

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 114
3118239
3120674

BETWEEN	DENISE MCDONALD Applicant
AND	KEVIN MCKERROW LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Adam Mapu, for the Applicant Andrew Schirnak and Rebecca White, for the Respondent
Investigation Meeting:	1 and 2 November 2021 (by audio visual link)
Submissions and further information received:	16 and 23 November 2021, from the Applicant 16, 23 and 29 November 2021, from the Respondent
Determination:	29 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Denise McDonald worked for Kevin McKerrow Limited (KML) as a business manager from 29 October 2019. Ms McDonald says she was dismissed unjustifiably from her employment in late March 2020 when her access to the work computer system was revoked and her pay stopped. She seeks remedies in relation to her personal grievance claim and a penalty for breach of good faith.

[2] KML says Ms McDonald abandoned her employment and no awards should be made in her favour. In addition, KML brings a claim against Ms McDonald alleging breaches of her employment agreement and breach of the duty of good faith for which it says an enquiry as to damages and award of penalties is warranted.

The Authority's investigation

[3] By consent the investigation of this employment relationship problem was held by audio visual link. During the investigation meeting the Authority heard evidence from Ms McDonald, Kevin McKerrow, KML's clinical director and owner and the person to whom Ms McDonald reported, Fiona Slane, who contracted to KML as a bookkeeper, Ian Masson, KML's accountant and Anthony McKerrow, an employee of KML who took over Ms McDonald's duties when her employment ended.

[4] 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.

[5] Also, as permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Issues

[6] The issues identified for investigation and determination are:

Ms McDonald's claim

- a) Was Ms McDonald unjustifiably dismissed?
- b) Is Ms McDonald entitled to a consideration of remedies sought including:
 - i. Lost wages pursuant to section 123(1)(b) of the Act?
 - ii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- c) Is Ms McDonald entitled to wage arrears and a holiday pay calculation?

- d) Should interest be calculated on any award of arrears?
- e) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms McDonald which contributed to the circumstances which gave rise to his grievance?
- f) Whether KML has breached the statutory duty of good faith and if so whether a penalty should be imposed?

KML's counter-claim

- g) Did Ms McDonald breach her employment agreement by failing or refusing to upload her relevant information into the KML payroll system and/or without KML's authority effecting the payment of invoices from KML to a limited liability company via KML's accounting system and/or effecting claims for GST input credits on those invoices and/or adding herself without authorisation to the payroll of a KML sister company and/or invoicing for overtime and/or failing to pay for product purchased wholesale from KML?
- h) Did Ms McDonald breach the duty of good faith she owed KML as its employee, including by the acts and omissions set out above?
- i) If breaches are established should an inquiry into damages be held, such damages to include special damages for management time, accounting and legal costs and other expenses, KML's liability to the inland revenue and a determination that such damages be awarded to KML?
- j) Should Ms McDonald be ordered to pay a penalty, pursuant to s 134 of the Employment Relations Act 2000 in the sum of \$10,000, in respect of each breach?
- k) If any penalty is awarded, should it or any portion be ordered payable to KML?
- l) Is either party entitled to an award of costs?

Background

[7] Ms McDonald commenced employment with KML on 29 October 2019 as the business manager of the skin specialist centre it operates. The parties had a written individual employment agreement which Ms McDonald signed on 30 September 2019. As the business manager Ms McDonald was responsible for managing the practice and marketing and social media strategies to grow the business. In addition, she had responsibilities for the day-to-day financial running of the business including preparation and running the payroll and filing monthly GST returns for KML and a sister company. The job description attached to the parties' employment agreement describes this part of Ms McDonald's duties as follows:

Assist in the general financial administration of the Practice as required, assist with staff payroll, PAYE and GST returns as required, filing and processing of source documentation.

[8] Under the terms of the parties' employment agreement Ms McDonald was to be remunerated by way of an agreed annual salary which was to be paid "weekly in arrears as a direct credit to a bank account nominated by the Employee".¹

Week beginning 28 October 2019

[9] When Ms McDonald started her employment with KML on Tuesday 29 October 2019 she had not been set up in the payroll. She gave unchallenged evidence that on her first day she provided the necessary details in writing to the retiring practice manager which were the nominated bank account into which her weekly salary was to be paid and the relevant tax code. It appears the retiring practice manager did not set Ms McDonald up in the payroll because Ms McDonald did not receive a salary payment on the next scheduled pay day. For completeness no written instructions were provided to Ms McDonald regarding her pay roll set up requirements including information she was required to provide or actions she was required to perform.

¹ Clause 4.2 of the parties' employment agreement.

Week beginning 4 November

[10] Ms McDonald emailed Ms Slane, the bookkeeper who ran the payroll, then travelling overseas, twice during this week regarding her pay. On 5 November she emailed Ms Slane:

...Sorry to bug you on your holiday. I will need to send you my IRD # etc for my wages...I'll do that shortly. It doesn't matter though, when you pay me. I can wait until you get back if you have already finalised pay for last week.

[11] On Friday 8 November Ms McDonald emailed Ms Slane again providing the necessary details (IRD number, tax code, salary) directly to Ms Slane by email. The email included:

If you are able to pay me this week, go ahead, otherwise I can leave it to next week after you get back. In fact, if that is easier for you, just leave it until next week. I have a company set-up so I can easily invoice for the last two weeks.

[12] On Sunday 10 November, Ms Slane, who by this stage had returned from overseas replied:

Thanks for the information. I will setup a payment for two weeks on Monday 11th November. Trust that is good for you.

[13] Ms Slane sent a follow up email that day seeking clarification:

Quick question. As I have not sighted your contract are you on a salary or an hourly rate. We can discuss this when I am in on Monday. See you then.

[14] The wage payment was not made on Monday 11 November as stated in Ms Slane's email of 10 November. Ms Slane says this was because Ms McDonald asked her to hold off processing her pay because she wanted to think about whether or not she should be a contractor. Ms McDonald says she does not know why Ms Slane did not process her pay as she had said she would. I accept Ms Slane's recollection of events – by this stage there was no reason Ms McDonald should not have been paid other than her asking for it to be delayed because she wished to consider moving to a contracting arrangement.

[15] On Friday 15 November Ms McDonald said she spoke with Dr McKerrow about her giving him an invoice for payment for the first three weeks she had been employed. She says that during this discussion they agreed she would continue invoicing KML as

an independent contractor. Dr McKerrow said in his evidence to the Authority that he could not recall the conversation. Given Ms McDonald's evidence of this meeting was not directly challenged and her subsequent conduct in tendering invoices I am satisfied she was given approval to tender at least an invoice for the first three weeks of her employment. What is not so clear on the evidence, and for which there is insufficient evidence to make a finding is whether agreement was reached that Ms McDonald's company would be the vehicle by which the invoices would be tendered.

Week beginning 18 November

[16] The first invoice Ms McDonald tendered to KML was dated Monday 18 November. It is understood the invoice was tendered in the name of the company Ms McDonald referred to in her email to Ms Slane on 8 November. Ms Slane could not recall processing the 18 November invoice. I am satisfied it is likely she did because that is Ms MacDonald's clear recollection and Ms Slane accepted in evidence she performed bookkeeping duties for KML on 18 November which is likely to have included processing invoices.

[17] Ms McDonald subsequently tendered and processed weekly invoices in the name of the company payment of which were approved by Dr McKerrow by way of batch payment. At this time the company had recently been struck off the companies register because an annual return had not been filed. The company has subsequently been re-registered.

22 January 2020

[18] Ms McDonald says in January 2020 Dr McKerrow agreed to move all staff to one payroll. This move was at Ms McDonald's initiative – rather than run two payrolls, one for KML and one for a sister company, all staff would move to one payroll. The documentary evidence suggests this was considered a sensible decision which was supported by Mr Masson and Ms Slane.² Dr McKerrow says he cannot recall the conversation with Ms McDonald where he agreed to this change. In his evidence to the Authority, he said he had no recall of this issue and that if Mr Masson said it was 'okay' then the arrangement was fine.

² Refer email exchange Ms McDonald and Mr Masson 18 November 2019 and Ms McDonald and Ms Slane 27 November 2019.

[19] On Wednesday 22 January, following return from the Christmas/New Year shut down, Ms McDonald and Dr McKerrow had a discussion about her pay. She says he asked her how much she had been paid over the break and she showed him on his computer screen her invoices in the electronic payroll platform in which they were located. Ms McDonald said Dr McKerrow asked her if she thought continuing to pay her as a contractor was a good idea. She says she said she would ask the opinion of the accountant Mr Masson but that if he (Dr McKerrow) was concerned about the arrangement, she was happy to go onto the payroll. Ms McDonald duly emailed Mr Masson that day:

Anytime this week, when you have time, can you call me re invoicing to Kevin for my services. My company is Ocean Group Consulting Limited and I have been billing Kevin McKerrow Ltd.

[20] She said when she did not hear back from Mr Masson, she and Dr McKerrow discussed the issue further and they agreed she would switch back to her being paid as an employee after that week which ended 24 January 2020.

[21] Dr McKerrow's recollection of the events of 22 January is different. He says in late January he checked the business bank accounts because he was unsure how Ms McDonald was being paid and could not identify any payments to her from those accounts. When he asked Ms McDonald about this she said she was paying herself by her own company. He then checked the accounts again and saw payments to two companies with which he was not familiar. One was Ms McDonald's company and the other was the company through which Ms Slane invoiced KML for her bookkeeping services. Dr McKerrow said he had not previously known Ms Slane was contracting to KML because he had always left the accountancy work to be done by the people concerned with it. He accepted he approved the payment of both sets of contractor invoices (Ms McDonald's and Ms Slane's) through the batch payment banking mechanism.

[22] Dr McKerrow's evidence was he was very surprised to learn Ms McDonald was paid through a company. He recalls telling her she was an employee, not an independent contractor and needed to be paid as an employee, that she asked if it bothered him that she was paying herself through a company and when he said she needed to be paid

personally and correctly she said something to the effect that he was being parsimonious.

[23] There was no further discussion between Dr McKerrow and Ms McDonald about the invoiced payments. This issue was next raised between the parties in April after Ms McDonald's employment ended. For completeness, in February Dr McKerrow asked Mr Masson to review Ms McDonald's work in setting up and maintaining new business accounting software which had occurred at Ms McDonald's suggestion in late November 2019.

[24] I accept Dr McKerrow was surprised when he learnt Ms McDonald was being paid through a company. Ms Slane did not discuss the 18 November invoice she processed with him and it is clear he did not examine the batch payments he approved in any detail. If he had, it is likely he would have raised the issue sooner with Ms McDonald. Ms McDonald's unchallenged evidence of the 15 November meeting did not include any discussion of the use of a company vehicle through which payments would be made. While it is clear Ms McDonald raised the possibility of invoicing for her first three weeks work using her company with Ms Slane this could not be said to be more than a possibility and is not evidence of agreement that a company would be used for any invoicing. KML says Ms McDonald knew Dr McKerrow would not scrutinise the batch payments before approval. The evidential basis of this is unclear particularly given there was no direct evidence such an issue was drawn the Ms McDonald's attention.

3 February 2020 – first resignation?

[25] On 3 February 2020 Ms McDonald met with Dr McKerrow. She says this was the first feedback she had received during her employment. I note this is disputed by Dr McKerrow who says he raised issues regularly with Ms McDonald as they arose. At the start of the meeting Ms McDonald says Dr McKerrow opened with "This isn't working for me" and blindsided her with criticism of the staff roster which she countered was not well founded and told her she was not performing tasks in a timely manner. When she asked for an example of this failure the example given, Ms McDonald says, concerned a delay which Dr McKerrow was aware of and was out of her control. When Ms McDonald said she thought he was looking for ways to dismiss

her and that she should resign he repeated “This isn’t working for me”. Ms McDonald then says she offered her resignation.

[26] Dr McKerrow says the concerns he raised with Ms McDonald were live issues between them including the specific example discussed concerning delays in arranging replacement pedals for a surgery table and a desk, the delay for which he did not understand and found unacceptable. He accepts he found these issues frustrating and says he raised these issues in a frank manner appropriate for a senior employee. He does not remember Ms McDonald resigning at this meeting or any other meeting. On balance I find it is likely Ms McDonald indicated an intention to resign at this meeting but did not tender her resignation.

5 February 2020

[27] On 5 February Dr McKerrow asked Ms McDonald to stay late after work to discuss the 3 February meeting. Due to a prior engagement, she was unable to meet as requested and Dr McKerrow moved the meeting to 10 February when he was next in the office.

10 February 2020

[28] The meeting proceeded as arranged on 10 February. I am satisfied they agreed Ms McDonald would not resign and they would meet again in two weeks’ time to review matters.

24 February 2020

[29] At this meeting Dr McKerrow, Ms McDonald says, stated ‘this still isn’t working for me’ but could not say what he wanted. The meeting ended with agreement that Ms McDonald would start a two-month notice period immediately with her last day of employment being 24 April. I am satisfied this is what occurred.

3 March 2020

[30] On this date Dr McKerrow raised a concern about two days’ pay Ms McDonald had received for days she had not been at work. Ms McDonald said they were time

banked hours, a system which she says had been agreed at the outset of employment. Dr McKerrow accepts they discussed long hours Ms McDonald was working and that she should record those hours for the purposes of a review. He does not accept they agreed to a time bank system or that Ms McDonald could claim payment for every hour over 40 she worked per week. The discussion was robust and frank which I am satisfied fairly characterises the communication style Dr McKerrow and Ms McDonald had developed during the employment relationship.

5 March 2020

[31] There was a further discussion about the time banked hours. Dr McKerrow said it had not been agreed, he had received advice on the issue and he wanted the hours paid reimbursed to the business. Ms McDonald refused.

[32] The evidence does not establish the parties agreed to a time banking system for hours worked over 40 per week or for payment of such hours by way of overtime. The conversation where Ms McDonald says this agreement was reached is disputed by Dr McKerrow, there is no written record of any agreement to a time-banking system and the asserted arrangement is difficult to reconcile with the express provisions of the employment agreement which includes no overtime will be paid (clause 3.1 of the parties' employment agreement). Further, the employment agreement provides a remuneration review will occur mid-February 2020 (Appendix 1, clause 4). Reference to this part of the parties' employment agreement is consistent with Dr McKerrow's recollection of his response to Ms McDonald raising concerns that she was working long hours which was that she should record her hours and they would discuss it at the review.

18 March

[33] Dr McKerrow emailed Ms McDonald on 18 March regarding her resignation and Ms McDonald replied the same day by email confirming her resignation and that her final day would be 24 April.

23 – 25 March COVID-19 lockdowns

[34] At 1.30pm on 23 March 2020 in response to the COVID-19 crisis New Zealand moved to Alert Level 3, effective immediately. On 25 March 2020 at 11:59pm, New Zealand moved to Alert Level 4, and the entire nation went into self-isolation. A State of National Emergency was declared at 12:21pm that day.

[35] In response to these events Ms McDonald made arrangements for staff to work from home because, on her review of the appointments no essential work was booked for the practise during the then expected four weeks of Level 4 lockdown. She did this in consultation with another doctor working in the practice and said Dr McKerrow was aware of the arrangements which were confirmed by Anthony McKerrow. In addition, Ms McDonald relies on communications between herself and Dr McKerrow on 24 and 25 March to support her view her actions were known to and approved by KML. During this period Ms McDonald relocated to Whangarei.

[36] At about 5pm on 25 March Ms McDonald noticed she could not access her work email or network. Dr McKerrow emailed her later that evening advising he would take over running all aspects of the business:

Hi Denise

In view of the current situation with Covid19 and the lock down from 11.59 tonight, I have taken over the running of all aspects of the Skin Specialist Centre as from now.

If staff have any concerns they will contact me directly.

Regards,

Kevin

[37] By reply email she commented ‘that makes sense’ and asked if he needed her to do accounts or run the payroll or if he preferred her to do nothing until her final day on 24 April.

[38] Ms McDonald received no reply, so she sent a follow up email on 30 March restating the offer and that she was finding the lack of communication very stressful.

[39] On 2 April Dr McKerrow emailed he could not pay Ms McDonald’s wages until she had provided a spreadsheet of payments made by way of invoice. On 4 and 7 April Ms McDonald emailed Dr McKerrow she had not been paid for two weeks, they had

agreed she would be paid until 24 April and there were pays that had been due or were due on 27 March, 3 April, 10 April, 17 April and 24 April. The email also included the invoice spreadsheets which she advised were accessible through the KML accounting software.

[40] Dr McKerrow did not reply.

[41] On 15 April Ms McDonald emailed Dr McKerrow she had not been paid, he had not replied to her last email, the situation was causing her emotional and financial distress and asked for it to be resolved as soon as possible.

17 April 2020

[42] By email dated 17 April KML replied to Ms McDonald through its solicitor:

- she had failed to attend work since 23 March;
- KML was an essential service;
- it was necessary for her to work from the business premises during the level 4 lockdown;
- she had abandoned her employment from 23 March; and
- KML would investigate allegations of acting without authorisation.

[43] On 15 June 2020 Ms McDonald through her representative provided a response to the concerns raised in the 17 April email and raised personal grievances for unjustified actions and unjustified dismissal, outlining remedies sought and seeking agreement to attend mediation.³

³ The claim was varied to one of unjustified dismissal which is consistent with Ms McDonald's clear evidence that she considered she was dismissed on 25 March 2019.

Discussion

Ms McDonald's claim

(i) *Was Ms McDonald dismissed or did she abandon her employment?*

[44] Ms McDonald says she was dismissed on 25 March when her access to work systems was revoked and Dr McKerrow wrote to her that evening advising he would be taking over all aspects of running the business. As the business manager, running the business was Ms McDonald's job. KML says Ms McDonald's employment ended by way of abandonment on 23 March when she left the Auckland region and was unable to perform her duties.⁴

[45] Abandonment is where an employer believes a worker has walked away from the job but where the worker has not clearly indicated an intention to finally end the employment, the employer should be cautious in that inference and make further inquiries of the worker.⁵ The statutory duty of good faith requires the employer to be active in finding out the true situation and to take reasonable steps to communicate with the worker about it. The worker has a corresponding obligation to be active and communicative in responding to the employer's query.⁶

[46] The starting point for a consideration of abandonment is what the parties have agreed it means. Clause 15.1(b)(ii) of the employment agreement provides:

Where the Employee is absent from work for a continuous period of two working days without notification to the Employer, and the Employer has made reasonable but unsuccessful attempts to contact the Employee, the Employee shall be deemed to have abandoned employment.

[47] Ms McDonald's employment did not end by way of abandonment on 23 March (or 24 March). The email evidence is clear she was in contact with her employer and continued to work up to the point on 25 March when she was locked out of work systems including carrying out work directed by Dr McKerrow. While it is accepted Ms McDonald did not physically attend work on 24 March or any day thereafter she could not be said to have abandoned her employment as defined in clause 15.1(b)(ii) of

⁴ KML's closing submissions say 24 March was the date of abandonment.

⁵ *E M Ramsbottom Limited v Chambers* [2000] 2 ERNZ 97 (CA) at [26].

⁶ Employment Relations Act 2000 s 4(1A).

the parties agreement because her employer was in contact with her during the period in question.

[48] The question in this matter is whether KML dismissed Ms McDonald when, on 25 March, her access to work systems was revoked and Dr McKerrow emailed her advising he was taking over the running of the business. Dismissal is the termination of employment at the initiative of the employer. It is an unequivocal act, which amounts to a sending away.⁷

[49] I am satisfied KML's actions on 25 March in revoking Ms McDonald's access to work systems when she was working remotely and in contact with her employer and then advising her duties were being taken over is an unequivocal sending away. KML dismissed Ms McDonald.

(ii) *Was Ms McDonald's dismissal unjustified?*

[50] When the Authority considers justification for KML's actions it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of a dismissal or other actions the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of KML and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

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

[52] KML's dismissal of Ms McDonald does not meet the statutory requirements of s 103A or the s 4 good faith obligations. KML's concerns that Ms McDonald's physical absence from Auckland meant she could not fulfil her work obligations were not raised with her for comment. The concerns were not raised with her at all – KML reached a view and by its actions in revoking her access and removing her duties sent her away so vitiating the employment relationship. Ms McDonald has established a personal grievance for unjustified dismissal.

⁷ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

(iii) *Did KML breach the duty of good faith owed to Ms McDonald?*

[53] This claim arises from the same factual matrix as the personal grievance which has been upheld. The claim of breach of good faith does not succeed.

KML's claim against Ms McDonald

[54] KML's claims against Ms McDonald centre on actions it says she undertook without its authorisation and which have caused it loss.

(i) *Did Ms McDonald breach her employment agreement by failing or refusing to upload her relevant information into the KML payroll system?*

[55] The evidence establishes Ms McDonald provided the information necessary to be uploaded to the payroll system to the retiring practise manager on her first day of employment and provided the information again to Ms Slane on 8 November. It is not clear why Ms McDonald was not paid on the first possible pay day given she had provided KML the relevant information. In light of this and in the absence of clear evidence as to what Ms McDonald was directed to do in respect of the payroll system the claim of breach does not succeed.

(ii) *Did Ms McDonald without KML's authority effect the payment of invoices from KML to her company via KML's accounting system?*

[56] Yes. There is insufficient evidence to establish Ms McDonald and KML reached agreement she would invoice for her services using her company. While I have found that on 15 November Ms McDonald and Dr McKerrow had a conversation which has resulted in Ms McDonald understanding she was authorised to invoice KML for her pay there is no evidence they discussed her invoicing using a company vehicle. This is not cured by Ms Slane's processing of the 18 November invoice or Dr McKerrow's batch payment approval because there is insufficient evidence that at the relevant time KML was aware this was Ms McKerrow's invoice (or subsequently tendered invoices) for services and tendered for payment.

[57] Does this amount to a breach of the employment agreement in particular clauses 1.5 and 4?⁸ I am satisfied it does because the invoicing for services using a company vehicle was outside the contemplation of the parties when they entered the employment agreement, the parties reached agreement as to remuneration which they recorded in their employment agreement and the evidence is insufficient to establish they reached accord to vary how they had agreed Ms McDonald would be paid using the vehicle for payment as Ms McDonald has invoiced. Further, the invoicing has resulted in a degree of accounting complexity for KML which has had to be investigated and will likely require reconstruction to square with obligations owed to the inland revenue. I am satisfied KML has suffered loss or is likely to suffer loss as a consequence of Ms McDonald's actions.

(iii) Did Ms McDonald effect claims for GST input credits on the tendered invoices?

[58] The GST input claim arises directly from Ms McDonald's tendering of the invoices in the name of her company. As above it is accepted this creates a degree of accounting complexity for KML which was not anticipated under the parties' employment agreement and to which it did not expressly agree. I am satisfied Ms McDonald by effecting these claims has breached duties owed under clause 1.5 of the employment agreement and as a consequence of the breach caused damage to KML.

(iv) Did Ms McDonald add herself without authorisation to the KML sister company payroll?

[59] No. The email evidence shows Ms McDonald proposed changes to business practises within KML which Mr Masson indicated were possible. One of these included all staff moving to the sister company payroll. Dr McKerrow was clear in his oral evidence to the Authority that if Mr Masson was comfortable with such a proposal, then that was fine. Given this, the process for approval for business practise change such as this on balance appears to have been appropriately sought and received by Ms McDonald.

⁸ Clause 1.5 of the employment agreement includes the employee must "promote the interests and prosperity" of KML and clause 4 deals with remuneration.

(v) *Did Ms McDonald breach her employment agreement by invoicing for overtime and failing to pay a skincare invoice?*

[60] I am satisfied there was no reasonable basis for Ms McDonald to believe invoicing for overtime hours (using her company vehicle or otherwise) worked on 14 December was agreed with KML.⁹ There is insufficient evidence this was expressly agreed (notwithstanding the batch payment approval) or generally agreed given the express provisions of the parties' employment agreement. The invoicing and payment of the overtime amount was a breach of the parties' employment agreement. The loss suffered by KML for the breach is readily quantifiable.

[61] Ms McDonald is to repay KML the overtime payment of \$582.19 within 21 days of the date of determination.

[62] The skin care invoice totals \$593.10 and is dated 19 March 2020. Ms McDonald accepted she received the product and has not paid the invoice. The commercial terms of payment are unclear on the face of the invoice (that is, by when the invoice must be paid) as are the terms of payment for employees purchasing product through KML. It is not clear on the evidence when KML made demand on Ms McDonald for payment.

[63] The product was purchased wholesale – but for the employment relationship Ms McDonald would not have been able to purchase the product at such a discount. I am satisfied this is a matter which arises from the employment relationship.¹⁰

[64] Ms McDonald is to pay KML the outstanding invoice amount of \$593.10 within 21 days of the date of determination.

(vi) *Did Ms McDonald breach the duty of good faith?*

[65] KML also says these actions of Ms McDonald's amount to a breach of the duty of good faith.

⁹ On Saturday 14 December 2019 Ms McDonald worked at a clinic KML held that day and invoiced for those hours worked as overtime.

¹⁰ *FMV v TZB* [2021] NZSC 102 at [98].

[66] While Ms McDonald's invoicing has led to findings of breach of the employment agreement the situation arose from the unfortunate situation whereby Ms McDonald was not paid in the first week of her employment despite having provided KML with the information necessary to get her onto the payroll and contrary to the express provisions of her employment agreement. In addition, I have found Ms McDonald sought and received approval to tender invoices and the payment of the invoices was approved by way of batch payments by Dr McKerrow, to whom she reported. A further factor which indicates grounds for breach of good faith do not exist distinct from the breaches of the employment agreement is that no concern was raised with Ms McDonald at the time about her actions with respect to the tendering of the invoices. For these reasons the evidence does not support a finding that Ms McDonald's actions amount to a breach of the duty of good faith.

Penalties

[67] Having found Ms McDonald has breached obligations owed under her employment agreement I must next consider whether the award of a penalty (or penalties) is warranted.

[68] KML submits penalties are warranted because Ms McDonald's actions were deliberate and calculated and with respect to the tendering of invoices sustained.

[69] As stated above the invoicing via Ms McDonald's company vehicle has created complexity for KML which has caused or likely caused damage an inquiry into which it is entitled. A penalty could be seen as a double punishment when such an inquiry is to be undertaken. The circumstances of the found breaches arose from a situation which was not entirely clear and not entirely of Ms McDonald's making. This is not a situation where an award of a penalty is warranted.

Remedies

[70] Ms McDonald has established a personal grievance for unjustified dismissal. She is entitled to a consideration of the remedies sought.

Reimbursement

[71] Ms McDonald seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and 128 of the Act.¹¹ At the date of her dismissal the parties had agreed her employment would end on 24 April 2020. Wages lost beyond that date is a consequence of the agreement she reached with KML to end her employment then and not as a result of the grievance.

[72] Ms McDonald is entitled to be reimbursed unpaid wages for the balance of her notice period totalling \$14,423.07 (gross).¹² She is also entitled to a calculation of holiday pay on that amount of \$1,153.85 (gross) - but for KML's precipitate actions in dismissing Ms McDonald she may have continued to work and accumulate holiday pay entitlement until 24 April 2020.¹³

[73] Issues regarding receipt of the Covid-19 wage subsidy during the reimbursement period or expenses claimed consequent to the invoices are matters for Ms McDonald and the relevant agency.

[74] In the circumstances of this matter I decline to exercise my discretion to award interest on the order for lost earnings.

Compensation for humiliation, loss of dignity and injury to feelings

[75] Ms McDonald said her confidence has been undermined by her experience with KML and she has felt depressed and anxious for which she has received medical advice. She said she felt very stressed particularly during the first week of Level 4 when her employer would not communicate with her despite her requests to do so. Ms McDonald said she felt humiliated to have been removed from her position during her notice period without an opportunity to discuss the situation or thank or farewell her team and that she felt sick when she received the letter saying she had abandoned her employment and is worried what staff have been told and the impact on her reputation.

¹¹ The wage arrears claim for the same period is more properly characterised as a claim for lost earnings given the finding the dismissal occurred on 25 March 2020.

¹² Unpaid wages for weeks ending 27 March 2020, 3 April 2020, 10 April 2020, 17 April and 24 April 2020 calculated at Ms MacDonald's usual rate of pay.

¹³ Section 27 Holidays Act 2003.

[76] The Authority is satisfied Ms McDonald has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation.¹⁴ Having regard to the particular circumstances of this case, I consider that an award of \$18,000 under section 123(1)(c)(i) is appropriate.

Contribution

[77] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[78] KML submits any remedies awarded Ms McDonald should be reduced by at least 50% to account for her contribution to the circumstances of her personal grievance including leaving the Auckland region when it was unclear if she could return and not communicating her intentions to KML which has resulted in confusion.

[79] In *Maddigan v Director-General of Conservation* the court held a reduction of 50% is to be reserved for exceptional circumstances and care should be taken before imposing a reduction of 25%.¹⁵ Ms McDonald's actions in leaving Auckland without clearly communicating her intention to her employer has created uncertainty and ensured she could not physically attend the office which KML considered was required. While I accept the circumstances of the lockdown were unprecedented and Ms McDonald's employment with KML, by agreement, was drawing to a close, this did not remove or lessen the duties she owed her employer whilst still employed. A reduction of 20% of remedies awarded under s 123(1)(i)(c) is appropriate to reflect the contributory conduct.

¹⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66]; *Richora Group Limited v Cheng* [2018] NZEmpC 113.

¹⁵ *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

Outcome

[80] The Authority orders as follows:

Within 21 days of the date of determination Kevin McKerrow Limited is ordered to pay Denise McDonald the following sums:

- (i) \$14,400 under s 123(1)(c)(i);
- (ii) \$14,423.07 (gross) under s 123(1)(b); and
- (iii) \$1,153.85 holiday pay calculation.

Within 21 days of the date of determination Denise McDonald is ordered to pay Kevin McKerrow Limited the following sums in damages:

- (i) \$593.10 for invoiced unpaid product; and
- (ii) \$582.19 for overtime hours claimed and paid.

[81] An inquiry as to damages for the balance of the established breaches of the employment agreement is to be held. A case management conference is to be convened within 21 days of the date of determination to set a timetable.

Costs

[82] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority