

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 440
3254079

BETWEEN BRIDGET TRELEAVEN
Applicant

AND MRZW LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Dave Cain, advocate for the Applicant
Lennon Xi, advocate for the Respondent

Investigation Meeting: 23 January 2024 at Christchurch

Last information received: 23 April 2024

Submissions Received: 24 January 2024 from the Applicant
31 January 2024 from the Respondent

Date of Determination: 23 July 2024

DETERMINATION OF THE AUTHORITY

[1] Ms Treleaven was employed by the respondent (M) in its cafes. Mr Mao is M's sole director. Ms Treleaven had some challenging circumstances in her life that required her to take leave. She says things changed for the worse in her employment when she returned from leave, mostly a dispute with Mr Mao and the way she says he was communicating and treating her in relation to the leave she took, the time she was getting to work in the morning and the way he was 'deducting' money for repayments by way of direct deductions from pay or by a reduction of hours worked on payslips. Ms Treleaven also formed the view that others in the workplace knew and had judged her circumstances and actions by Mr Mao and staff made the working atmosphere such that she says she had to resign.

[2] Ms Treleaven communicated she would not return to work and gave the reason as the way she saw she was being treated upon her return to work. Mr Mao responded with issues about lateness and repayment of the loans. The parties held a meeting and agreed the start time would be 7.45am. Ms Treleaven then struggled to get to work on time. She then resigned in writing giving notice. During the notice period Mr Mao communicated concerns about continued lateness for work and then after this summarily dismissed Ms Treleaven 6 days short of the end of her nominated notice period.

[3] Ms Treleaven seeks compensation, lost earnings including issues relating to alleged unconsented deductions from pay, various penalties, interest, and costs.

[4] M denies the claims. M says he did everything to help Ms Treleaven in her personal circumstances by lending her money to help her out when she asked for it. M denies any fault in the process or reason for the dismissal for lateness. In relation to the claims about deductions from pay, Mr Mao says he corrected this once he understood an employer's obligations about deductions.

The Authority's investigation

[5] I held an investigation meeting. On oath or affirmation, I heard from Ms Treleaven, her sister, and her mother; for M from Mr Mao. Representatives had the opportunity to ask questions of all witnesses. Written submissions were received after the investigation meeting from the representatives.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I do not record all the evidence and submissions. I set out my findings, express conclusions and make orders, all as necessary to dispose of the matter.

Issues

[7] The issues for me to determine are:

- (a) Has Ms Treleaven shown that she was constructively dismissed?
- (b) Was Ms Treleaven disadvantaged in her employment by the unfair actions of M?

- (c) Or did M unjustifiably dismiss Ms Treleaven directly?
- (d) Depending on the above what if any remedies are to be awarded for:
 - i. compensation under s123(1)(c)(i) of the Act 2000 for ‘humiliation, loss of dignity, and injury to the feelings of the employee’
 - ii. unpaid wages under s 128 of the Act?
- (e) Is Ms Treleaven to have remedies reduced because of any contribution towards her grievances under s 124 of the Act?
- (f) Has M breached the Wages Protection Act 1983 by deducting from Ms Treleaven’s wages without her consent? If so what if any money is M to repay?
- (g) Should penalties be awarded against M for the following:
 - i. breach of good faith under s 4 of the Act
 - ii. breach of failure to provide time and wage records under s 130 of the Act
 - iii. breach of s 134 (1) of the Act in that M breached the individual employment agreement to provide Ms Treleaven with notice
 - iv. breach of s 4 of the Wages Protection Act 1983?
- (h) Should any or all of any penalty awarded be paid to Ms Treleaven?
- (i) Should either party pay a contribution towards the costs of the other?

Has Ms Treleaven shown that she was constructively dismissed?

[8] When an employee resigns but the resignation was in fact the result of some something the employer did that effectively caused the employee to resign this may be considered a constructive dismissal.

[9] There can be three situations where a constructive dismissal may occur:

- Where the employee is given a choice of resignation or dismissal
- Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign
- Where a breach of duty by the employer leads a worker to resign.¹

¹ Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

[10] It is submitted for Ms Treleaven that Mr Mao either followed a course of conduct after she returned from her leave which led her to resign and or that through his actions M breached its duty of good faith to her not to remain active and constructive in his communications in order to maintain a ‘productive employment relationship’.² M only gave submissions addressing that it was justified in summarily dismissing Ms Treleaven.

[11] The Court of Appeal has said that to find a constructive dismissal it is also necessary to find that any breach of duty was serious enough that a substantial risk of resignation was *reasonably foreseeable* to the employer.

[12] I need to firstly consider when Ms Treleaven resigned.

Did Ms Treleaven resign on 15 June 2023?

[13] Ms Treleaven started back from her special leave on 12 June 2023. I accept she had been through a very difficult time (the reason for the leave) and this was well known to Mr Mao. Sometime towards the end of her shift on 12 June 2023 Ms Treleaven and Mr Mao had a verbal exchange about her start times. Ms Treleaven’s recall is that the exchange was about ten minutes and spilled over to be outside. She says she was concerned she was rostered to start at 7.30am because her child’s preschool did not open until 7.30am. Ms Trevealen says she told Mr Mao that and that it was always known. She indicated that she could be entitled to request flexibility for two months after the leave she had just taken. She says Mr Mao reacted negatively to this and was ‘aggressive’ and ‘yelled’. He denies this behaviour but recalls something about ‘flexibility’ in the discussion and a discussion about the start time. It is common ground that Ms Treleaven did not follow the statutory process to request flexibility.

[14] The above interchange was not recorded and there have been no witnesses provided.

[15] I find the closest to a ‘soon after’ recall of what was said is Ms Treleaven’s record of her reasons for not returning to work that she communicated to Mr Mao on 15 June 2023 when telling him she would not return to work:

I won’t be returning back at work. It’s become a very uncomfortable place to work at and I don’t find it comfortable with the things you’ve said to me about my personal life regarding my [child] and expecting

² Employment Relations Act 2000, s 4(1A)(b).

my family to do so much for your business. You told me the workplace isn't suitable any more as the hours. [sic] you put me in a horrible position saying there isn't hours for me and too [sic] hand in my two weeks [sic] notice I didn't want to and then you continued to put it back onto me as it was my fault. As I was on [special] leave there is a 2 month flexibility period as I mentioned to you since I have come back to work making it hard for me I'm getting legal advice before I take this further.

[16] Mr Mao denies that he was 'hostile' in the above discussion but recalls some discussion about 'flexibility' and about the start time. M's position is that Ms Treleaven did not follow any request in the Act to ask for flexibility and that (variously) a 7.30am start had always been in place, or that this was now something Ms Mao required for 'business reasons.' While M says it raised issue with Ms Trevealen's start times 'numerous' times before there is no evidence of this before me other than Mr Mao saying this. I find that Ms Treleaven had usually started a morning shift at 7.45am. The time records provide support for this.

[17] Ms Treleaven did not come to work the next day, Tuesday 13 June 2023 nor did she come to work on the Thursday that week.

[18] On 13 June 2023 between 9.27am and 9.36 am Mr Mao sent three messages to Ms Treleaven asking her where she was because she was to start at 7.30am, asking, 'Are you [Okay Emoji]?', and asking, 'Are you still going to work?'

[19] I have nothing before me to show that Ms Treleaven messaged back until 12.37pm on Thursday 15 June 2023 with the message set out above at [15].

[20] Mr Mao responded by email to the above at 4.11pm on 15 June 2023 by including that he was disappointed to receive her 'unpleasant' text 'which states untrue story'; that Ms Treleaven did not show up for work on the Tuesday 13 June 2023 and there needed to be a 'two way constructive communication to resolve the matter.' He then referred to her not getting to work by 7.30 am 'due to your personal circumstances' and that 'we have repeatedly told you our expectation in the past and this has put extra burden on other staff.' Mr Mao denied in the email that he had referred to Ms Treleaven's family or that he put her in a 'horrible' situation by saying that the workplace did not suit her anymore. Mr Mao then goes on to include details of the loans he has provided to her and that as a

matter of 'good faith' he wanted them to meet to 'discuss' 'your employment issue with us and the loan the company has advanced you.' The letter finished with telling Ms Treleaven she was welcome to bring a support person to the meeting and that she needed to respond about her attendance by the following day. There was no mention in Mr Mao's response of Ms Treleaven saying she would not be returning to work again. The meeting then occurred on 19 June 2023.

[21] There were likely further exchanges in messaging after the above including a dispute about the amount Mr Mao claimed was owed for the loan balance, whether there was consent for deductions from Ms Treleaven's pay to reduce the loan balance; and Ms Treleaven asking for documentation showing how Mr Mao had reduced the hours he paid her to recover loan repayments. On 16 June 2023 Ms Treleaven sent a message saying she did not give consent to further deductions from her pay. Before me is a text dated 15 May 2023 (around the time of the loans taken) that confirms at that time Ms Treleaven agreed to deductions of \$100 per week from her pay.

[22] While there is a lack of apparent immediate response from Mr Mao to what appears to have been Ms Treleaven's 'resignation' on 15 June 2023 when she communicated 'I won't be returning back at work ...', this appears to have been what both parties understood had occurred later. The transcript and record of the meeting then held on 19 June 2023 that I will return to below contains a number of references towards the end of the discussion about final pay including holiday entitlements such as alternate days remaining to be paid out. Further there was an email at 5.29pm that day after the 19 June meeting where Mr Mao emailed what appeared to be a reflection of the morning's meeting. Again, I will return to this below but for now note that communication ends with:

From our meeting today, we noticed you have no real intention to sign [I reasonably presume 'resign'] and MRZW Ltd has no intention to dismiss you from your current position. Therefore, the txt from you at 4.40pm 18 June 2023 stating you are signing [again I reasonably presume 'resigning'] from this position is invalid and not accepted. Should you change your mind or have other concerns, please let us know.

Regards

Jimmy [Mr Mao].

[23] There was no conversation that directly referenced that Ms Treleaven had retracted her resignation during the 19 June meeting. This apparent refusal to accept Ms Treleaven's resignation refers to a 'text' that is not the one Ms Treleaven sent on 15 June 2023 referred to above. I have no message before me about a further communication of resignation before the 19 June 2023 meeting that is referred to here by Mr Mao as on the 18 June 2023. The parties were asked to provide all communications. I decided when considering this that I would not seek this further information because what it shows me is that M had received a resignation from Ms Treleaven either on 15 June 2023 or on 18 June 2023. Either way the meeting on the 19 June discussion included enough references to final pay and entitlements to indicate this was at least at that stage what was accepted as the status of the employment, albeit not the main focus of the meeting.

[24] I accept therefore that Ms Treleaven communicated her resignation before the 19 June 2023 meeting. It was not then for M to reject the resignation³. An employer cannot make an employee remain working. This appears to have been a unilateral assumption by Mr Mao for M. Even if I account for his English communication not being a first language for him he was throughout being advised and represented or had access to the same.

What is the status of the 26 June resignation?

[25] Ms Treleaven resigned 'again' in a written communication on 26 June 2023 which says it was her 'formal resignation' giving what she referred to as two weeks' notice but then counting this as beyond two weeks to 13 July 2023. I find a likelihood that this confirmed Ms Treleaven's earlier resignation(s) or if Ms Treleaven had some second thoughts in the way she had engaged through her support person at the 19 June 2023 meeting about hours, days and weekly hours going forward, I accept her evidence that she felt nothing changed about her concerns in the workplace (as expressed in her 15 June communication about not working there anymore). The 19 June 2023 transcript includes only a brief reference to the concerns raised by Ms Treleaven. This was attempted to be raised by Ms Jackson as her support person in the meeting after Mr Xi raised a 'second issue' for discussion which was that Ms Treleaven 'walked away' from the workplace. It is unclear to me what this was about and there is no record of the employer raising this previously. However, Ms Jackson reacts to this by saying that it is no wonder her sister

³ *Mikes Transport Warehouse Ltd v Vermeulen* [2021] NZEmpC 197 at [37], Inglis CJ.

did this when she was being talked to in the way Mr Mao talked to her. Mr Xi challenged the 'politeness' of this and then continued to the subject of the loan repayments which was a major point of discussion in the 19 June meeting. In other words, little was addressed in relation to Ms Treleaven's concerns raised in her 15 June 2023 email. Mr Mao's oral evidence in the investigation meeting was to repeat his assertion that what Ms Treleaven said in that communication was 'fake' and that he simply ignored it.

[26] Standing back from the above I find that Ms Treleaven resigned on the 26 June 2023 reiterating her earlier resignation albeit giving a renewed notice period. I have nothing to show that M acknowledged her resignation but find it likely it was sent and received. I have instead before me Mr Mao's two communications after this. The first on the 30 June 2023 stating Ms Treleaven was late twice and absent without explanation twice since the 19 June 2023 meeting and that Ms Treleaven was to provide a 'performance improvement plan' by the following day noting that a further 'breach' would result in dismissal. The second was on 4 July 2023, briefly communicating that for continued noncompliance Ms Treleaven was summarily dismissed without giving any further specifics.

What caused the resignation?

[27] Ms Treleaven, gives as her reasons for resigning what happened at the 12 June discussion; hours of work being reduced on her payslips to satisfy her loan debt; others in the workplace talking about her personal circumstances; Mr Mao continuing to tell her she should resign beyond just in the 12 June meeting if she can't get to work on time (7.30am starts), and him being aggressive in these comments and generally how he talked to her. I am satisfied that a combination of the above things likely caused Ms Treleaven to resign.

12 June 2023

[28] I have set out above the circumstances of this exchange. While Mr Mao disputes he was aggressive or that he told Ms Treleaven to resign if she could not get to work by 7.30am, I find the following cumulatively supports behaviours by Mr Mao that supports Ms Treleaven's evidence of how Mr Mao talked to her at this meeting including that he told her if she could not meet the 7.30am start time she would have to resign.

- a. Ms Treleaven's setting out of her recall soon after (15 June 2023 communication set out above);
- b. Mr Mao continuing to produce in his evidence a social media post that I can only understand is presented to discredit Ms Trevealen in these proceedings. M granted that leave and I am satisfied there were serious circumstances for it, supported by Ms Gaynor's straightforward evidence. I find Mr Mao's approach here is consistent with some sort of impatience he developed towards Ms Treleaven that is consistent with her evidence about how the 12 June meeting went.
- c. A review of the transcript of the meeting that was subsequently held on 19 June shows that Mr Mao was inconsistent about his reasons for insisting on a 7.30am start (part of the 12 June exchange) either (saying through Mr Xi) it was a new business need or that Ms Treleaven had to do this under her IEA. Either way the communication in the meeting reflected a chaotic approach to communicating with Ms Treleaven and the time records shown an almost consistent pattern of starting at 7.45am. Ms Jackson, Ms Treleaven's sister, was straight forward and plausible in her evidence about the 19 June 2023 meeting. Her oral evidence includes that Mr Mao's body language included him pushing back in his chair when he disagreed with things during the meeting and saying "no,no,no". Her evidence is that she felt horrified at the behaviour because she knew what Ms Treleaven had gone through recently as did Mr Mao and yet she was being in her view subjected to aggressive behaviour from her employer.
- d. Ms Treleaven's mother, Ms Gayton provided written evidence that gave her view (based on times she brought Ms Treleaven's child back to her at the café) that Mr Mao did not talk to other staff well and she observed this as 'rude and disrespectful'. While she did accept when pressed that she may have overstated her description of this in her written evidence her impression was he was 'stern'. Ms Gayton also explained that while she provided written evidence to say that [Mr Mao's] behaviour towards Ms Treleaven was 'horrible' she understood this not from observation but from one of the staff who worked with Ms Treleaven who told her this directly. I have not heard from that person but understand they became friends with Ms Treleaven outside of the employment. I found Ms Gaynor's evidence that of a mother

concerned given the context of what had happened for Ms Treleaven. Overall, I found her evidence plausible.

- e. My own observation of Mr Mao when answering questions at the investigation meeting was that he was impatient and did not appreciate being at the meeting.

[29] Standing back from the above I accept Ms Treleaven's evidence that the way the 12 June exchange occurred on her first day back was a reason she resigned.

Hours of work being reduced on her payslips to satisfy her loan debt

[30] I find a likelihood given the communications before me from the time that Ms Treleaven first asked Mr Mao for money to help her out and he obviously agreed to arrange this that the parties each did nothing to confirm how these loans would work or be enforced about repayments. If they did then it is likely this was done through poor communication (based on what messaging I do have) or verbally.

[31] For Ms Treleaven I am asked to consider that while M submits that the loans had nothing to do with the employment relationship, and that while Mr Xi for M in the 19 June 2023 meeting referred to issues about deductions from pay or hours as just a 'minor issue', these things seriously impacted on Ms Treleaven because she did not know how Mr Mao was deducting her repayments and as raised in the 19 June meeting by Ms Jackson, it appeared he was taking away hours of work recorded through payslips to do this. I agree that this was likely occurring. There is reference on payslips to a side record of what was being accounted for this way. I do not agree with M's position that this was a 'minor' issue for an employer. I agree that this issue was likely impacting on Ms Treleaven adversely and M's not providing clear information about how these hours were reduced or the extent of this after the 19 June meeting as requested by Ms Jackson likely contributed to Ms Treleaven's reason to reiterate her resignation on 26 June 2023.

Others in the workplace talking about her personal circumstances

[32] Ms Treleaven says that the atmosphere in the workplace had become uncomfortable when she returned from her leave. She thought others were talking about her in mandarin. I have no way of assessing whether this was correct. However, while Mr Mao refutes that others were told about Ms Treleaven's special circumstances I find a likelihood that Mr Mao did not manage this situation as a fair and reasonable employer could have done. I have found above that the continued presentation of a social media

post in these proceedings to discredit Ms Trevealen supports the attitude Mr Mao had towards Ms Treleaven's situation. Mr Mao had explained that this post was given to him by someone else in the workplace. I find this lends support to Ms Trevealen's sense that others in the workplace were not supportive of her and that this likely contributed to her deciding to leave the workplace.

Mr Mao continuing to tell Ms Treleaven she should resign beyond just what was said in the 12 June meeting if she can't get to work on time (7.30am starts), and Mr Mao being aggressive generally towards Ms Treleaven.

[33] While this evidence is generalised, I look here to the manner in which Mr Mao has communicated back to Ms Treleaven when she first indicated she would not return to work on 15 June, and then again her formal resignation letter on 26 June. While I might consider Mr Mao communicated on 15 June 2023 to Ms Treleaven that he offered to discuss her 'employment issues' in a face-to-face meeting (as well as the loan repayments), the meeting that resulted on 19 June 2023 did not in fact deal with the issues raised by Ms Treleaven when saying she wasn't coming back. I find a likelihood that Ms Mao was only communicating the issue he had with her coming late to work in the invite to a meeting. This is because it was described as the reason for the meeting by Mr Xi at the meeting. Mr Mao also gave oral evidence that Ms Treleaven's claims in the 15 June 2023 communication about the way things were for her in the workplace were 'fake' and that he ignored them. This was his explanation for not dealing with these things in the 19 June meeting. This shows me that despite saying M was wanting to deal with Mr Treleaven in 'good faith' the reality was different. I might consider then Mr Mao's explanation to me that there may be miscommunication. However, M remained represented and able to access that representation and advice throughout.

[34] Standing back from the above I find all of the above indicates that M was not acting in the way it was obliged to do in terms of actively and constructively communicating to maintain a productive employment relationship. Ms Treleaven was a long term employee and by all accounts up until things has taken a turn for the worse in her personal life, had a good working relationship with M and Mr Mao.

[35] I find that M breached its duty of good faith towards Ms Treleaven and this caused her to resign from her employment.

Was the breach serious enough that it was foreseeable that Ms Trevealen would resign?

[36] I find that it was foreseeable that the above behaviour was serious enough that Mr Mao for M ought to have foreseen Ms Treleaven would resign due to the cumulative progression of breach of good faith from when Ms Treleaven started back from her special leave. I accept the submission that this was particularly so given Ms Treleaven's vulnerability that was well known to the employer at the time.

[37] I find further support for my finding in Mr Maos's curious reactions to both communications from Ms Treleaven that she wanted out of the workplace. The first was to invite her to meet but then not address the concerns she had expressed because they were 'fake' and then to later deny her resignation. The second was to apparently ignore her resignation and purport to quickly dismiss her based on a process where she was not given any form of opportunity to participate including a response to a finding of 'fraud' in relation to a claim that she altered her time sheet. This is not the way a fair and reasonable employer could have acted in all the circumstances at the time, circumstances that involved having access to representation and advice.

[38] Having considered that Ms Treleaven was constructively dismissed, I find this was not justified. I note here for the sake of completion that had I then to consider whether M was justified in its decision to summarily dismiss that occurred during the notice period I would also not have found it was justified. As noted above the process did not include Ms Trevealen in a clear opportunity to give feedback on particularly an allegation of 'fraud', and the substance of the claims that she had been late to work and or absent were not fully put to her before making a decision that summarily dismissed her. In any event it is a one or the other here and I have found that Ms Treleaven was constructively dismissed. I make a further finding that the dismissal was not justified based on the above.

Was Ms Treleaven disadvantaged in her employment by the unfair actions of M?

[39] I consider that the claim for constructive dismissal and my findings under that covers the same evidence submitted under this heading. I have not then considered this part of Ms Treleaven's claims further.

Depending on the above what if any remedies are available to Ms Treleaven?

Compensation under s123(1)(c)(i) of the Act 2000 for ‘humiliation, loss of dignity, and injury to the feelings of the employee’

[40] I accept Ms Treleaven’s evidence that the end of her employment was not something she wanted to occur. I find she had tried to organise working hours with Mr Mao and standing back from it was met with a level of negativity towards her that included a veiled ‘suspicion’ that she was not genuine in the circumstances that led to her special leave. I find this likely meant she felt humiliated at the very least. I accept the evidence from both Ms Gayton and Ms Jackson that they both made observations about the emotional impact on Ms Treleaven and the flow on to her family life. However, I am not wholly satisfied that all of this impact was connected to the end of Ms Treleaven’s employment. I find that an appropriate compensatory award is \$15,000.00.

Unpaid wages under s 128 of the Act

[41] For Ms Treleaven it is submitted that she ought to be paid for three months of lost wages from the end of her employment. Mr Treleaven’s evidence is that despite looking for other hospitality jobs, an area of work I accept she had worked in and enjoyed for approximately four years with M, she felt impeded by the fact that M had summarily dismissed her. I accept that this likely meant that Mr Mao would not give her a positive reference. I accept this was likely a real impediment to mitigating her loss of earnings. She decided then to study, and I accept her evidence that she is unlikely to have done this had her employment ended with M in the way it did.

[42] I find that it is appropriate to award three months of lost wages to Ms Treleaven based on the weekly hours she may likely have worked at 26 hours per week, \$25.00 per hour x 12 weeks. This is a total of \$7,800.00 gross.

Is Ms Treleaven to have grievance remedies reduced because of any contribution towards her grievances under s 124 of the Act?

[43] Ms Treleaven by her own admission accepts she remained in debt to Mr Mao for a sizeable sum at the end of her employment. This was not a situation were that debt connected to costs within her employment relating to costs for example of getting the employment or study costs commenting to the employment. This was debt that

communications in messages shows me was the result of Ms Trevealen asking Mr Mao to assist her more than once financially. I accept he did this with good intentions at the time. When it became apparent the money was not being repaid it seems likely he inadvisably without good reasons as an employer used the mechanism of Ms Treleaven's employment to get the loans repaid. To some extent there is messaging to show Ms Treleaven agreed to this at one point but later then revoked that agreement or simply had no information about how the 'deductions from her hours of work' were happening. In terms then of how the grievance has occurred I am not satisfied that I should reduce the remedies for Ms Trevealen's contribution. She will in any event likely face other civil debt enforcement if she does not make good the money she owes.

Has M breached the Wages Protection Act 1983 by deducting from Ms Treleaven's wages without her consent? If so what if any money is M to repay?

[44] Mr Mao says that after he made deductions from Ms Treleaven's pay to satisfy loans she had to repay, he came to understand that he could not do this and says he has paid these amounts back. However, the way he made these deductions appeared to have been by altering hours or leave paid or due to Ms Treleaven. After the meeting on 19 June 2023, it seems he then paid back the calculated \$350.00 he said he had previously deducted by paying Ms Treleaven extra hours than what she worked in the pay

[45] Looking at the time record and payslip that M has provided, I make the following observations and findings:

- a. Ms Treleaven is recorded as having worked 25.20 hours for the relevant week;
- b. Mr Mao confirmed he used a percentage type of recording of time which I take it means that the hours Ms Treleaven worked that relevant week were 25 hours and 50 minutes. I round hours to 26 hours and not '25.20'. worked. This means that by paying Ms Treleaven 39 hours, M 'paid' her an extra 13 hours and not the 14 hours claimed.
- c. M taxed the 39 hours paid in this relevant week. This means that the portion of 'extra' hours that Mr Mao says were paid to refund the \$350.00 of total deductions were also taxed. Even if I am wrong about the 13 hours rather than 14 hours 'paid back', Mr Mao cannot say he paid back \$350.00. The figure is likely less than

this. Giving the benefit of my doubt and taking 14 hours as the 'extra' hours paid at \$25.00, in reality M has paid 14 hours x \$25.00 per hour x (approximately) 18% tax being likely approximately \$287.00.

- d. This exercise has taken time to understand and unravel and while it relates to only \$63.00 not actually paid, this evidence together with the difficult to follow the way the parties engaged in the 19 June 2023 meeting about deductions, supports Ms Treleaven's claim that she was confused about how Mr Mao was recouping the loan money from her.
- e. On the other hand, Ms Treleaven says that she agreed to pay back the loans at \$100.00 per week at an earlier stage (15 May 2023). She described this as separate payment to M once she was paid in full for what she worked. If this was the case it has been pointed out for M that Ms Treleaven's text message also includes that 'take \$100.00 per week from my pay.'
- f. Standing back from the above I find that doing my best analysing the somewhat scatter scattered evidence provided, there is a likelihood that there is still \$63.00 net to be still repaid from deductions that M decided to repay to Ms Treleaven to avoid being in breach of non-consented deductions. This is now to be repaid as a deduction that was likely not consented to as required under s 5 of the Wages Protection Act 1983.
- g. Ms Treleaven by her own admission still accepts she owes money to M and another company of which Mr Mao is the director. I understand her evidence and that of her witnesses supports that the loans were made in good faith by Mr Mao to assist her. M has provided transaction evidence to show these loans were in four separate amounts for a significant amount. This was not the typical type of situation where an employer deducts for loans that relate to employment costs or recruitment costs, or some form of on-site live-in arrangement at a workplace. I accept Mr Mao's own evidence that he had his heart in the right place about lending Mr Treleaven money when she asked for it to help her out. However, he has been his own worst enemy by not seeking reliable advice about what he was doing or if he did then perhaps he has not listened to that advice. My comment is supported by my observations of Mr Mao's manner in giving his evidence. AS I noted above he had little patience and was somewhat reactive. I find this appeared to be the way he behaved even if he felt impeded by English not being his first language.

- h. I recommend Mr Mao for M takes care to listen to any reliable employment advice in the future so that he avoids making such a mess about the way he may enter agreements with employees who ask to borrow money from him or his company. This part of the dispute is likely to have been avoided if what was agreed to was carefully documented in a way that was understood by both parties.

Penalties

[46] Ms Treleaven claims various penalties for breaches of contract and statute. The Authority may award penalties where an employer is liable for them. For a company this is a maximum penalty per breach of \$20,000.00.⁴ The factors to consider in relation to penalty claims are provided under s133A of the Act and can be summarised as :

- (a) The objects of the Act⁵ which include employment relationships built on mutual trust and confidence and good faith. This also includes an acknowledgement of the ‘inherent inequality of power in employment relationships’;
- (b) The nature and extent of breaches
- (c) Whether the breaches were intentional, inadvertent or negligent;
- (d) Whether steps had been taken to mitigate the effect of the breaches;
- (e) The circumstances of the breaches including the vulnerability of the employee; and
- (f) Whether the person in breach has previously been found by the Authority or Court to have ‘engaged in similar conduct.’

Penalty for failure to provide time and wage records under s 130 of the Act

[47] I find that M breached the obligation it has to provide the records when requested. The personal grievance letter dated 21 July 2023 contained a formal request. It was not until 8 December 2023 that M provided a record of payslips and time records for Ms Treleaven. I find that M is liable for a penalty for this breach.

[48] Not only was this a significant unexplained delay during which time I find it likely that M had access to advice and representation, but the record provided dated only from August 2022 (as did the IEA provided) which was when Ms Treleaven transferred

⁴ Employment Relations Act 2000, s135(2)(b).

⁵ Employment Relations Act, s 3.

to a different city café and not the one she started at approximately three years before. I accept Ms Treleaven's evidence that apart from a brief time away for the birth of her child in 2022 this was likely an unbroken period of employment for the same employer.

[49] While the nature and extent of the breach is contained to one employee and I have no evidence before me of previous breaches of this kind by M, the unexplained delay and absence of pre August 2022 records seems at best more than inadvertent especially given M had access to representation and advice.

[50] While producing what records there are is some mitigation here, it is minimal. Ms Treleaven had to lodge proceedings in the Authority before the records were produced.

[51] I accept there is vulnerability in relation to Ms Treleaven's circumstances and this breach further exacerbated her ability to resolve this matter.

[52] In the above circumstances I find a level of deterrence is warranted and order a penalty of \$500.00 is to be paid to Ms Treleaven.

Penalty under s134(1) of the Act, breach of the IEA lack of notice

[53] Ms Treleaven claims this penalty because while she had resigned and gave notice of two weeks and three days (three more days than M was obliged to provide) Mr Mao decided to undertake a process that, had I not found unjustified constructive dismissal I would have found unjustified dismissal. I have already referred to this above. I find a degree of more than inadvertent behaviour here in a type of retaliatory approach taken to Ms Treleaven's resignation. She was contractually entitled to work out her notice period and be paid for it.⁶ Again while I have nothing before me to show prior breaches of this nature, I find there is a need for deterrence for this type of employer behaviour even if the financial difference is not great. To an extent the same reasoning applies to my award for a penalty for the delay in producing records. This added to an already difficult situation for a vulnerable employee, circumstances known to the employer. I order M to pay a penalty of \$500.00 and again that this is to be paid to Ms Treleaven.

⁶ Clause 25 of the IEA.

Penalty for deductions

[54] Based on my analysis about deductions above at [45] to [45] I am not satisfied this situation supports the granting of a penalty as expressed for Ms Treleaven as breaches of s4 of the Wages Protection Act 1983. My comments above should explain my reasons.

Penalty for breach of good faith s 4(1A)(b) of the Act

[55] It is submitted for Treleaven that I should award a penalty for breach of good faith in that M did not act as a fair and reasonable employer could have done in relation to communicating actively and constructively towards maintaining the employment relationship. I found above a breach of good faith that led to my finding of constructive dismissal. I consider that I have considered the relevance of this failure under the head of constructive dismissal and decline to order a penalty here.

Summary of Orders

[56] MRZW Limited is to pay Bridget Treleaven the following:

- a. \$15,000.00 compensation under s 123(1)(c) of the Act
- b. \$7,800.00 gross in lost wages under s 128 of the Act
- c. \$63.00 for a deduction consent under s 4 Wages Protection Act 1983
- d. MRZW Ltd is to pay a penalty of \$500.00 for breach of s130 of the Act to be paid wholly to Bridget Treleaven
- e. MRZW Ltd is to pay a penalty of \$500.00 for breach of s134(1) of the Act to be paid wholly to Bridget Treleaven.

Costs

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

[58] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Treleaven may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum M will then have 14 days to lodge any reply memorandum. On request by

either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[59] 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.⁷

Antoinette Baker
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1