

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2025] NZERA 126
3262039

BETWEEN ZAINE OLIVE
Applicant

AND McLEAN ANGLING
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Ashleigh Fechny, advocate for the Applicant
Paul Mathews, advocate for the Respondent

Investigation Meeting: 26 November 2024

Submissions received: 3 December 2024 from the Applicant
3 December 2024 from the Respondent

Determination: 3 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Olive was employed by the respondent (MA) as a fabricator in 2021 and then later in a new individual employment agreement (IEA) ‘customer service/ dispatch role’ that still included some fabrication tasks. In about February 2023 the parties agreed that Mr Olive could build up some tasks that could eventuate in a sales role but the proposed IEA reflecting such a role did not eventuate.

[2] The sole director and shareholder of MA is Mr Stephen Patterson. He describes himself as the owner of the business run by MA albeit travelling a lot. MA manufactures and sells fishing equipment.

[3] Mr Olive says his employment ended on 28 June 2023 when he was told to immediately leave the workplace by Mr Patterson and was subsequently paid his final pay and holiday pay. This Mr Olive says was after two informal discussions with Mr Patterson when he raised issues about the way his manager was distracting him from his work and in particular giving him ‘arse slaps’ that he had asked to stop. Mr Olive did not perform further work and get paid for it after the 28 June 2023.

[4] Mr Olive says he was unjustifiably dismissed and disadvantaged unfairly. He seeks compensation, lost wages and costs.

[5] MA has denied all claims including that if there were defects in the procedure they were minor. In written submissions provided by MA after the investigation meeting MA conceded for the first time that Mr Olive had been dismissed on 28 June 2023. This concession was unexpectedly made on MA’s behalf after all the evidence both written and oral from Mr Patterson for MA had included that Mr Olive was suspended on 28 June 2023, that the disciplinary investigation was still ongoing, that MA had sought feedback on its preliminary view that Mr Olive should be dismissed for serious misconduct, that Mr Olive would not participate in further meetings and that Mr Olive’s non participation and his raising of grievances resulted in MA confirming termination on 25 August 2023. MA submits that any remedies should be reduced due to Mr Olive’s contribution to the grievance.

The Authority’s Investigation process

[6] I received timetabled briefs of evidence and attached documentation. I held an investigation meeting at which under oath or affirmation, I asked questions of Mr Olive and his mother Ms Olive; for MA, Mr Patterson and Mr Olive’s manager at the time (the manager). At the investigation meeting, I recalled both Mr Patterson and Mr Olive to answer questions about the new documentation that emerged during the investigation process regarding notes that each provided at the meeting. At the end of the investigation meeting, I timetabled for written submissions to be lodged. This was mainly because of the above referred new evidence provided in the investigation meeting. I then received the written submissions and reserved my determination.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination are:

- a. Was Mr Olive summarily dismissed by MA on 28 June 2023?
- b. If so, was MA justified to dismiss Mr Olive for serious misconduct?
- c. Was Mr Olive unfairly disadvantaged in his employment by MA's actions in relation to the way the employer investigated matters that it eventually says it dismissed him for and the way it dealt with his complaint about how he says his manager was treating him?
- d. Depending on the above what if any compensation, lost wages and costs are to be ordered?
- e. Are any remedies to be reduced due to contribution under s124 of the Act?
- f. What if any costs are owed one to the other?

Was Mr Olive summarily dismissed by MA on 28 June 2023?

Was Mr Olive dismissed on 28 June 2023?

[9] As noted above, MA has, after the investigation meeting, submitted that it did dismiss Mr Olive on 28 June 2023 and that this decision was finalised on 25 August 2023. Mr Patterson in the investigation meeting did not resile from his position that he had not dismissed Mr Olive on 28 June 2023. This was a key dispute of fact based on the prior briefs of written evidence and documentation and then oral evidence. Although new evidence was provided by both parties at the investigation meeting being notes that Mr Olive made on his phone and Mr Patterson made in his diary, the evidence about whether Mr Olive was 'sent away' on 28 June 2023 was not greatly altered by this additional evidence. I will still outline the following and make findings about this first issue having heard the evidence about this dispute.

[10] Dismissal is the termination of employment at the initiative of the employer, an unequivocal act that has been referred to as ‘a sending away’.¹ I will first weigh up what happened leading to the 28 June 2023 and particularly what happened that day and then after this to decide whether there was a sending away by MA on the 28 June 2023. This background also assists me with other issues.

Previous matters raised with Mr Patterson by Mr Olive

[11] Mr Olive says he previously raised issues about his manager’s distracting behaviour with Mr Patterson that included a complaint that his manager would ask him to come over to him and ‘smell his farts’ or that the manager would alert Mr Olive to jokes through phone messaging looking at things on the internet. Mr Olive has provided a message interchange with his manager in November 2022 which I understand he wants me to accept showed that while he joined in and responded to his manager sending him a photo of their female work colleague’s feet (along with the manager’s colloquial comment about masturbation), he then did not respond when the same photo was resent to him by his manager.

[12] Mr Olive could not be sure exactly when he raised the issues about his manager with Mr Patterson but thought it may have been in a discussion likely around February 2023. This was when Mr Patterson discussed with Mr Olive taking on additional duties in his job to move him into what was to be a role still being developed in sales management. This was indicated for finalising in an IEA in ‘April/ May’. Mr Olive’s evidence includes that he was pleased with this agreement to ‘upskill’. This was all documented in a letter to Mr Olive from Mr Patterson that both signed on 8 February 2023. The timing of that letter seems consistent with a discussion held prior. Whether at that stage Mr Olive also discussed issues with Mr Patterson about his manager is less clear although Mr Olive’s evidence is that anything discussed was agreed to be left for the time being. I am satisfied that Mr Olive likely did not show Mr Patterson the above message exchange. I am satisfied Mr Olive likely did not include what was a latter issue raised about his manager giving him unwanted ‘arse slaps’. There is no evidence otherwise as to whether any matters were raised by Mr Olive about distracting conduct

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

towards him by his manager before Mr Patterson returned from a six week overseas work trip and called Mr Olive into his office to talk to him.

27 June 2023 meeting

[13] In terms of the discussion on 27 June 2023 I have nothing to show there was a record of this meeting. I find a likelihood given the small workplace and the likely family type environment that Mr Patterson describes in his evidence that this was an informal type of discussion. Mr Olive says he could see Mr Patterson was tired. Mr Patterson says he was jet lagged. I find a likelihood that both were already aware there had been some problems with product that Mr Olive was asked to dispatch while Mr Patterson was overseas in the northern hemisphere for the six weeks just prior to the 27 June 2023. I find a likelihood that Mr Olive was aware that Mr Patterson was unhappy about this. I find it likely Mr Patterson had already spoken with Mr Olive's manager before this discussion although have no record before me of what this included.

[14] Mr Olive says variously that he opened the discussion on 27 June 2023 by saying that issues with his manager 'still' continued, that he thinks he started reading out his issues from notes he made on his phone (notes latterly provided at the Investigation Meeting), or that Mr Patterson said to him something like 'he knew something was going on with me' and 'I know that's not like you at all.' Mr Olive says his response was to say that he was making 'mistakes' in his work because his manager was 'still dragging me away from my work' through 'distractions'.

[15] Mr Olive in his oral evidence said he thought that Mr Patterson may have stopped him talking about issues with his manager that involved the manager allegedly calling Mr Olive over to 'smell his farts'. Mr Patterson says he took the view that this was not something he was going to discuss and he likely would have stopped the conversation. This seems consistent with Mr Olive's evidence that he recalls Mr Patterson telling him at the end of this meeting to 'mature up'. I find it likely then that Mr Patterson stopped Mr Olive and asked him about matters to do with performance at some point but without any record of what these were. Given the shortness of the meeting I find it likely that there was little detail provided about the performance issues and not the sort of detail that is later reflected and specified in a formal letter coming after this meeting and after the one held the next day after Mr Olive was asked to leave

the premises. While Mr Patterson later says there was a disciplinary process started in this meeting, his explanation to me at the investigation meeting about what he 'put to' Mr Olive about performance concerns was to say that there was some paperwork relating to the product dispatch issues available on his desk and that Mr Olive already knew all about it.

[16] It appears not in dispute that Mr Patterson asked Mr Olive about whether he had issues with his pay in the 27 June 2023 meeting. Mr Olive's evidence is that he told Mr Patterson he found out that someone packing shelves at a supermarket was getting more than him and this felt like a 'kick in the guts because [he] felt [he] was doing more.' Mr Olive then says Mr Patterson said there would be a pay review the following week and Mr Olive thought to himself that this was 'great.' I have nothing further before me about a pay review pending.

[17] Mr Olive also explained in this meeting that he had some physical problems affecting him that affected his performance. He later went home on paid sick leave that day. I accept that Mr Patterson went home to recover from his jet lag.

After the 27 June 2023 meeting

[18] That the above meeting was informal and not disciplinary is consistent with Mr Patterson's message at 4.27 pm that afternoon to Mr Olive:

Hi Zaine, been thinking about our meeting today. Let's meet tomorrow 7.30am to continue. Want to make sure I fully understand the issues, and I'm more awake after earlier in the day after the long haul traveling. Thanks
Steve

[19] Mr Olive's response to the above was:

Hey Steve, yea fair enough sounds good.

[20] I note that the above shows me that Mr Patterson wanted to 'fully understand the issues' and acknowledged he needed to be more awake. There is no mention of this being a disciplinary process or that Mr Olive needed to provide responses to allegations or what they were. If anything, I accept that Mr Olive could have reasonably thought

the 'issues' Mr Patterson wanted to further understand were those that Mr Olive had about his manager interfering in his ability to do his work.

28 June 2023

[21] The next day on 28 June 2023 the further meeting Mr Olive and Mr Patterson had was in two parts. Looking back from what appears to have been the approximate time that Mr Olive was asked by Mr Paterson to leave the workplace at 9.00am, I find that because Mr Patterson went and spoke with four employees before resuming a discussion with Mr Olive, the first part of this meeting must have only been minutes.

[22] Mr Olive says he recalled going into 'more detail' about how his manager's behaviour was impacting him at work and outside of work and causing him to make mistakes and lack motivation in his work. While Mr Olive has said he raised that his manager was giving him unwanted 'arse slaps' on 27 June I find this unlikely. His preparation notes that he says he took to the 27 June 2023 meeting do not include this. I find it likely that he raised this issue on the 28 June 2023 with Mr Patterson. I accept Mr Patterson's evidence that he was 'shocked' by the allegation that this had an alleged sexual connotation. This 'shock' is consistent with what I find was likely Mr Patterson's decision to then go immediately and ask other employees in the workplace about this. Mr Olive says he recalls Mr Patterson saying he would need to go and talk to the other employees 'as part of an investigation' and that before he went to do this he asked Mr Olive if he had been participating in 'bitch sessions' about his pay. Mr Patterson's recall is that Mr Olive said he was not but that he had been 'bitching' to colleagues about his manager's behaviour towards him. Mr Patterson recalls Mr Olive referring to his manager 'being a dick'.

Interviews with staff on 28 June 2023

[23] After the first brief part of the 28 June 2023 meeting it is not disputed that Mr Patterson left and talked to Mr Olive's two male colleagues (I will call them colleagues A and B), the person who worked as an accounts office person, and Mr Olive's manager. As noted above, Mr Patterson has provided handwritten notes from his diary about his 'interviews', notes that he mentioned when I was questioning him about his evidence and I then asked to see. The notes are briefly handwritten as if taken while

talking with a person at the same time as writing except for the 'interview' with Mr Olive's manager which I return to below. The notes for all employees except the manager reflect two issues. Firstly, about whether Mr Olive had 'bitched' about his pay. Second, whether there had been 'touching' which I reasonably conclude related to Mr Olive having raised the 'arse slapping' issue. The notes are light on details, but they are the closest to a record that I have in terms of MA's investigation process. I will consider each of Mr Patterson's 'interviews' below with reference to these notes.

Male colleague A

[24] I understand this person worked in the fabrication area only. This was unlike Mr Olive who also worked in customer dispatch. He is recorded as saying 'no' about whether Mr Olive had 'bitch sessions' about pay, and then later is recorded as being asked to come back at which point he was asked the same question again and 'reluctantly said "yes"' and confirmed that the topic was about "pay and money". This employee is recorded as not seeing anything about 'touching'.

Male colleague B

[25] The notes refer to colleague B saying, 'yes' about whether Mr Olive was having 'bitch sessions' : "yes [it] was about pay, working conditions, money ... that he "would go on about it, told him to stop going on about it." Then in relation to 'touching' this colleague said, 'they all did it, a kick, wack as one of the team went past.' The notes continue that this person was asked 'who is all'. The colleague said Mr Olive, the manager, and himself. This colleague then confirmed 'he' had asked the manager to stop 'but jokey like "Piss off". Not serious or anything. All sort of stopped/ died out by itself.' The notes continue to record that this person was asked if Mr Olive participated, and the answer was, 'yes [Mr Olive] had asked [the manager] to stop. [The colleague] hadn't seen but thought it was all jokey stuff prob not taken seriously.'

Accounts person

[26] Mr Patterson's notes of talking to the accounts person shows they had no information to assist.

The manager

[27] Mr Patterson's notes then record that the manager's 'interview' was 'as per typed write up (attached)'. In other words, there are no handwritten notes as for the other employee interviews above. Mr Patterson says he interviewed this person in his office. I am not satisfied that this was about all of what has been typed up in the notes 'attached.' The typed up notes include considerably more than the topics regarding the other interviews. The manager when giving evidence was asked about these notes. He confirmed that he recorded these after Mr Olive had left the workplace.

[28] Mr Patterson's oral evidence included an explanation that [the manager] when he went to talk to him as part of the above interviews that morning had become so distressed that Mr Olive had said the 'arse slaps' were allegedly sexual that this was a main reason for deciding to have Mr Olive leave the workplace. Mr Patterson says he was concerned because the manager was 'vulnerable'. I find on balance a likelihood that the manager's answers to Mr Patterson before Mr Olive was asked to leave the workplace were minimal given the apparent state the manager was likely in. That said if the typed notes are what Mr Patterson says he relied on in this less than one hour investigation process, then to the extent they refer to answers to the same things Mr Patterson asked of the others (above) the responses were as I set out now.

[29] Of the 'bitch sessions' the manager says that Mr Olive would refer to finding work elsewhere where the pay was better, and that he would 'constantly bad mouth [Mr Patterson], in which I would have your back and then get told by [Mr Olive] that "I'm just up your [Mr Patterson's] ass [sic] or sucking you off". I note here that none of the other interviewee notes refer to Mr Olive having 'bad mouthed' Mr Patterson.

[30] Of the 'smacking on ass [sic]' as the notes record this the manager is recorded as saying:

[Mr Olive] used to do it to [sic], he has done it to me in the past it is just workplace banter.

[31] I pause here to note that the manager's written brief of evidence included that he was responding to Mr Olive's personal grievance in that Mr Olive had claimed the 'arse

slaps' were sexually motivated. He refers to Mr Olive's reference to this being a 'sexual assault'. The manager's brief of evidence then goes on to say that he played rugby for many years and

'that it is not unusual for athletes to slap on the backside. As part of the banter, [colleague B] , Mr Olive and myself used to do it to each other. [Mr Olive] did the same thing to me and [colleague B] on numerous occasions. All of a sudden [Mr Olive] just got fed up with it but because he was joking all the time, and we didn't sit down and have a serious chat, I couldn't gauge if he was serious or not because he was still doing it to [colleague B]. There is no way this was sexual assault. I don't know why he would even write that. It really hurt me and brought me as a person to tears as I really cared about him and valued our friendship'.

[32] The manager's oral evidence volunteered that he thought Mr Olive was making up these claims because he did not like it that the manager was his manager, they having previously been friends in the workplace and outside of it. Mr Olive's oral evidence included that he did not think he had been 'best friends' with the manager as claimed.

After Mr Patterson talked to others on 28 June 2023

[33] Having spoken to the above people, Mr Patterson and Mr Olive then resumed their meeting. It is not in dispute that Mr Patterson told Mr Olive he considered the 'arse slaps' were 'banter', and that Mr Olive was joining in as well; that Mr Patterson considered that Mr Olive had lied to him about not having 'bitch sessions' about pay. It was not in dispute that Mr Patterson told Mr Olive to leave the workplace at that point.

[34] I find it likely that Mr Patterson dismissed Mr Olive after he returned from speaking with others. I find this for the following reasons:

- a. The accounts office person was asked to be in the reconvened meeting on 28 June 2023. That person after this meeting created an electronic pay slip and processed a final pay for Mr Olive which included three references to final pay, two of which were against references to holiday pay. The payslip is dated 28 June 2023 and is produced electronically from a pay role system. I find this strong evidence that MA considered Mr Olive's employment over

when Mr Patterson told him to leave the workplace on 28 June 2023. I do not find the later email from this accounts person on 29 June 2023 to Mr Olive plausible when it says the processing of a final pay was a mistake. I find a likelihood that this person as an employee of MA was asked by Mr Patterson to sit in on the 28 June 2023 meeting, heard what was said and then acted as was their job on the final pay.

- b. I found Mr Patterson's responses under cross examination that the person who completed this payslip would not have understood what they were doing in relation to the reference to final holiday pay to be unreliable. I note further that Mr Olive remained unpaid until MA then wrote a letter terminating his employment on 25 August 2023. Had the final payslip not been an accurate reflection of the situation then I would expect to see MA's reconciled payslip. I do not have one before me.
- c. The manager when he gave evidence had joined the investigation meeting in person without having heard other oral evidence. I give weight to his evidence because of this. As I did with Mr Olive, I found the manager reasonably straight forward. He confirmed that Mr Patterson had told him after Mr Olive was asked to leave the premises that Mr Patterson had immediately dismissed Mr Olive.
- d. Within only a short time after being asked to leave the workplace by Mr Patterson, colleague B, who I reasonably take to have remained in the workplace messaged Mr Olive at 9.13am:

Colleague B: Holy fucking shit/Mannn

Mr Olive: Whats [sic] happened

Colleague B: My jaw is dragging on the ground/We had like a meeting and said everything could have been reconciled but he can't tolerate dishonesty but like fuck that's not that big of a deal/Shittt/[sic] [the manager] looks like been crying to [Mr Patterson]

Mr Olive: By saying no I haven't talked about pay/ Bro you need to get out of there asap

Colleague B: Yea man

- e. I am satisfied that this (close in time) interchange further supports that it was the issue of Mr Patterson considering Mr Olive had 'lied' to him about not

bitching about his pay that is consistent with Mr Olive's evidence of why he was told by Mr Patterson to leave the workplace as the reason MA was ending his employment. It also further supports that there was a meeting, as the manager said occurred, after Mr Olive left at which Mr Patterson told staff about what happened. Colleague B is apparently sending a spontaneous reaction to all of this which is consistent with being shocked about the dismissal. His explanation is also consistent with dismissal being for 'dishonesty' rather than performance issues: 'everything could have been reconciled but he can't tolerate dishonesty issues'. I find it reasonable in the context to accept that 'him' is Mr Patterson.

- f. I note further that Mr Patterson had an opportunity to correct Mr Olive's email at 11.44 am that morning soon after Mr Patterson told Mr Olive to leave the workplace at the earlier approximately 9.00am:

Hey Steve

Would like to start of [sic] with saying I'm absolutely gutted by your quick decision today although its pretty convenient the company is/was going through a restructure due to the massive drop in business. I ask that you could please send within the next 24 hours due to the nature of how today went. My termination of employment and any notes taken during our meetings, as I was not advised it was a disciplinary meeting, so I was unable to have a support person. I intent [sic] to seek legal advice in regard to my unfair dismissal.

Thanks

Zaine.

- g. Mr Patterson did not reply to Mr Olive's request for a termination letter until just on 24 hours later with: 'Hi Zaine, will be getting a letter to you shortly.' I accept the submission for Mr Olive that because Mr Olive had communicated that he thought he had been dismissed and asked for a termination letter, MA through Mr Patterson, did not correct the position that Mr Olive had not been dismissed.
- h. Further the subsequent 'letter' promised by Mr Patterson then on 29 June 2023 sets out in a formal manner three typed pages stating eight specific performance allegations with a preliminary view about these that Mr

Patterson considered Mr Olive had ‘repeatedly and willfully’ not followed reasonable managerial instructions; ‘intentionally not undertaken customer service role duties’ which are stated as having a negative impact on MA’s brand with customers and has had ‘a high potential to be disastrous for the financial health of MA’. This letter came around the same time that the above referred accounts person emailed Mr Olive to say the final pay was a ‘mistake’.

[35] Standing back from the above I find that Mr Olive was dismissed from his employment by an almost immediate sending away by Mr Patterson on 28 June 2023. I will now consider whether MA was justified under s 103A of the Act to have done this.

Was MA justified to dismiss Mr Olive for serious misconduct?

[36] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified within the scope of what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This is an objective test and does not involve the Authority replacing what it thinks the outcome should have been. A range of responses by the employer could be found as justified under the test.²

[37] Under s103A(3) of the Act the following factors are considered to measure an objectively reasonable employer’s fair process leading to a decision to dismiss:

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback

² *Cowen v Idea Services Ltd* [2020] ERNZ 252 at [39]; and recently referenced and explained in *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133 at [14].

[38] In addition to the above, other factors may be considered³ but procedural unfairness alone will not support an unjustified dismissal if they are only minor and did not result in an employee being treated unfairly.⁴

29 June 2023 letter MA to Mr Olive

[39] I find that Mr Patterson's letter sent to Mr Olive on 29 June 2023 to be more of the type that retrospectively attempts to correct a poor disciplinary process. Had that letter been one that set out detailed allegations about performance but asked then for further feedback this may have gone some way to perhaps give Mr Olive an opportunity to choose whether he would engage further, having been dismissed, by taking a further opportunity to explain the allegations. However, the letter did not do that. Rather MA doubled down on setting out that an investigation process had concluded across the 27 and 28 June above, something I find was at best informal brief discussions with employees and a jumping to serious conclusions about Mr Olive's lack of honesty and motivation. Mr Patterson's letter refers to interviewing clients about Mr Olive's alleged performance failures. There is nothing before me to show any of these interviews were put to Mr Olive before the 29 June 2023 letter after Mr Olive had already been dismissed. There is also nothing before me to show how Mr Patterson for MA concluded that Mr Olive's alleged performance failures were linked to the deliberateness or intentional behaviour that formed MA's 'proposal' to dismiss. There is nothing before me to show MA put to Mr Olive the impacts alleged about reputational damage to MA because of alleged performance failures. I find nothing minor about these procedural failures. I find that they were significantly unfair to Mr Olive in terms of his ability to explain his performance and have his explanation of being affected by his manager's alleged conduct more carefully and fairly investigated.

[40] I note further that even if I accept that Mr Olive was not telling the truth when he said 'no' to Mr Patterson's question about whether he had 'bitched' about his pay, it is difficult to see how this on its own would be a matter that a fair and reasonable employer could have concluded meant the employment relationship was at an end. I accept the submission for Mr Olive that employees may well be unhappy with their pay and talk about it.

³ Section 103A (4) of the Act.

⁴ Section 103A (5) of the Act.

[41] I also find that the process towards dismissal was so lacking that the substantive decision to dismiss, now submitted as a loss of trust and confidence breaking down the relationship, cannot be substantively justified. That MA has now sought to have me consider that in any event Mr Olive had done numerous things including making ‘malicious’ accusations against his manager when Colleague B at the very least confirms Mr Olive asked the manager to stop ‘arse slapping’ him and then did not stop, shows that there was some form of reactive bias operating here in the way Mr Patterson acted.

[42] I have been asked to consider that Mr Patterson operates a small business, that he had no human resource support, and that he was jet lagged at the time the events of 29 June unfolded. I do not find this diminishes the unjustified nature of the dismissal based on ‘all the circumstances at the time’. I found Mr Patterson a less than reliable witness in terms of what actions he took and when he took them.

[43] On the other hand, Mr Olive by my observation is young, as is his then manager. Material before me shows me that he and his manager at the very least have likely behaved like immature men during the time they both worked at MA until Mr Olive objected to some of that behaviour. However, MA did nothing to seriously investigate, beyond Mr Patterson jumping to a conclusion that the allegation was malicious, what was a serious allegation by an employee about his manager making physical contact with him after he had asked the manager to stop. Mr Patterson’s own handwritten notes of colleague B show that the manager was asked to stop and this seemed to have been ignored by Mr Patterson whose evidence is that he concluded the manager was so upset that he had to ask Mr Olive to leave the workplace immediately.

[44] I find that Mr Olive was unjustifiably dismissed from MA’s employment on 28 June 2023 both on the basis of procedural failure that was not minor and substantively.

Was Mr Olive unfairly disadvantaged in his employment by MA's actions in relation to the way the employer investigated matters that it eventually says it dismissed him for and the way it dealt with his complaint about how he says his manager was treating him?

[45] I consider that the same events claimed as disadvantage in relation to the disciplinary procedure have already been dealt with above under the head of unjustified dismissal. I will now consider global remedies.

Remedies

Compensation

[46] Mr Olive seeks compensation under s 123(1)(c)(i) of the Act which is for 'humiliation, loss of dignity, and injury to feelings of the employee.'

[47] Mr Olive says that after he was told to leave the workplace on 28 June 2023 'I remember sitting in my car, in a boat load of stress. I had no idea where to go, or what to do. I had seen myself at that job for years to come. I was at a complete loss.' I accept there was a suddenness to the end of Mr Olive's employment. I accept a fellow employee likely came out to see Mr Olive and was told to return to the workplace by Mr Patterson. I find there was a likelihood of humiliation to the way Mr Olive was suddenly ousted from the workplace.

[48] I find the effect of the unjustified dismissal was exacerbated in terms of Mr Olive's likely humiliation by the failure of MA to have properly investigated Mr Olive's serious allegation about his manager's behaviour towards him. Mr Patterson concluded with little or no investigation that Mr Olive had 'malicious intent'.

[49] Mr Olive lived in his mother's house at the time of the dismissal, and she gave plausible evidence that she observed close hand a negative change in the way Mr Olive coped with things after he was dismissed including a loss of confidence in himself and a cessation of socialising and spending time on his hobby. That is the sort of observation that I do not need medical evidence for. While Ms Olive described more serious medical

effects I am not convinced that all of this was related to the dismissal but accept a likelihood the dismissal contributed.

[50] I accept the sickness benefit that Mr Olive then went on due to a lifelong disability was less than what his earnings from MA would have been and this caused him stress because he could not contribute to his household share of expenses.

[51] I do not accept without medical evidence a link between what Ms Olive (and Mr Olive in his personal grievance letter) described as Mr Olive suffering more during this time due to long lasting Covid-19 symptoms inferred as a result of being made to work through lockdown by MA. For the sake of completion MA refutes Mr Olive was 'made to' work during this time as an employee who was asymptomatic working in a bubble with others similarly 'asymptomatic'.

[52] Based on the above I find that Mr Olive is to be paid compensation of \$20,000.00.

Lost wages and reimbursement under s 128 of the Act

[53] It is submitted that Mr Olive should receive lost wages for up to five months post his termination of employment on 28 June 2023 under s 128(3) of the Act.

[54] Mr Olive claims for the '51 days' lost in wages between the end of his employment at MA and the commencement of the next job he obtained commencing on 6 September 2023⁵. I agree that the government sickness benefit that Mr Olive received during this time is not counted as replacing lost earnings as a result of a grievance. If there is to be a reconciling for Mr Olive of past benefits that is a matter for him with whatever agency is involved.⁶

[55] I regard the lost days of wages should be calculated from 28 June to 5 September 2023 (inclusive) being 50 days. I accept the submission that based on calculating 8 hour

⁵ Referenced in the letter of offer from the subsequent employer dated 1 September 2023, annexed at "J" of the Statement of Problem.

⁶ *Judea Tavern v Jesson* [2017] NZEmpC 82; *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57.

days at \$23.50 per hour, the calculation is 50 x \$188.00. This results in lost wages of \$9,400.00 gross.

[56] As above I am satisfied from Ms Olive's evidence that the effect of the dismissal on Mr Olive likely impacted his ability to find further work until he did so. However, without further evidence of what actually went wrong for Mr Olive at the subsequent employment I am not satisfied that a further two months should be awarded based on the 'chain of causation' to the grievance continuing when the subsequent employment did not work out for Mr Olive. Accordingly, I have not exercised my discretion under s 128(3) of the Act to exercise my discretion to award a sum of up to five-months. I find an appropriate award for lost earnings is three months with no deduction due to Mr Olive being on a sickness benefit throughout that time.

[57] It is submitted for MA that I should not consider any lost wages because Mr Olive being on the sickness benefit after he finished his employment meant he was unfit to work. I have no reliable evidence to support this and have not attempted to make assumptions about what support Mr Olive was assessed as needing after his employment ended. I have already found above that I accept Mr Olive had suffered from the effects of the dismissal. His mother's evidence included observation of social withdrawing and a losing of confidence. For a young employee with a disability, I find it plausible that the dismissal affected his confidence to seek further employment for a time.

[58] I order that \$9,400.00 gross in wages is to be reimbursed by MA to Mr Olive for lost wages.

Are any grievance remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?

[59] For MA, I have been asked to consider that Mr Olive have any remedies significantly reduced due to what it is submitted was his blaming of his manager for a long list of performance 'failures'. While employees can sometimes have remedies reduced for the 'extent to which the actions of the employee contributed towards the

situation that gave rise to the grievance⁷ I do not find it is applicable here in the situation where performance issues with the added claims that the employee was deliberate, malicious and intentionally not performing had not been sufficiently investigated to have supported the dismissal for serious misconduct. MA's reliance on these issues to support contribution is inconsistent with situations where contribution can be found but where the employee's contributory actions are not in dispute.⁸

Summary of outcome

[60] McLean Angling Limited is to pay Zaine Olive the following:

- a. Compensation of \$20,000.00 under s 123(1)(c)(i) of the Act.
- b. Lost wages of \$9,400.00 gross under s 123(1)(b) and 128 of the Act.

Costs

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

[62] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Olive may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MA will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

⁷ Employment Relations Act 2000, s 124.

⁸ *Maddigan v Director-General of Conservation* [2019] NZEmpC190.

[63] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

Antoinette Baker
Member of the Employment Relations Authority

⁹ <https://www.era.govt.nz/determinations/awarding-costs-remedies#awarding-and-paying-costs-1>