

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 188
3001233

BETWEEN ADAM LLOYD
Applicant

A N D HEALTHY BUSINESS
INVESTMENTS LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Anna Oberndorfer, Advocate for Applicant
Robert Thompson, Advocate for Respondent

Investigation Meeting: 3 October 2017 at Christchurch with the Applicant
giving evidence remotely

Submissions Received: 10 October 2017 from Applicant
19 October 2017 from Respondent

Date of Determination: 7 November 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant was unjustifiably dismissed and suffered unjustified disadvantage in his employment. He is awarded the remedies set out in this determination, subject to a partial reduction for contribution.**
- B. I decline to impose penalties upon the respondent.**
- C. Costs are reserved.**

Prohibition from publication order

[1] During the course of the proceedings, evidence was put before the Authority which consisted of notes taken by a nutritionist of a consultation with Mr Lloyd which disclosed medical and other information about him of a personal nature. The contents of these notes are confidential, and I prohibit from publication the contents of these notes, and other evidence about the consultation, save for that set out in this determination.

Employment relationship problem

[2] Mr Lloyd claims that he was unjustifiably constructively dismissed, and was subject to unjustified disadvantage in his employment. An unlawful deduction from wages claim was withdrawn following payment by the respondent of monies which it said were withheld in error. The respondent denies unjustified dismissal and unjustified disadvantage, or argues in the alternative that if Mr Lloyd was unjustifiably dismissed, he should be awarded no remedies.

[3] Mr Lloyd, who is a British national, has returned to the UK since his dismissal and gave his evidence to the Authority remotely, by Skype, as did his partner Ms Cindy Tapscott.

Brief account of the events leading to the dismissal

[4] The respondent operates three businesses from the same premises in Middleton, Christchurch. These are The Pure Café Co; Mint, a fitness centre, and a nutritional clinic. The respondent company is wholly owned by two directors, Diane and Michael McCauley. Mr Lloyd was originally employed by the respondent in the role of senior chef in the Café but, in or around October 2015, stepped into the role of kitchen manager. Ms Tapscott was also employed by the respondent working in the fitness centre, marketing and working on reception.

[5] Mr Lloyd's evidence is that he found the role stressful and that his original role of senior chef was not filled, but that, as the months went by, he was praised for the cohesion of the team, staff costs being kept down and for bringing in new clients and increasing sales.

[6] Mr Lloyd says that, towards the middle of 2016, he realised that his lack of food knowledge and available time were holding the business up. He said that life had become very busy and his stress was increasing as he and Ms Tapscott adjusted to life in a new city and a new country. Mrs McCauley says that she had been getting reports from staff about Mr Lloyd's moodiness.

[7] On Wednesday 8 June 2016 Mr Lloyd and Mrs McCauley met and discussed Mr Lloyd's performance in the role. He says that he became quite emotional and openly discussed his feelings with Mrs McCauley. They also discussed him stepping down from his role as kitchen manager. However, Mr Lloyd said that he felt supported and guided after the discussion as Mrs McCauley had made some suggestions including Mr Lloyd getting into a routine of working out in the gym after work, meeting with a counsellor known to Mrs McCauley and also meeting with the clinic's nutritionist (Jane Syme) for some advice.

[8] Mr Lloyd met with Ms Syme later that day and says that he regarded it as being a personal appointment, as it was outside of his working hours. He says that he was assured by Ms Syme that the consultation was confidential and he treated it like any other medical appointment he had ever had. He gave Ms Syme a fairly detailed account of his personal history.

[9] Ms Syme discussed his nutrition with Mr Lloyd and raised the possibility of him taking a 'neurotransmitter test'. She told him that she needed to know about his intake of caffeine, chocolate, drugs and alcohol, as they would affect the test. He says that Ms Syme assured him at the time that the information would be confidential. This led to a discussion about Mr Lloyd's past use of party drugs in the UK and how he sometimes smoked marijuana. He says that Ms Syme told him that she would have to check with Mrs McCauley, who was the senior nutritional practitioner and a qualified herbalist, whether he could take a herbal tincture necessary for the neurotransmitter test. Ms Syme gave him a test kit but told him to wait 48 hours for his system to clear before using it.

[10] Ms Syme's evidence to the Authority was that Mr Lloyd gave her to understand that he was still regularly taking drugs (smoking cannabis and 'pill popping' as she put it). Mr Lloyd denies both that he told Ms Syme this and that he

was still taking drugs, other than occasionally smoking marijuana outside of work. Ms Syme said that, based on what she understood to be his drug usage, she believed Mr Lloyd had an addiction, and she was concerned about his mental health. She believed that his problems were beyond the scope of her practice, and she needed to speak to Mrs McCauley. She believes that she had obtained Mr Lloyd's consent to do this. Ms Syme says that she explained to Mrs McCauley that Mr Lloyd had a high drug usage and that he needed further help.

[11] For the record, I accept Mr Lloyd's evidence that he was not using drugs, apart from cannabis, during his employment with the respondent. I believe that Ms Syme made a mistake in understanding that he said he was. I also believe that Ms Syme genuinely believed that she had Mr Lloyd's consent to pass this information (erroneous as it was) onto Mrs McCauley. As for Mr Lloyd, I accept that he believed that Ms Syme was only going to be asking Mrs McCauley whether the tincture was appropriate.

[12] Mr Lloyd says that, the following morning, he came to work and was asked by Mrs McCauley where the work van was that was allocated to him, and how he had got to work that day. She also asked him whether he was going to use it that night. He said he regarded the questions as odd but carried on working.

[13] At the end of the day Mrs McCauley wanted to speak to him and asked him to tell her about his "drug use". He says that Mrs McCauley told him that the counsellor that she had tried to arrange for him to see would not see him as she did not see "people involved in hard drugs". Mr Lloyd says that he was baffled by this.

[14] Mr Lloyd says that Mrs McCauley asked whether Ms Tapscott used drugs as well, which he denied. He says that Mrs McCauley told him that if it were anybody else he would be dismissed straight away. She then told Mr Lloyd that he could no longer use the company vehicle and that he needed to attend a rehabilitation programme at Odyssey House, which provides in-patient drug rehabilitation services. Mr Lloyd says that he told her that she had the "wrong end of the stick" but she cut him off. He says he was stunned, and went home.

[15] Later that day Ms Tapscott gave Mr Lloyd a letter from Mrs McCauley which had been handed to her by Mrs McCauley earlier that day. This letter referred to Mr Lloyd's confession to a "history of drug use" and stated that "this situation has recently impacted your ability to function to your full capability which impacts the business and those around you".

[16] The letter went on to say that it had been agreed that Mr Lloyd was committed to withdrawing from any form of drug use, would seek immediate assistance from Odyssey House, and would not use the business vehicle while under the influence of any drug. It also stated that he was to work with Mrs McCauley to restructure his current position in the kitchen and that he was to commit to maintaining a professional work standard at all times. He was also to maintain "clear communication". The letter stated that he could ask for help at any time for any reason and that the company would contribute \$200 to a "supplementation programme" in support of the initial withdrawal phase. He was also to have a second consultation with Ms Syme.

[17] The letter ended as follows:

The decision to continue to offer you employment in context of the contractual breach has not been taken lightly and I am taking the above steps as a show of commitment from us that we would prefer to help you through this and assist you in receiving the necessary support that will be required for you to be 'drug free'. Your continued employment is now conditional on you committing to this process due to the risk you place on the business, the team and yourself by not following through.

This will be a 'process' which requires your 100% commitment and as such it's important as part of this process that you take the lead by following up with Odyssey House and equally you also invest in this process yourself. You currently have our complete support & we look forward to your future on the Pure team☺
Di.

[18] The letter had a space at the end for Mr Lloyd to sign. Mrs McCauley said in evidence that the reference in the letter to matters having been agreed was in anticipation of Mr Lloyd signing the letter. Mr Lloyd said that he did not sign the letter.

[19] According to Ms Tapscott, Mrs McCauley had showed her the letter addressed to Mr Lloyd and had asked her whether Mr Lloyd was taking "P" and other drugs. She says that she told Mrs McCauley that he was not but occasionally smoked weed.

[20] On Friday 10 June 2016 Mr Lloyd and Mrs McCauley met to discuss the letter. Mr Lloyd says that he acknowledged the offer of support but that he wanted to make sure that everybody was clear in what was happening, as he thought that things had been taken out of context. Mr Lloyd says that this caused Mrs McCauley to respond “very sharply” and that she stated that he had broken his contract by being intoxicated in the workplace, which he denied. Mrs McCauley then said she would test him for drugs which Mr Lloyd said he agreed to but did not see the need. Mr Lloyd then told Mrs McCauley that he was extremely upset that the information she was using had come from a private clinic appointment with Ms Syme and that he had been told it was all private and confidential. From this point on an argument developed between the two.

[21] According to Mr Lloyd’s evidence, Mrs McCauley shouted “I cannot believe you are doing this” and told her to “get out of her face”, at which point he left the room, dropping his keys on the desk in the main office.

[22] According to Mrs McCauley, it was Mr Lloyd that immediately became angry and agitated and that she tried to de-escalate the situation. She says that he got more and more angry, stood up and talked to her in a very loud voice leaning over her desk and poking the air. She says that she was quite startled and pushed her chair back from the desk as far as it would go against a wall. She said that he was rambling and that she became concerned as she was essentially trapped in the corner behind the desk with no way out. She says that, as Mr Lloyd was “seething with anger” she became very frightened and shouted “get out of my face”. It was at this point that he threw his keys into a bowl on the shelf by the door and went out.

[23] Mr Lloyd’s evidence is that he realised that he needed his keys to get into the kitchen and take his possessions and so went to walk back into the room where he had met Mrs McCauley, at which point he saw her talking to Ms Tapscott and Mr McCauley at the reception desk. He told Mrs McCauley not to discuss the matter with Ms Tapscott as it did not involve her. He says that he retrieved his keys and walked back past the desk heading for the exit, at which point Mrs McCauley stepped out from the desk and blocked his path. Mr Lloyd says that he asked Mrs McCauley to get out of his way but she would not. He says that she then placed her hands on his chest to stop him moving and he tried to move around her but she would not move.

After asking her not to touch him a couple more times he pushed her hands away and said “if you touch me again I will do you for it”. Mr Lloyd said that he was meaning by this that he would call the police.

[24] Mr Lloyd says that by now he was down the walkway by the lockers because Mrs McCauley kept pushing him and he was backing away. Mrs McCauley was telling him not to leave, and it was heated. Ms Tapscott came around from behind the desk and told Mrs McCauley to give Mr Lloyd some space so that he could leave which caused Mrs McCauley to stand aside.

[25] Mr Lloyd then discussed with Ms Tapscott him resigning and went to his computer and wrote out a resignation letter. He gave the resignation letter to Mr McCauley. This stated as follows:

Dear Di
I am writing to inform you of my resignation, Served as of today the
10th of June. My last working day will be on the 24th of June.
Kind regards
Adam Lloyd

[26] According to Mrs McCauley, she saw Mr Lloyd “ranting” at her husband and Ms Tapscott. She says that she approached him and calmly tried to get him to calm down. She says that she put her hands up and that Mr Lloyd “stormed towards” her and bumped into her hands. She says that he could have walked around her if he had wanted to. She says that he was clearly trying to scare her again by pushing her around. And she says that Mr McCauley asked Mr Lloyd to leave and he stood aggressively with his hands in the air in the middle of the café yelling at Mr McCauley saying “Come on, what are you going to do about it? Come on I’ll have you as well”.

[27] Mr Lloyd’s version of the events was corroborated by Ms Tapscott, whilst Mrs McCauley’s version was corroborated by Mr McCauley. Another witness, Ms Hooper, who was using the gym at the time, gave evidence that she saw Mr Lloyd, who was angry, walking towards Mrs McCauley but did not hear what was being said. Her evidence was more corroborative of Mrs McCauley’s evidence than Mr Lloyd’s. The respondent’s camera which is sited near the events was pointed away from the action, and so did not capture what happened.

[28] Mrs McCauley says that Mr Lloyd then went into the office and saw no more of him as her husband dealt with him from then on. She said that she was very shaken by his behaviour towards her as she had never seen him like that before. She says that she was very relieved when Mr McCauley told her that Mr Lloyd had submitted his resignation.

[29] Mrs McCauley says that she later discussed the matter with her husband and decided that she did not want Mr Lloyd to be around working his notice. She says that she called the police but decided not to press charges as Mr Lloyd was planning a trip overseas and did not want to interfere with that. She then told Ms Tapscott to tell Mr Lloyd that he was not welcome to work out his notice.

[30] A trespass notice dated 10 June 2016 was issued by Mrs McCauley to Mr Lloyd although Mr Lloyd says that he was not told about the notice and only found it in his letterbox about a week and a half later. It appears that this was served by NZ Post.

[31] On 11 June 2016 Mr Lloyd emailed Mrs McCauley asking for confirmation that he was not required to work out his notice saying that he expected to be paid in full for the notice period. He offered to help with any handover. Mrs McCauley responded by email on 12 June 2016 saying that he was not required to work and that his employment was terminated due to “serious misconduct”. She also asked for the return of company property. She also stated the following:

Due to the aggressive nature of your behaviour during the incident on Friday, I personally no longer feel safe in your presence. I am therefore also advising you are not to come onsite or enter the premises of; Pure Café, Pure Kitchen or Mint Fitness, 31 Birmingham Drive. I suggest the above items are returned via a third party.

[32] On 13 June Mr Lloyd replied asking for a full explanation of her accusation of serious misconduct.

[33] On 13 June Mrs McCauley responded by email saying the following:

Dear Adam

I confirm your employment has terminated. We have your resignation of 10 June 2016 and, as I advised you yesterday, the employment relationship was at an end anyway due to your serious misconduct and your threats to both Directors. According to your employment agreement, termination for serious misconduct means termination without notice. I also note that you resigned without notice so it appears the parties agree that there was no notice period to pay out.

I have received company property as requested – thank you.

There is an outstanding account to Mint of \$608.14. On a without prejudice basis, we are prepared to reduce this to \$300 in full and final settlement. I will deduct this from your final pay and send you through a confirmation slip.

[34] Mr Lloyd responded again seeking an explanation of what Mrs McCauley deemed to be serious misconduct and a more thorough explanation of the threats to the directors.

[35] A personal grievance was raised on behalf of Mr Lloyd by Ms Oberndorfer in a letter dated 15 August 2016.

The issues

[36] The Authority must determine the following issues:

- a. How Mr Lloyd's employment came to an end, by constructive dismissal or direct dismissal by the respondent;
- b. whether the dismissal of Mr Lloyd during his notice period following his resignation was justified;
- c. if his dismissal was not justified, what remedies Mr Lloyd is due in respect of dismissal;
- d. whether Mr Lloyd suffered an unjustified disadvantage in his employment;

- e. if he did suffer an unjustified disadvantage in that respect, what remedies he is due.
- f. Should a penalty be imposed on the respondent for a breach of the employment agreement and for a breach of the duty of good faith.

How Mr Lloyd's employment came to an end

[37] It is clear from Mr Lloyd's written resignation that he was giving 14 days' notice of termination, and that he intended to work until 24 June 2016. The employment agreement given to Mr Lloyd when he was a chef required the giving of four weeks' notice, although giving short notice does not invalidate the resignation. It does not appear he was given a new agreement when he was made kitchen manager.

[38] It is also clear that the respondent treated Mr Lloyd as having been dismissed summarily on or around 10 June. Mrs McCauley stated "...the employment relationship was at an end anyway due to your serious misconduct..". During the notice period, no matter who initiated it, an employee remains employed and subject to all the same rights and obligations he or she was subject to before the notice period began, unless there are express reservations in the employment agreement (such as the service of notice on garden leave) which are activated.

[39] Mr Lloyd was an employee, notwithstanding his giving of notice, until his employment was terminated by the communication from Mrs McCauley of 12 June telling him his employment had been terminated due to serious misconduct. Therefore, the employment ended by the direct actions of the respondent, not by Mr Lloyd's resignation.

[40] However, it will still be necessary for the purposes of assessing remedies to consider whether Mr Lloyd's resignation was caused by a repudiation of the employment agreement by the actions of the respondent.

[41] Was Mr Lloyd's dismissal during his notice period following his resignation justified?

[42] Section 103A of the Employment Relations Act 2000 (the Act) provides as follows:

103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
 - (a) minor; and
 - (b) did not result in the employee being treated unfairly.

[43] Section 4 of the Act provides as follows:

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)
 - (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.
- (1A) The duty of good faith in subsection (1)—
 - (a) is wider in scope than the implied mutual obligations of trust and confidence; and

- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

[44] It is evident that the respondent fundamentally failed to follow a fair process in deciding to dismiss Mr Lloyd. Mrs McCauley said that she and her husband decided that Mr Lloyd could not come back to work because of the safety of the staff and her own safety. This related to the way that she says Mr Lloyd behaved on 10 June 2016.

[45] However, pursuant to ss. 4(1A) and 103A of the Act, prior to any decision being made, those concerns of Mrs McCauley about the safety of the staff and of herself needed to have been put to Mr Lloyd, so that he could respond to them. Mrs McCauley then needed to have genuinely considered Mr Lloyd's explanation.

[46] I understand that Mrs McCauley did not want to follow this process because of her fears about Mr Lloyd's conduct. However, there were steps that could have been taken to have mitigated any risks, whilst still complying with the respondent's legal requirements. For example, Mrs McCauley could have ensured that she had her husband present at the disciplinary investigation meeting (who used to be a military policeman) and/or her adviser. If necessary, she could even have had a security guard present.

[47] This failing to follow any process whatsoever must render the dismissal procedurally unjustified, and no fair and reasonable employer could have failed to have followed a minimum fair process in all the circumstances.

[48] Was the decision to dismiss substantially justified, nonetheless? It is not possible to untangle exactly what happened in the meeting room and the reception area between Mr Lloyd and Mrs McCauley on 10 June 2016. I am satisfied that Mr Lloyd was angry because of what he saw as a breach of his privacy, and the unilateral imposition of conditions in his employment, and so shouted at Mrs McCauley, both in the meeting and in the reception.

[49] I believe that Mrs McCauley did try to calm him down in the reception area (so she cannot have been in fear of her safety at that point at least) and she did put her hands up in an attempt to do so, touching him in so doing. I believe that Mr Lloyd did ask her to stop touching him, but did so in an angry way. I believe that Mr Lloyd was not in full control of his emotions. However, something prompted him to write out his resignation immediately afterwards, and I accept that he had not had the intention of doing so before the events in the reception area. I believe that it was likely to have been prompted by him seeing Mrs McCauley speaking to Ms Tapscott in the reception area, which he inferred was about him, rather than solely due to any physical actions by Mrs McCauley.

[50] I am not convinced, on balance, that Mrs McCauley seriously tried to prevent Mr Lloyd from leaving the premises or backed him into a corner, as he did not mention this in any of his emails afterwards.

[51] I do not believe that it is necessary to try to ascribe any bad faith to either Mr Lloyd or Mrs McCauley. The point is, both were emotional, and neither was in a state to make rational decisions about the employment relationship at that point.

[52] It is clear that Mr Lloyd had calmed down by 11 June, when he sent an email to Mrs McCauley saying that he was happy to work his notice, but that he had received a message via Ms Tapscott that Mrs McCauley did not wish him to. He also stated:

I would like to add how sorry I am that we have reached the end of this working relationship and to thank you for the opportunity and your support. I am willing to help any handover to the team or new leaders in anyway I can.

[53] This should have signalled to an employer acting reasonably that the immediate danger that Mrs McCauley says she saw on 10 June, when Mr Lloyd was

angry and shouting, had passed. Had Mrs McCauley then held the disciplinary investigation meeting that the respondent was required to hold, it is probable, based on my understanding of the evidence, that she would have learned the following:

- a. That Mr Lloyd had been concerned that Mrs McCauley believed that he was a user of hard drugs, and was coming to work under the influence of drugs;
- b. That Mr Lloyd was in fact not a user of hard drugs, and only used cannabis recreationally;
- c. That Mr Lloyd was concerned that steps affecting his employment had been proposed based on an erroneous belief that he was a drug user;
- d. That Mr Lloyd was concerned that Mrs McCauley had shared with Ms Tapscott the contents of the letter of 9 June;
- e. That these legitimate concerns had caused him to lose his temper on 10 June.

[54] On balance, I am not able to conclude that Mrs McCauley would still have dismissed Mr Lloyd if she had followed a fair process and given Mr Lloyd the chance to say the above points, and considered them in good faith. Mrs McCauley displayed a supportive approach to Mr Lloyd on 8 June. It is therefore possible that Mrs McCauley could have been persuaded to have let Mr Lloyd work his notice. It is also possible that he may have been persuaded to have withdrawn his resignation.

[55] Whilst that is speculative, I cannot safely conclude that the dismissal would have been substantially justified had a fair process been followed. I must therefore conclude that the dismissal was substantively unjustified as well. I shall address remedies below.

Did Mr Lloyd suffer an unjustified disadvantage in his employment?

[56] Ms Oberndorfer clarified at the investigation meeting that Mr Lloyd alleged that the following actions amounted to an unjustified disadvantage in his employment:

- a. The lack of process and consultation regarding the removal of the work vehicle;
- b. The failure to discuss the perceived drug consumption prior to decisions being made;
- c. Imposing or attempting to impose conditions that were unreasonable;

[57] Ms Oberndorfer said at the start of the investigation meeting that Mr Lloyd was not seeking to argue that the alleged breach of his privacy by the respondent was an unjustified disadvantage in his employment.

The lack of process and consultation regarding the removal of the work vehicle

[58] It appears that Mr Lloyd was given the use of the work van, which he occasionally used to get to and from work. There is no contractual right in the individual employment agreement to the use of the van. However, I accept that it was a benefit that Mr Lloyd was accorded during his employment as kitchen manager.

[59] Mr Lloyd said in his evidence that he was not bothered by the van being taken away from him. He had access to his own vehicle, and I cannot, therefore, find that the removal caused him a disadvantage in his employment. Even if the removal was a disadvantage that was unjustified, I would not have been able to have awarded any compensation to Mr Lloyd in light of his evidence.

The failure to discuss the perceived drug consumption prior to decisions being made

[60] I accept that there was a genuine mistake made by Ms Syme when she believed that Mr Lloyd said that he was still using hard drugs. I also accept that she believed that she had Mr Lloyd's consent to tell Mrs McCauley this.

[61] However, I do not accept that a fair and reasonable employer could have written the letter that Mrs McCauley wrote on 9 June without having first had a formal meeting with Mr Lloyd to discuss the implications of what she believed she had learned about him. What Mrs McCauley was told by Ms Syme had very serious implications for Mr Lloyd and his employment. It was not the action of a fair and

reasonable employer to have sought to impose conditions without discussing them with him first.

[62] Furthermore, I do not accept Mrs McCauley's evidence that she wished for Mr Lloyd to agree to the conditions set out in the letter of 9 June, and that they were proposals. The letter was clearly written so as to suggest that the conditions were going to be imposed. The letter states that Mr Lloyd's continued employment was conditional on him committing to the steps set out in it.

[63] Mr Thompson characterises the contents of the letter as a "support agreement", and that it was not disciplinary in nature. He also submits that Mr Lloyd did not sign the document and so has failed to demonstrate that there was disadvantage to his employment in being presented with it because he resigned shortly thereafter.

[64] However, the letter confirmed the imposition of terms which Mr Lloyd had to agree to in order to continue his employment. The letter did not indicate that Mr Lloyd had any choice in the matter, and just because the employment ended before the consequences of Mr Lloyd failing to agree became known, that does not mean he did not suffer a disadvantage. His employer was telling him that, if he did not agree to the terms, his employment would be terminated. That clearly amounts to a disadvantage in his employment.

[65] In conclusion, I find that the issuing of this letter imposing conditions upon Mr Lloyd for his continued employment before any consultation or investigation with him had been carried out constituted a disadvantage in his employment, as it caused him concern about what appeared to be a serious misunderstanding about his putative drug use. Furthermore, as no fair and reasonable employer could have done this in all the circumstances, that action was unjustified.

Imposing or attempting to impose conditions that were unreasonable

[66] The imposition of any conditions without first discussing them with Mr Lloyd was unreasonable, as I have already found. Were the conditions themselves unreasonable? What the respondent did was to effectively demand that Mr Lloyd withdraw from any form of drug use, undergo a rehabilitation course and commit to "clear communication moving forward regards your progress". This was a serious

invasion of his privacy and personal rights. The respondent had a right to prevent Mr Lloyd from attending work in an impaired state, not to dictate what he did in his private life.

[67] I can foresee a narrow set of situations where such conditions could have been reasonable. This could be where an employee came to work impaired by illegal drug use, and a clear drug and alcohol policy was in force, for example. However, there was no evidence that Mr Lloyd was ever impaired at work by illegal drug use. Until Ms Syme told Mrs McCauley that she believed Mr Lloyd had admitted to hard drug use, Mrs McCauley had never suspected that he was addicted to hard drugs or came to work under their influence. In addition, the respondent had no drug and alcohol policy in place.

[68] Therefore, Mrs McCauley acted too hastily. No fair and reasonable employer could have imposed the conditions that the respondent did under the circumstances that prevailed at the time.

[69] Did the conditions cause Mr Lloyd a disadvantage in his employment? The conditions were never acted upon, as the employment came to an end the following day. However, the fact of the conditions having been imposed did cause a disadvantage, as it caused Mr Lloyd concern. This disadvantage is, however, the same as the disadvantage already found above.

Remedies

[70] I have found that Mr Lloyd was unjustifiably dismissed and suffered unjustifiable disadvantage in his employment.

[71] Section 123 of the Act provides as follows:

123 Remedies

- (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
 - (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

- (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
- (c) the payment to the employee of compensation by the employee's employer, including compensation for—
 - (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
 - (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:
- (ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[72] Section 128 of the Act provides as follows:

128 Reimbursement

- (1) This section applies where the Authority or the court determines, in respect of any employee,—
 - (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, 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.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Lost remuneration

[73] Mr Lloyd earned \$23 an hour at the respondent and worked an average of 42.82 hours per week. Mr Lloyd concedes that he went travelling in January 2017, thereby cutting his loss. He says that his total loss until 19 January 2017 was \$20,288, taking into account his earnings up to that date. However I do not accept that the total loss should be calculated to 19 January 2017, as Mr Lloyd started full time employment on 2 November at which he earned \$25 an hour. His loss therefore stopped at that point. Up to the date he gained this new employment he would have

earned \$20,485.09 gross with the respondent, if he had not been dismissed. During the same period he actually earned \$5,252. His loss is therefore \$15,233.90.

[74] Three months' ordinary time remuneration, based upon an average of 42.82 hours work a week equates to a gross sum of \$13,083.87.

[75] It is arguable that, as Mr Lloyd resigned, he should only be awarded two weeks' pay, as that was the notice he would have worked but for the dismissal. However, that can only apply if the resignation was voluntary, as otherwise, if the resignation was prompted by the repudiatory actions of the employer, the employer would benefit from its own wrongdoing.

[76] I am satisfied that the actions of the respondent were repudiatory when taken all together. These actions were Mrs McCauley setting conditions on his continued employment prior to discussing her concerns with him first, and discussing with Ms Tapscott his personal employment business. Whilst the final straw prompting the resignation was described by Mr Lloyd as Mrs McCauley trying to prevent him from leaving on 10 July, that action does not need to be a repudiatory action in itself. The previous two actions were capable of being repudiatory actions, as they stemmed from breaches of duty by the respondent, and I am satisfied that they were the principal reasons why Mr Lloyd resigned.

[77] I am also satisfied that the breaches were of sufficient seriousness to make it reasonably foreseeable by the respondent that the employee would not be prepared to work under the conditions prevailing. This is not to say that I believe that the respondent deliberately set out to force Mr Lloyd to leave, but that if the respondent had stood back and viewed their approach objectively, they could reasonably have foreseen that Mr Lloyd could resign.

[78] Having carried out this analysis, I am satisfied that, but for the intervening dismissal, Mr Lloyd's resignation would have been a constructive dismissal. The loss of remuneration therefore cannot be curtailed by the expiry of notice following the resignation as that resignation was a foreseeable consequence of the repudiatory actions of the respondent.

[79] I do not believe that there is any compelling reason to exercise the Authority's discretion to award a sum greater than that required under s 128(2) of the Act. I therefore fix the award of lost remuneration at \$13,083.87, gross, which is three months' ordinary time remuneration.

Loss of a benefit under s.123(1)(c)(ii) of the Act

[80] Mr Lloyd's employment agreement entitled him to full gym membership at a value of \$1,014 per annum, and free meals at a value of \$75 a week. He did not enjoy these benefits in his subsequent employment he said. Therefore, he is entitled to receive compensation for these lost benefits for a period of three months. That equates to a gross sum of \$253.50 for the gym membership, and \$975 for the meals.

Compensation for humiliation, loss of dignity and injury to his feelings arising from the dismissal

[81] Having been unjustifiably dismissed, Mr Lloyd is eligible to be considered for an award of compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings. In his written evidence Mr Lloyd stated that he had had no intention of leaving Pure as he was building a future there. He said that the time after the dismissal has been "some of the most confidence destroying and stressful I've ever encountered". He said that "this came as a direct result of these outlandish claims of how I behaved, the complete refusal to recognise their responsibilities, the lack of engagement to resolve the issue, this bizarre claim they fear for their safety and the challenge in finding another job"

[82] This evidence refers not only to the dismissal but also the events prior to the dismissal and after the dismissal. It is therefore not possible to discern what effects flow from the dismissal itself. My understanding of the evidence, though, is that Mr Lloyd was more affected by the events prior to the dismissal than the dismissal itself. This makes sense as he had actually already decided to leave when he was dismissed. I will address the consequences of this when considering the remedies due with respect to the unjustified disadvantage I have found.

[83] Mr Lloyd put into evidence a letter from his GP dated 24 April 2017. This referred to issues that Mr Lloyd had consulted her about. However, whilst the letter referred to “the challenging circumstances surrounding the termination of [his] job” it also referred to other issues, such as the stresses of moving to a new country, working in a high pressure job, and the ongoing stresses around mediation and the legal processes. This letter also does not assist me therefore in understanding what effect the dismissal had on Mr Lloyd.

[84] When I asked Mr Lloyd about the effect on him of the dismissal he referred to the stress of the mediation. He said that he had been to see his GP straight after the dismissal because he felt down, that he had felt down prior to that, but that the dismissal compounded that.

[85] The evidence about the effects of the dismissal is scant. I can infer from Mr Lloyd’s emails to Mrs McCauley on 11 to 15 June 2016 that he was puzzled by the decision to dismiss him for serious misconduct. However, it is hard to discern any other effect. I believe that I cannot safely infer that there was an effect arising from dismissal that is separate from the effects of the other actions he complains of. I therefore decline to award any separate compensation for the dismissal.

The unjustified disadvantage

[86] Arguably, lost remuneration flows from the repudiatory actions of the respondent which I have also found to have constituted actions giving rise to unjustified disadvantage in Mr Lloyd’s employment. However, I have dealt with these under the rubric of lost earnings arising from the dismissal.

[87] Again, Mr Lloyd’s evidence was scant about the effect on him of the actions that I have found amounted to unjustified disadvantage in his employment. He said that he first felt support and then prejudice, and that compassion changed to judgement. He said he needed help. However, I can infer that Mr Lloyd was particularly upset because of his anger that was directed at Mrs McCauley on 10 June, although that was largely due to the breaches of his privacy that he perceived had occurred, and there is no disadvantage claimed in respect of that. However, I can also, on balance, impute to Mr Lloyd humiliation, loss of dignity and injury to his feelings

arising out of the contents of the letter of 9 June, which I accept played a material part in his upset on 10 June.

[88] In his statement of problem, Mr Lloyd seeks an award of \$28,000 under s 123(1)(c)(i) of the Act. However, that would be indicative of a significant effect falling into a category of high level loss/damage¹. Whilst I do not doubt that Mr Lloyd suffered effects as a result of the disadvantage, I cannot be satisfied that they were significant, as other factors also contributed to his reactions, as I have noted above. I assess the effects as falling in the mid-range band of loss/damage, referred to in *Waikato District Health Board*², and assuming that that band roughly encompasses compensation awards falling between \$13,000 and \$26,000³, I fix Mr Lloyd's award at \$15,000.

Contribution

[89] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s 124 of the Act).

[90] The dismissal was prompted by Mr Lloyd's angry reaction to Mrs McCauley. Whilst Mr Lloyd had reason to be angry, that did not excuse him shouting at Mrs McCauley and causing her to feel apprehension, which I accept she did. Mr Lloyd presented in evidence as an articulate and intelligent man, and he was clearly capable of expressing his concerns calmly, even if he was frustrated.

[91] I must therefore find that he did contribute in a blameworthy way towards the situation that gave rise to the personal grievance, and believe that it is appropriate to

¹ Designated as a "Band 3 level of compensation" by Her Honour Chief Judge Inglis in *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, at [62].

² *Ibid.*

³ Based on Chief Judge Inglis' designation of her award of \$20,000 in *Waikato District Health Board* as falling "around the middle of band 2", at [63], which suggests that she theoretically envisages the three bands as justifying awards of between \$1 to \$13,333 for Band 1, \$13,334 to \$26,666 for Band 2, and \$26,667 to \$40,000 for Band 3. Presumably, a more approximate approach would need to be adopted for practical purposes.

reduce his awards for that grievance accordingly. I believe that a 25% reduction is appropriate.

[92] With respect to the unjustified disadvantage, I find that Mr Lloyd did not contribute to them. It was not his fault that Mrs McCauley decided to put steps in place which he had to accept for his employment to continue when she had not consulted with him first. I therefore do not reduce the remedy that I have awarded in respect of this personal grievance.

Should a penalty be imposed on the respondent?

[93] Ms Oberndorfer submits that a penalty should be imposed in respect of a breach of the employment agreement due to the unilateral withdrawal of the company van.

[94] Section 134 of the Act makes liable to a penalty every party to an employment agreement who breaches that agreement. The Employment Court in *Tan v Yang and Zhang*⁴ states, at paragraph [25], that:

The purpose of a penalty is ... to punish and deter others from engaging in such conduct.

[95] Whilst the unilateral withdrawal of Mr Lloyd's right to use the work van was arguably a breach of an implied contractual right, the respondent did not take this step maliciously, but because it had concerns that Mr Lloyd may be using it under the influence of drugs. That belief was based on a misunderstanding, and it should have investigated properly first, instead of jumping to conclusions. However, on balance, I do not believe that the imposition of a penalty is appropriate, as the breach was not egregious or unfounded, at least in the mind of the respondent. Punishment and deterrence are not necessary in this isolated case, I believe.

[96] I therefore decline to impose a penalty for this breach.

[97] Ms Oberndorfer also seeks to have a penalty imposed for a breach of the duty of good faith. This relates to the imposition of conditions on Mr Lloyd's continued employment, as set out in Mrs McCauley's letter dated 9 June 2016 without having followed an investigation process first.

[98] Section 4A of the Act provides :

4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

- (a) the failure was deliberate, serious, and sustained; or
- (b) the failure was intended to undermine—
 - (i) bargaining for an individual employment agreement or a collective agreement; or
 - (ii) an individual employment agreement or a collective agreement; or
 - (iii) an employment relationship; or
- (c) the failure was a breach of section 59B or section 59C.

[99] I accept that the imposition of conditions was a breach of good faith, as no fair and reasonable employer could have done that, in all the circumstances, without having first properly investigated its concerns. I also accept, as submitted by Ms Oberndorfer, that the breach was serious, for the reasons set out in paragraph [66] above.

[100] However, I am not convinced that the respondent deliberately breached the duty of good faith. My view is that Mrs McCauley believed she was doing what was right, albeit based on erroneous information and an erroneous belief of the respondent's rights to impose these conditions.

[101] Furthermore, I also do not believe that the breach was sustained, as the employment ended the following day. I accept that the breach could have been sustained had Mr Lloyd not been dismissed.

[102] I also do not believe that the breach was intended to undermine the employment agreement. Rather, Mrs McCauley was seeking to maintain it, albeit by imposing unreasonable conditions unilaterally.

[103] On balance, I do not believe that the imposition of a penalty is justified.

⁴ [2014] NZEmpC 65

Recommendations

[104] Section 123(1)(ca) of the Act provides that, if the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance, the Authority may make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring.

[105] I find that the misunderstanding of Ms Syme as to what Mr Lloyd was willing to have her divulge to Mrs McCauley was a significant factor in the personal grievance. I recommend that the respondent adopt the following practices:

- a. Where an employee accesses one of the respondent's services in a personal capacity (whether the nutritionist, fitness instructor, or otherwise), the employee be required to agree in writing before any information about the employee which is obtained is shared with any other individual working at the respondent, including its directors;
- b. The written agreement must state expressly and in detail what information the employee is agreeing to be shared; and
- c. Where the information being shared may be used by the respondent in relation to the employee's employment at any time, the written agreement must state expressly that the employee understands that the information could be used in that way.

Orders

[106] I order the respondent to pay to Mr Lloyd the following gross sums, within 14 days of Mr Lloyd (or his representative) advising the respondent (or its representative) of details of his bank account into which to pay the sums:

- a. \$9,812.90 in respect of lost remuneration;
- b. \$190.13 in respect of the loss of the benefit of gym membership;
- c. \$731.25 in respect of the loss of the benefit of free meals; and
- d. The sum of \$15,000 paid pursuant to s 123(1)(c)(i) of the Act.

Costs

[107] Costs are reserved. The parties are to seek to agree between them how costs are to be dealt with. If they are unable to do so within 14 days of the date of this determination, any party seeking a contribution to their costs should serve and lodge within a further 14 days a memorandum setting out what contribution they seek, and the basis of that. Any reply must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority