IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE

[2025] NZERA 343
3293119

	BETWEEN	DEAHN MARK Applicant
	AND	JOANNE BROWN Respondent
Member of Authority:	Rowan Anderson	
Representatives:	Adrian Plunket, for the Applicant Kevin Badcock and Kate Badcock, for the Respondent	
Investigation Meeting:	31 October 2024 in Tauranga	
Submissions and further information received:	Up to and including 17 April 2025	
Determination:	16 June 2025	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Deahn Mark worked at the Mediterraneo Café (the Med) in Tauranga, having commenced employment in 2014.

[2] Ms Brown was the sole owner and operator of the Med.

[3] A proposed sale of the Med fell through in September 2023 and Ms Brown made then made a decision to restructure aspects of the business. On 4 October 2023, Ms Mark was advised that she was being dismissed from her employment, her role having been disestablished.

[4] Ms Mark claims that she was unjustifiably dismissed from her employment and seeks compensation for humiliation, loss of dignity, and injury to feelings. She also seeks compensation for lost wages.

[5] Ms Brown denies the claims made by Ms Mark and asserts that the decision to dismiss Ms Brown was due to genuine redundancy and both substantively and procedurally justified.

Issues

[6] The issues for investigation and determination are:

(a) Was Ms Mark unjustifiably dismissed from her employment?

(b) In the alternative, was Ms Mark unjustifiably disadvantaged in her employment?

(c) If Ms Brown's actions were not justified what remedies should be awarded?

(d) Has Ms Brown failed to comply with her duty of good faith? If so, should a penalty be imposed in terms of s 4A of the Employment Relations Act 2000 (the Act)?

(e) Has Ms Brown failed to pay wages when due or breached any implied term of Ms Brown's employment agreement by failing to make payment (at the relevant time) of a four-week payment related to the redundancy? If so, should any penalty be imposed in terms of s 134 of the Act?

(f) Is Ms Mark entitled to payment of any outstanding holiday pay?

(g) Were wages paid to Ms Mark, without deduction, in terms of s 4 of the Wages Protection Act 1983? If so, should any penalty be imposed upon Ms Brown in terms of s 13?

(h) If any sums are outstanding, should any award of interest be made?

(i) Should either party contribute to the costs of representation (if any) of the other party?

[7] Ms Mark's statement of problem also included a claim that Ms Brown breached s 130(2) of the Act by failing to, upon request, provide her immediately with access to, or a copy of, her wages and time records. Notwithstanding that Ms Mark's final submissions referenced that claim, the claim had been withdrawn at the case management conference (CMC) held on 18 July 2024. That is reflected in the written directions issued at the time. A claim for payment of four weeks wages as a redundancy payment was also withdrawn on account of the sum having been paid, albeit penalties were still sought for delay in payment. Those claims, excluding the penalty issue, were withdrawn and need not be considered further.

[8] It was also confirmed at the investigation meeting that a claim by Ms Mark alleging that Ms Brown failed to comply with s 64 of the Act was withdrawn. As such, that claim need not be considered.

The Authority's Investigation

[9] A CMC was held on 18 July 2024 and timetable directions issued.

[10] Written witness statements were lodged prior to the investigation meeting from Ms Mark and Shar Ellis, a friend of Ms Mark, in support of Ms Mark's claims. Written witness statements were lodged from Ms Brown, and Tarryn Cox, a family friend who assisted Ms Brown in the restructuring process, in defence of the claims.

[11] All witnesses attended the investigation meeting and answered questions under oath or affirmation at the investigation meeting.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Was Ms Mark unjustifiably dismissed from her employment?

[13] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Ms Brown's actions, and how Ms Brown acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.[1]

[14] Justification requires the consideration of both substantive and procedural fairness. The onus is on Ms Brown to justify her actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

Procedural justification

[15] Ms Mark first commenced work at the Med in 2014 and was employed as a barista according to an individual employment agreement (IEA) dated 5 June 2022. The IEA records that Ms Mark's agreed hours of work were a minimum of 28 hours per week.

[1] Employment Relations Act 2000, s 103A.

[16] Ms Mark suffered an injury in 2020 which, after later making further enquiries, meant she changed to working 16 hours per week from approximately February 2023. Prior to that, she said that she had been working an average of about 38 hours per week, with between 25 and 40 hours of work each week. In questioning at the investigation meeting, Ms Mark did not dispute that in fact she had been working an average of 22 hours per week between 27 February 2022 and 19 February 2023.

[17] Ms Mark's evidence was that her work at the Med involved her being a 'drifter', performing a range of tasks such as serving customers at tables and on the till in addition to making coffee. She also said that she performed other tasks including covering for Ms Brown when she was away, preparing food, opening and setting up the café, and that she was at times an 'unofficial manager'.

[18] Ms Brown said that all staff, including Ms Mark, were expected to perform a variety of tasks having regard to the nature of the industry and the business itself, but that Ms Mark's core task remained making coffee and other beverages. She denied claims by Ms Mark that she had been, officially or unofficially, a manager of the Med.

[19] Ms Brown said that in 2022 that she decided to sell the Med and retire as a result of both financial and stress considerations. A sale and purchase agreement had been entered into, but the sale fell through at the last minute meaning that settlement scheduled for July 2023 did not proceed. In that context Ms Brown decided it was necessary to restructure.

[20] A letter dated 29 August 2023 from Ms Brown notified employees of a possible restructuring. That letter noted the failed sale and a 'downturn in business' and advised that she would "likely need to look at restructuring some roles".

[21] On 15 September 2023, Ms Brown issued a further letter which repeated the same background matters. The letter also outlined that a meeting would be required as Ms Mark's role "could be affected by the restructuring that The Mediterraneo Café is looking at".

[22] Ms Mark attended a meeting on 21 September 2023. Instead of the meeting being with Ms Brown, which Ms Mark said she expected, the meeting was with Ms Cox. Ms Mark's evidence is that Ms Cox refused to disclose her last name or job title.

Ms Mark said that the meeting lasted approximately 3 minutes, that Ms Cox noted the sale of the Med had fallen through and that it otherwise involved Ms Cox wanting Ms Mark to discuss ideas for 'a work proposal to cut costs'.

[23] Ms Cox said the first meeting with Ms Mark was brief as the purpose was simply to give Ms Mark the information needed at the start of the consultation process. Her evidence was that, as her notes reflect, she provided an opportunity for Ms Mark to go away and consider options and alternatives and that Ms Mark was told no decisions had been made and that there would be a further meeting.

[24] A letter was then sent to Ms Mark dated 25 September 2023 to schedule a follow up meeting to "discuss any ideas you have come up with, other than restructuring of your position."

[25] A second meeting took place on 26 September 2023. Ms Mark said she had lots of ideas to cut costs and discussed those at the meeting. She said that Ms Cox made notes of the comments but that they were not discussed with her again. She also said that she asked Ms Cox to show her the proposal and that Ms Cox responded saying that her lawyer had said she didn't have to. Ms Mark said she showed Ms Cox some content from the Employment NZ website suggesting she needed to provide the information, and that Ms Cox made a note of that.

[26] Ms Cox's evidence was that the meeting was much longer than the first and that Ms Mark raised several costs cutting suggestions at that meeting. She said that Ms Mark then raised concerns with the process, including that there was no 'workplace proposal' and asserted that the process was predetermined. She said that she told Ms Mark, as reflected in her notes, that consultation was needed before making any kind of proposal and denied an assertion from Ms Brown that she had said that the Med's lawyer had told them a proposal was not required.

[27] A letter from Ms Brown to Ms Mark on 28 September 2023 stated that the "Café turnover / profitability has steadily reduced by 12% in the past 4 months and is no longer sustainable…". The letter also recorded that Ms Brown had considered feedback that had been provided but that a restructuring would likely be necessary and that it would likely lead to redundancies. A 'workplace change proposal' was attached to the letter.

[28] The workplace change proposal recorded various initiatives not directly relating to a reduction in the number of staff. It then proposed staff changes, including the disestablishment of some roles, the expansion of others, and a combining of the barista and front of house roles. It also proposed that the selection criteria would include retaining permanent staff over temporary staff, full time staff over part time staff, and that consideration would be given to employee skillset across all Café tasks.

[29] It was submitted for Ms Mark that the criteria were not disclosed and consulted on prior to being decided. However, the 28 September 2023 letter clearly records that the selection criteria were 'proposed'. The letter noted that further consultation was planned. While it could have been clearer as to the scope of that consultation, I do not consider that the selection criteria noted in that letter were final or excluded from the consultation process.

[30] Ms Cox met with Ms Mark again on 2 October 2024. Her evidence is that the purpose of the meeting was to discuss the workplace change proposal and that the meeting was short and Ms Mark did not have any feedback. Ms Mark said she didn't have much else to add.

[31] Ms Cox said she then met with Ms Brown to discuss the feedback and options. They determined that there was no suitable alternative to the proposed restructuring and that it should proceed. She said they then applied the selection criteria from the proposal. Her evidence was that Ms Mark would have been suitable for a combined barista/front of house role but that continuing to employ part time staff was not financially viable and so it was determined Ms Mark was not suitable for the role would be made redundant. Ms Cox said that she had no indication from Ms Mark about a full return to work and that she does not recall Ms Mark saying anything about it during the process.

[32] Ms Mark said that she spoke to Ms Brown on the Saturday prior to being advised of her dismissal and asked her whether she was being fired. She said that Ms Brown responded saying it was not up to her. Ms Mark also gave evidence that Ms Cox told her that it wasn't up to Ms Brown who would be staying or going, and that Ms Cox would be making that decision.

[33] In a letter dated 3 October 2023 Ms Brown advised Ms Mark that the Med had decided that "…restructuring of the Café, along with some roles will likely be

necessary, that will likely lead to redundancies". The letter proposed a meeting on 4 October 2023 to discuss the "outcome of the restructuring".

[34] Ms Cox met with Ms Mark on 4 October 2023 to discuss the outcome. The meeting took place in an upstairs office above the Med. Ms Mark said the meeting was just with Ms Cox. Ms Mark's evidence as to the 4 October 2023 meeting was that she was told at the beginning of the meeting that she was no longer needed. She said she asked about a new role created by the restructure and was told there was no new role for her. She also said that she offered to trial in the role but that that was refused.

[35] Ms Cox's evidence was that Ms Mark expressed concerns about the process and the outcome at that meeting, with one of her concerns being that there were eight other staff with similar roles. Ms Cox also said Ms Mark raised concerns with not having been offered counselling or help with getting a new job. Ms Cox said that she explained the proposed redundancy payment and that Ms Mark said she would have to check with Employment New Zealand first. When Ms Mark asked about the new role being created and whether she could apply, Ms Cox's evidence is that she told her no new staff were being hired. Ms Cox said that Ms Mark did not return to the café to collect her things and that she offered to get them for her given she was upset.

[36] Written confirmation of the redundancy was provided via letter dated 4 October 2023. The letter noted that meetings had been held and that Ms Mark had been asked to provide feedback on a proposed restructuring and "any suggestions on ways The Mediterraneo Café can restructure". It noted that the workplace change proposal was provided before the 2 October 2023 meeting at which feedback was discussed. It asserted that the feedback was considered prior to a decision being made to make Ms Mark's position redundant. The letter included a statement advising that Ms Mark would be paid four weeks' redundancy pay, in addition to notice, based on her current hours of work.

[37] I find that while there was a strong possibility of restructuring before 21 September 2023, the process that was followed was not necessarily approached with a closed mind. I do not consider the approach taken, which effectively involved advising that unless other measures could be taken then redundancy was a strong possibility, was necessarily problematic. While the process was not commenced with a formal proposal,

I do not consider a 'negative inference' can be drawn from that as submitted for Ms Mark.

[38] It was submitted for Ms Mark that the references to turnover reducing by 12 percent were generalised and that no supporting information was provided. Ms Mark accepted in questioning that she was afforded opportunities to asks questions during the process but said that her questions were not answered. I accept that was the case and the information provided was in my view clearly insufficient to establish a justification of the action taken, and critically, was insufficient in terms of providing an opportunity to understand Ms Brown's concerns and to enable meaningful proposals to be put forward that might have seen Ms Mark remain employed.

[39] A further criticism of the process was that there was a failure to engage on feedback given by Ms Mark. Ultimately the feedback able to be given was limited given the absence of relevant information already discussed. I am not satisfied that there is evidence of sufficient engagement with the feedback that was provided, albeit that there was seemingly some acknowledgment that some of the ideas presented by Ms Mark had value. I find that Ms Brown's actions in this regard were not consistent with those open to a fair and reasonable employer and that the actions, or inactions in dealing with the feedback, were not in keeping with Ms Brown's duty of good faith as to being active and constructive in maintaining a productive employment relationship.

[40] Ms Cox had significant involvement in the restructuring process and in the decisions ultimately made. Indeed, Ms Brown involved her to provide a degree of independence in relation to those matters. Ms Cox's evidence was that she was hired to conduct the consultation process on behalf of the Med. This followed conversations with Ms Brown, who was a family friend and partner of Ms Cox's father. Ms Cox said that Ms Brown had been stressed by the issues with the proposed sale and that she offered to help as she had some HR experience. She said she was asked to conduct the consultation process and to help Ms Brown make decisions.

[41] It was submitted for Ms Mark that Ms Brown's engagement of Ms Cox and Ms Brown's absence from the relevant consultation meetings amounted to a breach of good faith. I do not consider that is a reasonably available conclusion. There was no requirement that Ms Brown personally undertake the consultation. However, as she was

a decision maker she was obligated to make sure that she was appraised of all relevant matters.

[42] Ms Cox gave evidence that she did not review Ms Mark's IEA and proceeded on the basis she was part time. She said one other employee was made redundant. Ms Brown said three individuals were made redundant and that they were all part-time employees. Ms Brown acknowledged in her evidence that Ms Mark was "technically a full-time employee at the time…" but said she was only available to work 16 hours a week. She said it was not financially viable to employ individuals on a part-time basis. She also said Ms Brown's position was unfortunately made redundant as she was not available for full-time work and her role was being combined with another one.

[43] Ms Mark said she told Ms Cox that her position was full time and disputed the accuracy of notes made by Ms Cox reflecting that Ms Mark had told her she only worked 16 hours per week. She also said she explained the situation relating to ACC to Ms Cox. I find that, while not necessarily deliberate, there was a considerable failure relevant to the consideration of Ms Mark's employment agreement and hours of work.

[44] Ms Brown also said that she was aware that Ms Mark was to have surgery and that that was always going to happen. She said the fact Ms Mark worked 16 hours a week was a factor in the decision. Ms Brown also said at the investigation meeting that Ms Mark was unable to work more than 4 hours and that was a concern. However, that was not raised with Ms Mark in the course of the restructuring consultation, and I find it was a factor in both the design of the selection criteria and the dismissal of Ms Mark.

[45] Further, I am not satisfied that Ms Brown, through Ms Cox or otherwise, appropriately communicated the issues she now has said were relevant to the restructuring and dismissal. That includes a failure to raise her concerns about Ms Mark being limited to 16 hour per week and 4 hours a day.

[46] Further to the above, the failings included a failure to explain and provide information as to the basis for the cost savings said to relate to avoiding an overlapping of shifts. While some further attempt was made in submissions to justify the approach taken, the facts said to be relevant were never disclosed during consultation. That included an alleged desire by Ms Brown to close the café early on occasion and costs associated with the alleged overlap. Ms Brown's evidence was that part of the costs savings to be achieved from the restructuring where a consequence of her personally

working increased hours herself. That was a significant matter that was not disclosed to Ms Mark.

[47] The difficulty is that information was critical to the reasons for the proposed changes and directly relevant to continuation of Ms Mark's employment. Ms Mark was not given that information, genuine consultation cannot be said to have occurred given the absence of that information, and it meant Ms Mark was not afforded an opportunity to make proposals that may have led to a different result. That was a significant procedural failing.

[48] The approach taken to selection was also problematic from a procedural point of view. Ms Mark said she was not shown how she, or any others, were scored. She also gave evidence that the selection criteria were not discussed with her prior to the dismissal. She also said that she should have been considered as being a full-time employee at the time of the restructuring.

[49] I do not consider that the absence of scoring as to some the criteria of itself to be problematic, at least as to the first two of the criteria. Those first two criteria were in essence to be answered either yes or no. However, the third, which concerned skills and suitability, did not involve any objectively verifiable criteria to be assessed. It is no complete answer in my view that the third of the criteria did not end up being used.

[50] I am also not satisfied there was any explanation provided for the approach taken to selection. In cross-examination, Ms Brown acknowledged that another employee that worked part-time was retained and said that was because they worked full days. It was put to her that that was another criteria used and she accepted that that selection criteria was not published. The selective application of criteria and/or use of other criteria without disclosure in my view undermines the purported justification provided and gives weight to Ms Mark's submission that she was targeted. I accept that the motivation for the restructuring and Ms Mark's dismissal were in a meaningful way, albeit not entirely, motivated by erroneous considerations.

[51] Ultimately, I do not accept that the process followed was procedurally justified on account of two main deficiencies. First, the disclosed selection criteria were not uniformly applied. Second, I am not satisfied that Ms Brown ensured that all reasonably available and relevant information was disclosed to Ms Mark, including information as to the concerns Ms Brown had relating to part time hours and work that Ms Brown

would undertake herself. I also consider that the approach taken to Ms Mark's hours of work, that being that she was limited to 16 hours a week and 4 consecutive hours of work at any time, was unreasonable. In short, if Ms Mark was to be treated only being able to work with those limitations on an ongoing basis, then that issue should have been discussed and resolved.

[52] Ms Cox accepted at the investigation meeting that there was no consideration of alternatives after confirming that Ms Mark's role was to be disestablished and before termination of her employment. While it was submitted for Ms Brown that there were no reasonable alternatives available, I am not satisfied that that was necessarily the case and, in any event, I find that a fair and reasonable employer could not have failed to actively consider that at the time.

[53] I find that the dismissal was both procedurally unjustified.

Substantive justification

[54] As to the reasons for the restructuring, Ms Brown's evidence was that turnover had reduced 12 percent and that there were costs associated with the failed sale of the business. She also said that operating costs had been steadily increasing, and that she had immediately actioned several cost saving measures.

[55] Ms Brown denied a suggestion that the dismissal was motivated in any part by Ms Mark having been friends with the prospective purchaser of the Med. Further, she said that Ms Cox was engaged to ensure objectivity. Ms Brown's evidence was that, after considering other measures, it seemed that reducing the number of staff was likely the best financial option. She said that required maximising the number of hours staff would work and that based on that she considered priority should be given to those working full time.

[56] Ms Cox gave evidence that the likely biggest cost saving was in reducing the overall number of staff and that they formed the view that full time staff should take priority over part time staff. Ms Cox said at the investigation meeting that she was told there had been a drop in sales by Ms Brown but was not provided specific financial information. In terms of the proposal that the various roles be combined, Ms Cox was unable to say whether that proposed change occurred in practice following the restructuring.

[57] In terms of the claimed reduction in turnover and failed sale of the business, I am not satisfied that Ms Brown has provided sufficient information in support of those matters such as to establish a substantive justification for the restructuring and the termination of Ms Mark's employment. While noting and accepting that the business was relatively small, and giving that serious consideration, little information was given other than Ms Brown's direct evidence as to the turnover having been reduced. There is an absence of financial statements, cost estimates, or any other records or analysis were provided during the restructuring process, nor was sufficient information provided in the Authority.

[58] Ms Brown said at the investigation meeting that one other employee, who worked between 25 and 30 hours per week, was made redundant. She said a decision was made to keep full time employees over part time employees and that there was a need to cut wages as they were too high given the turnover. That position evidences some degree of selectivity undermining the proposition that Ms Mark's role was impacted having regard to objective considerations rather than personal ones.

[59] There was conflicting evidence as between Ms Brown and Ms Cox as to who and how many individuals were dismissed because of the restructuring process. While it was submitted for Ms Mark that Ms Brown misled the Authority, I make no such finding on the evidence that was given. However, the conflict of evidence does clearly highlight that there was an absence of any clear commercial reasoning for the relevant changes, including an arbitrariness in terms of what changes were necessary having regard to the financial position of the business.

[60] I am not satisfied that Ms Brown has discharged the onus of establishing that the dismissal was substantively justified. Ms Mark was unjustifiably dismissed from her employment.

Is Ms Mark entitled to remedies?

Is Ms Mark entitled to compensation for lost wages?

[61] Ms Mark gave evidence that she was told in December 2023 that surgery would be needed, and that the surgery was to be scheduled for January 2024. She said that her condition has improved and that she would have been able to work full time hours from 3 April 2024 had she not been dismissed. She said she applied for various jobs unsuccessfully and has been searching for work using job sites and social media.

[62] Ms Mark seeks additional compensation for lost wages from the date she was fully fit for work, that being 3 April 2024, to 31 October 2024, the date of the Authority's investigation meeting. She calculates that based on 28 hours per week at the rate of $24.50 per hour, minus the 80 percent paid by ACC.

[63] Ms Mark's evidence is that she was regularly working 38 hours prior to going on ACC. She was being paid $24.50 per hour at the time of the dismissal and that ACC would top her wages up to 80 percent. She then received 80 percent of her pre-injury earnings from ACC after she was dismissed.

[64] I accept Ms Mark took sufficient steps in attempting to mitigate her losses in the period following her dismissal. Her ability to do so in the longer term was no doubt compromised by the necessary medical treatment she received and a period of recouperation. It is also apparent, although I find no basis for criticism of Ms Mark, that she was overseas for a period of time which likely impacted her attempts to find alternative work.

[65] Ms Brown acknowledged that the job market was very difficult and that said that was likely why Ms Mark had difficulty finding alternative employment. She denied having disparaged Ms Mark to other business owners.

[66] The Authority may, at its discretion, order an employer to pay compensation for remuneration lost in excess of 3 months' ordinary time remuneration.[2] The principles applicable to the exercise of such discretion were discussed by the Court of Appeal in *Telecom New Zealand Ltd v Nutter*,[3] including that there is no automatic entitlement to compensation reflecting the balance of the expected working career, and that allowance must be made for contingencies.[4]

[67] I am satisfied that Ms Mark suffered a loss of income attributable to her being unjustifiably dismissed and that she should be compensated for that. However, I do not consider there is a sufficient basis on which to make any discretionary award in excess of three months wages.

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[2] Employment Relations Act 2000, s 128(3).
[3] [2004] 1 ERNZ 315 (CA) at [70] to [79].
[4] Ibid, at [78] and [81].

[68] I find that Ms Mark is entitled to payment of lost wages, on the basis of 16 hours per week she otherwise would have been able to work, at $24.50 per hour, for a total of 13 weeks wages. I decline to make any discretionary award beyond that period.

[69] I order Ms Brown make payment to Ms Mark, within 28 days, of $5,096 as compensation for lost wages.

Is Ms Mark entitled to compensation for humiliation, loss of dignity and injury to feelings?

[70] Ms Mark seeks compensation for humiliation, loss of dignity and injury to feelings. She said the dismissal has affected all areas of her life and that she was fearful of leaving her house because she might run into people she knew from the Med. She also said she feels unfairly judged, is no longer outgoing and socially active, cannot sleep without medication, and that she has been attending counselling weekly since the dismissal. She also gave evidence of having distanced herself from others and feeling shame, embarrassment, and betrayal.

[71] Ms Ellis's evidence was that she noticed changes after Ms Mark was made redundant. Much of her evidence related to feelings that Ms Mark is said to have conveyed to her following the dismissal rather than direct observations made. However, I accept her evidence given at the investigation meeting that Ms Mark appeared tired and dark, and exhibited signs of increased anxiety, following the dismissal. I also accept that there was some observed negative change in relation to Ms Mark's social interaction following the dismissal.

[72] Ms Brown provided the Authority with screenshots of social media posts relating to Ms Mark having been on a family holiday following the dismissal, the suggestion being in effect that Ms Mark was not unable to get out of bed due to anxiety as was said to have been claimed by Ms Mark previously. Ms Brown suggested in her evidence that Ms Mark's evidence as to the impacts of the dismissal was exaggerated. She said, she said reluctantly, that Ms Mark suffered from mental health issues for the entire time she had known her, and that Ms Mark had painted a false picture by suggesting that Ms Brown's actions alone caused her to change from happy and bubbly to depressed and bedridden.

[73] In response to the disclosure of social media posts of her on holiday after the dismissal, Ms Mark said that her sister paid for the holiday for her and her children to

help with the psychological stress resulting from the dismissal. Ultimately. I do not consider the evidence relating to Ms Mark's travel to be significant. However, it is also the case that the evidence does not establish a basis for an award at the high end.

[74] I find that many of the issues raised by Ms Mark, including as to medical treatment and to the impact of events relating to the unsuccessful sale of the Med, are not matters in relation to which compensation flows.

[75] I find that Ms Mark was understandably impacted by the dismissal and that an award of compensation for humiliation, loss of dignity, and injury to feelings is appropriate. However, I do not consider an award at the high end is justified based on the evidence before the Authority.

[76] Having carefully considered all of the evidence, and having regard to compensation awarded in similar matters before the Authority, I consider an award of $15,000 would be appropriate subject to any reduction on account of contribution.

Contribution

[77] Section 124 of the Act requires that I consider the extent to which Ms Brown's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.[5]

[78] I am unable to find that there is a basis on which Ms Mark's actions could be said to have contributed to the situation giving rise to her personal grievance.

[79] I order Ms Brown make payment to Ms Mark, within 28 days of this determination, of $15,000 as compensation for humiliation, loss of dignity and injury to feelings.

Has Ms Brown failed to comply with her duty of good faith?

[80] Such as the basis for this claim can be discerned from the statement of problem and submissions lodged on behalf of Ms Mark, I consider the claims are inextricably linked to the same set of circumstances relevant to the successful personal grievance claim. I decline to impose any penalty.

[5] Employment Relations Act, s 124.

Was Ms Brown obligated to make payment (at the relevant time) of a four-week payment related to the redundancy?

[81] Ms Mark said that she was entitled to payment of four weeks wages that she was told would be paid at the time on account of the redundancy. The sum was ultimately paid some considerable time later, in mid-June 2024.

[82] Ms Brown's evidence was that Ms Mark was offered four weeks as a redundancy payment having regard to various personal circumstances and to provide some additional financial support. In questioning at the investigation meeting, she accepted that the sum was paid later than the acceptance was communicated and said it was paid as soon as she was told to pay it. Ms Cox's evidence was that Ms Mark was offered four weeks wages "as a redundancy package" but had said she would need to "check with Employment New Zealand first". It was submitted for Ms Brown that the delay in payment was occasioned by a disagreement as to whether the payment was made in settlement of the employment dispute or not. It was submitted that the payment was ultimately made on 13 June 2024 after the issue fell by the wayside pending mediation.

[83] The background to the payment is that Ms Mark was offered the payment by Ms Cox at the end of the meeting on 4 October 2023 at which she was advised that she was being dismissed from her employment by reason of redundancy. Ms Mark's evidence is that she did not decline the offer whereas Ms Brown asserted that she had. Despite that difference, what is clear is that the offer was not accepted at that time. Ms Mark said she later accepted the offer, on 17 October 2023, in the correspondence advising Ms Brown of her personal grievance claims. That correspondence asserted that there had been a promise to make the payment and that Ms Mark had never declined the payment. It also stated that the payment was being claimed as a loss of benefit and that penalties would be sought for a breach of an implied term of the employment agreement.

[84] Such as an offer was made, I find it was not accepted as at the time of the meeting with Ms Cox. The email via which the written notice of termination was communicated asserted that the offer had been declined. That is not to say that Ms Mark actually declined the offer.

[85] Ms Brown's response to the personal grievance dated 8 November 2023 asserted that a redundancy payment was offered but was declined by Ms Mark. It went on to advise that the payment would be made should she confirm she wished to receive it. On 17 November 2023 Ms Mark's representative emailed providing the bank account details for payment and seeking confirmation of payment be provided. However, it did not expressly communicate that an offer was being accepted.

[86] Ms Mark submitted that the delay in payment was "deliberate, serious and sustained" and that penalties for "breach of written duty or implied duty" should be ordered. I find that the redundancy payment was not an agreed express term of Ms Mark's employment agreement. Further, it is unclear on what basis the payment is said to have been an implied term and I find it was not. Indeed, the submissions for Ms Mark recorded that Ms Mark understood she would not receive the payment given the reference to it being declined in the email on 4 October 2023. On that basis, a claim for penalty in terms of s 134 of the Act, which is the basis claimed, cannot succeed.

[87] In reply submissions, Ms Mark asserted the relevant breach was of Ms Brown's duty of good faith. Such as there was any expectation or acceptance of the proposed payment, I find that arose only following the conclusion of the employment relationship and on that basis that any duty of good faith did not apply at the relevant time. On that basis, no penalty is available.

[88] I find that Ms Brown was obligated to make payment of the sum on the basis that she had committed to making the payment. The payment was ultimately made but was significantly delayed. I conclude that Ms Brown made the payment once she was advised that she should do so and that it is more likely than not that the payment was in fact delayed on the basis that the position was taken that the payment should be dealt with in the context of mediation and potential settlement. The reality was that the payment had already been both committed to and should have been paid at the conclusion of the employment.

[89] Regardless, the letter confirming termination of employment on notice unilaterally committed to making payment without any condition. It is also the case that Ms Mark later purported to communicate acceptance of the payment, albeit not expressly, by providing her bank account details.

[90] The payment was referred to as a redundancy payment at various times but was in effect an ex-gratia payment. The promised payment was not part of Ms Mark's wages for the purposes of the Wages Protection Act 1983 and I find no action lies for penalty.

Is Ms Mark entitled to payment of any outstanding holiday pay?

[91] Ms Mark accepted in submissions, having reviewed the records provided with the statement in reply and matters raised at the investigation meeting, that she was paid her notice period and that she was not entitled to payment for a day in lieu relating to Labour Day. She contends the only remaining question is whether she was paid correctly for annual holidays.

[92] Ms Mark claims that her holiday pay might need to be adjusted to be paid based on her earnings in the 12-month period before she went on ACC. That approach was ultimately abandoned and the submissions for Ms Brown instead focused on whether payment should have been made based on ordinary weekly pay or an average of 12-months earnings.

[93] Ms Brown's evidence was that Ms Mark's holiday pay was paid appropriately having been calculated based on the 'relevant period'. She said that annual leave was automatically calculated using payroll software based on the preceding 12-month period and relevant entitlements paid out in full. She also said that Ms Mark was injured in August 2022 and that her pre-injury earnings were only relevant for the 12-month period that followed.

[94] Payment for any outstanding annual holidays was due when the employment came to an end.[6] Payment was required to be made at the rate based on the greater of Ms Mark's ordinary weekly pay as at the date of the end of her employment, or her average weekly earnings for the 12 months immediately before the end of the last pay period before the end of her employment.[7] The parties are apparently in agreement that Ms Mark was paid on the basis of her average weekly earnings for the 12 month period prior to termination.

[95] Following a request by the Authority, Ms Brown provided what appear to be fulsome records generated by the Med's payroll system. Those records included a

[6] Holidays Act 2003, s 27.
[7] Holidays Act 2003, s 24(2).

breakdown of the hours of work for each week and gross and net sums paid based on hours worked. The records also include relevant details regarding leave entitlements. Given that material has been provided to Ms Mark any dispute as to the basis on which Ms Mark was paid and the basis for any assertion that the payment made was incorrect should be available to Ms Mark.

[96] Ultimately, Ms Mark has the same records that have been provided to the Authority and, having regard to Ms Mark's claim that penalties should be imposed, it is in my view incumbent on Ms Mark to show that the entitlements were paid incorrectly and to specifically identify the alleged breach. She has not done so, and I find that the claim has not been made out.

Were wages paid to Ms Mark, without deduction, in terms of s 4 of the Wages Protection Act 1983?

[97] Ms Mark claims that a corrective payment made in March 2024 provides a foundation for a finding that Ms Brown breached s 4 of the Wages Protection Act 1983 in that wages were not paid when due.

[98] Ms Mark's evidence did note that a corrective payment was made to her in late March 2024. Ms Brown's evidence was that the corrective payment related to alternative holidays for public holidays worked by Ms Mark. The statement of problem alleges any failure to make payment at the time of making the final pay is a breach of s 4 of the Wages Protection Act 1983 and penalties are sought.

[99] I accept Ms Brown's evidence as to the nature of the corrective payment. The payment was not part of Ms Mark's wages for the purposes of the Wages Protection Act 1983, and I find no action lies for penalty.

[100] I note, even if a penalty had been sought in terms of breach of s 60 of the Holidays Act 2003 that I would have declined to impose a penalty having regard to the apparent voluntary corrective action taken and the absence of any intentional breach.

Summary of orders

[101] Joanne Brown is ordered, within 28 days of the date of this determination, to make payment to Ms Mark of:

(a) $5,096 as to compensation for lost wages; and

(b) $15,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[102] Costs are reserved. Having regard to the personal attendance of both parties at the investigation meeting, any costs claimed are likely to be negligible. The parties are encouraged to resolve any issue of costs between themselves.

[103] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Mark may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Brown will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[104] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" reflecting one full day and one half day, unless circumstances or factors, require an adjustment upwards or downwards.[8]

Rowan Anderson
Member of the Employment Relations Authority

[8] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1