

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 691  
3212679

BETWEEN CHRISTINE MCLAUGHLIN  
Applicant

AND HKR LIMITED  
Respondent

Member of Authority: Shane Kinley

Representatives: Joshua Pietras, counsel for the Applicant  
Alice Porter, advocate for the Respondent

Investigation Meeting: 19 and 20 September 2023 at Wellington

Submissions: 20 September 2023 from the Applicant  
21 September 2023 from the Respondent

Determination: 16 November 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Christine McLaughlin was employed by HKR Limited in September 2018, initially as Operations Manager with her role becoming General Manager in September 2021. Mrs McLaughlin raises a number of unjustified disadvantage claims arising from events leading up to her resignation on 30 March 2022. Mrs McLaughlin also seeks wages arrears in relation to an unpaid bonus and a penalty for HKR Limited failing to provide her with an updated employment agreement and job description when her role became General Manager.

[2] HKR Limited denies that it unjustifiably disadvantaged Mrs McLaughlin, denies that Mrs McLaughlin was entitled to the bonus that she is claiming and denies

that it was required to provide her with an updated employment agreement and job description when her role became General Manager.

### **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged for Mrs McLaughlin by herself and her husband, Gavin McLaughlin, and for HKR Limited by Hayden Rau (Managing Director of HKR Limited), Hazel Remfry (Sales Consultant), Cameron McLaren (formerly Project Manager), Chris Walker (Construction Manager), Sandra Walker (Administrator). Mrs and Mr McLaughlin, Messrs Rau, McClaren and Walker, Ms Remfry and Ms Archer answered questions, under oath or affirmation, from me and from counsel for Mrs McLaughlin and the advocate for HKR Limited. I excused one other witness from appearing (by agreement of the representatives), as the evidence in their witness statement was contextual and largely related to events prior to the key time period for the matters that Mrs McLaughlin had raised. The representatives also provided written submissions, after the investigation meeting concluded.

[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.

### **The issues**

[5] The issues requiring investigation and determination are:

- (a) Was Mrs McLaughlin's employment or conditions of employment unjustifiably disadvantaged by HKR Limited, in relation to HKR Limited:
  - (i) breaching its duty of good faith by failing to properly investigate and respond to Mrs McLaughlin's concerns about the handling of the construction side of HKR Limited's business;
  - (ii) pre-determining that Mrs McLaughlin was at fault in relation to inter-personal issues at HKR Limited, with reference to interactions between Mrs McLaughlin and Ms Archer, including by Mr Rau telling Mrs McLaughlin that she was responsible for staff resignations and lack of collegiality; and

- (iii) breaching its duty of good faith by failing to notify Mrs McLaughlin that she was the subject of an employment investigation?
- (b) Was HKR Limited required to pay Mrs McLaughlin a quarterly bonus for the period ending 31 March 2022?
- (c) Was HKR Limited required to provide Mrs McLaughlin with an updated employment agreement and job description when her role became General Manager?
- (d) What remedies should be awarded, considering:
  - (i) compensation under s 123(1)(c)(i) of the Act;
  - (ii) payment of a quarterly bonus for the period ending 31 March 2022 and interest on that amount pursuant to the Interest on Money Claims Act 2016; and
  - (iii) a penalty for HKR Limited's failure to provide Mrs McLaughlin with an updated employment agreement and job description?
- (e) Should either party contribute to the costs of representation of the other party?

[6] The issues requiring investigation and determination evolved a number of times from when Mrs McLaughlin initially raised her employment relationship problem. The list of issues above reflects submissions on behalf of Mrs McLaughlin at and following the investigation meeting. An earlier claim of unjustified constructive dismissal was withdrawn on Mrs McLaughlin's behalf at a case management conference in April 2023, with the primary issues becoming Mrs McLaughlin's unjustified disadvantage claims, which had until that time been an alternative claim. An amended Statement of Problem and Statement in Reply was lodged to reflect this. I am satisfied that both parties have had a full opportunity to present and respond to the refined scope of Mrs McLaughlin's claims.

*Context for Mrs McLaughlin's claims*

[7] The issues to be investigated largely focussed on events that occurred in March 2022. There is a reasonable degree of common understanding as to some of the factual aspects of events, though marked differences in how those events were described and what determinations of fact I should make in relation to those. Common facts include that a number of meetings occurred in early to mid-March 2022, although Mrs McLaughlin says that there was an additional meeting that Mr Rau says did not occur.

[8] In terms of Mrs McLaughlin's employment up until the end of 2021, Mr Rau spoke in positive terms and acknowledged the role that Mrs McLaughlin had played in building HKR Limited's systems and processes, and contributing to the growth of HKR Limited's business. This matched the positive experiences that Mrs McLaughlin described over the same time period.

[9] As part of the growth of HKR Limited there was an expansion in the leadership team in September 2021, where Mr Walker joined HKR Limited as Construction Manager, to manage construction including overseeing and assisting HKR Limited's project managers. At the same time Mrs McLaughlin's position became described as General Manager, with Mr Walker and the Administrator to report to her. Mrs McLaughlin's role was described as having "overall responsibility for the day to day business operation" and "an oversight role for construction". There was no dispute that when Mrs McLaughlin's role became described as General Manager there was no update to her employment agreement and job description. Differences in views about Mrs McLaughlin's role, how she approached her role and Mr Rau's response to that are central to Mrs McLaughlin's claims.

[10] Mr Rau described his management style as being very informal, seeking to understand different perspectives and then resolve matters at the lowest level possible. Mrs McLaughlin described herself as a stickler for health and safety, which was one of her responsibilities, and for following policies and procedures. Mr Rau's management style and Mrs McLaughlin's views about health and safety, and policies and procedures, were a feature of disagreements at the heart of the meetings and events that led to Mrs McLaughlin leaving her employment at HKR Limited.

[11] Finally as context, HKR Limited was a relatively small family-run business, where there were connections between the Directors, Mr Rau and his wife Kylie Rau, and employees that blurred some of the boundaries between work and social or non-work activities. Mrs McLaughlin had been introduced to Mr Rau by her husband, who shared an interest in motorsports with Mr Rau and was away at a Targa rally event with Mr Rau over the weekend between the meetings and events that led to Mrs McLaughlin leaving her employment at HKR Limited. Mr McLaughlin also met with and spoke to Mr Rau a number of times and discussed the events as they were unfolding.

## **Was Mrs McLaughlin unjustifiably disadvantaged by HKR Limited?**

### *Relevant law*

[12] For Mrs McLaughlin's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires that:

- a. Mrs McLaughlin's employment, or one or more conditions of her employment, was (in this case, as Mrs McLaughlin's employment has since ended) affected to Mrs McLaughlin's disadvantage; and
- b. This was due to some unjustifiable action by HKR Limited.

[13] In assessing this, I must apply the test of justification under s 103A of the Act: whether HKR Limited's actions, and how HKR Limited acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[14] In reaching my conclusions about Mrs McLaughlin's unjustified disadvantage claims, I must consider:

- a. having regard to the resources available to it, did HKR Limited sufficiently investigate before taking action;
- b. did HKR Limited raise concerns that it had with Mrs McLaughlin before taking action;
- c. did Mrs McLaughlin have a reasonable opportunity to respond; and
- d. did HKR Limited genuinely consider Mrs McLaughlin's explanation or comments.

[15] I may also take into account any other factors I think are appropriate. I must not determine an action to be unjustifiable where there were defects in HKR Limited's process that were minor and did not result in Mrs McLaughlin being treated unfairly.

[16] Where Mrs McLaughlin's claims included that HKR Limited breached its duty of good faith I was also referred to the obligations under s 4(1A)(b) for "parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

**Did HKR Limited breach its duty of good faith by failing to properly investigate and respond to Mrs McLaughlin’s concerns about the handling of the construction side of HKR Limited’s business?**

[17] Mrs McLaughlin says that she raised concerns about “how the construction side of [HKR Limited] was being run”, including Mr Walker not using a function in HKR Limited’s project management system that would send notifications to contractors and sub-contractors. Mrs McLaughlin says as a result she was receiving complaints from sub-contractors and after trying to raise this informally unsuccessfully, she sought a formal meeting with Mr Rau. At a meeting that covered this issue, amongst others, Mrs McLaughlin says that “Mr Rau accused her of “micromanaging the team” and instructed her to “keep out of construction”.” Mrs McLaughlin says this left her feeling “undermined and ignored.”

*Submissions of the parties*

[18] Submissions for Mrs McLaughlin were that “Failure to properly investigate and respond to complaints can form the basis for a disadvantage grievance”<sup>1</sup> and that HKR Limited “breached its duty of good faith by adopting a dismissive and abrasive approach to the various concerns raised by Mrs McLaughlin.”

[19] Submissions for HKR Limited were that Mrs McLaughlin had “provided no evidence that she raised concerns that could reasonably be understood to amount to a complaint that warranted an investigation on its own merits.” Rather HKR Limited says that it “had reasonable grounds to understand her comments amounted to a disagreement between [Mrs McLaughlin’s] view on how aspects of construction should be managed, and how [Mr Walker] was actually managing construction.” HKR Limited says that Mr Rau considered Mrs McLaughlin’s concerns and advised her that she “should remain in the oversight role” and “that he did not believe micro-management of construction was appropriate”. HKR Limited acknowledged that Mrs McLaughlin did not agree with Mr Rau’s decision, but says it was a decision “within the range of responses open to the fair and reasonable employment [sic] in all the circumstances”.

*Analysis*

[20] Mrs McLaughlin acknowledged that she had raised concerns with Mr Rau about whether Mr Walker should have been employed, saying that she initially did not think that Mr Walker was a good fit with the business due to his background and experience.

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<sup>1</sup> Citing *Clear v Waikato District Health Board* [2008] ERNZ 646.

She also says that she raised concerns that Mr Rau needed to respond to, including Mr Walker's approach to managing contractors (as described at paragraph [17] above).

[21] Both Mrs McLaughlin and Mr Rau provided evidence of Mrs McLaughlin's primary concerns about HKR Limited's construction operations and Mr Walker's approach to issues being discussed at a meeting on 10 March 2022. Mrs McLaughlin said she was frustrated at the time of that meeting as she had been trying to discuss a number of issues with Mr Rau for most of that week, following his being at a conference the previous week, but a meeting had not occurred. Mr Rau agreed that he had a busy week due to having been at that conference and, while he thought issues were still being discussed as needed, he was aware that Mrs McLaughlin still wanted a meeting.

[22] Mrs McLaughlin and Mr Rau had starkly different accounts of the meeting that eventually occurred on 10 March 2022 and its outcome. In part this appeared to be coloured by Mrs McLaughlin's perception she had been excluded from drinks at the office and matters related to a client hand-over which had occurred earlier that week.

[23] Both Mrs McLaughlin and Mr Rau's accounts of their meeting on 10 March 2022 suggest that it became somewhat heated, with each raising and robustly discussing issues, which appeared to have been building up for some time. Mrs McLaughlin acknowledged questioning aspects of how Mr Rau was running HKR Limited, with discussions about team culture and the lack of a Christmas party the prior year. Mr Rau acknowledged that he responded by advising Mrs McLaughlin that she was part of the reason that he had not held a Christmas party as other staff members had said they would refuse to attend if she was present. It appeared that this related to earlier interpersonal issues which had not fully been resolved and that these resurfaced during this discussion.

[24] Against this backdrop Mr Rau says that he reiterated feedback that team-members thought that they were being micro-managed by Mrs McLaughlin and that this was not his expectation, particularly in relation to construction. Mrs McLaughlin was open in response to questions at the investigation meeting that she had been micro-managing people, saying that was what you did if people were no't doing their jobs properly. Mr Rau says that he told Mrs McLaughlin to let Mr Walker "run the construction side of the business" and talked about the need for everyone to "stay in lane". Mrs McLaughlin was adamant that Mr Rau also told her to "stay out of construction".

[25] Mr Rau says that he left the meeting feeling it had ended somewhat positively, while Mrs McLaughlin described feeling somewhat shocked and thought that the meeting ended with her upset and that Mr Rau should have realised this. These different perspectives carried over into the events that followed, which I will return to in relation to Mrs McLaughlin's other claims of unjustified disadvantage below.

*HKR Limited did not breach its duty of good faith*

[26] In relation to this aspect of Mrs McLaughlin's claims, I am not convinced that she has demonstrated that HKR Limited breached its duty of good faith to her by failing to properly investigate and respond to her concerns.

[27] I heard evidence that at the meeting on 10 March 2022 both Mr Rau and Mrs McLaughlin raised issues or concerns related to the handling of the construction side of HKR Limited's business. On Mrs McLaughlin's behalf this included matters that had occurred over a period of time, including Mr Walker's approach to managing contractors as well as other health and safety complaints. This led into a discussion about Mrs McLaughlin's admitted micro-management of construction staff, which I heard had previously been discussed informally by Mr Rau and Mrs McLaughlin.

[28] While the meeting on 10 March 2022 was at times heated and robust comments were made by both Mr Rau and Mrs McLaughlin, I do not consider that means that Mr Rau did not investigate and respond to Mrs McLaughlin's concerns. I consider this is a scenario where Mrs McLaughlin did not agree with Mr Rau's business decisions, but that these were decisions that Mr Rau (as the Managing Director of HKR Limited) was entitled to make under the sphere of managerial prerogative, so long as I objectively determine that HKR Limited (through Mr Rau) acted as a fair and reasonable employer could have done.<sup>2</sup>

[29] I am satisfied that Mr Rau had sufficiently heard and considered Mrs McLaughlin's concerns. It was open to him to then set expectations for how he expected Mrs McLaughlin to work with Mr Walker. Mrs McLaughlin's claim in relation to this alleged disadvantage is unsuccessful.

[30] There are two aspects where I consider Mr Rau could have better approached this meeting discussed below. I do not consider, however, that these aspects mean that

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<sup>2</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [89].

HKR Limited breached its duty of good faith in its response to Mrs McLaughlin's concerns about the handling of the construction side of HKR Limited's business. Rather I would characterise these as minor defects in HKR Limited's process, which did not in themselves result in Mrs McLaughlin being treated unfairly.

[31] The first aspect relates to the meeting continuing when it appeared to have become heated. If Mr Rau (or equally Mrs McLaughlin) had chosen to pause the meeting, then it may well have had a different outcome in relation to subsequent events. This was, however, a meeting where both Mr Rau and Mrs McLaughlin wished to discuss issues and doing so robustly does not mean that those discussions are not in good faith.

[32] The second aspect was Mr Rau not recording the outcome of the meeting in writing at the time and not checking whether Mrs McLaughlin wished to discuss matters further at a later stage. Not doing so appeared to reflect both Mr Rau's informal management style and the fact that he was leaving Wellington for the weekend the next day (along with Mr McLaughlin). If Mr Rau had taken the step of recording his expectations and asking Mrs McLaughlin to raise any further concerns with him then that may have led to a different outcome in relation to subsequent events.

**Did HKR Limited pre-determine that Mrs McLaughlin was at fault in relation to inter-personal issues?**

*Interactions between Mrs McLaughlin and Ms Archer (and context for those interactions)*

[33] The relevant interactions between Mrs McLaughlin and Ms Archer for the purposes of this claim occurred on 11 and 16 March 2022. Prior to this Mrs McLaughlin says that she considered Ms Archer worked quickly and she was happy to praise her as she developed into her role, which she had commenced early in 2022.

[34] The first incident on 11 March 2022 involved what Mrs McLaughlin acknowledged was an inappropriate comment, at a time when Mrs McLaughlin said she was still frustrated following her discussions with Mr Rau on the previous day. It also followed an exchange between Mrs McLaughlin and Mr Walker earlier that day.

[35] Mrs McLaughlin's evidence suggests that this was not a smooth exchange and it was likely to have coloured events later that day. Mr Walker acknowledged that both

he and Mrs McLaughlin would have had their “tone up” during that exchange and that it was tense.

[36] The inappropriate comment Mrs McLaughlin acknowledged making to Ms Archer on 11 March 2022 was words to the effect of “I don’t know what you do here anyway”. Mrs McLaughlin said this occurred when she was frustrated with Ms Archer not being able to understand how to make certain entries into HKR Limited’s computer systems and appeared to appreciate that she had caused some impact to Ms Archer, as she produced a text message sent later that day that said “So sorry. Now I have upset you.” Both Mrs McLaughlin and Ms Archer left the HKR Limited office early that day, with Ms Archer saying that she was visibly upset, while Mrs McLaughlin said she left because she had a headache and did not fully appreciate how upset Ms Archer was.

[37] Mrs McLaughlin says that at some stage by 15 March 2022 she had decided to apologise further to Ms Archer and she sent a text early on 16 March 2022 seeking to meet with Ms Archer at a café to do so. Prior to this there had been discussions between Mr Rau and Mr McLaughlin where the possibility of Mrs McLaughlin apologising to Ms Archer had been discussed, with Mrs McLaughlin saying that those discussions were happening to “try and sort out problems behind the scenes”. Mrs McLaughlin was, however, adamant that it was her decision to apologise to Ms Archer.

[38] From the perspective of both Mrs McLaughlin and Ms Archer their meeting on 16 March 2022 did not go well, with Mrs McLaughlin giving evidence that Ms Archer did not seem to accept her apology. Ms Archer’s evidence also was that the meeting did not go well, saying it was uncomfortable and awkward, and that she did not think that Mrs McLaughlin wanted to be there. Both Mrs McLaughlin and Ms Archer described there being some discussion about how Ms Archer should undertake her role.

[39] Ms Archer said that she thought she had mentioned something about this meeting to Mr Rau when she returned to the office and may have sent a text or texts to him but as she no longer had the same phone could not be certain about that. Mrs McLaughlin acknowledged she had indicated to Mr Rau on her return to the office that the apology had not gone well.

#### *Submissions of the parties*

[40] Submissions for Mrs McLaughlin acknowledged a terse exchange between Mrs McLaughlin and Ms Archer on 11 March 2022 and suggested that this was “formally

addressed” at a meeting on 15 March 2022 where Mr Rau told Mrs McLaughlin that she was the reason why some staff had resigned. Those submissions then referenced the second apology on 16 March 2022 and a meeting between Mr Rau and Mrs McLaughlin later on 16 March 2022.

[41] Submissions for Mrs McLaughlin went on to say:<sup>3</sup>

Pre-determination of fault and unwarranted criticism about an employee’s conduct can form the basis for an unjustified disadvantage grievance. ...

... [HKR Limited’s] conclusion that Mrs McLaughlin was solely at fault for the incident with Ms Archer, coupled with the misplaced criticism about her standing within the workplace, was tantamount to a formal warning.

[HKR Limited’s] conclusion was pre-determined because it was made without considering Mrs McLaughlin’s side of the story. It involved nothing more than putting a string of allegations, dressed up as incontrovertible fact, to Mrs McLaughlin.

If [HKR Limited] was genuinely concerned about Mrs McLaughlin’s management style, then it needed to raise those concerns with her in a fair and constructive way. It did none of these things.

[42] Submissions for HKR Limited denied that there was a meeting between Mr Rau and Mrs McLaughlin on 15 March 2022, saying that the points raised about Mrs McLaughlin being responsible for staff resignations and lack of collegiality were discussed between them on 10 March 2022. Submissions for HKR Limited also said that Mr Rau:

... did not make any decisions about what occurred during the 11 March incident or what (if any) action to take in response to it. [Mrs McLaughlin] accepted during cross examination that her 11 March behaviour towards [Ms Archer] could be described as ‘inappropriate work behaviour and that she chose to apologise of her own accord, on this basis. The only evidence of [Mr Rau] having formed a view about what the applicant’s behaviour was, is in his 18 March 2022 [email] to his HR Adviser where he describes it as ‘inappropriate work behaviour’. Given it is common ground that the behaviour could reasonably be described in this way, this cannot be an issue of pre-determination.

### *Analysis*

[43] HKR Limited accepted that Mr Rau had expressed views about Mrs McLaughlin being responsible for staff resignations and lack of collegiality in the workplace, with its main response being to question whether there was a meeting on 15 March 2022 and stating that this occurred on 10 March 2022. As noted at paragraph [23] above both Mrs McLaughlin and Mr Rau’s accounts of their meeting on 10 March

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<sup>3</sup> With reference to *Johnson v Chief of the New Zealand Defence Force* [2019] NZEMPC 192.

2022 suggest that it became somewhat heated, with each raising and robustly discussing issues.

[44] Given the nature of the issues raised, I am not persuaded that there was a separate discussion of those issues again on 15 March 2022. Even if there was clear evidence of this, I am also not convinced that this would amount to HKR Limited (through Mr Rau) pre-determining that Mrs McLaughlin was at fault in relation to interpersonal issues at HKR Limited.

[45] The main reason for this is that Mr Rau's views were presented for Mrs McLaughlin as supporting the submission that HKR Limited pre-determined "that Mrs McLaughlin was at fault in relation to the Sandra Archer incident, including by telling Mrs McLaughlin that she was responsible for staff resignations and lack of collegiality". I am not convinced that predetermination on the part of HKR Limited has been established, as Mrs McLaughlin was adamant that it was her decision to apologise and she stated in response to questions from me that "she had vented her frustrations and when she [did] something wrong, she apologise[s]".

*It is not clear that HKR Limited (through the actions of Mr Rau) pre-determined that Mrs McLaughlin was at fault in relation to the Sandra Archer incident*

[46] I consider that Mrs McLaughlin's acknowledgement that her behaviour had been inappropriate and her position that she voluntarily apologised for her behaviour, supports a finding that it is not clear that HKR Limited (through the actions of Mr Rau) had reached a conclusion on Mrs McLaughlin's behaviour. I address the issue of whether Mr Rau had commenced an employment investigation in paragraphs [47] to [57] below, but consider that doing so would also not be sufficient to demonstrate pre-determination. Mrs McLaughlin's claim in relation to this alleged disadvantage is unsuccessful.

**Did HKR Limited breach its duty of good faith by failing to notify Mrs McLaughlin that she was the subject of an employment investigation?**

*Submissions of the parties*

[47] Submissions for Mrs McLaughlin were that Mr Rau met with his HR Advisor on 15 March 2022 and it was reasonable to "infer that the sole purpose of this meeting was to discuss commencing an investigation into Mrs McLaughlin's overall conduct."

[48] Submissions for Mrs McLaughlin were also that:

The duty of good faith requires that an employer to notify an employee that an investigation is about to commence. [sic]

In most cases, it will be appropriate for the employer to compile all the relevant information and ensure everything is in order before inviting an employee to a formal investigation meeting.

However, an employer is still required to notify an employee that he or she is under investigation and that further information will be provided in due course.

[49] Submissions for HKR Limited were that no investigation occurred, with Mr Rau's choice to not do so "within the range of fair and reasonable actions open to the employer ... [due to Mr Rau's] concerns about the impact this could have on [Mrs McLaughlin's emotional state at the time." While it was acknowledged Mr Rau did not follow advice to inform Mrs McLaughlin that he was gathering statements, it was submitted that was because he "thought it might inflame the situation given "Mrs McLaughlin's emotional state on Thursday" and that he was concerned about this.

[50] HKR Limited says, in relation to the contemporaneous notes made by Ms Remfry, Mr McLaren, Mr Walker and Ms Archer about the incidents, that Mr Rau "simply asked these people to write down what they recalled at the time, in case it needed to be referred to later after memories had inevitably faded." HKR Limited also submitted that "undertaking an investigation into conduct matters where reasonable grounds exist to do so, cannot itself amount to an unjustified disadvantage."

### *Analysis*

[51] Part of the information that was provided in the common bundle of documents was an email exchange between Mr Rau and HKR Limited's HR Advisor on 17 and 18 March 2022. Email advice to Mr Rau showed that it was recommended that he tell Mrs McLaughlin that HKR Limited would take statements from witnesses to incidents with Mrs McLaughlin, although he did not tell Mrs McLaughlin that. Mr Rau's actions in doing so were characterised as reflecting his concerns for Mrs McLaughlin's emotional state.

[52] Having reviewed those emails, I consider it is more likely than not that Mr Rau had commenced gathering information and had started an employment investigation by no later than 18 March 2022, and chose to not disclose this to Mrs McLaughlin.

- [53] My reasons for this finding, on the balance of probabilities, are the following:
- a. Both Mr Rau and Ms Remfry are former police officers who described the importance of collecting contemporaneous notes, which Mr Rau said would be notes made as soon as possible after events occurred. Ms Remfry's notes were made on 13 March 2022 and she described the contents of those as being unprompted, however, she could or would not say who had asked her to make those notes. Ms Remfry's notes were the only set that were dated and she acknowledged it was a reasonable inference that she had been asked to make those notes on or before 13 March 2022.
  - b. Mr Rau said he asked for notes to be made at some stage during the week of 14 to 18 March 2022, though was unable to be specific in responses to questions at the investigation meeting about when that occurred. As notes for Mr McLaren, Mr Walker and Ms Archer cover events on 16 March 2022, it is reasonable to infer that those were completed on or after that date. Mr Rau said he intended to "ask [Mrs McLaughlin] for her recollection too but I never got the opportunity to do this as she was too angry when we met on 16 March, and she never returned to work following that."
  - c. An email from Mr Rau to HKR Limited's HR Advisor on 17 March 2022 says "I'm not sure what "stance" I have taken but we can now move to the next stage and after her behaviour in the office yesterday it is probably best for her and the others that she does stay away for a bit." This was in response to Mrs McLaughlin advising she was on stress leave and taking "legal advise [sic] on the stance [Mr Rau] has taken." I consider that this next stage was more likely than not to be conducting an investigation process, despite Mr Rau and submissions for HKR Limited saying that no investigation was commenced.
  - d. On 18 March 2022 Mr Rau again emailed HKR Limited's HR Advisor, referring to the possibility that Mrs McLaughlin may return to work on the following Monday. That email says "Obviously we will need to address the overall behaviours that need to change then, then we would need to address the issue with the inappropriate work behaviour that occurred last week and decide on an outcome." This is the email where Mr Rau says he didn't want to inflame the situation with Mrs

McLaughlin given her emotional state, which refers to not sending an email about a medical certificate which he says can be dealt with if need be.

[54] In relation to the emails from Mr Rau to HKR Limited's HR Advisor I consider that the plain wording of these emails supports a conclusion that an investigation process was underway. While undertaking an investigation may have been reasonable, given Mrs McLaughlin's acknowledgement that there were actions that she should and did apologise for, that is not the complaint here. Rather Mrs McLaughlin's complaint is that HKR Limited did not advise her that it was investigating her actions.

*HKR Limited breached its duty of good faith by failing to notify Mrs McLaughlin that she was the subject of an employment investigation*

[55] I find that HKR Limited's actions were not those of a fair and reasonable employer, in that it did not alert Mrs McLaughlin to the concerns that it had which I consider led to it, at a minimum, undertaking the preliminary steps of gathering information and, more likely than not, having commenced an investigation into her actions. While HKR Limited also did not give Mrs McLaughlin a reasonable opportunity to respond to its concerns and as a consequence did not hear any explanation or comments from Mrs McLaughlin, those procedural shortcomings in HKR Limited's process arise from the failure to alert Mrs McLaughlin to the concerns that it was investigating. In terms of resources available to it, I also note that HKR Limited had received advice on the steps that it should take and chose not to follow that advice. For completeness, I do not consider that the defects in HKR Limited's process in relation to this issue were minor.

[56] I consider that HKR Limited's actions caused an unjustified disadvantage to Mrs McLaughlin by virtue of making her employment less secure than it would otherwise have been. Mr Rau's email of 18 March 2022 indicated that an outcome would need to be decided, which infers a negative impact for Mrs McLaughlin.

[57] Submissions for Mrs McLaughlin were that she only learned of the investigation while on stress leave and that this "made the prospect of returning to work unpalatable and contributed to her decision to resign." The impact of the investigation on Mrs McLaughlin is a matter for remedies, which I return to at paragraphs [82] to [88] below.

**Was HKR Limited required to pay Mrs McLaughlin a quarterly bonus for the period ending 31 March 2022?**

[58] Pay records for Mrs McLaughlin showed that she was paid a quarterly bonus in the last week of each quarter up until December 2021. The amount of three of the four quarterly bonuses paid was the same amount as Mrs McLaughlin claims was due for the end of the March 2022 quarter, being \$1,524.15. The other quarterly bonus paid was \$1,500.

*Submissions of the parties*

[59] Submissions for Mrs McLaughlin were that she was entitled to the payment of the bonus as:

... the bonus structure was contractual in nature. Although there is no mention of a quarterly bonus in Mrs McLaughlin's written employment agreement, it had become a regular and expected part of her remuneration. It took on a contractual flavor.

[60] Submissions for HKR Limited were that the bonus arrangements for Mrs McLaughlin were purely discretionary, with no "record of such an entitlement being offered and agreed." Those submissions also said "The fact that 3 previous quarterly payments and one special bonus payment of a similar value had been made, does not automatically translate it into a contractual entitlement."

[61] It was also submitted that Mrs McLaughlin's assertion of a verbal guarantee that she would receive a bonus regardless of circumstances "is not plausible" and Mr Rau was "clear that both company and individual performance were relevant factors in the decision to pay any bonus, for anyone." HKR Limited therefore says that "In the circumstances, not paying a discretionary bonus was fair and reasonable."

[62] Finally, submissions for HKR Limited were that:

[Mrs McLaughlin] has alleged the bonus was contractual and holiday pay was also due on that basis, for the first time in her submissions. [Mrs McLaughlin] has not however asserted that it ought to have been included in the terms of her employment agreement, as she has with her job title changes. This suggests that she accepted it was not an unwritten contractual entitlement.

*Analysis*

[63] Mrs McLaughlin's evidence was that her bonus arrangements were put in place towards the end of 2020 and she did not have any KPIs for her bonus, in contrast to the project managers. Mr Rau's evidence was that there were informal arrangements for Mrs McLaughlin to receive her bonus, based on factors including her "contribution to

business performance”, overall business performance and her own performance. Reflecting the informality of arrangements, Mrs McLaughlin was also provided with access to a fuel card and this was also not included in her employment agreement.

[64] Mr Rau accepted that payments had been made for the four quarters of 2021, in the last week of the quarter. In terms of non-payment of the bonus for the March 2022 quarter, he said that this was for a number of reasons including “business slowing due to [changes to the Credit Contracts and Consumer Finance Act 2003] coming into effect, [Mrs McLaughlin] had resigned before the end of the quarter, and employment issue there perhaps.”

[65] I consider that it is more likely than not that Mrs McLaughlin’s bonus arrangements had taken on a contractual nature with an expectation of payment, albeit with a lack of documentation. The (broad) consistency of payment amounts and timing of payments support this, with the bonus paid in the last week of each of the four quarters preceding Mrs McLaughlin’s resignation.

[66] While Mrs McLaughlin was on leave during the last week of March 2022, it was accepted by Mr Rau that her resignation was effective on 31 March 2022 and confirmed on 5 April 2022. Mr Rau acknowledged that he had taken advice on whether the bonus needed to be paid, which was likely to have occurred in response to a claim for it to be paid raised shortly after Mrs McLaughlin’s resignation.

[67] I do not accept submissions for HKR Limited that not paying Mrs McLaughlin this bonus was fair and reasonable, in all the circumstances. As Mrs McLaughlin was still employed in the last week of March 2022 (when the bonus should have been assessed and paid), she was entitled to the bonus payment. If HKR Limited considered that the bonus was truly discretionary, then it would have needed to have provided evidence to support this. The references to Mrs McLaughlin’s resignation date, which was accepted to be incorrect, and the “employment issue”, create a strong inference that these were the reasons HKR Limited did not pay Mrs McLaughlin a bonus for that quarter.

*HKR Limited are required to pay Mrs McLaughlin a quarterly bonus for the period ending 31 March 2022*

[68] I find that Mrs McLaughlin was entitled to a quarterly bonus for the quarter ending 31 March 2022, as this bonus had taken on the nature of a contractual entitlement, rather than remaining a truly discretionary matter.

[69] I order that HKR Limited pay Mrs McLaughlin \$1,524.15 for this quarterly bonus, 8% on that amount for holiday pay and interest on those amounts calculated under the Interest on Money Claims Act 2016 from 31 March 2022 until the date of payment.<sup>4</sup>

**Was HKR Limited required to provide Mrs McLaughlin with an updated employment agreement and job description when her role became General Manager?**

[70] The evidence of the parties was that when Mrs McLaughlin's role became General Manager (or became described as such) she was not provided with an updated employment agreement and job description. An email from Mr Rau dated 8 September 2021 described Mrs McLaughlin's role as General Manager, along with welcoming Mr Walker to the HKR Limited team and describing the respective roles of a number of employees and the Directors. Mrs McLaughlin had been consulted about the contents of that email prior to it being sent and replied "That covers everything, thanks."

*Submissions of the parties*

[71] Submissions for Mrs McLaughlin were that she "repeatedly asked for an updated IEA and Job Description", that this was required to be provided under s 65 of the Act and that the failure to do so "contributed to the breakdown of the employment relationship here."

[72] Submissions for HKR Limited were that Mrs McLaughlin's terms and conditions of employment did not change, meaning no update was required under s 64 of the Act, and as position or job title are not mandatory contents of an employment agreement under s 65 of the Act, there was also no breach of s 65 from not updating Mrs McLaughlin's employment agreement to reflect the new job title.

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<sup>4</sup> Interest to be calculated using the civil debt calculator on the Ministry of Justice website: <https://www.justice.govt.nz/finances/civil-debt-interest-calculator/>. As at 16 November 2023, the amount of interest payable was \$101.38 (based on the bonus amount of \$1,524.15 and \$121.93 for holiday pay). The parties will need to determine the amount payable at the date any payments are made.

[73] It was also submitted for HKR Limited that:

[Mrs McLaughlin's] assertion that she chased up paperwork several times is not true, and is implausible given her record of emailing [Mr Rau] with any concerns she had that [Mr Rau] had not resolved verbally.

*Analysis*

[74] Mrs McLaughlin provided an assumed job description as part of her evidence for this matter. When questioned about this at the investigation meeting she said that she had prepared this after she resigned and it had not previously been shared with Mr Rau.

[75] This along with Mrs McLaughlin's response "That covers everything, thanks" to the email sent by Mr Rau on 8 September 2021, which described Mrs McLaughlin's role at that time, supports the view that she was comfortable with her employment agreement or had not turned her mind at that time to whether it needed to be updated.

[76] While Mrs McLaughlin says that she asked for an update of her employment agreement or job description three or four times, Mr Rau was adamant that she had not. Similarly Mr Rau adamantly denied Mrs McLaughlin's claim that she was to prepare a job description for Mr Walker and he would in return prepare an updated job description for her.

[77] Mrs McLaughlin said that she was a stickler for policy and procedures (particularly related to health and safety) and there was evidence provided that she was willing to raise issues that she did not consider had been resolved sufficiently in writing, in relation to health and safety breaches. In this case, she acknowledged that she did not raise in writing a view that she needed an update to her agreement or job description, but was unable to offer any reasons why she did not do so.

[78] I consider it more likely than not that Mrs McLaughlin did not formally raise a request for an updated agreement or job description with Mr Rau, with the inference that she was comfortable operating under the description in Mr Rau's email of 8 September 2021.

[79] This does not fully dispose of this claim however as the question is whether HKR Limited were required to provide Mrs McLaughlin with an updated employment agreement and job description when her role became General Manager. In response to questions at the investigation meeting Mrs McLaughlin said that the description of roles

in Mr Rau's email of 8 September 2021 was too high level, without sufficient detail, and that there was too much overlap between her role and that of Mr Walker.

[80] Even considering this, I am not persuaded that this was a situation where HKR Limited were unambiguously required to provide Mrs McLaughlin with an updated employment agreement and job description. While doing so may have been helpful, it did not appear to be a barrier to Mrs McLaughlin performing her role, at least until the events that led to her resignation.

*HKR Limited were not required to provide Mrs McLaughlin with an updated employment agreement and job description*

[81] I find that HKR Limited were not required to provide Mrs McLaughlin with an updated employment agreement and job description when her role became General Manager, as there is no unambiguous requirement for this in the Act or Mrs McLaughlin's employment agreement. It was also not clear to me that there was a sufficient change to Mrs McLaughlin's responsibilities to imply such a requirement. In light of this finding, I do not need to consider further the penalty sought in relation to this claim.

## **Remedies**

[82] As I have found at paragraphs [55] and [56] above that HKR Limited breached its duty of good faith by failing to notify Mrs McLaughlin that she was the subject of an employment investigation, which amounted to an unjustified disadvantage, Mrs McLaughlin is entitled to consideration of remedies for the impacts of HKR Limited's actions on her.

### *Submissions of the parties*

[83] Submissions for Mrs McLaughlin were that as a result of HKR Limited's actions she "was left feeling undermined, unsupported, and belittled" and that "the nature and degree of harm arising from Mrs McLaughlin's workplace treatment falls near the mid-range level of compensation (Band 2 of *GF v Customs*)."

[84] Submissions for HKR Limited were that Mrs McLaughlin had "not described any impact she experienced as a result of any of the alleged unjustified disadvantages

by themselves”. This followed the observation that Mrs McLaughlin was not claiming constructive dismissal and that:<sup>5</sup>

the impacts she describes in her brief of evidence in relation to her employment ending, were not caused by the actions (or inactions) of the employer causing her to suffer an unjustified disadvantage. The impact of being out of work for an extended period cannot be attributed to the employer by way of remedies for an unjustified disadvantage claim ...

### *Analysis*

[85] Mrs McLaughlin’s evidence was focused on the overall feelings that she had of mistreatment by HKR Limited (and Mr Rau) and did not specifically focus on the impacts of the unjustified disadvantage that I have found she suffered. I accept the submissions for HKR Limited that the impacts of Mrs McLaughlin leaving her employment are separate from the impacts of the actions of HKR Limited related to not advising her that she was the subject of an employment investigation.

[86] Mrs McLaughlin’s witness statement concluded with the following comments on impact:

This time in my life has been extremely stressful and has put pressure on me emotionally and financially. I have gone through periods of depression and anger at the way I have been treated and got through this with the support of my family, not my employer who offered only platitudes. ... This has all caused a significant amount of stress and cost to us.

[87] I am satisfied from Mrs McLaughlin’s evidence that she was impacted by HKR Limited’s actions that form the basis of this disadvantage claim and not just the other claimed disadvantages (that were not successful) or the ending of her employment (which was not pursued at the investigation meeting). I consider, however, that this is a situation where a modest award of compensation is appropriate reflecting the humiliation, loss of dignity and injury to Mrs McLaughlin’s feelings evidenced by her references to stress and “anger at the way [she has] been treated”. These statements are sufficient evidence of impact, notwithstanding the fact that the majority of Mrs McLaughlin’s evidence of impact, both in her witness statement and in person, was

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<sup>5</sup> The last element of this submission referred to *Spotless Facility Services NZ Ltd v Mackay* [2017] NZEMPC 15.

focussed on the impact of other aspects of HKR Limited's actions and leaving her employment.

### *Compensation*

[88] Based on my assessment of impact and a review of other cases<sup>6</sup> where a disadvantage was unjustified, but a dismissal claim was not successful, I consider that an appropriate award of compensation payable to Mrs McLaughlin under s 123(1)(c)(i) of the Act is \$5,000.

### **Contribution**

[89] As I have awarded remedies to Mrs McLaughlin I must now consider whether she contributed to the situation that gave rise to her grievance.<sup>7</sup>

[90] This assessment requires me to determine if she behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.<sup>8</sup>

### *Submissions of the parties*

[91] Submissions for Mrs McLaughlin were that her "conduct was neither causative nor blameworthy to the disadvantage she suffered. This is because [HKR Limited] never raised any formal concerns with Mrs McLaughlin about her conduct or performance."

[92] Submissions from HKR Limited that Mrs McLaughlin contributed to her grievance were focussed on her resignation, concerns about her behaviour in the workplace and the need to be fair to both Ms Archer and Mrs McLaughlin in considering what had happened in relation to the incidents between them.

### *No reduction is warranted to compensation payable*

[93] The submissions provided do not assist me in assessing whether Mrs McLaughlin contributed to the unjustified disadvantage that I have found she suffered. I do not consider, however, that Mrs McLaughlin could be said in any way to have contributed to that action, as the core of the unjustified disadvantage is that she was not

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<sup>6</sup> For example *Johnston v Dacombe Motor Company Ltd* [2023] NZERA 653.

<sup>7</sup> Section 124 of the Act.

<sup>8</sup> Section 124 of the Act.

advised she was the subject of an employment investigation. Accordingly there is no reduction required in respect of the compensation awarded to her.

### **Summary of outcome**

[94] I have found:

- a. HKR Limited did not breach its duty of good faith by failing to properly investigate and respond to Mrs McLaughlin's concerns about the handling of the construction side of HKR Limited's business. Mrs McLaughlin's unjustified disadvantage claim in relation to this breach is unsuccessful;
- b. It is not clear that HKR Limited (through the actions of Mr Rau) pre-determined that Mrs McLaughlin was at fault in relation to the Sandra Archer incident. Mrs McLaughlin's unjustified disadvantage claim in relation to this breach is unsuccessful;
- c. HKR Limited breached its duty of good faith by failing to notify Mrs McLaughlin that she was the subject of an employment investigation. Mrs McLaughlin's unjustified disadvantage claim in relation to this breach is successful. Mrs McLaughlin did not contribute to this unjustified disadvantage claim;
- d. Mrs McLaughlin was entitled to a quarterly bonus for the period ending 31 March 2022, as this bonus had taken on the nature of a contractual entitlement; and
- e. HKR Limited were not required to provide Mrs McLaughlin with an updated employment agreement and job description, meaning I do not need to consider a penalty in relation to that claim.

### **Orders**

[95] For the above reasons I order HKR Limited to pay Christine McLaughlin:

- a. \$1,524.15 for the quarterly bonus for the period ending 31 March 2022, 8% on that amount for holiday pay (being \$121.93) and interest on those amounts calculated under the Interest on Money Claims Act 2016 from 31 March 2022 until the date of payment;<sup>9</sup> and

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<sup>9</sup> Interest to be calculated using the civil debt calculator on the Ministry of Justice website: <https://www.justice.govt.nz/finances/civil-debt-interest-calculator/>. As at 16 November 2023, the amount of interest payable was \$101.38 (based on the bonus amount of \$1,524.15 and \$121.93 for holiday pay). The parties will need to determine the amount payable at the date any payments are made.

b. \$5,000.00 (without deduction) for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

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

[97] If they are not able to do so and an Authority determination on costs is needed, Mrs McLaughlin may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum HKR Limited 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.

[98] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup> As the investigation meeting for this matter took two full days, my preliminary view is that the notional daily rate for two days is the appropriate starting point for a determination of costs.

Shane Kinley  
Member of the Employment Relations Authority

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<sup>10</sup> See <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>.