

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 136
3173069

BETWEEN KATHERINE HELEN MCINTYRE
Applicant

AND NSW
Respondent

Member of Authority: Helen Doyle

Representatives: Lauren Archer and Leticia Glover, counsel for the Applicant
Sara Jamieson and Bailey McIntosh, counsel for the
Respondent

Investigation Meeting: 2 February 2023

Submissions Received: 8 and 22 February and 9 March 2023 from the Applicant
15 February and 3 March 2023 from the Respondent

Date of Determination: 20 March 2023

DETERMINATION OF THE AUTHORITY

Prohibition of publication

Names of two previous employees

[1] The Authority considered the actions and conduct of two previous employees in its investigation of the employment relationship problem. The two employees are no longer employed, are not parties to the employment relationship problem and did not attend the Authority investigation meeting as witnesses. They have not had an opportunity to respond to evidence about their actions and omissions.

[2] The Authority put to counsel that it was proposing not to identify the two previous employees by name. No issue was taken by either party about that proposal.

[3] NSW additionally asked for non-publication of the name of the employer on the basis that its identification would in turn identify the two employees. That request was treated as an application for non-publication and submissions were provided opposing that on behalf of Ms McIntyre.

[4] I have considered whether the identities of the two previous employees and the identity of the employer should result in a departure from the fundamental principle of open justice. Clause 10(1) of schedule 2 to the Employment Relations Act 2000 (the Act) provides that the Authority may order that the name of any party or witness or other person not be published.

[5] In *Chief of NZ Defence Force v Darnley* the Employment Court made permanent orders for non-publication of the names and identifying details of four individuals who were not parties to the proceedings and not expected to give evidence.¹ There was reference in *Darnley* to the potential for long term damage to reputation, including future job prospects by publication.²

[6] I conclude it is appropriate to depart from the usual principle of open justice and prohibit from publication the names of the two previous employees and details about the position of one. As set out earlier they have not had an opportunity to respond to the evidence. There is some potential for reputational damage and impact on their employment opportunities.

I intend to refer to the general manager at the material time of the applicant's employment by the letter "P" and the employee who was the subject of investigation about bullying by the letter "X".

[7] An order is made for permanent non-publication of the names of the two previous employees.

Name of the employer

[8] NSW seeks non-publication of its name because it says that is required to provide additional protection from the possibility of identifying the previous employees. Reliance is placed on the location and size of the employer.

¹ *Chief of New Zealand Defence Force v Darnley* [2021] ERNZ 123.

² Above n 1 at [3].

[0] NSW refer to an Employment Court judgment *QDA v EKD*.³ A permanent order for non-publication of names of the both the employee and employer was made in *QDA*.⁴ There was reference in the judgment that the general principles of open justice should not be displaced lightly.⁵

[1] There are some distinguishing features in *QDA* to this matter. *QDA* took a neutral view on non-publication sought by the employee. The employee had some medical issues which increased vulnerability, and this was weighed.⁶ In this matter the application for non-publication of the employer's name is strongly opposed and there is not the additional feature of increased vulnerability before the Authority.

[2] The Judge in *QDA* balanced the principle of open justice with the ability for an employee to pursue legal entitlements under the Act without the fear that doing so may damage future employment prospects. There was a concern in *QDA* that publication of the employer and its staff could lead to the identification of employee.⁷ The current application is based not on protecting a party from being identified but rather protecting the identity of previous employees who did not give evidence and will not be referred to by name and in the case of X by position in the determination.

[3] There was no additional order made for non-publication in *Darnley* of the employer's name. Ms Archer and Ms Glover in submissions opposing non publication of the employer's name referred to an Authority determination with a similar factual matrix involving bullying allegations. Two employees in that matter who had not given evidence had findings made about their behaviour and actions which may have reflected badly on them. Their identities and names were prohibited from publication, but the employer's name was not.⁸

[0] The starting point is that the general principle of open justice should not be displaced lightly.⁹ There is already non-publication orders in place for the two previous employees' names and the position of one of them. I am not satisfied in addition to the orders already made

³ *QDA v EKD* [2021] ERNZ 610.

⁴ Above n 3 at [132].

⁵ Above n 3 at [130].

⁶ Above n 3 at [128] and [129].

⁷ Above n 3 at [130].

⁸ *Tracy-Quinton-Boundy v Waimakariri District Council* [2022] NZERA 616.

⁹ Above n 3 at [130].

in respect of the two employees it is necessary that open justice be displaced further, and the name of the employer prohibited from publication.

[9] I decline the application for permanent non publication of the employer's name.

[10] I will make an interim order prohibiting from publication the name of the employer for a period of 28 days from the date of this determination to enable a challenge to the Employment Court. At the end of 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication. I shall refer to the employer for the purpose of the interim order as NSW.

Draft financial information

[11] I prohibit from publication the draft financial statements for the respondent for the year ended 31 March 2022 together with any additional detailed financial information referred to in evidence to the extent that it is not referred to in this determination.

Employment Relationship Problem

[12] Katherine McIntyre commenced her employment at the Workingman's Club (the Club) on 10 May 2021 as an administrative assistant. In her role as administrative assistant Ms McIntyre was employed to assist X and P. She shared an office with X.

[13] Ms McIntyre says she experienced bullying behaviour from X from the start of her employment.

[14] There was an independent investigation report into allegations of bullying of Ms McIntyre dated 3 August 2021. It concluded that the way Ms McIntyre was treated amounted to bullying in accordance with the WorkSafe definition.¹⁰ Ms McIntyre did not receive a copy of the investigation report until on or about 9 November 2021 although was advised on 26 September 2021 that her complaint had been upheld.

[15] Ms McIntyre continued to experience behaviour that she considered to be of a bullying nature from X. The Club took no further steps after the investigation report was provided in August 2021. On 2 November 2021 Ms McIntyre was placed on sick leave by her doctor for

¹⁰ Worksafe New Zealand "Preventing and Responding to Workplace Bullying: The Guidelines", first published in February 2014 and updated in March 2017.

work-related stress and provided a medical certificate that she was off work until 12 November 2021.

[0] On 8 November 2021 Ms McIntyre sent a letter to P and the interim committee of the Club elected on 1 November 2021. The letter concluded with Ms McIntyre advising that unless the situation was resolved satisfactorily before her return to work on 12 November, she would have no option but to resign from her position.

[4] On 15 November 2021 Ms McIntyre advised P and the interim committee that she wanted to tender her resignation effective immediately referring to a lack of contact from anyone from the Club except to drop off the investigation report.

[5] Ms McIntyre says that her resignation was a constructive dismissal or alternatively that she was subjected to actions that were unjustified and disadvantaged her in her employment.

[6] Ms McIntyre seeks reimbursement of lost wages for a period of about eight months until she obtained alternative employment and compensation in the sum of \$50,000 and costs.

[7] The Club holds a permanent charter. Governance is by an elected committee and members who serve on a voluntary basis. In its statement in reply the Club says that the previous elected committee was “effectively ousted” and a new interim committee was elected on 1 November 2021. The new committee once installed came to realise that it had inherited numerous issues resulting from poor governance by the previous committee and management staff. The financial situation was viewed as precarious. Closure was considered.

[8] The Club says that it has attempted to resolve the issues with Ms McIntyre but its ability to do so is constrained by its resources, debt and ongoing cashflow issues. If the Authority gets to the point of awarding remedies, then it says that it would only be able to pay by instalment.

The investigation meeting

[9] The Authority held its investigation meeting on 2 February 2023. It heard evidence from Ms McIntyre and her husband Gary McIntyre. The Authority heard evidence from the President of the Club who was appointed to the role in August 2022 when the new committee took over from the interim committee. The Authority heard evidence from the interim Chairperson who was elected in early November 2021 during a special general meeting. Both had previously been Presidents of the Club before Ms McIntyre was employed.

[28] Submissions were provided after the investigation meeting in writing as the draft financial report for the Club was only produced at the investigation meeting and time was requested to consider it before submissions.

The issues

[29] The Authority needs to resolve the following issues in this case:

- (a) What are the material clauses in the employment agreement?
- (b) What is the legal approach to a constructive dismissal?
- (c) What were the reasons for Ms McIntyre's resignation?
- (d) Was the resignation caused by breaches of duty to Ms McIntyre?
- (e) If there were breaches by the Club, then were they of a serious nature that would mean it was reasonably foreseeable that Ms McIntyre would not be prepared to continue to work for the Club?
- (f) If there was a constructive dismissal, then was it justified?
- (g) In the alternative, were there unjustified actions that caused disadvantage? If there was an unjustified constructive dismissal or alternatively unjustified actions causing disadvantage, then what remedies should be awarded?
- (h) Are there issues of mitigation or contribution?
- (i) Should the Authority make a recommendation?
- (j) If there are orders for payment of lost wages and compensation should there be an order under s 123(2) of the Act that payment to Ms McIntyre of remedies be by instalments?

What are the material clauses in the employment agreement?

Work duties and reporting to requirements

[30] Schedule one of the written individual employment agreement (the employment agreement) between Ms McIntyre and the Club provided Ms McIntyre reported to X. The position description stated that Ms McIntyre reported both to X and P. The page and a half position description required Ms McIntyre to perform any other reasonable duties as directed

by P. Most of the key responsibilities and duties involved Ms McIntyre assisting and supporting X in his role.

Employees conduct and obligations

[31] Clause 3 sets out the employee's conduct obligations. It provides amongst other matters that a professional and dedicated approach to the requirements of the business be demonstrated and that the duties of the position are undertaken to the best of the employee's ability. Further that the employee act in a manner that complements the obligation of the employee of trust and confidence to the employer.

Health and safety

[32] Clause 18.1 provides that the employer will take reasonably practicable steps to ensure the employee's health and safety while in its employment.

[33] Clause 18.2 provides that the employee undertakes to take reasonable care including of their own health and safety.

The legal approach to a constructive dismissal

[34] In some circumstances a resignation may amount to a dismissal. It was stated by the Court of Appeal in *Wellington Clerical Union v Greenwich* that:¹¹

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[35] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:¹²

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

¹¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

¹² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

(c) Where a breach of duty by the employer leads a worker to resign.

[36] The conduct complained of must amount to a repudiation of the contract rather than just be unreasonable.

[37] Ms McIntyre relies on the third situation described by the Court of Appeal in *Woolworths* that a breach of duty by the Club led her to resign.¹³

[38] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.¹⁴ In determining that all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[39] Ms McIntyre has the burden of establishing that the resignation was a dismissal.

What were the reasons for Ms McIntyre's resignation?

[40] Ms McIntyre wrote a letter to the interim committee on 15 November 2021 resigning effective immediately. She agreed when questioned at the Authority investigation that the letter contained most of the reasons for her resignation. She wrote in the letter of 15 November that she had not been contacted since writing an earlier letter on 8 November 2021 by anyone from the Club. The interim Chairperson did drop the investigation report off to her home. This was the first time that Ms McIntyre had seen the investigation report. Ms McIntyre wrote that the lack of acknowledgement to her letter by P and the interim committee showed they were happy for her to resign and no longer wished to employ her.

[41] Ms McIntyre wrote amongst other matters:

...I can no longer work in the hostile and toxic environment that permeates throughout the Club. This is mostly instigated by X's condescending and belittling ways, not only of me but of other staff members.

I therefore tender my resignation from the ---Club.”

¹³ Above n 2.

¹⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[42] The resignation was accepted on 17 November 2021.

[43] I find that the reasons for the resignation was the conduct that Ms McIntyre had complained she was subjected to by X and what Ms McIntyre saw as the failure to address the concerns about bullying behaviour as set out in the letter.

Was there a breach of duty on the part of the Club?

Initial attempt to deal with the matter in an informal manner

[44] Within the first three week of employment Ms McIntyre attempted to raise concerns about X's conduct. She tried to approach X directly about her concerns with his behaviour on 20 May 2021. That was unsuccessful. She then asked P to have a meeting with her and X to try to attempt to resolve the issues. Ms McIntyre said that when she tried to speak at that meeting on 25 May 2021 X would interject or ignore her and the behaviour that he exhibited was the behaviour she had been trying to address. She did not feel that P did anything to assist at that meeting.

Written complaint 28 May 2021

[45] Ms McIntyre then raised complaints in writing on 28 May 2021.

Appointing an independent investigator

[46] On 4 June 2021, P advised in a letter to Ms McIntyre that an independent investigator had been appointed to investigate the complaint. The investigator was asked to report on whether he finds evidence of bullying by X and was instructed to avoid expressing a view as to whether any of the parties involved is guilty of serious misconduct or of recommending any disciplinary action. P wrote that he was the contact point within the Club for the process, although it would be the then Club president who would be the recipient of the report.

[47] Ms McIntyre met with the independent investigator on 9 and 23 June 2021. She reviewed the notes of the interviews on 10 and 27 June 2021. Ms McIntyre continued to share an office with X during the investigation and until her employment ended.

[48] The overall assessment by the independent investigator in a report dated 3 August 2021 was that some of the complaints of bullying within the first three weeks of employment were substantiated. It was concluded that Ms McIntyre:

- (a) Was not welcomed as a reasonable person might expect to be.
- (b) Was yelled at unnecessarily on her first day by X and this raised voice was a regular feature of his management.
- (c) Was not provided with work and trained in tasks that were most of her job description, nor was there any clear plan for doing so.
- (d) Was ignored and had information withheld in relation to what clearly was a significant issue in relation to the safe. This led to relationships with some staff being seriously negatively impacted. Further that X seems to have minimised Ms McIntyre by not explaining why things are the way they are and simply telling her to do things because he says so.
- (e) Was belittled when seeking to pass on an email and phone message.

[49] It was the opinion of the independent investigator that X did not agree with Ms McIntyre's appointment and had stated that she did not have the skills that he wanted and had no apparent interest in managing her. The independent investigator set out that for him to conclude that Ms McIntyre had been bullied would require repeated unreasonable behaviours with a health risk using the Worksafe guidelines.¹⁵

[50] The investigator recorded there had been a series of events that were unreasonable starting with the lack of a welcome and continuing with an impersonal and intimidating style of management and occasional belittling of Ms McIntyre to herself and others. He wrote that in his opinion this was repeated on a reasonably regular and continuous basis through the first three weeks' employment and there was no evidence that this has changed since. Further that it was logical that the way she had been treated could lead to Ms McIntyre deciding not to remain in the job and the fact that she is still there is likely to be that she felt it was wrong.

¹⁵ Above n 10.

[51] The investigator referred to some mitigating circumstances and then later in the report that these “significantly mitigate” against a finding that X had bullied Ms McIntyre. These were the sort of matters that X may have advanced if facing disciplinary action for bullying behaviour such as the fact X was busy. Four of the “mitigating circumstances” could not sensibly relate to any actions or conduct of Ms McIntyre.

[52] The fifth referred to Ms McIntyre being quite challenging, making “numerous suggestions for change” even during her “settling in period” and doing tasks on P’s instructions which were part of X’s role. I could not be satisfied from the evidence that there was an opportunity for Ms McIntyre to properly respond to these circumstances.

[53] These issues need to be considered in the context of X not training or showing Ms McIntyre how to do most of her work tasks and the difficult working relationship that developed. For example, on her first day when Ms McIntyre asked X why banking was done the way it was, she said that X yelled, “You have to do it my way.” If these issues presented as mitigating aspects to bullying were concerns, then the Club could and should have dealt with those with Ms McIntyre separately. They did not.

[54] The investigation report concluded with this statement:

I believe the organisation is fortunate that both parties have continued working and there is therefore an opportunity to put right the wrongs that have been committed.

What happened after the investigation into bullying and the report

1 August 2021

[55] On 1 August 2021 Ms McIntyre sent an email to P and the then President of the Club setting out matters of concern that had arisen in her interactions with X during the month of July 2021. The email acknowledged that there was a process in train but stated it was written to show that the behaviour had not changed and that it made for a “very unpleasant working environment” and “is starting to have an effect on my mental health.” Ms McIntyre described the relationship with X in her email as:

...

If X is not yelling at me, he tends not to talk at all. (Not that I have a problem with that, silence is slightly better than being yelled at) and to put it mildly, the workplace relationship between X and I is non-existent.

[56] Ms McIntyre did express in the email that she appreciated P showing her some of the processes that were part of her job description that she believed X should have been teaching her. One of the incidents described in the email involved Ms McIntyre going to the bathroom and crying after an interaction with X during which he had yelled at Ms McIntyre. That incident was observed by another person and Ms McIntyre reported it to P.

[57] From this email the Club would have understood that the environment was beginning to have an impact on Ms McIntyre's mental health. There was evidence from Ms McIntyre and her husband that she became anxious about going to work and being at work and on returning home was often tearful. She started to feel excluded at work from activities such as morning tea with other staff. Whilst she had a confident and outgoing personality and was self-assured, she had started to withdraw and not engage with others and started to doubt her ability in her work.

16 August 2021

[58] Ms McIntyre did not receive a response to her email and sent a further email on 16 August 2021 to P. She asked in the email where the process was with her complaint of 28 May 2021 and noted it was eleven weeks since the first email containing the formal complaint was sent. She asked to know what stage her complaint is at as the situation had continued to be uncomfortable.

26 September 2021

[59] On 26 September 2021 Ms McIntyre met with P and was advised that the complaint she had made against X was justified and that he had in fact bullied her. She requested a copy of the investigation report but did not receive it at that time. Ms McIntyre was hopeful that steps would be taken to resolve the matter but as it transpired there was no such action.

23 October 2021

[60] On 23 October 2021 Ms McIntyre wrote to P and the then President of the Club by email advising that she had been called by the police after X had made a complaint with them that Ms McIntyre had assaulted him. Ms McIntyre said that the complaint related to an incident

at the photocopier when Ms McIntyre grabbed a document from X whilst he was reading it as it was a colleague's personal letter that she had printed.

[61] In a further email to P and the then president of the Club dated 23 October 2021 Ms McIntyre questioned when the bullying and harassing was going to stop. She referred to the matter being the last straw and that it was taking a huge toll on her physical and mental health. There was reference in the email to involving the police as an attempt to discredit her and it was all part of the bullying, she had been subjected to from her first day. She asked to be provided with a working environment safe from bullying and asked for the situation to be rectified as soon as possible.

Offer to move to another office

[62] Ms McIntyre recalled that a day or two before the special meeting P suggested that she sit in his office. Ms McIntyre said that she did not want to move because all her things were in the office and she felt that she was being punished not X. She had a lot of work to do before the special meeting and the shift was left to be revisited after that.

Overhearing of telephone call

[63] In her evidence Ms McIntyre said that on 2 November 2021 she heard X's half of a conversation to the effect he regarded the outcome of the special meeting as a success. It appeared likely from the evidence that the person X was talking to was the new interim Chairperson. From that she concluded that nothing was going to change.

2 November 2021

[64] On 2 November 2021 Ms McIntyre went to see her doctor and was placed on sick leave due to work related stress until 12 November 2021. She was advised by her doctor to remove herself from the work environment so that her condition could improve. A medical certificate was provided to the Club.

8 November 2021

[65] On 8 November 2021 Ms McIntyre wrote to P and the interim committee of the Club. She set out in her email the background to difficulties in her working situation and her bullying

complaints. She wrote that nothing was done to resolve the concerns and the difficulties with the working relationship with X.

[66] She described the impact on her working situation and health as follows:

I am anxious about going to work every day as it feels like I am trapped in an abusive relationship. There have been times that I have had to leave the office to cry in the toilets. The stress has also spilled over into my personal life.

My health has deteriorated because of the stress and anxiety associated with working in this hostile, oppressive and intimidating environment.

[67] Ms McIntyre advised in the letter that if the situation was not satisfactorily resolved before her return on 12 November 2021, she would be left with no option but to resign from her position.

After 8 November and before resignation

[68] Ms McIntyre supplied a further medical certificate to the Club on 11 November 2021 that she was unfit to work until 20 November 2021.

[69] P sent an email to the interim Chairperson dated 9 November 2021 and attached a copy of Ms McIntyre's 8 November letter. He advised that Ms McIntyre was aware that the letter has been forwarded for review. The interim Chairperson said in his evidence that at or about the same time P gave notice of his resignation.

[70] Ms McIntyre received an email from the interim Chairperson on or about 8 November that said he had been given the investigation report by P on 6 November and that it would be presented at the interim committee meeting on 10 November. He wrote that he would let Ms McIntyre know the outcome of the meeting.

[71] The interim Chairperson dropped a copy of the investigation report to Ms McIntyre's home and gave it to Mr McIntyre.

[72] There was no further contact with Ms McIntyre before she resigned on 15 November 2021. It was unclear if there had been discussion about Ms McIntyre's situation at the interim committee meeting.

Conclusions about a breach

[10] The Club acknowledged in the evidence that Ms McIntyre's complaint was not dealt with promptly after the investigation report was received and before Ms McIntyre resigned. The interim Chairperson explained that initially the interim committee appointed on 1 November 2021 had no knowledge of the investigation into X initiated by P.

[11] The interim Chairperson said that he was unaware how bad things were for Ms McIntyre although I am satisfied it is likely that he had her letter of 8 November 2021. He did acknowledge appropriately in his written evidence that the interim committee should have done more to help Ms McIntyre before she resigned.

[12] The interim Chairperson and the interim committee were only aware of the issues at a very late stage. By this stage the failure to take any steps to provide a safe workplace had impacted on Ms McIntyre to the stage that she had been advised to take sick leave. If the relationship was to be preserved there needed to be urgent measures. Unfortunately, the evidence supported the attention of the interim committee was diverted from the concerns of Ms McIntyre by pressing financial issues. Most of the committee who are volunteers were working long hours at that time to try and get the Club back to a viable position. There was no response at all to Ms McIntyre. Because of that her concerns from 2 November 2021 that nothing would change were strengthened and she decided to resign.

[0] It remains unclear why no action was taken after the report into bullying was provided to the then President and P. The interim Chairperson said that the documents appeared to have been "shoved in a bottom drawer and ignored by P."

[13] The Club was aware that the working relationship between Ms McIntyre and X was problematic very soon after employment commenced. It took an appropriate step to arrange for an independent investigation into bullying allegations. Ms McIntyre continued to raise concerns about the working relationship with X and his behaviour. She referred in an email dated 1 August 2021 to the working environment as very unpleasant and stated that it was starting to have an effect on her mental health.

[14] The investigation report dated 3 August 2021 concluded bullying. The Club failed to take any steps thereafter to ensure Ms McIntyre had a safe working environment. This remained the position notwithstanding further concerns being raised and the working relationship with X was clearly dysfunctional. The only suggestion made was that Ms

McIntyre shift from the office that she shared with X following his vexatious assault complaint with the Police on 23 October 2021.

[73] The Club had agreed that it would take reasonably practicable steps to ensure Ms McIntyre's health and safety whilst she was in employment but took no steps following the investigation report.¹⁶

[74] The failure to take steps to provide a safe workplace was in the knowledge that the working environment was starting to impact on Ms McIntyre's mental health and that the relationship was dysfunctional from the outset of employment. It was telling when questioned by the Authority that of the twenty key responsibilities and duties in the position description many of which were designed to assist X, Ms McIntyre said that she was only performing about seven. That was because X would not permit her to undertake tasks and/or provide information and training so that she could undertake them.

[75] The Club breached its duty to provide Ms McIntyre with a safe working environment and her resignation was caused by that breach as no resolution of her concerns was likely.

Was it reasonably foreseeable that Ms McIntyre would not be prepared to continue to work for the Club?

[76] The breach of the duty to provide a safe working environment was serious. It was reasonably foreseeable to the Club, if not earlier, certainly at the time of the letter of 8 November 2021 that Ms McIntyre would not be prepared to continue to work for the Club under the same conditions.

Was the constructive dismissal justified?

[77] Applying the test in s 103A of the Act the Authority is not satisfied that the dismissal was justified. The breach of duty to provide a safe working environment was not what a fair and reasonable employer could have done in the circumstances.

[78] Ms McIntyre has made out her personal grievance of unjustified constructive dismissal.

¹⁶ Clause 18 of the employment agreement.

[79] She is entitled to an assessment of remedies. The alternative claim for unjustified actions causing disadvantage is effectively absorbed into the finding of unjustified dismissal.

Remedies

Lost wages

[80] Ms McIntyre commenced looking for alternative employment in December 2021. She explained the delay of a few weeks in doing so because she was an “absolute mess” and “a shell of the person that she once was.” She said that she approached looking for employment with some anxiety that she would end up in a similar situation to that with X and the Club. The evidence supports that Ms McIntyre had assistance from a counsellor having been referred by her doctor specifically to address the effects of the bullying from mid- December 2021. Although the number of roles applied for were reasonably limited, I have considered confidence and anxiety issues, the location where the job search took place and the fact that Ms McIntyre applied for a wide range of roles and was not selective. I accept that there were adequate attempts to mitigate the loss of wages in the circumstances.

[81] Ms McIntyre was successful in securing employment on 15 July 2021 and started her new role on 25 July 2022. Lost wages are claimed for the periods between 15 November 2021 and 25 July 2022 which is a period of 36 weeks. The average weekly earnings have been assessed in final submissions as \$793.96 gross per week.

[82] Section 123 (b) of the Act provides for the reimbursement of a sum equal to the whole or any part of the wages lost because of the grievance found established. This needs to be considered with s 128 of the Act which deals with lost remuneration.

[83] Section 128 (2) of the Act provides that the Authority must order the payment of three months ordinary time remuneration, or the actual amount lost whichever is the lesser.

[84] Section 128 (3) the Act provides the Authority may in its discretion, order an employer pay an employee for lost remuneration a sum greater than that under subs 2.

[85] In considering whether this is an appropriate case to exercise my discretion and order that the Club pay a greater sum for lost remuneration. I have undertaken a counterfactual analysis. This is to assess whether if Ms McIntyre had not resigned, she would have remained employed until 25 July 2022. During the employment and despite considerable difficulties Ms

McIntyre undertook her employment with determination and hope that the issues would be dealt with. Had the bullying issues that impacted on the relationship been dealt after the investigation report was available in early August 2021 then it is likely that the relationship would have continued for at least the period to July 2022. There was no evidence that the position was no longer required after 15 November 2021.

[15] I conclude it is appropriate to exercise my discretion and award reimbursement of lost wages for the period between 15 November 2021 and 25 July 2022.

[16] To assess the quantum, I have calculated average lost wages by taking the gross ordinary time earnings for the period of employment together with sick leave and public holiday payments to arrive at gross earnings of \$19,849. I have divided this by the number of weeks worked of twenty-seven and have arrived at average earnings of \$735.15 gross. That is different from the average earnings in submissions lodged on behalf of Ms McIntyre because I have not included that holiday payment made in the final pay.

[17] Subject to contribution Ms McIntyre is entitled to reimbursement of lost wages in the sum of \$26,465.40 gross under s 123 (b) of the Act calculated as \$735.15 multiplied by 36 weeks.

Compensation

[18] Ms McIntyre seeks a substantial sum under s123(1)(c)(i) of the Act of \$50,000. Compensation is claimed for humiliation, loss of dignity and injury to feelings. The evidence supports that Ms McIntyre was impacted under each aspect that requires consideration.

[19] The Club say that the sum claimed is excessive and that there is no similar case that supports an award of that nature. The Club also says that its financial position should be considered in any award.

[20] Ms McIntyre had not suffered from anxiety before she started working at the Club but she then became anxious about everything. She had headaches and began to doubt herself and struggled to sleep requiring sleeping pills. Counselling has been necessary to try to overcome the impacts of the ongoing behaviour of X and the lack of support and action shown by the Club. Counselling is ongoing. Ms McIntyre felt very let down with the way the Club did not actively deal with her concerns which impacted on her dignity as an employee. She worked

with X over some months without the known concerns about his bullying and its impact being addressed. I do weigh that the interim Chairperson and the current President accepted that there were failings on the part of the Club and apologised for these in their evidence. There was no real dispute that the actions of X as concluded in the investigation report were bullying in nature. Often there is no such acknowledgement in these types of matters.

[86] The evidence supported Ms McIntyre has suffered a significant loss of confidence. Ms McIntyre said that she still suffered from a loss of confidence although not to the same degree in her evidence as had been the case closer to her employment.

[87] The long-term side effects of the bullying were confirmed by the counsellor in her letter. There was a fear of failure and feelings of not being good enough, in addition to confidence issues.

[88] Mr McIntyre noticed a marked change in Ms McIntyre's behaviour and confidence. He said that she was not the self-assured confident person that she had been but that he does see it coming back. Mr McIntyre said that previously as a couple they had been very social and attended activities with friends, but this all stopped. Ms McIntyre instead watched television or worked in the garden. She withdrew. There were some issues with arguing.

[89] One of the concerns for Ms McIntyre was the possibility of having to rehome her horse because she could no longer afford its upkeep. The horse was helpful with Ms McIntyre's mental health, and I accept that a possibility of not having the horse was particularly difficult.

[90] I have considered the harm that was experienced, the extent of the loss and where this case sits with others both in terms of harm and quantum.¹⁷

[0] I accept that the Club is experiencing financial difficulties but that was not a consideration that the Employment Court has found relevant to the assessment of a compensatory award under s 123(1)(c)(i) of the Act.¹⁸ I weigh with this that I have also been asked to consider ordering payment by instalment.

¹⁷ *Richora Group Limited v Cheng* [2018] ERNZ 337.

¹⁸ *Innovative Landscapes (2015) Limited v Celia Popkin* [2020] ERNZ 55 at [18] to [39].

[91] I do not conclude an award as high as \$50,000 is appropriate but I do not conclude an award at the level proposed by the Club of an amount between \$10,000 and \$20,000 would be adequate to reflect the harm caused to Ms McIntyre.

[92] Subject to any issue of contribution an appropriate award under this head when other awards in similar cases are considered is the sum of \$30,000.

Contribution

[93] Ms McIntyre did not contribute to her personal grievance and the awards made above are not reduced for reason of contribution.

Should there be an order for payment by instalment

[94] The Authority may make an order under s 123(1)(d) of the Act that orders for payment under s 123(1)(b) or (c) be by instalment.

[95] There are different views about the ability of the Club to make payment in full. Having regard to the submissions and the financial statements that have not been subject to audit or review I am not satisfied that the Club is able to pay an award in full without the risk of impact in other areas of its operations. There is a level of uncertainty going forward for the Club as confirmed by its accountants.

[1] I intend to order payment by instalments over a six-month period by six equal payments. It is important that Ms McIntyre is not left waiting for full payment for a longer period.

[96] I order the first of the six payments is to be made on the 20 April 2023 and thereafter on the 20th of the months that follow until the final payment in September 2023. If any instalment payment is not made in time then the full amount will become due and owing.

Should the Authority make a recommendation?

[97] In final submissions on behalf of Ms McIntyre a recommendation under s 123 (1) (ca) of the Act was requested to prevent a repeat of what occurred.

[98] Bullying is a serious issue. It can lead to serious harm. I recommend that a policy on bullying and harassment be considered by the Club. In this matter a policy would have

identified what the next steps would be where bullying was concluded. The employment relationship problem may not then have arisen.

Orders made

[99] The Club is ordered to pay to Katherine McIntyre the sum of \$26,465.40 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[100] The Club is ordered to pay to Katherine McIntyre the sum of \$30,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

[101] The amounts ordered payable above are to be paid in six equal instalments commencing on the 20 April 2023 and thereafter on the 20th of each month with the last payment on 20 September 2023. Failure to make a monthly payment will result in the full amount becoming due and owing.

Costs

[102] Costs are reserved.

[103] If costs are not agreed, then Ms Archer and Ms Glover may lodge and serve a costs submission within 14 days from the date of this determination. Ms Jamieson and Ms McIntosh will have a further 14 days from receipt of the submission to lodge and serve reply submissions as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[104] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.¹⁹

¹⁹ <https://www.era.govt.nz/assets/Uploads/practice-note-2> .

Helen Doyle
Member of the Employment Relations Authority