link between Mrs Kelland's actions on 6 July with X and the grievance that I have found. Mrs Kelland in all likelihood came to work agitated on 6 July 2018 and took that agitation out on X unfairly. I do weigh that she tried to apologise and then formally did on 9 July. Mrs Kelland did not however accept and acknowledge the pivotal role her earlier statements and actions that morning had played in X's final angry outburst. Instead she focussed in the main on what X had said to her and she complained about that. It would have demonstrated some insight into her own behaviour if Mrs Kelland had acknowledged her part in the events on 6 July 2018 in provoking such a response and in turn this would have provided greater potential for resolution of ongoing issues. Instead the difficulties remained and Mrs Kelland felt somewhat isolated in the workplace. X felt being at work with Ms Kelland after the incident on 6 July 2018 was barely tolerable to the point that she no longer wanted to work in her role.

[70] On 24 July 2018 X complained about Mrs Kelland and said that she was intimidating her and X wanted to go into packing. The acting manager then stood between X and Mrs Kelland. I do weigh that it is likely Mrs Kelland did feel isolated and that, in all likelihood, on 24 July she was trying to re-engage with X who only wanted to do her job and did not feel safe with Mrs Kelland or want to engage with her.

[71] There was also a concern about aggressive conduct by Mrs Kelland toward her manager. The conversations that day between Mrs Kelland and her manager were robust but her manager did not escalate any concerns about how Mrs Kelland spoke to her. I weigh there was inadequacy of investigation into this matter. Nevertheless the way Mr Kelland spoke to her manager was unsatisfactory and clearly alarmed Mr Berry when he saw it.

[72] I find there was blameworthy conduct on the part of Mrs Kelland in her failure to properly acknowledge what she did on 6 July 2018 before X's outburst and that contributed to the overall concerns and failure to resolve the relationship issue at an early stage before

matters progressed down the path they did. It was also inappropriate to gesticulated as Mrs Kelland did to her manager however I weigh Mrs Kelland did appear to have some insight into the concerns about the way she had spoken to her manager during the process

[73] The investigation into bullying was inadequate and I was unable to find any contributory conduct about that matter.

[74] Taking all matters into account, including the significant procedural deficiencies and the likelihood that if the process had been a fair one Mrs Kelland would have retained her role I find that the remedies should be reduced by 20%.

Was there a breach of good faith that should attract a penalty?

[75] Both parties allege breaches of good faith on the part of the other.

[76] I will start with the breaches of good faith I have found made by Whitestone Cheese. Although the video footage was not shown in its entirety I am not persuaded that this breach meets the threshold of s 4A (a) or (b) of the Act for an award of a penalty. Although not ideal Mrs Kelland was able to provide explanations to the footage she saw. The failure to disclose the other information was more serious however I am not satisfied that it was other than a misguided and incorrect view that the information was confidential. I have taken into account that Mr Berry did not have a representative with him at the second meeting.

[77] I am not satisfied that there should be an award of a penalty for the breaches of good faith in this case.

[78] I am further not satisfied that the circumstances of recording the disciplinary meetings without disclosure meet the required standard for an award of a penalty. Although it would have been appropriate to disclose the fact of recording Mrs Kelland attended the first meeting without representation and the second with her Aunt but by telephone connection only.

Orders made

[79] Taking contribution into account I order Whitestone Cheese Company Limited to pay to Rochelle Kelland the sum of \$4,420 gross, being reimbursement of lost wages under s 123(1)(b)(i) of the Employment Relations Act 2000.

[80] Taking contribution into account I order Whitestone Cheese Company Limited to pay to Rochelle Kelland the sum of \$17,600 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1)(c)(i) of the Act.

Costs

[81] I reserve the issue of costs. Failing agreement being reached Mr Beck has until 24 September to lodge and serve submission as to costs and Mr de Wattignar has until 8 October 2019 to lodge and serve submission as to costs.

Helen Doyle
Member of the Employment Relations Authority