

Attention is drawn to the order prohibiting publication of certain information in this Determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 616
3143161

BETWEEN TRACY QUINTON-BOUNDY
Applicant

AND WAIMAKARIRI DISTRICT
COUNCIL
Respondent

Member of Authority: Peter van Keulen

Representatives: Kathryn Dalziel, counsel for the Applicant
Penny Shaw, counsel for the Respondent

Investigation Meeting: 24, 25 and 26 May 2022

Submissions Received: 16 June 2022 and 11 July 2022 from the Applicant
4 July 2022 from the Respondent

Date of Determination: 24 November 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tracy Quinton-Boundy worked for Waimakariri District Council (WDC) as the Manager of the Environmental Services Unit (ESU). Ms Quinton-Boundy says that during her employment she was bullied by her manager and her executive assistant and that WDC did not take any steps to stop the bullying.

[2] As a result, Ms Quinton-Boundy resigned from WDC and raised personal grievances for unjustifiable dismissal and unjustified action causing disadvantage.¹

The Authority's investigation

[3] The parties were unable to resolve Ms Quinton-Boundy's personal grievances and she lodged a statement of problem in the Authority based on these grievances and also claiming WDC breached the duty of good faith.

[4] I investigated Ms Quinton-Boundy's claims by receiving written evidence and documents, holding an investigation meeting on 24 – 26 May 2022 and assessing the oral and written submissions of the parties' representatives.

[5] In my investigation meeting, under oath or affirmation, the witnesses who had provided written statements confirmed their statements and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided written submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

[7] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s 174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174D(2) of the Act.

¹ Bullying behaviour toward an employee by a colleague does not give rise to a personal grievance on its own – there is no personal grievance defined in the Employment Relations Act 2000 on the basis of bullying as there is, for example, with sexual or racial harassment in sections 117 and 118 of the Employment Relations Act 2000, but bullying can be the basis for an unjustifiable dismissal grievance or an unjustified action causing disadvantage grievance – see *FGH v RST* [2018] NZEmpC 60.

Identity of two key employees

[8] Ms Quinton-Boundy's manager and her executive assistant did not participate in my investigation and did not provide any evidence. I have made findings about their behaviour and actions based on evidence from other witnesses and some of the documents I have reviewed. This evidence and my findings may reflect badly on each of them and as they have not been able to influence or address those findings, I have decided not to identify them in my determination and to prohibit their names and identities from being published.

[9] Pursuant to clause 10 of the Second Schedule of the Act I prohibit from publication the name and identity of Ms Quinton-Boundy's manager and her executive assistant. I will refer to Ms Quinton-Boundy's manager as RJH and her executive assistant as CPT.

Issues and steps for resolving the employment relationship problem

Unjustifiable dismissal

[10] The first issue for an unjustifiable dismissal grievance is, was the employee dismissed?

[11] Dismissal in this case arises out of a resignation. Ms Quinton-Boundy alleges that her resignation amounts to a dismissal because she resigned in response to breaches of duty by WDC; the breaches of duty arising out of the alleged failings in regard to bullying by RJH and CPT. This is a constructive dismissal.

[12] The relevant case law² shows that for a constructive dismissal I need to be satisfied that:

- (a) There was a breach of duty by WDC.
- (b) The breach of duty was sufficiently serious, that is repudiatory or dismissive, to warrant Ms Quinton-Boundy's resignation.

² *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

(c) It was reasonably foreseeable that Ms Quinton-Boundy might resign in response to the breach.

(d) Ms Quinton-Boundy did resign in response to that breach of duty.

[13] If these things are established and Ms Quinton-Boundy was dismissed I must then consider the second issue; was the dismissal justified?

Unjustified action causing disadvantage

[14] An unjustified disadvantage personal grievance is set out in section 103(1)(b) of the Act; an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[15] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

(a) What does Ms Quinton-Boundy complain of in terms of WDC's actions and did WDC act as alleged?

(b) If so, did the actions cause any disadvantage to Ms Quinton-Boundy's employment or a condition of employment?

(c) If so, were WDC's actions unjustified?

[16] In this case Ms Quinton-Boundy says WDC's actions in relation to the alleged failings by it in regard to bullying by RJH and CPT caused a disadvantage to her employment and these actions by WDC were not justified.

Steps for investigating both personal grievances

[17] What is clear from the issues as set out above is that the allegations about WDC's actions regarding the bullying by RJH and CPT inform both grievances.

[18] So in the first instance I will consider what it is that Ms Quinton-Boundy complains of and whether WDC acted as alleged.

[19] Once I have established what occurred I will then consider whether the events give rise to an unjustifiable dismissal personal grievance (addressing the other issues in paragraph 12) or in the alternative, an unjustified disadvantage personal grievance (addressing the other issues in paragraph 15).

What happened?

Was Ms Quinton-Boundy bullied by RJH and CPT?

[20] There was a large amount of evidence provided by the parties, which I used to investigate the claims. The evidence relating to the alleged behaviour by RJH and CPT included Ms Quinton-Boundy's comprehensive personal grievance letter with an attached chronology, some contemporaneous documents, a report from an independent investigator into RJH and CPT's conduct at WDC which included transcripts from interviews held with staff from WDC, and written and oral evidence from Ms Quinton-Boundy, HR staff at WDC, the Chief Executive from WDC (at the time) and the previous Manager of ESU.

[21] I make the following observations about this evidence:

- (a) Ms Quinton-Boundy's personal grievance letter is very comprehensive and was drafted from contemporaneous notes. It is, in many respects, a remarkable piece of work and was very informative for my investigation.
- (b) WDC did not lead any evidence to directly contradict Ms Quinton-Boundy's account of RJH and CPT's actions. Neither RJH nor CPT gave evidence; WDC HR staff did not conduct any investigation either at the time of the alleged events nor after and could not give any significant evidence about what RJH or CPT did; and likewise, the Chief Executive did not give any direct evidence that contradicted Ms Quinton-Boundy's account of what occurred although he did try to explain some of the conduct in terms of RJH's role and RJH's explanation to him for some of the allegations.
- (c) Much of WDC's written and oral evidence was about how it responded to Ms Quinton-Boundy and much of this evidence supported the allegations Ms Quinton-Boundy was making, i.e., WDC responded in a way that indicated

it accepted much of what Ms Quinton-Boundy said was occurring – although it does say it took a different view of what the behaviour amounted to and what was required by it and Ms Quinton-Boundy in response.

- (d) The independent investigation report and transcripts of interviews support Ms Quinton-Boundy's account of what occurred in respect of RJH and CPT's behaviour.

[22] Based on my review of the evidence I conclude that Ms Quinton-Boundy's personal grievance letter and attached chronology set out a detailed account of RJH and CPT's actions toward Ms Quinton-Boundy and the ESU Team. Rather than set out all of these events in detail I simply record my finding that the facts established in my investigation in terms of RJH and CPT's actions are those set out in Ms Quinton-Boundy's personal grievance letter and attached chronology.

[23] What is more important to set out is the key findings of RJH and CPT's conduct and my assessment and findings on how that that behaviour impacted on Ms Quinton-Boundy because this informs my assessment of whether RJH and CPT bullied Ms Quinton-Boundy:

- (a) RJH was the Regulation Manager at WDC, which was a Level 2 Manager role. RJH managed various regulatory units including ESU.
- (b) ESU dealt with some of the regulatory services within WDC including parking, food and liquor licencing and animal control.
- (c) Ms Quinton-Boundy was the Manager of ESU, which was a Level 3 Manager role and she reported to RJH.
- (d) CPT was the administrator for ESU, which was a Level 4 position and she reported to Ms Quinton-Boundy. CPT had acted on occasion as the Manager of ESU, on a temporary basis, prior to Ms Quinton-Boundy being employed.
- (e) RJH and CPT had a close relationship, working together over a number of years and having a friendship outside of work.

- (f) The relationship between RJH and CPT manifested in regular and extensive meetings at work, often before work and at the end of each working day and they would often have lunch together.
- (g) This relationship created a situation where CPT would speak to RJH about operational matters within the ESU, bypassing Ms Quinton-Boundy in the process: this meant RJH and CPT discussed and acted on work within ESU without recourse to Ms Quinton-Boundy. In essence the two created a situation where CPT reported to RJH rather than Ms Quinton-Boundy and they made decisions about ESU matters without recourse Ms Quinton-Boundy.
- (h) RJH supported and to quite a considerable extent endorsed CPT within ESU for tasks and roles (such as her becoming a liquor licencing inspector) and also spoke negatively of others, making suggestions about their removal from roles and/or tasks. The effect was that RJH undermined Ms Quinton-Boundy and tried to influence her decisions, or even force decision on her, about operational matters within ESU.
- (i) Overall CPT undermined Ms Quinton-Boundy; she would not respond productively to Ms Quinton-Boundy, refusing to do certain things and speaking badly of her to others. CPT could not be managed by Ms Quinton-Boundy because of her attitude to her, her actions and because she was supported by RJH.
- (j) Overall RJH undermined Ms Quinton-Boundy, he obstructed her work, he interfered inappropriately with operational matters particularly with CPT's role in ESU, he tried to influence or coerce Ms Quinton-Boundy into certain actions and he was not supportive of her management.

[24] The question of whether these actions amount to bullying turns on the definition of bullying. The WDC Harassment and Bullying Policy defines bullying as:

Workplace bullying is repeated unreasonable behaviour directed towards a worker or group of workers that can lead to physical or psychological harm.

The repeated behaviour is persistent and can involve a range of actions over time. ...

[25] This definition replicates the definition adopted by WorkSafe New Zealand and is not controversial. At its simplest bullying is about behaviour that:

- (a) Is repeated and unreasonable.
- (b) Is directed at a worker (or group of workers).
- (c) Can lead to physical or psychological harm.

[26] RJH and CPT's behaviour (as summarised above) was:

- (a) Repeated – it was ongoing over a number of months and occurred regularly.
- (b) Unreasonable – the behaviour undermined Ms Quinton-Boundy, prevented her from doing her job, was isolating toward her and/or exclusionary of her in her role, was intimidating and humiliating for her, amounted to a form of positional abuse and applied pressure to her amounting to coercion at times.
- (c) Was directed at Ms Quinton-Boundy – this was so both directly and indirectly; RJH and CPT's actions were at times directly aimed at Ms Quinton-Boundy and other times their relationship and actions indirectly impacted on her, in circumstances where they both knew the effect would be felt by Ms Quinton-Boundy.
- (d) Could and did lead to psychological harm to Ms Quinton-Boundy - she was undermined and lost confidence, became anxious and stressed, was fearful and sad, and withdrew and isolated herself as a result of RJH and CPT's actions.

[27] Ms Quinton-Boundy was bullied by RJH and CPT.

What did WDC do in relation to the bullying?

[28] Ms Quinton-Boundy's evidence, including her personal grievance letter, outlined the numerous discussions she had with WDC, particularly members of the HR team, about RJH

and CPT and the effect of their relationship and actions on her and ESU. WDC's evidence was largely consistent with this in terms of the recollection of frequency and occurrence of the discussions. The difference between the evidence was around the detail Ms Quinton-Boundy gave when describing the behaviour – this becomes key because counsel for WDC says WDC did not know Ms Quinton-Boundy was being bullied and it believed Ms Quinton-Boundy was managing the issues arising for her and her team as a result of RJH and CPT's relationship.

[29] As with the evidence about RJH and CPT's behaviour I find that Ms Quinton-Boundy's personal grievance letter and chronology are an accurate and credible account of her dealings with WDC over RJH and CPT's behaviour. This covers the frequency of discussion, what was discussed about the behaviour and the impact on Ms Quinton-Boundy and ESU and what actions would be taken. I do not accept WDC's account where it differs over what was discussed.

[30] Based on this my key findings are:

- (a) Ms Quinton-Boundy had numerous discussions with WDC HR team members about RJH and CPT's behaviour – this extended from September 2019 through to December 2020. These discussions were a mixture of informal chats in passing or when Ms Quinton-Boundy called into the HR office and a mixture of more formal meetings.
- (b) Ms Quinton-Boundy mentioned to HR aspects of her concerns such as she was feeling harassed by CPT and not supported by RJH, she was stressed and tired of the lies and manipulation, CPT constantly reported to RJH behind her back, that RJH and CPT do what they want to and there is no respect, and that she was being ignored and shut out by RJH and CPT.
- (c) The repeated advice from WDC HR was that Ms Quinton-Boundy should discuss her concerns with RJH and performance manager CPT.

- (d) Ms Quinton-Boundy tried to performance manage CPT, including undertaking a review with a fresh start put in place but the end result was none of Ms Quinton-Boundy's efforts brought about a change in CPT's behaviour.
- (e) WDC HR escalated Ms Quinton-Boundy's concerns, particularly about RJH, to the Chief Executive and he met Ms Quinton-Boundy two times to discuss RJH and CPT. The Chief Executive's notes of these meetings are consistent with Ms Quinton-Boundy's chronology and reveal that she discussed with him her concerns in detail including advising him that she felt undermined, she could not manage CPT as she would always go to RJH and that she did not trust RJH and CPT.
- (f) In the second meeting with Ms Quinton-Boundy on 22 July 2020, the Chief Executive discussed a solution to the issues raised with him. This was to use RJH's pending retirement to broker a discussion about how RJH might move out of his management role, particularly managing ESU and Ms Quinton-Boundy, by moving into a special project role or some other arrangement.
- (g) The Chief Executive had this discussion with RJH as part of RJH's performance review on 22 July 2020.
- (h) Apart from a short follow up with Ms Quinton-Boundy a few days after the second meeting, the Chief Executive did not meet with Ms Quinton-Boundy to see how she was coping or whether anything further was required. The Chief Executive believed the issues had been resolved or would be resolved as RJH was going to move out of his role in due course – it would just take some time for RJH to consider his options and decide what he wished to do.
- (i) In the end RJH resigned on 17 September 2020; RJH worked out a three-month notice period.
- (j) From the end of July 2020 through to 15 December 2020 Ms Quinton-Boundy continued to experience issues with RJH and CPT and she continued to raise her concerns with WDC HR. Ms Quinton-Boundy's chronology records that

she advised HR that RJH and CPT were ignoring her and she was feeling strained and harassed as a result, RJH and CPT's behaviour was no better and the ESU team was waiting for RJH to leave, RJH was undermining and escalating tensions with ESU staff and she had become upset and overwhelmed, and RJH would not stop interfering, undermining and pressuring staff.

(k) On 16 December 2020 Ms Quinton-Boundy resigned.

Unjustifiable dismissal

Breach of duty

[31] The allegation is that because Ms Quinton-Boundy was bullied by RJH and CPT, WDC failed to meet their duty to provide a safe workplace.

[32] The duty to provide a safe workplace is an obligation to take all reasonable practical steps to maintain a safe workplace, a workplace that meets health and safety requirements.³ Reasonably practical steps are steps that are proportionate to the known risk – employers are only obliged to protect employees against a risk of harm that is foreseeable and need only take proportionate steps in light of that foreseeable risk.⁴

[33] So what I must determine is, was the bullying by RJH and CPT foreseeable and if so was WDC's response proportionate to that.

[34] WDC says the bullying by RJH and CPT was not foreseeable; it did not know Ms Quinton-Boundy was being bullied based on what she told it and what it understood was happening. It says further that it treated Ms Quinton-Boundy's concerns as a "conflict of interest", that is a managerial issue in terms of RJH potentially favouring CPT and not being objective about Ms Quinton-Boundy's role and CPT not responding to management from Ms Quinton-Boundy.

³ *FGH v RST* [2018] NZEmpC 60.

⁴ *Attorney-General v Gilbert* [2002] 1 ERNZ 1.

[35] WDC also says, in any event, its response was proportionate to concerns about RJH and CPT's relationship and behaviour. It believed Ms Quinton-Boundy was handling matters, she was capable of dealing with and resolving the issues and gave them reassurances that she was able to do what was required. It also says there was never a formal complaint of bullying so there was never anything further required from it in response to any concerns raised by Ms Quinton-Boundy.

[36] I do not accept WDC's position. I find that the risk of Ms Quinton-Boundy being bullied was foreseeable for two very clear reasons:

- (a) WDC knew about RJH and CPT's relationship and how they operated with ESU work and staff. WDC knew this because of previous incidents with staff including the previous ESU Manager. These incidents also included RJH undermining HR.
- (b) Ms Quinton-Boundy complained about RJH and CPT to HR and the Chief Executive. I have no doubt about how clear the complaints were in terms of the actions and the consequences for Ms Quinton-Boundy and the ESU team. Whether these complaints were formal or informal is irrelevant – the message which resounded again and again was that Ms Quinton-Boundy and her team were being bullied by both RJH and CPT.

[37] That WDC responded to the complaints and the knowledge it had in addition to those complaints by continually expecting Ms Quinton-Boundy to manage her own relationships with RJH and CPT. This was wholly inadequate. It was clear that this was not working and more was required both for Ms Quinton-Boundy and for the ESU team.

[38] In coming to this conclusion about WDC's knowledge and its failure to act appropriately I note two things:

- (a) The honest and frank evidence of some of the WDC witnesses was refreshing and courageous and it reflected well on the individuals but not the organisation. As one witness put it, she had seen a previous manager crushed

by RJH and CPT's actions and was watching that happen again with Ms Quinton-Boundy.

- (b) I am not normally persuaded by demeanour when witnesses are giving evidence but in this investigation meeting four witnesses who gave evidence of their experience of dealing with RJH and CPT either directly or dealing with the consequences of their behaviour, broke down whilst being questioned – over eighteen months after their experiences all of these people were still feeling the emotional and psychological impact of what was a traumatic and distressing time for them.

[39] What this situation required was an independent investigation and then based on the outcome of that investigation appropriate action and WDC knew that. I think WDC chose not to take those steps because there was a view at a higher management level that RJH would not be put through that in light of his long service and pending retirement.

[40] WDC's response to the foreseeable and actual bullying by RJH and CPT was wholly inadequate. It breached the duty it owed to Ms Quinton-Boundy to provide her a safe workplace.

Repudiatory breach

[41] WDC failed to meet their duty to provide a safe workplace and in the circumstances, this was sufficiently serious to warrant Ms Quinton-Boundy resigning in response.

Foreseeable that Ms Quinton-Boundy might resign

[42] In the circumstances it was also foreseeable that Ms Quinton-Boundy would resign in response to WDC's breach. This is particularly so in light of the ongoing failures – if someone continues to complain and the response remains the same and ineffective then at some point resignation becomes inevitable, let alone foreseeable.

Ms Quinton-Boundy resigned in response to WDC's breach

[43] WDC suggest that any issues Ms Quinton-Boundy had were resolved by RJH resigning; so, it follows that Ms Quinton-Boundy actually resigned for other reasons including that she was not promoted to RJH's role and/or Ms Quinton-Boundy's husband wanted her to resign and he pushed her to do it.

[44] During the investigation meeting I considered there was some merit to the position being advanced by WDC – that is I thought that it was possible that if the issues Ms Quinton-Boundy had raised were resolved by RJH's resignation then she could not be said to have resigned in response to the issues. If there was no issue anymore there was no basis for Ms Quinton-Boundy to leave. On reflection though I do not accept this.

[45] First, RJH resigning did not resolve all of the issues arising for Ms Quinton-Boundy out of WDC's breach – he continued to work and bully her up until she resigned, RJH's resignation did not address CPT's bullying and there was no assurance this would stop once RJH left, and RJH resigning did not remedy the fact WDC failed to act before this despite Ms Quinton-Boundy's complaints and there was no assurances it would act differently if bullying occurred again with someone else.

[46] Ms Quinton-Boundy had these concerns and all of this came to a head when RJH and CPT's continued actions in the ESU team appeared to cause a key team member to resign.

[47] Second, Ms Quinton-Boundy expressed her reasons for resigning as being the failure by WDC to act on her complaints in a timely and effective way, being placed in an untenable position due to RJH and CPT's conduct and the impact of their behaviour on her and the ESU team. In a follow up exchange of correspondence with WDC Ms Quinton-Boundy stated that CPT's continued involvement in the ESU team with no action from WDC regarding her behaviour remained an issue for her; she also commented that RJH's resignation and the Chief Executive's approach to the situation had simply swept her concerns under the carpet and the issues had not been addressed.

[48] I am satisfied that Ms Quinton-Boundy resigned because:

- (a) She was bullied by RJH and CPT and WDC did not do enough to protect her from it.

- (b) WDC expecting the ESU team to simply carry on meant there was no accountability and the real issues had not been addressed.

Were WDC actions justified?

[49] WDC's actions that led to Ms Quinton-Boundy resigning were wholly inadequate and not justified.

Conclusion on unjustifiable dismissal

[50] In conclusion WDC unjustifiably dismissed Ms Quinton-Boundy.

Unjustified action causing disadvantage

[51] The unjustified disadvantage personal grievance was claimed as an alternative to the unjustifiable dismissal grievance. As I have found the unjustifiable dismissal claim has been proven I do not need to consider the alternative claim.

Remedies

[52] As Ms Quinton-Boundy has been successful with her personal grievance I may award any of the remedies provided for under s 123 of the Act. Ms Quinton-Boundy seeks compensation and reimbursement.

Compensation

[53] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act

[54] As I have set out before when dealing with compensation, I view my task as being to consider the effects of the dismissal, in this case the breach of duty by WDC and Ms Quinton-Boundy's decision to resign, on Ms Quinton-Boundy. Then I must identify the harm caused to Ms Quinton-Boundy and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss

suffered by those that have been unjustifiably dismissed. Then I must consider where that corresponds to the spectrum of quantum awarded as compensation.⁵

[55] Ms Quinton-Boundy's evidence and evidence from her husband and counsellor, shows that she suffered from the following effects of WDC's unjustified actions (that is, the bullying and the failure to prevent and stop it):

- (a) Physical illness – Ms Quinton-Boundy says this extends to specific medical conditions she has been diagnosed with.
- (b) Headaches, tiredness and sleeplessness.
- (c) Anxiety, stress, fear and sadness.
- (d) Loss of confidence and self-esteem, withdrawal from others and social settings and general tendency to isolate herself.

[56] Many of these effects were ongoing during Ms Quinton-Boundy's employment as the breach by WDC continued. And some of these effects caused her to seek medical assistance including specialist tests for some of the illness she experienced and counselling to deal with psychological impact.

[57] I accept this evidence except in relation to the specific medical conditions – given the timing it may be that these two conditions were caused by WDC's breaches but I need medical evidence to support this conclusion and I do not have that⁶ – I cannot assume there is a diagnosed medical link between the specific conditions Ms Quinton-Boundy has been diagnosed with and WDC's actions.

[58] These effects show that Ms Quinton-Boundy suffered the following harm and losses:

- (a) Humiliation – she was degraded but what occurred and it damaged her status, her self-worth and her confidence.

⁵ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁶ *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132.

- (b) Loss of dignity – she was harmed as her complaints were marginalised or ignored, she was devalued by WDC and treated as less valuable or of less worth than others.
- (c) Injury to feelings – which predominantly manifested in stress, anxiety, fear, and sadness. I am prepared to accept that the impact of WDC’s actions on her feelings (or psychological state) impacted on her physical health, which manifested in some of the illness she experienced, as well as tiredness and sleeplessness; in particular the ongoing stress and anxiety caused her to feel ill and exhausted.

[59] In terms of where Ms Quinton-Boundy’s harm and loss sits on the spectrum of the quantification of loss this is in line with cases where \$25,000.00 has been awarded. In this case however I am satisfied that there is an aggravating effect to the losses Ms Quinton-Boundy suffered by the ongoing nature of the breaches and the severity of the actions. Balancing all of this I conclude that Ms Quinton-Boundy’s loss is quantified at, and therefore compensated by payment of, \$32,000.00.

Reimbursement

[60] Ms Quinton-Boundy also seeks reimbursement for the earnings and KiwiSaver contributions she has lost as a result of her unjustified dismissal.

[61] I am satisfied that Ms Quinton-Boundy is entitled to be reimbursed for lost remuneration; this is because she lost remuneration as a result of WDC’s unjustified dismissal. What follows is that pursuant s 128 of the Act I must award the lesser of three months ordinary time remuneration or Ms Quinton-Boundy’s actual loss. However, if Ms Quinton-Boundy’s actual loss is greater than three months ordinary time remuneration I may exercise my discretion and award an amount up to the actual loss.

[62] Ms Quinton-Boundy was unable to find new employment until 17 August 2021 – 28 weeks after her dismissal. Ms Quinton-Boundy’s actual loss is therefore greater than three month’s ordinary time remuneration.

[63] So, the question becomes whether I should exercise my discretion to award more than three months ordinary time remuneration. In answering this question, I must keep in mind that there is no automatic entitlement to full loss. Ms Quinton-Bundy's actual loss merely represents the upper award. So, I must decide whether I should exercise my discretion to award more than three months ordinary time remuneration and if so how much more, up to the actual loss. In doing this I should recognise that moderation is appropriate, my assessment should be individualised to the circumstances of the case and I must allow for any contingencies that might have resulted in termination of the employee's employment such that they would not have earned the total amount of the claimed loss.⁷

[64] With all of this in mind and undertaking the various assessments in relation to Ms Quinton-Bundy's circumstances I conclude that 20 weeks ordinary time remuneration is the appropriate award for lost remuneration.

[65] As Ms Quinton-Bundy is enrolled in a KiwiSaver fund and was receiving employer contributions on her remuneration she is also entitled to be compensated for that loss for the same period, i.e., Ms Quinton-Bundy is entitled to receive a payment equivalent to the employer KiwiSaver contributions she would have received on 20 weeks ordinary time remuneration.

Contribution

[66] As I have awarded remedies to Ms Quinton-Bundy, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁸ This assessment requires me to determine if Ms Quinton-Bundy behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.⁹

[67] I have reflected on what occurred to Ms Quinton-Bundy and how she acted throughout the events. I am satisfied that Ms Quinton-Bundy did not act in a blameworthy or culpable manner. There was no contributory behaviour from Ms Quinton-Bundy and therefore no reduction in remedies.

⁷ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

⁸ Section 124 of the Act.

⁹ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Breach of duty of good faith

[68] In failing to meet the duty it owed to Ms Quinton-Boundy WDC also failed to meet the duty of good faith set out in s (1A) of the Act.

[69] In doing so WDC is liable to a penalty if I am satisfied that the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship.¹⁰

[70] I am satisfied that the criteria for imposing a penalty has been met – the breach of good faith was deliberate, serious and sustained - and therefore a penalty should be imposed.

[71] Assessing the scope of the breach and the nature of the actions as well as the impact on Ms Quinton-Boundy I assess the penalty to be \$12,000.00 and consider it appropriate that 65% of that be paid to Ms Quinton-Boundy.¹¹

Conclusion

[72] Waimakariri District Council unjustifiably dismissed Tracy Quinton-Boundy. In satisfaction of this personal grievance Waimakariri District Council must pay Tracy Quinton-Boundy, within 28 days of this determination:

- (a) \$32,000.00 without any deductions for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (b) \$47,153.80 pursuant to s 123(1)(b) of the Employment Relations Act 2000.
- (c) \$1,414.60 for the employer KiwiSaver contribution on the lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[73] Within 28 days of the date of this determination, Waimakariri District Council must pay to Tracy Quinton-Boundy the sum of \$7,800.00 as part payment of the penalty imposed.

¹⁰ Section 4(1A) of the Employment Relations Act 2000; and *Maddigan v Director-General of Conservation*

¹¹ Applying s 133A of the Employment Relations Act 2000 and *Maddigan v Director-General of Conservation*, above n7 at [55].

[74] Within 28 days of the date of this determination, Waimakariri District Council must pay to the Authority for transfer to a Crown Bank account the balance of the penalty imposed being \$4,200.00.

Costs

[75] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Quinton-Boundy may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum WDC will 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.

[76] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹²

Peter van Keulen
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.