

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 217
3053312

BETWEEN EMMA McALPINE
Applicant

AND STONEWOOD
GROUP
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Danny Gelb, Advocate for the Applicant
Brent Gilchrist, on behalf of the Respondent

Investigation Meeting: 11 April 2019

Oral Determination: 11 April 2019

Written Record Issued: 12 April 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Stonewood Group Limited (Stonewood) is a commercial property management company. It is also the National Franchisor of Stonewood Homes, a house design and building company with 19 Franchises throughout New Zealand.

[2] Emma McAlpine was employed by Stonewood on 24 April 2018 as its Marketing and Communications Manager.

[3] Ms McAlpine's employment was terminated on 24 November 2018. She alleges she was unjustifiably dismissed and claims lost wages and compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Her claim is denied by Stonewood who maintains she was justifiably dismissed on the grounds of irreconcilable differences.

[4] As permitted by s174E of 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 but has not recorded all evidence and submissions received.

Issues

[5] The issues for determination are:

- a. Was Ms McAlpine unjustifiably dismissed?
- b. If the answer to that question is yes, what remedies should be awarded?
- c. If any remedies are awarded, should they be reduced for blameworthy conduct by Ms McAlpine that contributed to the situation giving rise to her grievance?
- d. Should interest be awarded?
- e. Should either party contribute to the costs of representation of the other party?

Relevant background facts

[6] The parties' relationship was relatively uneventful, in terms of matters material to this investigation, until November 2018.

[7] Thereabouts Ms McAlpine was asked to speak at Stonewood Homes' annual conference on marketing strategy and planning and results for 2018. Prior to her presentation she organised a meeting with Ka Yu (John) Chow, Stonewood's Director, and Brent Gilchrist, Stonewood's Chief Operating Officer, to discuss her presentation and Stonewood's strategy moving forward.

[8] At this meeting the parties discussed a new strategy that Ms McAlpine wanted to present to the franchisees. Mr Chow was not impressed with the idea. There is a dispute as to whether or not Mr Chow agreed that Ms McAlpine could present this idea at the conference. I find it is more likely than not that Mr Chow did not expressly tell Ms McAlpine that she could present her strategy at the conference but she understood, from his lack of verbal response, that he was agreeing. This finding is consistent with a recording of a meeting between the parties on 12 November 2018.

The Conference

[9] On 7 November 2018 Ms McAlpine provided her presentation to the conference. During her presentation she presented the strategy discussed with Mr Chow. She said she told those present words along the lines that “John is still a little ho hum about this strategy so we are looking for your feedback in order to make a decision going forward.”

[10] Mr Chow felt undermined by Ms McAlpine presenting this strategy without his authorisation and telling those present that he was “ho hum” about the idea. He immediately spoke to Mr Gilchrist about this. His conversation was followed up by an email to Mr Gilchrist. This email was copied to Ms McAlpine and two others. These two recipients did not provide evidence and therefore I shall simply refer to them as Ms McAlpine’s former supervisor and the Director of Stonewood Homes. The email advised:

I have expressed to you this morning with my disappointment about Emma’s presentation.

I personally felt that Emma is undermine my authorization, which you agree with me.

Let me know if you need to involve to talk to Emma.

Events on 8 November 2018

[11] The next day Mr Gilchrist responded advising he had spoken to Ms McAlpine the evening before and she was:

adamant that at the briefing meeting she had with you she set out that she would present the idea to the conference to get feedback and if you were against that idea you would have made it clear she was not to present the idea.

There were no meeting minutes and I can’t recall if she did or did not make it clear how she would proceed.

She also thinks the presentation was clear in that by referencing that you were “ho hum” about the idea was indicating that it was an idea that did not yet have Directors’ sign off.

Please let me know if you want a more formal explanation in writing from Emma.

[12] Mr Chow responded that he was not satisfied with the answer provided by Ms McAlpine. He asked Mr Gilchrist to ask her to provide a written explanation and he would then decide whether he needed to take further action. His email was again copied to Ms McAlpine, Ms McAlpine's former supervisor and the Director of Stonewood Homes. The email ended by stating in bold and underlined:

Emma, to avoid any doubt, any further marketing plan/idea/strategy that presentation to external party, including franchisee must be got my written approval before issue out. Please confirm via reply that you are fully understand?

(the direction)

[13] Ms McAlpine then replied to Mr Chow. Her email was copied to Mr Gilchrist, her former supervisor, the Director of Stonewood Homes, the head of HR and her Advocate. It stated:

Apologies but I feel this is getting a little out of hand.

I simply presented an idea for strategy, stated that it was still in planning stages and that you were a little "ho hum" about it which meant you were not fully on board and we were still consulting on it. This was to ensure that everyone knew this strategic direction was not set in stone.

My intention was certainly not to undermine you. If you feel this way, please find this email as my formal apology. Certainly the feedback I have received was that this slide and my commentary around it was absolutely not taken in that way that you are prescribing.

If you require a written explanation further, I shall have to consult my employment lawyer Danny Gelb (cc'd in this email) on this matter and take his recommendations into account going forward. If this is leaning into the area of "gross misconduct" (a ridiculous notion in its own right), you need to inform me in writing formally so I can take appropriate action and gain appropriate support and advice.

I will not be bullied into writing you an explanation letter. This is bordering on intimidation and bullying over a presentation that was by all accounts taken with great positivity.

Please advise prior to 5pm today with regards to the process you wish to take in this matter so I can take appropriate action accordingly.

[14] Materially Ms McAlpine's letter did not provide confirmation that she understood the direction. She said she did not provide this confirmation straight away as she was concerned about the implications. Particularly, she was concerned that the direction was inconsistent with the way in which she currently performed her role.

Her undisputed evidence was up until that point she had the authority to make decisions on strategies on behalf of the company and did this on a regular basis.

[15] Mr Chow responded to Ms McAlpine's email accepting her apology and advising her that no further explanation letter was required. His email went on to repeat the direction and requested Ms McAlpine to confirm she understood it. Beneath this request Mr Chow suggested that Ms McAlpine consult her lawyer to clarify her employment rights. He also requested Mr Gilchrist to arrange a meeting with Ms McAlpine "about the process".

[16] Ms McAlpine was upset by this email. She said she thought the "process" Mr Chow was referring to was a disciplinary process given his suggestion to consult her lawyer. She was aware that Stonewood had a high turnover of staff and was concerned that Mr Chow was going down a path to get rid of her. She spoke to the head of HR and explained what was going on.

[17] The head of HR told Ms McAlpine that she could take the remainder of the day off and the following if needed. Ms McAlpine then text Mr Gilchrist to advise him that she had left the office, was taking stress leave the following day and was feeling bullied and intimidated by Mr Chow. Mr Gilchrist replied noting her text message and asking her to keep him informed. Ms McAlpine also responded to Mr Chow's email, advising that she would like her lawyer at any future meetings and to liaise with him to arrange this. She went on to advise "I will be on stress leave tomorrow."

9 November 2018

[18] The following day, 9 November 2018, Mr Gilchrist responded advising:

1. Please accept this message as a formal response on behalf of CGML to your email below.
2. I'm disappointed that you have acted in this way given that you apologised to John and he accepted your apology. I would have hoped that ended the matter.
3. At this point you are on unapproved leave and so our view is that it is inappropriate to be copying in your lawyer on confidential company matters around marketing strategy and internal differences of opinion on such matters. If though, you consider that you require legal support at company meetings, we encourage you to instruct your lawyer to write to us setting out his/her expectations as to involvement in such meetings.

4. We wish to point out that if you forward other company information to third parties (including lawyers) without our approval, it could amount to breach of your confidentiality obligations, so please take legal advice as to your rights and obligations in that respect.
5. Unless advised otherwise, our expectation is that you will return to work on Monday. Regardless of your decision about returning, I can meet you Monday (in or out of office) to discuss any and all issues regarding above.

12 November 2018 Meeting

[19] A meeting took place on 12 November 2018. Present at the meeting was Ms McAlpine, Mr Chow and Mr Gilchrist. The conversation that took place between the parties was recorded by Ms McAlpine and I have listened to the recording and viewed the typed transcript.

[20] At the commencement of the meeting Mr Chow referred to the direction he had made in his emails of 8 November 2018 and Ms McAlpine's failure to respond. He sought Ms McAlpine's commitment to obtaining his consent before discussing marketing plans/ideas/strategies to external parties. He acknowledged there had been a miscommunication and that they could not change what had happened. He said he wanted to ensure she was aware of his expectations moving forward and agreed to abide by these. Ms McAlpine said she would have to think about what he was saying. It was agreed she would take the remainder of the day off to take legal advice and would provide her response before starting work the next day.

[21] The meeting concluded with the parties discussing their obligations of good faith and their relationship moving forward. Mr Chow made it clear that unless Ms McAlpine could commit 100% to following the direction then she shouldn't be working for Stonewood.

[22] Later that evening Ms McAlpine emailed Mr Chow confirming she would follow the direction recorded in his emails of 8 November 2018.

13 November 2018 meeting and suspension

[23] Another meeting took place on 13 November 2018. Present at the meeting was Ms McAlpine, Mr Chow and Mr Gilchrist. The conversation that took place

between the parties was again recorded by Ms McAlpine. I have listened to the recording and viewed the typed transcript.

[24] Mr Chow confirmed he had received Ms McAlpine's email and asked whether she had consulted her lawyer. Ms McAlpine said she had and he had confirmed Mr Chow's directions were reasonable. Mr Chow expressed concern that she had only agreed once she had obtained advice. He went on to advise:

JC: Ok, so what I want to do. I need to think about it, our relationship and I would like you to uh, uhh send you home and then I will think about my options and then we, we maybe have to, have to bring your support person to because I need to follow because my point of view is I am not sure I can continue to work with you due to what's happened so I need to think about my options but I will seek my legal advice as well and I suggest you do the same but I need to, I'm not telling you but what I'm saying to you is that, I'm asking you to go home first and then wait for my instruction.

[25] Ms McAlpine agreed to go home and the meeting ended.

The invitation to a disciplinary meeting

[26] Later that day Stonewood sent a letter to Ms McAlpine, the material parts of which were these:

Further to our meeting today, I would like to meet with you to discuss an employment matter that is currently causing disharmony and impacting our employment relationship. In particular, I have concerns about your view that I am a bully; unwillingness to follow reasonable instructions; and repeated threats to have your lawyer deal with your employer for matters that are within the ambit of the employer's rights to implement. I set out the details below:

- I have previously informed you that I do not agree with your marketing strategy especially as regards Stonewood Homes and on the 7th of November, you have presented the same strategy at the Stonewood Homes conference without my authorisation. I felt that you have undermined my authority.
- In my email addressed to the COO, Brent Gilchrist, dated 8 November where I have asked him to get your written explanation for the incident, you have replied indicating your formal apology but stating that you will not be bullied into writing an explanation letter. You have also failed to acknowledge my instruction twice in my emails without justifiable cause that "to avoid any doubt, any further marketing plan/idea/strategy that may be presented to external party including franchisee must have my written approval before issuing out."

- In the same email thread, after I have accepted your apology and indicated that no further explanation is required, you replied that you would like your lawyer to be in any further meetings.
- You have walked out from the office during office hours on 8 November and did not report to work on 9 November without your manager's approval.
- At our meeting on 12 November, with Brent Gilchrist in attendance, you stated that you would like to seek legal advice as regards my instruction to seek my written approval before issuing out any marketing plan/ideas/strategy to external parties.
- At our meeting today (13 November) with Brent Gilchrist in attendance, you have confirmed that after consulting with your lawyer, you will follow my instructions as your lawyer had also agreed that it was reasonable.
- You have repeatedly showed up late for work and scheduled meetings despite my approval with your request to work with more flexibility.

The above-mentioned conduct involves a serious breach of trust. As our Marketing and Communications Manager, you are entrusted with confidence on protection of the Company's marketing plans, strategies, and communications and to follow reasonable instructions.

At the meeting, you will be given the opportunity to and will be expected to give a full explanation in response to the above. We want to consult with you to ascertain how we can best move forward.

You are entitled to bring a support person or representative to the meeting and we encourage you to do so. This person can be a friend, family member or legal representative.

The outcome of the meeting could result in action up to and including dismissal/termination of employment. You are requested to attend and exercise your rights at the meeting, failing which the meeting will proceed in your absence.

[27] Correspondence then ensued over several days between Mr Chow and Ms McAlpine's Advocate, Mr Gelb, regarding a date for the disciplinary meeting. Part of the dialogue between the gentlemen involved clarification of Ms McAlpine's status.

[28] In an email dated 14 November 2018, Mr Chow confirmed that Ms McAlpine had been suspended on 12 November 2018. He went on to say:

We have considered Emma's blatant disregard to confidentiality of internal communications and Company strategies, which is core to her role as Marketing and Communications Manager, and reservation to follow reasonable instructions as threat to our business. We are entitled to act promptly to further prevent detrimental impact and protect our business.

Her suspension with pay is effective unless otherwise revoked by the Board of Directors.

The disciplinary Meeting

[29] The disciplinary meeting took place on 22 November 2018. Present at the meeting were Ms McAlpine, Mr Gelb, Mr Gilchrist and Stonewood's minute taker. The conversation that took place between the parties was again recorded by Ms McAlpine. I have listened to the recording and viewed the typed transcript. While notes of the meeting were also provided by Stonewood, I have preferred the recordings as evidence of the matters discussed at this meeting.

[30] The recording shows that Mr Gilchrist set out the purpose of the meeting and then provided Ms McAlpine with an opportunity to respond to each of the bullet points referred to in Stonewood's letter of 13 November 2018. The meeting concluded with Mr Gilchrist agreeing to provide Ms McAlpine with a letter setting out the proposed outcome before any final outcome was decided.

The decision to terminate

[31] Following the meeting Mr Gilchrist attended an internal Board meeting. Mr Gilchrist could not recall who attended the meetings but believed Mr Chow was present.

[32] At this meeting Mr Gilchrist advised the Board that it was his view that the differences between the parties had become irreconcilable. He said he told the Board that Ms McAlpine had "consistently asserted that John was a bully but did not once present any evidence of any act of being bullied". He said he went on to tell the Board:

Emma obviously did not see it as acceptable to have to clear marketing strategy announcements with John first, despite John making it clear that he considered it important enough to direct Emma to do so.

[33] After discussing the matter with the Board, it was agreed that Ms McAlpine's position would be terminated. Mr Gilchrist then emailed Mr Chow. He attached a copy of the minutes taken at the meeting on 22 November 2018 and went on to say:

1. Emma had ample opportunity to demonstrate that the issues set out in your letter of 13 November had or could be resolved. I was looking for signals that she accepted that her views had changed during the time given to her to reflect on full pay. Unfortunately, the meeting demonstrated that in fact Emma has not changed her views.
2. In your letter of 13 November you refer in particular about your concerns over her bullying allegations. Note under bullet point 2 she maintains *her* view that you are a bully and that by requesting a formal apology you are bullying her. Under bullet point 3 Emma makes the same inference by referring to how you treat employees and how it's reasonable to involve an external party over bullying.
3. I record that Emma did not present any particular examples of bullying behaviour, apart from linking the request for a formal apology to the issue of bullying.
4. The second issue you specifically referred to in your 13 November letter was Emma's unwillingness to follow instructions and the involvement of a "lawyer" to review operational instruction requests. Note at the meeting that Emma again asserted that she sees it as "reasonable" to communicate with an external party to guide her over operational instructions she might take issue with. Emma repeated her position that it is an overreaction by us to show concern at providing third parties with email trails over marketing strategy issues. I note at this point that the recipient of that information was Danny Gelb who is not a lawyer but is an employment dispute advocate.
5. In conclusion, there was nothing in Emma's verbal response that indicated to me that the issues you identified in your letter of 13 November can be resolved by further negotiation. In my opinion, the meeting and the prior events demonstrate irreconcilable differences between the parties and that the employment relationship damage is irreparable.

Recommendation

That Emma's employment be terminated.

[34] Mr Gilchrist said he reached the view that the “relationship was unhealthy, contributing to internal stress on other employees and had to be terminated”.

The termination

[35] On Saturday 24 November 2018 Mr Gilchrist sent the following email to Ms McAlpine:

Further to the meeting held on 22 November 2018, I am writing to formally confirm that your employment with Stonewood Group (CGML) Limited is to be terminated on the grounds of irreconcilable differences.

The reasons for the termination are that:

- your conduct on the 7th of November 2018 was regarded as blatant disregard to confidentiality of commercially sensitive information;
- your repeated failure to follow reasonable instructions and your stance that it is over the top for the employer to require you to have a written approval before issuing out or presenting further marketing plan, ideas and strategy to external parties including franchisees; and
- your conviction that your managing director, John Chow, is a bully.

We maintain that:

- It is expected of you as Marketing and Communications Manager, to protect the Company's marketing plan, ideas and strategy and to seek approval before its release to external parties. Your explanation that you needed external guidance and do not believe that the same were sensitive information, is untenable especially when the Managing Director has expressly stated that he disagrees with the same marketing plan and strategy that you have previously presented to him. Seeking prior approval is part of your responsibility as an employee to be communicative and to act without hidden motives towards your employer. This is within the good-faith obligation in employment relationship.
- You have repeatedly stated that John Chow is a bully whilst failing to cite instances where you have been a recipient of repeated offensive and intimidating behaviour from him. This allegation was never raised in the past considering your outspoken disposition. We believe that this claim was brought about by his request (through writer) for an explanation after the presentation incident and instruction that any marketing plan, ideas or strategy must have written approval before issuing to external parties. You in fact then apologised for your actions and John accepted your apology but you then refused to end the matter there. This request and instruction is considered to be normal in the circumstances. Your unshakable belief that your employer is a bully despite you in fact apologising for your behaviour, is evidence that your continuous employment will cause ongoing disharmony in the workplace.

In view of the foregoing, we conclude that your behaviour is inimical to the Company's interest, resulting in our complete loss of confidence in you as an employee. Therefore, your employment is being terminated effective immediately due to an irreconcilable breakdown in the employment relationship.

You must immediately return to me any company equipment (including mobile) and all records, documents, keys and other materials of every description (including copies), which are within your possession or control and which belong to or came from the Company.

Your final pay will take into account any accrued leave, leave taken in advance and any outstanding pay.

Issue One: Was Ms McAlpine unjustifiably dismissed?

[37] The onus falls upon Stonewood to prove that its actions in dismissing Ms McAlpine were justified.

[38] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Stonewood, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[39] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Stonewood sufficiently investigated the allegations, raised the concerns with Ms McAlpine, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal. The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms McAlpine being treated unfairly.¹

[40] The legal principles applicable to an employer's ability to dismiss on the basis of an irreconcilable breakdown are well-settled. The leading decision is *New Zealand Fire Service Commission v Reid*, upheld by the Court of Appeal in *Reid v New Zealand Fire Service Commission*.² In that case the Court of Appeal confirmed that in unusual and rare cases an employer may be able to justify the dismissal of an employee on the grounds of an irreconcilable breakdown in the employment relationship. The Court stressed, however, that it must be established on entirely convincing facts that the employee was substantially responsible for the irreconcilable breakdown. The Court of Appeal also emphasised what is now embodied in the s 103A test, namely that the employer must be able to establish that the employee was treated in a manner which was procedurally fair.

Analysis

[41] For the reasons that follow, I am satisfied that Stonewood was not justified in dismissing Ms McAlpine.

¹ Section 103A(5), Employment Relations Act 2000

² [1998] 2 ERNZ 250 (EmpC) and [1999] 1 ERNZ 104 (CA) cited with approval in *Snowden v Radio NZ Ltd* [2014] NZEmpC 45 at [80].

[42] Stonewood's decision to terminate Ms McAlpine's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. I am satisfied that Stonewood did not have a sufficient and reliable basis for concluding that there were irreconcilable differences between the parties or, if there was, that Ms McAlpine was substantially responsible for the irreconcilable breakdown.

[43] In terms of the matters raised in the dismissal letter of 22 November 2018:

Unwillingness to follow reasonable instructions

- a. There was a misunderstanding between Ms McAlpine and Mr Chow regarding whether Ms McAlpine was permitted to present her strategy at the Conference on 7 November 2018. However, this issue was resolved through the exchange of emails on 8 November 2018 where Ms McAlpine apologised and Mr Chow accepted her apology.
- b. Mr Chow's insistence that Ms McAlpine not present strategies to third parties without his consent was a reasonable instruction. Ms McAlpine's initial reluctance to provide her agreement to this direction, without consulting her lawyer, did cause concern to Mr Chow. Had she maintained this position then it may have supported a finding of irreconcilable differences. However this was not the case. Ms McAlpine emailed Mr Chow on 12 November 2018 confirming she would follow the direction recorded in his emails of 8 November 2018. In the meeting on 13 November 2018 Mr Gilchrist told Ms McAlpine that he saw no point to the meeting given the exchange of emails the day before.

Allegation of bullying

- c. The issue of bullying followed receipt of Mr Chow's email of 8 November 2018. At this time Ms McAlpine said she spoke with HR about what was going on and told HR that she was feeling stressed, bullied and intimidated by Mr Chow's email. Her concerns were reiterated in her text message to Mr Gilchrist and in the email sent to Mr Chow later that afternoon where she said she would not "be bullied into writing you an explanation letter" that she felt was "bordering on intimidation and bullying over a

presentation that was by all accounts taken with great positivity”. Her complaint was resolved by Mr Chow agreeing that no explanation letter was required. Had it not been resolved then I would have expected some action to have been taken by Stonewood to investigate this complaint. This was not done.

- d. During the investigation meeting Mr Gilchrist said that he also took into account other complaints of bullying that Ms McAlpine had made about Mr Chow prior to the events in November 2018. I did not find his evidence that Ms McAlpine had previously complained about bullying credible. He was unable to provide me with any detail as to when these issues were raised by Ms McAlpine or what Ms McAlpine actually said. He also told me he took no notes and took no steps to investigate. In addition, an evaluation form completed by Ms McAlpine on 6 July 2018 recorded:

I really enjoy working with John ... I am inspired to work with leaders that are positive, enthusiastic and fun to be around.

- e. Even if I am wrong on this last point, if this was a matter taken into account by Mr Gilchrist in reaching a view that the parties had irreconcilable differences then it ought to have been put to Ms McAlpine for her response. It was not.

[44] For completeness, I record that I also considered the other concerns raised by Stonewood in its letter of 13 November 2018, and addressed by Ms McAlpine in the meeting on 22 November 2018. I am satisfied that Ms McAlpine provided a reasonable explanation of the events that was acceptable to Stonewood. These matters did not form part of Stonewood’s decision to terminate Ms McAlpine’s employment.

Finding on Issue 1

[45] The test of justification set out in s 103A of the Act has not been satisfied. For the reasons that I have outlined, Stonewood’s decision to terminate Ms McAlpine’s employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. Stonewood did not have a sufficient and reliable basis for concluding that there were irreconcilable differences between the parties.

[46] Ms McAlpine was unjustifiably dismissed from her employment with Stonewood and is entitled to remedies.

Issue Two: Remedies

Compensation under s 123(1)(c)(i) of the Act

[47] Ms McAlpine claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[48] Ms McAlpine gave compelling evidence of the effects that her summary dismissal had on her. She explained the shock and distress she endured as a result of the manner in which she was notified of her dismissal. She explained that prior to her termination she had never lost a job or been fired. Explaining to friends, family and colleagues why she had suddenly stopped working caused her to become extremely anxious and upset. Professionally it was also highly embarrassing.

[49] A medical certificate provided by Ms McAlpine's doctor records Ms McAlpine was seen and examined by the Doctor on 17 December 2018. She was viewed to be in a highly distressed state and was prescribed medication to control heart palpitations brought on by her dismissal.

[50] Ms McAlpine also explained the serious financial hardship she has faced since her dismissal. She explained how, prior to her dismissal, she was the main wage earner for her family. She discussed the difficulty her and her family have faced living on one income. They struggled through the Christmas period, had to cancel a planned holiday, have had to borrow money from her parents and have defaulted on mortgage payments. Recently they have had to move from the family home into rental accommodation.

[51] I am satisfied in the circumstances that Ms McAlpine suffered humiliation, loss of dignity and injury to her feelings. I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$18,000.

[52] Stonewood is ordered to make payment to Ms McAlpine the sum of \$18,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Lost wages

[53] Section 123(1)(b) of the Act provides for the reimbursement by Stonewood of the whole or any part of wages lost by Ms McAlpine as a result of her grievance. Section 128(2) provides that I must order Stonewood to pay Ms McAlpine the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.³

In *Allen v Transpacific Industries Group Ltd*⁴, Chief Judge Colgan emphasised that those representing dismissed employees intending to take personal grievances should keep complete records of their attempts to mitigate losses. He said:

[D]ismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[54] In *Xtreme Dining Limited v Dewar* the full Court confirmed that where the employer puts mitigation in issue, the employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.⁵

[55] In the present case, Stonewood did not put mitigation in issue; however Ms McAlpine provided evidence of the steps she took to mitigate her asserted loss. Having reviewed the evidence provided I am persuaded that she has acted reasonably in attempting to mitigate her loss and that her loss is attributable to her personal grievance. It is reasonable in all the circumstances that she recovers an award of compensation greater than three months' lost wages.

[56] At the time of her dismissal Ms McAlpine was paid an annual salary of \$125,000. She remains unemployed and has not been offered alternative employment. She has not received any income for the period from 24 November

³ S 128(3).

⁴ [2009] 6 NZELR 530 (EmpC)

⁵ [2016] NZEmpC 136

2018 to 11 April 2019. 20 weeks multiplied by her weekly salary of \$2,403.85 equals \$48,077 gross.

[57] Stonewood is ordered to make payment to Ms McAlpine of the sum of \$48,077 gross for lost wages within 14 days of the date of this determination.

Issue Three: Contribution

[58] 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. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁶

[59] I am satisfied that Ms McAlpine did not contribute to her personal grievance and for this reason I make no deduction to the remedies I have awarded.

Issue Four: Interest

[60] In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion of interest on the amount awarded.⁷ Interest on lost wages is not a remedy specified in s 123 of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. Until the issuing of this determination there was no known entitlement and therefore no loss of use in the interim. Ms McAlpine's claim for interest is therefore declined.

Issue Four: Costs

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

[62] If they are not able to do so and an Authority determination on costs is needed Ms McAlpine may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Stonewood will then have 14 days to lodge any reply

⁶ s 124.

⁷ Employment Relations Act 2000, Sch 2 cl 11.

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Outcome

[64] The overall outcome is:

- (a) Emma McAlpine was unjustifiably dismissed by Stonewood Group Limited.
- (b) Stonewood Group Limited is ordered to pay Emma McAlpine the following sums within 14 days of the date of receipt of the record of determination:
 - (i) The sum of \$48,077 gross for lost wages;
 - (ii) The sum of \$18,000 as compensation pursuant to s 123(1)(c)(i) of the Act.
- (c) Costs are reserved pending receipt of memoranda from the parties.

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].