

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 171
3254600

BETWEEN LEAH MCCANN
 Applicant

AND WINTON CAPITAL
 LIMITED
 Respondent

Member of Authority: Sarah Blick

Representatives: Emma Butcher and Suzie England-Hall, counsel for the
 applicant
 Stephen Langton, counsel for the respondent

Investigation Meeting: 27 November 2024 in Auckland

Information and
submissions received: 23 December 2024 from the applicant
 20 December 2024 from the respondent

Determination: 21 March 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Leah McCann has significant experience as an Executive Assistant (EA) and came to be employed by Winton Capital Limited (Winton) in late 2022, reporting to its CEO and Executive Chairman Chris Meehan. Ms McCann claims her employment was affected to her disadvantage by Mr Meehan swearing at her and threatening her employment, after a flight booking she arranged resulted in him having an unsuitable business class seat on an international flight. She further says Winton failed to address the distress and harm she experienced as a result of that behaviour; told her the behaviour would likely continue; told her that the relationship was broken and pressured her to resign while on sick leave; and removed her access to Mr Meehan's email address and calendar.

[2] Ms McCann says she was also constructively dismissed by Winton embarking on a course of conduct with the deliberate and dominant purpose of coercing her to resign and by Winton breaching its duties to her, those breaches being sufficiently serious to destroy the trust and confidence she was reasonably entitled to have in Winton as her employer.

[3] She further claims Winton breached her employment agreement by failing to ensure her health and safety while at work, as well as its statutory obligations of good faith by pressuring her to resign while on sick leave and distressed. Penalties are sought for these alleged breaches.

[4] Winton denies Ms McCann's claims and has focused on what it perceived to be unaddressed performance issues her during her employment. In relation to the international flight, its witnesses say Ms McCann had been told not to use the travel agent used but did so anyway.

The Authority's process

[5] Ms McCann and her husband Antony Hogg gave evidence at the investigation meeting. Winton's General Manager, Corporate Services Justine Hollows, its HR manager Victoria Cooke, former Winton receptionist Georgia Chilman and Mr Meehan gave evidence.

[6] 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 and considered.¹

Issues

[7] There are numerous issues for investigation and determination:

- (a) Does Ms McCann have a personal grievance for unjustified dismissal on a constructive dismissal basis?
- (b) Does Ms McCann have a personal grievance for unjustified disadvantage?
- (c) If she has a grievance or grievances, what if any remedies should be awarded, and are there issues of contribution?

¹ As permitted by s 174E of the Employment Relations Act 2000.

- (d) Did Winton breach its contract with Ms McCann by failing to ensure her health and safety while at work, and if so should a penalty be imposed?
- (e) Has Winton breached good faith obligations by pressuring Ms McCann to resign while on sick leave and distressed, and if so should a penalty be imposed on it?

Background

[8] Winton is a property developer with interests in New Zealand and Australia. Mr Meehan is a director and shareholder of the company.

[9] Ms McCann was employed by Winton from 8 December 2022 as EA to Mr Meehan. The nature of the role meant that she worked closely with Mr Meehan and reported directly to him. During her employment Mr Meehan often travelled. One of Ms McCann's duties was to book his travel and accommodation.

Winton's workplace environment according to Ms McCann

[10] In the 10 months she worked for Winton, Ms McCann reports witnessing and experiencing inappropriate workplace behaviours. She gave evidence of examples of the way Mr Meehan and another executive spoke to employees. These included:

- (a) In March 2023 a manager left within a short time of Mr Meehan having an angry response to an interaction with the manager, and telling Ms McCann "I pay people to do their fucking job if they can't they are gone";
- (b) In May 2023, Mr Meehan gave Ms McCann three business cards to put into his contacts list before leaving to travel. Mr Meehan called while away asking about the cards to which she told him she had not had a chance to input them but would text him the details. She says he replied: "When I give you something I expect you to do it so just fuckin do it" and hung up;
- (c) In June 2023 Mr Meehan spoke angrily to Ms Chilman in front of other employees and banged on her desk about the fact ham in the office fridge had expired. Ms McCann heard him say he "didn't care how much it fuckin cost, just get it and make sure that there is always fuckin ham there at all times"; and
- (d) In September 2023, the other executive yelling and swearing at a senior employee within earshot of other employees and the employee leaving his

employment that day as a result. Ms McCann says when she later mentioned the manager's leaving to Mr Meehan and he told her he "just needs to do his fucking job...if he can't then he is gone."

[11] By his own admission, Mr Meehan gets annoyed with those he believes are not "doing their job" or meeting his "high standards". He says that he gets "frustrated", "stormy" and "colourful", and during the investigation meeting he accepted that he sometimes swears when he needs to make his point. He stressed that he does not swear "at" people. He gave evidence that he oversees a culture of safety and excellence, and when people do not do the job that they have been entrusted to do, or they do something despite being told not to do it, he gets grumpy about this. He says the Winton group's culture is to "instruct people on what to do once, and then expect them to do it, and to hold them to account if they do not". He accepts that the Winton work environment is not one that suits everyone. Some find the high standards too exacting of them, and go on to do other things, but the majority are loyal and thrive.

[12] In relation to the "ham incident", Mr Meehan is unsure if McCann's description is accurate but he certainly would have had "cross words" at the time and was probably angry (and hungry). In relation to the business cards issue, Mr Meehan says he may well have sworn when speaking to Ms McCann, but he does not recall it.

[13] Ms Cooke and Ms Chilman gave evidence that they had only heard Mr Meehan raise his voice once at work, which happened in the boardroom during a project meeting. She says she could not clearly hear what was being said but assumes this is the meeting Ms McCann referred to in March 2023. Ms Cooke says Ms McCann was not in the office at the time of the meeting so when she was next in she mentioned hearing Mr Meehan come out of a meeting and slam his door, but did not know exactly what had happened in the meeting.

[14] In relation to the ham incident, Mr Meehan said he banged down on the desk or table but his frustration was actually about Ms McCann delegating the job to restock ham to Ms Chilman.

Ms McCann makes an inquiry about looking for a new role

[15] Ms Cooke says since Ms McCann lodged her claim in the Authority, an email from Ms McCann was discovered which she sent to her friend on 25 August 2023 in

which Ms McCann comments “I miss [company] it was a dumb move I made and on the hunt for a new role (so quietly and confidentially if you hear of anything on the grapevine. Let me know)”. By way of explanation, Ms McCann says in around July/August 2023, she started considering leaving due to the behaviours she was witnessing at Winton. She sent the email but was told that at her level, there was no movement in the market and it would take a long time to find another role. There is no evidence before the Authority she made other efforts to find another role.

Travel bookings

[16] Ms McCann says when she was inducted by the previous outgoing EA, she was told all of Mr Meehan’s professional, personal and family travel was booked through an agent (the agent) at a boutique travel agency (the agency). Ms McCann says that prior to the events leading to the termination of her employment, she was not told by Mr Meehan not to use the agent or the agency for travel bookings.

[17] She lists international trips booked by the agent for travel in March, April, May, June and September 2023. The agent also booked personal family trips for the Meehan family for travel in June, July, August and September 2023.

[18] Ms McCann’s evidence was that the agent assisted with some of Mr Meehan’s domestic travel between Auckland and Queenstown, when availability was an issue and/or when flights needed rearranging. Ms McCann recalled an occasion when she and other staff were stuck in Queenstown due to the weather, and the agent booked alternative flights.

[19] Ms McCann has provided text and email messages between herself and Mr Meehan where she refers to the travel agent by name in around January 2023, 8 and 9 July 2023, 18 July 2023 and 9 August 2023 in relation to travel and accommodation bookings. She says this shows he was aware she used the agent for travel bookings and had not objected to it.

[20] At the investigation meeting Mr Meehan could not remember when he made a direction to Ms McCann about not using the agent. At the investigation meeting Mr Meehan accepted he had not directed Ms McCann to use any other travel agent, and that his and his family’s international travel was too complex for Ms McCann to arrange on her own, without expert assistance.

Request to change return flight in September 2023

[21] In June or July 2023 Ms McCann arranged flights on Emirates for September 2023, using the agent.

[22] There is no dispute that Mr Meehan contacted Ms McCann from overseas, around a week before he was due to return in September 2023, asking that his flights be changed. Ms McCann says she passed this on to the agent who was concerned that flights were fully booked around this time and getting Mr Meehan on a flight may be difficult.

[23] The agent located an Emirates seat for Mr Meehan at the time he wanted to return and Ms McCann says she checked to ensure the seat was still business class, which it was. Ms McCann says she had never flown business class on Emirates and was not aware that there was such a thing as a “bad” seat.

[24] Ms McCann gave evidence that any notes that may have existed in the Winton system about seating preferences of Mr Meehan were not pointed out or known to her and were never discussed between her and Mr Meehan or anyone else.

The phone call incident on 14 September 2023

[25] Mr Meehan travelled back to New Zealand on the new flight booking. Mr Meehan gave evidence that he became frustrated when friends he talked to told him they had upgraded to first class seats on the same flight. Ms McCann says despite her suggesting Mr Meehan ask about an upgrade the check-in counter at the relevant airport, he did not do this. Mr Meehan says on the final leg, the flight from Dubai to Auckland, his seat was between the toilet and the bar in the middle of a thoroughfare. In his opinion it was arguably worse than an economy seat. He had no sleep on the flights home and there was a long stopover on the trip. By the time he landed in New Zealand, on the morning of Thursday 14 September 2023, he was, in his own words “grumpy”. Mr Meehan says Ms McCann should have checked what had been allocated, and if she did not know if that was a good or bad seat, she should have found out – that is what an EA does and it is basic stuff to check such things.

[26] On the drive from the airport on the morning of 14 September 2023, Mr Meehan called Ms McCann. Ms McCann told the Authority that she has a very clear

recall of the words used by Mr Meehan on that call, including the threat to dismiss her, because it was so shocking to her. She says the call went as follows:

Me: Hi, how are you going?

Mr Meehan: Not good, that was the worst fucking flight I have ever fucking taken, how the fuck did I end up in seat 29 between the bar and the toilet.

Me (in shock at this): I don't know.

Mr Meehan: This is your fucking job, what the fuck have you been doing for the last 3 fucking weeks?

Me: Chris, please don't speak to me like that.

Mr Meehan (after more angry words directed at me): Just what the fuck have you been doing for the last 3 weeks Leah, this is your fucking job and you should know this?

Me: I don't know the layout of business class. I will speak with Michele and find out what happened.

Mr Meehan: They are fucking done, do not speak with them, you are not to fucking ever use them again and if you do I will fucking sack you.

[27] In his witness statement Mr Meehan said he generally agreed with the gist of what Ms McCann set out about the call - there is no question he was angry with Ms McCann, and would have sworn on the call. He however he would not have sworn "at" her or "abused" her. When he said to her that if she ever used the agency again, he would sack her. By the time of the investigation meeting, Mr Meehan clarified that it was unlikely he sworn in front of his driver, who is an older person. His evidence is that he was so frustrated with Ms McCann's response, that she had defied his prior instructions not to use the agent and did not take ownership of the "debacle".

[28] Mr Meehan says prior to taking this trip to and then back from Europe, he had expressly told Ms McCann she was not to use the travel agent because it was expensive and they were not doing a good job in his opinion. Initially, he told her this in relation to any domestic travel, then subsequently in relation to international travel.

After the call ended

[29] After the call ended Ms McCann went to Ms Cooke's office. It appears Ms Chilman followed her. It is common ground that Ms McCann appeared upset. Ms McCann recalls shaking and crying and explaining she was in shock and did not know

what to do. Ms Cooke says Ms McCann was not crying. Ms Chilman cannot recall if she was.

[30] Ms McCann says she explained what had occurred and Ms Cooke agreed with her that there is nothing wrong with business class seating on Emirates. Ms Cooke says McCann recounted the phone conversation and that Mr Meehan had reminded her not to use this travel agent, but she said she had still used them. She says Ms McCann tried to defend her actions by explaining it was the travel agent's job to ensure the appropriate seat was allocated and it was their responsibility to check this.

[31] Ms McCann recalls saying: "I cannot be spoken to like this, I do not deserve this at all". She says Ms Cooke agreed but said "it will never change Leah and you will need to decide what to do". Ms Cooke's recall is that she told Ms McCann to think about what she wanted to do and did ask her to think about whether Mr Meehan's behaviour would change.

[32] Ms Cooke says Ms McCann asked her what she thought she should do, and in response she asked her what Ms McCann wanted to do as it was her decision. Ms Cooke says she did not apologise for Mr Meehan's behaviour but remembers saying she was sorry and that no one should be spoken to like that, having only heard Ms McCann's account of the phone call at this stage.

[33] Ms McCann says Ms Cooke apologised that she could not offer EAP as Winton did not see the need for it. Ms Cooke recalls her comment being that she would like to have offered EAP but that she could not, as this service was not provided by the Winton Group and her efforts to introduce EAP as a service across the entire Winton Group had not been approved at that stage. Ms Cooke says they left it that Ms McCann to let her know what she wanted to do going forward.

[34] Ms Chilman appears to have left before the discussion ended. She could not recall details except Ms McCann asking what she should do and Ms Cooke saying she could not tell her what to do, as it was her decision, and saying they were sorry this had happened to her.

[35] After reporting what had happened, Ms McCann returned to her office.

[36] Ms McCann says she went to her computer and noted down her conversation with Mr Meehan while it was fresh in her mind. Next she called her husband. Mr Hogg says she was in distress and crying but relayed what had happened with Mr Meehan. He told Ms McCann to leave the office but says she was worried about her job and could not leave as she had things to do.

[37] After the meeting, Ms Cooke reports having a brief conversation with Ms Hollows about the situation who was general counsel at the time, and Ms Cooke's manager.

[38] Ms Chilman and Ms Cooke checked on Ms McCann during the day. Ms McCann says she relied on Ms Cooke to get her through, repeatedly talking to her, asking her what she thought she should do and telling her how ill she felt.

[39] Ms McCann's evidence is that at some point Ms Cooke told her that Winton would fight her if she left. Ms Cooke did not recall saying this but says it does not sound like something she would have said.

[40] Mr Meehan did not to come into the office that day.

Events of Friday 15 September 2023

[41] Early on 15 September 2023 Ms McCann emailed Mr Meehan, Winton's non-executive director, Ms Cooke and Ms Chilman. The email said she was unwell and would not be coming into the office that day. Ms McCann says she was physically unable to go to work, had slept very little and was in a highly anxious state at the time, which Mr Hogg also confirmed.

[42] After receiving the email, Ms Cooke and Mr Meehan spoke about what happened and Ms Cooke asked him what he wanted to do. Ms Cooke recalls him saying something to the effect that he could not have this type of situation on a long-haul flight and that he had no sleep due to the allocated seat being terrible. He also stressed he had repeatedly asked Ms McCann not to use the travel agent, but she had used them anyway.

[43] Ms Hollows gave evidence that it was clear from her conversation(s) with Mr Meehan that the relationship between him and Ms McCann was irretrievable and he had lost trust in her. Ms Hollows say she and Ms Cooke explained to Mr Meehan that

they should wait for Ms McCann's sick leave to expire to see what her thoughts were, but in his mind, it was unlikely she was returning – once she said she was off sick, that was it.

[44] Ms Cooke says she could see Mr Meehan's confidence in Ms McCann's ability to perform her role to the required standard was in question, so suggested that if she wanted to leave, Winton could make her an offer. She suggested due to the seniority of Ms McCann's position, one month on top of her one month notice period could be offered, which Mr Meehan agreed with. Ms Cooke says they did not talk about what they would do if Ms McCann did not want to leave.

[45] Ms McCann visited her doctor who signed her off as unfit to return to work for two weeks. She says her doctor advised she would review her health again after this period and should not make any decisions in this time as she was in a state of shock.

[46] The same day Ms Cooke called Ms McCann. Ms McCann says she was advised that Mr Meehan had come into the office and told her about their "blow up" yesterday, and Ms Cooke said she had asked if the relationship was broken and he had said it was. Ms Cooke's evidence to the Authority is that she explained she had spoken to Mr Meehan about what had happened and her impression was that the trust in the relationship was broken. She says she was up front about this because she assumed that at her level of seniority Ms McCann would appreciate an "adult and frank" conversation. Ms Cooke says she asked Ms McCann if she wanted to engage in a conversation about not returning to work, explaining that if she did not want to return, Winton would provide one month's pay on top of her contractual entitlements and that she would be released from her notice period. Ms McCann describes the offer made as being four weeks' paid notice, four weeks additional salary and her annual holiday entitlements.

[47] Ms McCann says she was told she would not have to come back to work if she agreed and could keep her laptop and phone until Tuesday 19 September 2023, but after that date would lose access to Mr Meehan's email/calendar. These items would then be collected. Ms Cooke explains that she told Ms McCann that while she was off sick, her access to Mr Meehan's calendar and emails would be suspended so he could manage these tasks himself or get someone else to help. She says she it was important that only one person have access at any one time to avoid confusion over diaries and communication, and secondly to manage any risk that Ms McCann might have been so

aggrieved that she did something to Mr Meehan's email and calendar. Ms Cooke says this is standard practice at Winton if there is a contentious employment matter or it has reason to think someone may delete emails containing important information or Winton intellectual property.

[48] It is common ground that Ms McCann either asked for or said she would need to time to think about the offer. She says she told Ms Cooke she was in total disbelief, could not understand what had happened, how Mr Meehan could say the employment was broken or why she had been verbally attacked and threatened. Both witnesses confirm Ms Cooke said she could take the weekend to consider the offer would check in on Ms McCann after that.

[49] The same day Ms McCann sent Ms Cooke a medical certificate.

Call on Monday 18 September 2023

[50] On Monday 18 September 2023, Ms Cooke texted Ms McCann to arrange a time to call. Ms Cooke then called Ms McCann mid-morning asking if she had a response to the offer. Ms Cooke says in answer to her asking how Ms McCann was, Ms McCann explained she was not great and had not slept well over weekend as she could not turn her brain off. Ms McCann says she could not respond to the offer as she was too sick and anxious. She recalls saying to be spoken to and then made to feel like this was shocking and could not get her head around it. She reports saying she felt like she had been sacked when she had done nothing wrong and that she was distressed about being unemployed at that time of year, close to Christmas. Ms Cooke denies Ms McCann said this and in any event it was not close to Christmas at the time.

[51] She told Ms Cooke that she knew they were probably pushing her for a response and she agreed they were. Ms Cooke denies she suggested there was pressure for a response. Ms McCann's evidence is that she said she was signed off work sick for two weeks, in shock and she could not respond in that situation.

[52] Ms McCann reports being told that if she "pushed back" on the offer, Ms Cooke would have to go back to Mr Meehan, and he would "chop it in half". Ms Cooke denies saying anything about chopping the offer in half. Ms Cooke says at this point it was important to remind Ms McCann that the offer presented was the best Winton would provide and that she could not predict if the offer would stand if it was rejected. She

said she wanted to be fully transparent and not mislead her into thinking there was scope for a long negotiation, and reminded her the offer was double her contractual entitlement.

[53] Ms Cooke says she reminded Ms McCann what she had said on Friday about losing access to Mr Meehan's emails and calendar the following day. She says Ms McCann never challenged this Ms McCann recalls saying she was currently off sick and was not looking at emails but thought she was still employed so thought cutting off her email would be constructive dismissal. Ms Cooke denies constructive dismissal was mentioned.

[54] It is common ground that Ms Cooke said she would contact Ms McCann the next day about the offer.

[55] Ms Cooke says at no point in any of their conversations did Ms McCann say she was too unwell to consider the offer, or that she was not interested and did not want to be contacted about it anymore.

Winton puts "litigation hold" on Ms McCann's email account

[56] The same day (18 September 2024) Ms Cooke asked Winton's external IT provider to apply a "litigation hold" to Ms McCann's email inbox. She says Ms McCann could still access Mr Meehan's emails at this point. She says the litigation hold was actioned later that day, and Ms Hollows was given access to Ms McCann's work email account to ensure Ms McCann was not responding to any of Mr Meehan's emails on his behalf without him knowing until her access was suspended.

Ms McCann's access to Mr Meehan's email and calendar is suspended

[57] Ms Cooke sent a text message to Ms McCann on 19 September 2023 to ask when it would suit to discuss the offer. Ms McCann did not respond. Ms McCann says she was too sick to do so.

[58] Ms Cooke says Ms McCann retained full access to her own email account and Winton's systems. The same day, Ms Cooke made arrangements to suspend Ms McCann's access to Mr Meehan's emails and calendar.

[59] Ms Hollows says Ms McCann instructed a representative on around 19 September 2023, but there is no evidence of further correspondence between Ms McCann or a representative and Winton prior to 26 September 2023. Ms Cooke's evidence was that from 19-25 September 2023 she did not make contact as Ms McCann was off sick and she did not want to badger her.

Ms McCann raises personal grievance for unjustified dismissal

[60] Ms McCann obtained legal representation and on 26 September 2023, her previous representative sent a letter to Winton's legal representative, advising she was resigning from her employment effective immediately due to the treatment towards her. She raised a personal grievance for unjustified constructive dismissal in the letter. Winton processed the termination as a resignation recording this as her last day of work. On the same day, Ms McCann made contact for arrangements for the return of property.

Personal grievance claims

Constructive dismissal claim

[61] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign. In *Auckland Shop Employees Union v Woolworths (NZ) Limited*, the Court of Appeal held that the three non-exhaustive categories of constructive dismissal are:²

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

[62] Ms McCann relies on the second and third categories.

[63] Ms McCann says Winton's course of conduct was deliberately intended to coerce a resignation from her.

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] ERNZ 136 (CA) at 138139.

[64] Where a breach of duty is asserted as causing a resignation, the focus of this enquiry is on the Ms McCann’s motivation to resign, and whether that motivation arises from a breach of Winton’s duty or its other actions, and if so, whether the resignation was reasonably foreseeable.³

Factual findings

[65] There is no supporting documentary evidence that Mr Meehan directed Ms McCann not to use the agent. Mr Meehan was unable to identify with any specificity when he gave such instructions. As her counsel points out, it would be surprising that Ms McCann would be openly referring to the agent in messages and emails to Mr Meehan as late as August 2023 if she had been told at the time of booking flights for September 2023 travel to Europe, not to use the agent. The evidence does not support a finding, on the balance of probabilities, that Ms McCann was aware prior to the phone call of Mr Meehan’s desire not to use the agent for travel and accommodation bookings. Even if the evidence did support that finding, Mr Meehan appears to have condoned the ongoing use of the agent.

[66] Mr Meehan’s oral evidence at the investigation meeting that he would not have sworn in front of his driver during the phone call with Ms McCann is not reliable, in light of his earlier statements in his witness statement. Although Ms McCann gave evidence that she has not kept the notes of the call she made shortly after the call, her description of the call is detailed and has remained consistent since outlining the details in her personal grievance letter. Based on this, it is more likely than not that Mr Meehan swore and told Ms McCann she would be “sacked” if she used the agent again.

[67] While Ms McCann’s evidence of their interactions following the 14 September 2023 phone call diverges in relation to some points in their discussions, it aligns in many respects.

Discussion

[68] While I accept that the role of EA to the CEO is necessarily one of high trust can be and robust. Counsel says Mr Meehan’s actions went far beyond “robust” and were intimidating and offensive. I agree. While Ms McCann would likely have been

³ *Hawkins v Commissioner of Police* [2007] 2 ERNZ 762 (EmpC) at [30], upheld and endorsed in *Commissioner of Police v Hawkins* [2009] NZCA 209 at [48].

used to Mr Meehan's use of swear words in the workplace by that point, in this instance the swearing was directed at her or actions. The words Mr Meehan used when speaking to Ms McCann on 14 September 2023 were clearly unjustifiable.

[69] Mr Meehan's evidence before the Authority indicated that he was not familiar with Winton's workplace policies or obligations to employees in terms of bullying and appropriate workplace conduct. When describing health and safety Winton's workplace environment, Mr Meehan rightly placed importance on this in a construction context, for risks of physical harm and loss of property, but did not have regard for the psychological safety of employees, particularly for office-based employees like Ms McCann. Mr Meehan appeared, under questioning in the Authority, to be unaware of his Winton's obligation to act fairly and reasonably towards all employees of Winton.

[70] It is not clear that if Winton did have any policies that would have been applicable situation that arose between it and Ms McCann, such as complaint procedures or a code of conduct, Ms McCann was not advised of them. When she approached Ms Cooke in distress, Ms Cooke did not provide any guidance on what she or it would do about the situation. It was confirmed that Winton had no EAP to offer. The support offered to Ms McCann was sympathy, an offer to take the rest of the day off and check in with her on 14 September 2023.

[71] Winton thereafter did not take steps to determine what had happened or if Ms McCann had done anything to justify termination of employment or commence any sort of process that would properly and fairly deal with what had occurred.

[72] Ms Cooke's comment to Ms McCann during one of their subsequent phone calls that the employment relationship was broken (or that her impression that it was broken in Mr Meehan's view), sent a clear message to Ms McCann that there was no path for her to return. Winton's internal discussions make it clear there was no path back for her.

[73] There is no evidence before the Authority that Ms McCann was signalling a desire to terminate her employment after the incident. Winton however pursued discussion of an exit offer despite, being aware Ms McCann was on sick leave. Other reasonable options were available to Winton in the circumstances, such as advising Ms McCann it would await her return from sick leave.

[74] In relation to Winton's suspension of Ms McCann's access to Mr Meehan's email and calendar, it is unclear why it could not have asked Ms McCann to not use her computer during the sick leave period. As counsel points out, Ms McCann did not demonstrate any animosity or threaten any kind of retaliation or sabotage. A direction to remain off the system while on sick leave was all that was required. By telling Ms McCann that she would be removed from the system, Winton was signalling to her that she was no longer trusted or welcome at Winton.

Finding

[75] Winton had a duty to deal with Ms McCann in good faith and be active and constructive in maintaining a productive employment relationship with her when dealing with the concerns that gave rise to the 14 September 2023 phone call, and in its subsequent actions. Winton's actions above fell short of what a fair and reasonable employer could have done in the circumstances and these failures breached the duty of good faith and the implied duty not to seriously damage and destroy the trust and confidence inherent in an employment relationship. Remaining in the workplace became untenable in the circumstances. It was reasonably foreseeable that Ms McCann would resign in all the circumstances at the time.

[76] Applying the test of justification in s 103A of the Act, on an objective basis, Winton's conduct at or about the time of the dismissal, is not how a fair and reasonable employer could have acted in all the circumstances. Winton has not justified its actions and Ms McCann has made out her claim for constructive dismissal.

[77] Having made this finding, it is not necessary to make a finding on whether Winton followed a course of conduct deliberately intended to coerce Ms McCann to resign.

Unjustified disadvantage grievances

[78] To establish a disadvantage grievance it is necessary to show that the employee's employment, or one or more conditions of the employee's employment, is or are or was affected to the employee's disadvantage by some unjustifiable action by the employer.⁴ Given the factual matters relied on to support findings of unjustified disadvantage

⁴ Employment Relations Act 2000, section 103(1)(b).

significantly overlap those relied on to support the constructive dismissal grievance, I see no basis for finding separate disadvantage grievances.

Remedies

[79] Ms McCann has established a personal grievance and is entitled to a consideration of remedies.

Compensation under s 123(1)(c)(i)

[80] Ms McCann seeks compensation for hurt and humiliation in the sum of \$35,000. The harm suffered by Ms McCann prolonged involving shock, anxiety, loss of sleep and loss of confidence. This experience left her doubting her worth and feeling deep humiliation and shame that this had happened, having always been a high performing and trusted employee. She was made to feel like she had been dismissed for her behaviour and work ability and that her reputation was at stake. She says the lack of explanation or apology by anyone at Winton was devastating. Ms McCann's husband, Mr Hogg, also gave evidence on the financial and other impacts this has had on Ms McCann and their family.

[81] I have considered the extent of the harm suffered and where it sits when compared with other cases, then stepped back and assessed what I consider a fair and just amount in the circumstances. Taking into account the circumstances and the general range of awards, a compensation award of \$25,000 to Ms McCann is appropriate.

Lost wages

[82] Section 128 of the Act requires the Authority to order an employer pay an employee the lesser of a sum equal to the remuneration lost as a consequence of the personal grievance or three months ordinary time remuneration. Despite that, the Authority may use its discretion to award a sum greater than that.

[83] Ms McCann says initially she could not look for work due to her state of health the need to recover from her experience at Winton. Despite this Ms McCann was able to take initial steps by updating her LinkedIn profile in September 2023, working on updating her CV in September and October 2023 and starting to reach out to recruiters. She says she began to feel better and from around November 2023, began taking active steps to try to find a new role, in what was a difficult recruitment market, in part due

to the time of year. By the end of November 2023, she started to make applications and attend interviews.

[84] Ms McCann gave evidence that vacancies at her level of executive support are not plentiful at the best of times. Given the time of year that Ms McCann recovered sufficiently from her experience at Winton to start being fully active in the job market, there were few opportunities, and she interviewed for those she could from the point she could. She secured a new EA role in March 2024 and commenced employment in early April 2024.

[85] Ms McCann seeks, under ss 123(1)(b) and 128 of the Act, reimbursement of a sum equal to the amount she lost as a result of the grievance. She has calculated this sum as \$74,846.15 between 22 September 2023 and 4 April 2024 when she commenced her new role. Winton submits that Ms McCann would have resigned in short order. Ms McCann counters that she had decided to remain in her employment and make the best of it until another opportunity presented itself. The Authority accepts it was not inevitable that the relationship would have ended for some time. It is appropriate to award the amount sought.

Contribution

[86] The Authority has not found that Ms McCann had been told not to use the agent before the incident that led to the termination of her employment. In the absence of any compelling evidence that this was raised with Ms McCann (or other performance issues for that matter) any contribution is not such that remedies are required to be reduced. No reduction in remedies is made.

Penalty claims

Breach of good faith

[87] Ms McCann also seeks a penalty on the basis Winton breached its obligation to deal with Ms McCann in good faith, on the basis Mr Meehan and Ms Cooke knowingly used their power over Ms McCann at a time when they knew she was sick and vulnerable, to pressure her to leave Winton's employment.

[88] It is submitted that this is the antithesis of actively and constructively maintaining a productive employment relationship, and therefore a breach of good faith.

Further, it is submitted that the breach was deliberate, serious and sustained and was intended to undermine the employment relationship.

[89] Pursuant to s 4A(b)(iii) a penalty for a breach of good faith is available if the failure was deliberate, serious, and sustained, or the failure was intended to “undermine an employment relationship”.

[90] I find Winton breached the duty of good faith pursuant to s 103A (3) of the Act. It did not act as a fair and reasonable employer could have acted in the circumstance and its actions fundamentally undermined the employment relationship.

Breach of contract

[91] Ms McCann seeks a penalty on the basis Winton breached clause 10 of the parties’ written employment agreement, to ensure, so far as is reasonably practicable, the health and safety of Ms McCann while she was at work. It was submitted that Winton did not ensure this, which caused her to feel unsafe while at work on 14 September 2023 and to suffer ill health to prevent her from being able to work for a considerable period from 14 September 2023. Given the findings and awards made, I am not satisfied a separate finding on a penalty in relation to this breach is appropriate or necessary.

Penalty assessment

[92] In considering whether a penalty is warranted and, if so, at what level in relation to the breach of good faith, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Boorsbom v Preet*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁵

[93] Winton’s actions must be seen as intentional and its culpability high.

[94] The starting point for a penalty in the case of a company is a maximum amount of \$20,000.

[95] The purpose of penalties is punitive, and to act as a specific deterrent to an employer and other employers not to act in a similar fashion. Winton had no regard to

⁵ *Boorsbom v Preet PVT Limited* [2016] NZEmpC 143 at [138]–[151]; *Nicholson v Ford* [2018] NZEmpC 132 at [18]; and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

employment law in New Zealand when it chose to act in the ways it did towards Ms McCann. There was no attempt to seek to maintain a productive employment relationship with Ms McCann, or to explore options if it considered her performance fell short of its expectations. In all the circumstances and considering proportionality, I consider that a penalty of \$5,000 to be appropriate.

Outcome

[96] Winton Capital Limited must pay Leah McCann within 21 days of the date of this determination the following:

- (a) Compensation of \$25,000 under s 123(1)(c) of the Act;
- (b) Lost wages of \$74,846.15; and
- (c) A penalty of \$1,000.

[97] Within the same timeframe, Winton must pay the balance of the penalty of \$4,000 to the Crown Bank Account.

Costs

[98] Costs are reserved.

[99] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms McCann may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination.

[100] From the date of service of the costs memorandum Winton would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.

Sarah Blick
Member of the Employment Relations Authority