

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 87  
3201899

BETWEEN LEIGH WORTH  
Applicant

AND ALISON NICHOLSON  
Respondent

Member of Authority: Jeremy Lynch

Representatives: Grace Moore, counsel for the Applicant  
LesleyAnn Thomas, advocate for the Respondent

Investigation Meeting: 26 October 2023 in Hamilton

Submissions and other material received: At the investigation meeting and on 1 November 2023,  
23 January 2024, and 2 February 2024 for the Applicant  
At the investigation meeting, and on 2 November 2023  
and 19 January 2024 for the Respondent

Determination: 16 February 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Alison Nicholson was the owner of the Garden Art Studio (the Studio) in Cambridge, Waikato. The Studio was a gallery selling artworks by New Zealand artists, on consignment, with a particular focus on garden ornaments and outdoor sculptures. The Studio was not a limited liability company, nor was it owned by a limited liability company. Rather, the Studio was owned and operated by Alison Nicholson in her personal capacity.

[2] On 7 January 2021 Ms Nicholson employed Leigh Worth to work in the Studio. Ms Nicholson says this was casual employment. Ms Worth says this was permanent, ongoing employment.

[3] It is not disputed that Ms Worth was not provided with a written employment agreement.

[4] On 7 July 2022, the Studio ceased operating. Ms Worth says she was unjustifiably dismissed by Ms Nicholson, and that her employment was unjustifiably disadvantaged, and that Ms Nicholson breached her obligations of good faith.

[5] Ms Nicholson denies that Ms Worth has been unjustifiably dismissed or unjustifiably disadvantaged in her employment. Ms Nicholson also denies breaching her statutory obligations of good faith. She opposes the remedies sought.

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

[6] For the Authority's investigation a written witness statement was lodged by Ms Worth, together with a written witness statement from her father, Michael Worth. Ms Worth also lodged a comprehensive witness statement in reply.

[7] Alison Nicholson lodged a written witness statement, as did her daughter, Georgina Nicholson.

[8] Ms Worth's original statement of problem lodged in November 2022 contained claims for arrears of unpaid sick leave, and arrears of unpaid holiday pay. The parties were able to resolve these issues between them without the assistance of the Authority. Ms Worth amended her statement of problem in October 2023 accordingly.

[9] Under oath or affirmation, all witnesses answered questions from the Authority and from the parties' representatives. The representatives made closing submissions at the conclusion of the evidence.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made. It has not recorded all the evidence and submissions received.

### **The issues**

[11] Issues requiring investigation and determination are:

- (a) Does Ms Worth have a personal grievance for unjustified disadvantage arising from Ms Nicholson:

- (i) failing to provide her with a written employment agreement; and/or
  - (ii) failing to provide her with information relevant to the continuation of her employment, and an opportunity to comment prior to the termination of her employment?
- (b) Does Ms Worth have a personal grievance for unjustified dismissal?
- (c) If Ms Nicholson’s actions were unjustified in respect of disadvantage and/or dismissal, what if any remedies should be awarded, including:
- (i) compensation for hurt and humiliation;
  - (ii) reimbursement of lost wages?
- (d) Has Ms Nicholson breached the statutory duty of good faith, and if so, should a penalty be ordered, payable to Ms Worth?
- (e) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Worth which contributed to the situation giving rise to her grievance(s)?
- (f) Should either party contribute to the costs of representation of the other party?

[12] In addition, Ms Worth seeks a determination that Ms Nicholson breached the provisions of the s 27 of the Holidays Act 2003 (the Holidays Act) by unlawfully withholding Ms Worth’s holiday pay upon termination.

### **How did the employment relationship end?**

[13] Ms Nicholson says the Studio was significantly impacted by the effects of Covid. She says that as the Studio was not self-funding, she was having to ‘top up’ the Studio’s finances to keep it afloat.

[14] Ms Nicholson says that “Leigh and I decided we would shut for July as it was traditionally a terrible trading month anyway”.

[15] Ms Worth does not accept that the decision to close the Studio was made jointly. She says that in the first week of July 2022 she was informed by Ms Nicholson that the Studio would be closing, and that her last day of work would be 7 July 2022. She says Ms Nicholson told her that “... she would look at either reopening the Studio after one

month or rebranding and opening at another location, depending on the terms of her lease”.

[16] Ms Nicholson’s evidence is that she did reopen the Studio and operated it herself, with the occasional assistance of her daughter Georgina.

[17] Although Ms Nicholson accepts that Ms Worth did not resign, she does not accept she dismissed Ms Worth. Instead, Ms Nicholson described the employment relationship “dissolving”, as opposed to a situation of dismissal for redundancy.

[18] After she closed the Studio on 7 July 2022, Ms Nicholson did not offer Ms Worth any further work. Ms Worth was unable to perform any of the duties she had been employed to perform. Nor did Ms Nicholson pay Ms Worth any wages or holiday pay. Ms Worth says she did not receive her holiday pay until March 2023.

#### **Was Ms Worth a casual or permanent employee?**

[19] Ms Nicholson’s evidence was that Ms Worth was employed on a casual basis. With genuinely casual employment, there is no obligation to provide ongoing work. Not offering any further casual work to Ms Worth would have been a legitimate action for Ms Nicholson, had the parties’ employment relationship been genuinely casual.

[20] Casual employment is not defined in the Act. As there is no written employment agreement, the Authority must determine the nature of the relationship, by considering the factual evidence.

[21] Ms Nicholson says that Ms Worth “generally worked 20 hours per week and... was paid a minimum of 20 hours a week even if she finished early on days when the Studio was quiet.”

[22] Ms Worth says that at the time of her employment, Ms Nicholson advised her the role was for 30 hours per week. Ms Nicholson disputes this.

[23] However, Ms Nicholson’s own evidence suggests that she guaranteed Ms Worth a minimum of 20 hours per week. In her statement in reply she refers to Ms Worth’s “contracted 20 hours ...”.

[24] Ms Nicholson accepts that Ms Worth worked an average of 22 hours per week for the 77 weeks in which she was employed, and that her usual days of work were

Tuesday to Friday. Ms Nicholson also accepts that although there was some variation, Ms Worth generally worked consistent hours over these days.

[25] The Employment Court in *Jinkinson v Oceana Gold (NZ) Limited* considered the factors relevant to determining whether the real nature of employment is casual or permanent.<sup>1</sup> At paragraph [47], the Court held that the following factors are relevant to determining the real nature of the relationship:

- (a) the number of hours worked each week;
- (b) whether work is allocated in advance by roster;
- (c) whether there is a regular pattern of work;
- (d) whether there is a mutual expectation of continuity of employment;
- (e) whether the employer requires notice before an employee is absent or on leave;
- (f) whether the employee works to consistent starting and finishing times.

[26] Applying the factors from *Jinkinson* above, there was no evidence of Ms Worth's work being allocated in advance by a roster.

[27] Ms Nicholson did not dispute that other than some weekend work on an as-needed basis, Ms Worth's usual pattern of work was five hours per day, four days per week, Tuesday to Friday, and that Ms Worth generally worked 10.00 am to 3.00 pm on these days.

[28] Ms Worth's evidence was that she understood the work to be permanent and ongoing. Ms Nicholson's evidence is that she consulted with Ms Worth about the closure of the Studio, which would suggest that both parties had a mutual expectation of continuity of employment.

[29] Ms Worth did not take annual leave during the period of her employment, however she was unwell and unable to attend work from 20 July 2021 to 25 July 2021. Her evidence (which is not disputed by Ms Nicholson) is that she notified Ms Nicholson of her absence, as she was expected to be at work.

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<sup>1</sup> *Jinkinson v Oceana Gold (NZ) Limited* [2009] ERNZ 255.

[30] Ms Nicholson says that during pre-employment negotiations the two women discussed hours of work, and that she told Ms Worth “I could only offer 20 hours per week”.

[31] Having analysed the employment relationship between Ms Worth and Ms Nicholson, there are several indicators that the relationship is more consistent with permanent employment than with a casual arrangement. A finding is made that Ms Worth was permanently employed by Ms Nicholson. As her employer, Ms Nicholson had an obligation to provide ongoing work to Ms Worth.

### **Was Ms Worth dismissed by Ms Nicholson?**

[32] A dismissal is the termination of the employment relationship at the employer’s initiative.<sup>2</sup>

[33] A dismissal does not require an employer to tell an employee that they are dismissed, or to write to an employee terminating their employment in order for there to have been a dismissal. A dismissal in law will occur where there has been a ‘sending away’ of an employee by an employer. In sending away the employee, the employment relationship is brought to an end at the employer’s initiative, rather than through any voluntary action of the employee.

[34] Despite Ms Nicholson describing Ms Worth as being “cooperative” about the closure of the Studio, there is no evidence of a mutual agreement to terminate the employment relationship. In response to questions from the Authority, Ms Nicholson accepted that the decision to close the Studio was ultimately made by her.

[35] This is consistent with Georgina Nicholson’s evidence that “...Alison [Nicholson] decided to shut The Garden Art Studio...”.

[36] Ms Nicholson also says that as it was her genuine belief that the Studio would reopen, Ms Worth was not dismissed. The difficulty with this position is that it was several weeks before Ms Nicholson opened the Studio again, and when it did open, Ms Worth was not offered any work.

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<sup>2</sup> *Wellington, Taranaki and Marlborough Clerical Etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC).

[37] There was no evidence of any agreement from Ms Worth to take a period of leave without pay. Nor was there evidence that the Studio ceased trading during a 'closedown period' (as that term is defined in s 29 of the Holidays Act).

[38] There is no dispute that the decision to shut the Studio was communicated to Ms Worth at some point in the first week of July 2022, and she was informed that her last day of work would be 7 July 2022.

[39] In shutting the Studio, there was a clear sending away of Ms Worth. This amounts to a dismissal.

[40] Ms Worth was therefore given notice of her dismissal in the first week of July, and her employment with Ms Nicholson terminated on 7 July 2022.

### **Was Ms Worth's dismissal justified?**

[41] When the Authority considers justification for the actions of Ms Nicholson, including the dismissal decision (and any claim of disadvantage), it does so by applying the test of justification in s 103A of the Act.

[42] In determining justification for an action or a dismissal, the Authority considers whether the actions of Ms Nicholson, and how she acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[43] The Authority must also consider whether Ms Nicholson's process for making and carrying out the decision to terminate Ms Worth's employment was fairly conducted.

[44] Ms Nicholson, as a fair and reasonable employer, could also be expected to comply with the good faith obligations set out in s 4(1A)(c) of the Act which provides:

Without limiting paragraph (b), [the duty of good faith] requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

- (i) Access to information, relevant to the continuation of the employees' employment, about the decision; and
- (ii) An opportunity to comment on the information to their employer before the decision is made.

## **Substantive justification**

[45] The Court of Appeal in *Grace Team Accounting Limited v Brake* emphasised the importance of addressing the genuineness of a redundancy decision and held that a non-genuine redundancy (that is one effected for a purpose other than genuine business need) is unlikely to satisfy the s 103A test.<sup>3</sup> Conversely, the Court of Appeal suggested if an employer can demonstrate that the redundancy was genuine, and that the contractual and consultation requirements of s 4 of the Act have been complied with, this could go a long way towards satisfying the test.

[46] Ms Worth says that Ms Nicholson's decision to dismiss her for redundancy is substantively unjustified because the decision was predetermined and tainted by an inappropriate motive.

[47] Despite the claim in Ms Worth's witness statement, there was no evidence to suggest that Ms Nicholson had dismissed her for the purpose of employing her daughter Georgina to work the hours she had previously worked.

[48] The Authority accepts that the decision to dismiss Ms Worth for redundancy was based on genuine commercial need. Ms Nicholson's evidence (unchallenged by Ms Worth) was that sales at the Studio had fallen to such an extent that she was unable to pay wages. Ms Nicholson appears to be able to substantively justify her decision to dismiss Ms Worth.

## **Procedural justification**

[49] A key element of enquiry in redundancy situations is whether the employer complied with its obligations of good faith.<sup>4</sup> This includes the obligations set out in s 4(1A)(c) above.

[50] Although Ms Nicholson appears to have had a genuine business reason for terminating Ms Worth's employment, the Authority observes that the process Ms Nicholson adopted in effecting Ms Worth's redundancy was inadequate and lacking in transparency.

[51] Ms Nicholson accepts that she did not make any kind of proposal to Ms Worth about the termination of her employment, nor engage in a consultation process with her

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<sup>3</sup> *Grace Team Accounting Limited v Brake* [2014] ERNZ 129 (CA) at [85].

<sup>4</sup> *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28 at [60].

leading up to her dismissal. She accepts that no written material was provided to Ms Worth, and that at no stage was Ms Worth informed of her right to have representation.

[52] Ms Nicholson accepts that although Ms Worth would have been aware of the Studio's takings being low, she was not privy to any of the Studio's financial arrangements and would not have been aware of any specifics as to the financial position of the Studio. Ms Nicholson accepts that Ms Worth would not have been aware of the details of the lease, or any other of the Studio's overheads.

[53] Ms Nicholson says Ms Worth would have had a general idea about the Studio's financial position because she would frequently "moan" to Ms Worth about it. In addition, Ms Nicholson says that frequently she and Ms Worth would exchange text messages about how bad trading conditions were at the Studio.

[54] In a redundancy situation, this is insufficient. Ms Nicholson did not follow any process in effecting Ms Worth's dismissal. She did not provide any written information to Ms Worth to consider, nor did she provide Ms Worth with a reasonable opportunity to respond or provide comment before the decision was made to dismiss her. Ms Nicholson has not met the requirements of s 4(1A)(c) of the Act.

[55] Procedural defects do not render a dismissal unjustifiable if they are minor, and do not result in the employee being treated unfairly.<sup>5</sup> In this case the flaws in the procedure adopted by Ms Nicholson were more than minor and did result in Ms Worth being treated unfairly.

[56] In all the circumstances at the relevant time, the decision to dismiss Ms Worth was not a decision a fair and reasonable employer could have taken. A finding is made that Ms Worth was unjustifiably dismissed by Ms Nicholson.

### **Unjustified disadvantage**

#### *Failure to provide a written employment agreement*

[57] The Authority finds that without excuse, Ms Nicholson acted in breach of the Act when she failed to provide Ms Worth with a written employment agreement. Ms Nicholson acted without justification.

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<sup>5</sup> Employment Relations Act 2000, s 103A(5).

[58] Ms Nicholson acknowledged that she had acted in breach of the Act. Ms Nicholson accepts that she did not provide Ms Worth with a written employment agreement. She says this arose from her “own stupidity”. However, she does not accept that Ms Worth was disadvantaged. Her statement in reply appears to minimise the effects of the failure to provide Ms Worth with a written employment agreement:

Alison acknowledges that her employee, Leigh, was not provided with an IEA however Leigh was provided with detailed pay slips outlining her pay...

...

Our client does not accept that there has been unjustified disadvantage ...

[59] The Authority disagrees that there was no disadvantage to Ms Worth. She was disadvantaged in many ways.

[60] She did not receive the benefit of the statutory requirement to have an individual employment agreement in writing. Ms Worth’s evidence is that she was offered (and accepted) permanent employment of 30 hours per week. Ms Nicholson’s evidence is that Ms Worth was employed on a casual basis; and that she offered her employment of 20 hours per week. Both parties would have benefitted in having the certainty of the terms they had agreed upon recorded in a written employment agreement.

[61] The Act contains express provisions around the requirements for and of a written employment agreement. These provisions provide a fundamental benefit for both parties to an employment relationship. Section 64 of the Act is an employment standard.<sup>6</sup> This is one of several provisions intended for the advancement of productive employment relationships.

[62] An employee who has not been provided their full legal rights (particularly when such rights have been enshrined in statute as an adjunct to a minimum legal standard) could rarely (if ever) be said not to have been disadvantaged in their employment.

[63] The disadvantage to Ms Worth was not purely theoretical. She suffered significant disadvantage by not having certainty and clarity over the essential terms of her employment. In addition, Ms Worth considered she should have been provided with more hours by Ms Nicholson. Her evidence was that she:

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<sup>6</sup> As this term is defined in s 5.

...thought that I would be getting more than 20 hours per week based on the conversation I had with Alison before I commenced my employment. I did not raise any concerns with Alison about this because I did not have an employment agreement to reflect on, so I thought I just had to accept what Alison instructed.

[64] The oral terms of employment discussed at the commencement of the employment relationship were insufficiently clear or certain as to the existence and scope of these and other entitlements, rights, or obligations, putting Ms Worth at a disadvantage.

[65] Failing to provide an employment agreement for over 18 months, is not what a fair and reasonable employer could have done in the circumstances. The Authority finds that Ms Worth has a further personal grievance for unjustified disadvantage, arising from Ms Nicholson's failure to provide a written employment agreement.

[66] The Authority notes that the failure to provide a written employment agreement is a matter for which a penalty of up to \$10,000 under s 64(4) of the Act could have been sought by Ms Worth. However, Ms Worth has made no such application for a penalty in respect of this breach. As such, no finding is made in respect of this issue.

*Failure to provide information relevant to the continuation of the employment*

[67] Ms Worth also claimed she was unjustifiably disadvantaged by Ms Nicholson's failure to provide her with information that was relevant to the continuation of her employment, and the opportunity to comment on the same information prior to the termination of her employment.

[68] The factual matters of this particular unjustified disadvantage claim also form part of the factual matrix on which the finding of unjustified dismissal has been made. No separate finding is made in respect of Ms Worth's additional unjustified disadvantage grievance. The Authority is satisfied that the personal grievance for unjustified dismissal provides Ms Worth with adequate remedy (as set out below) for the failure to provide information and the opportunity to comment.

**What remedies (if any) should Ms Worth receive?**

[69] Ms Worth has established personal grievances for unjustified dismissal, and for unjustified disadvantage to her employment. She is therefore entitled to a consideration of the remedies sought.

*Lost wages*

[70] Ms Worth is entitled to be reimbursed for the remuneration she would otherwise have received but for her unjustified dismissal.

[71] Ms Worth gave evidence that she had applied for four suitable positions, for which she was unsuccessful. In addition, Ms Worth also contacted a recruiter in the hope of obtaining temping work.

[72] Ms Worth applied for a position at a home improvement store in Hamilton. She was offered this position but chose to decline it for a variety of reasons. One such reason being that it required her to work every Saturday and Sunday. She says she had left her previous employment to work for Ms Nicholson at the Studio specifically because she did not want to work weekends.

[73] In addition, the position offered to Ms Worth was subject to a probationary period of three months during which Ms Worth could be dismissed with one week's notice. The probationary period could be extended for a further period to allow for further assessment of Ms Worth's suitability for the role.

[74] Ms Worth says that she was significantly impacted by the way in which her role at the Studio ended and did not want further stress and anxiety about dismissal under a probationary period clause. Having recently been dismissed, it was reasonable for Ms Worth to decline a role which was probationary for (at least) the first three months and comprised weekend work.

[75] Ms Worth's evidence was that she was eventually able to find work at a wine company in Thames, one day per week. Her evidence was that this role required two and a half to three hours of driving for the return trip from her home, and she ultimately ended up resigning from this role because the travel became too difficult.

[76] In addition, Ms Worth obtained a small amount of casual work for the CFO of the wine company, tidying up files at his house.

[77] Ms Worth's evidence is that she was in receipt of the jobseeker benefit from 27 July 2022. A condition of her continuing entitlement to this benefit was that she remained available to accept employment, and that she was actively seeking employment.

[78] The Authority is satisfied that Ms Worth acted to mitigate her losses.

[79] Ms Worth seeks reimbursement for lost remuneration from the date of her dismissal up until the date of the Authority's determination. Where the Authority finds an employee has a personal grievance and has lost remuneration as a result of the personal grievance, the Authority has a statutory obligation to order the employer to pay to the employee the lesser of a sum equal to the lost remuneration, or to three months' remuneration.<sup>7</sup>

[80] The Authority has discretion to order reimbursement of a sum in excess of three months lost remuneration.<sup>8</sup> However, after considering the evidence, the Authority declines to exercise its discretion to depart from the statutory three month period provided for under s 128(2) of the Act. The award of a sum equal to three months' lost remuneration is appropriate.

[81] As noted above, Ms Worth worked an average of 22 hours per week during her employment. Three months from the date of Ms Worth's dismissal (that is, 7 July 2022 to 7 October 2022) is 13 full weeks. Ms Worth's hourly wage of \$24.00, for an average of 22 hours per week, for a period of 13 weeks equals \$6,864.00 (gross).

[82] From this amount is to be deducted wages Ms Worth earned during this three month period. The pay information provided to the Authority (unchallenged by Ms Nicholson), discloses that in the period from her dismissal to 7 October 2022, Ms Worth earned the sum of \$515.00 (gross) from her employment with the wine company in Thames. Wages earned from Ms Worth's casual employment with the CFO of the wine company fall outside of this three month period, so no deduction applies.

[83] Receipt of this benefit is a matter between Ms Worth and the Ministry of Social Development. No deduction is made in respect of benefit payments received.

[84] Ms Nicholson is therefore ordered to pay to Ms Worth the sum of \$6349.00 (gross) as reimbursement for lost remuneration within 28 days of the date of this determination.

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<sup>7</sup> Section 128(2).

<sup>8</sup> Section 128(3).

*Compensation for humiliation, loss of dignity and injury to feelings*

[85] Ms Worth's evidence is that she became physically unwell from the stress suffered as a result of her dismissal, and experienced symptoms such as swollen lymph nodes, and ongoing pain under her arms and in her chest. No medical evidence was provided in support of this position. As a result, the Authority has given limited weight to this evidence.

[86] However, the Authority accepts Ms Worth's evidence that she felt extremely depressed after her dismissal and told her father that she felt like a "failure and an idiot". In addition, the Authority accepts Ms Worth's evidence that she withdrew from social activities, and experienced general distrust of other people, as well as feeling humiliated and belittled.

[87] Ms Worth's evidence establishes that she has experienced harm under each of the heads in s 123(1)(c)(i) of the Act. I have quantified the harm suffered having regard to the spectrum of harm, and quantum of compensation, particularly with regard to other awards of compensation.

[88] In *Wikaira v Chief Executive of the Department of Corrections*, the Employment Court confirmed that it was desirable that awards of compensation pursuant to s 123(1)(c)(i) of the Act "... should be, although not over-generous, nevertheless fair, realistic and not miserly".<sup>9</sup>

[89] The hurt and humiliation experienced by Ms Worth as a result of her unjustified disadvantage grievance is sufficiently connected to her unjustified dismissal (and the effects of this on her) that compensation may be globalised.

[90] Having regard to the particular circumstances of this case, a global award of \$18,500 under s 123(1)(c)(i) of the Act is appropriate to compensate Ms Worth for the humiliation, loss of dignity and injury to feelings she experienced as a result of her unjustified dismissal and unjustified disadvantage grievances.

*Contribution*

[91] Where the Authority determines an employee has a personal grievance, it is required under s 124 of the Act to consider the extent to which the employee's actions

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<sup>9</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237].

contributed towards the situation that gave rise to the personal grievance (or grievances) and if the actions so require, reduce remedies that would otherwise have been awarded.

[92] No deduction from remedies awarded is to be made under s 124 of the Act. The unjustifiability of both Ms Worth's dismissal and disadvantage to her employment have been established in Ms Nicholson's failure to follow statutory requirements. These obligations were not Ms Worth's and there is to be no deduction from the monetary remedies for reasons of contribution.

#### *The payment of remedies instalments*

[93] Under s 123(2) of the Act, the Authority may order payment to an employee by instalments, but only if the financial position of the employer requires it.

[94] Ms Nicholson submitted that her financial situation was such that any remedy awarded to Ms Worth should be payable by way of instalments. The Authority invited Ms Nicholson to provide a summary of her financial position so that her request for payment of remedies by way of instalment could be properly considered. After taking some time to consider her position, Ms Nicholson declined to provide the requested information. As such there is insufficient evidence before the Authority as to Ms Nicholson's financial position to order the payment of remedies by instalments.

#### **Penalty for breach of good faith**

[95] In addition, Ms Worth seeks a penalty against Ms Nicholson under s 4A(a) of the Act.

[96] Ms Worth says Ms Nicholson's breached her obligations of good faith in:

- Offering Ms Worth a minimum of 30 hours work per week, but only providing 20 hours per week throughout her employment.
- Attempting to sell the Studio to Ms Worth without providing any financial information relevant to the sale.
- Telling Ms Worth that she hoped to reopen the Studio in one month and/or would look to rebrand and relocate the Studio, which suggested to Ms Worth that she may have future employment at the Studio. Ms Worth says this was a breach of the duty of good faith because Ms Nicholson never had any intention for this to eventuate.

- Ms Nicholson failed to provide any information to Ms Worth prior to making the decision to terminate her employment.

*The number of hours offered*

[97] Ms Nicholson disputes that she offered Ms Worth 30 hours per week. She says she only offered 20 hours per week. There is insufficient evidence before the Authority as to what Ms Nicholson offered, and/or what Ms Worth accepted in terms of hours per week. The Authority makes no finding on this issue, and declines to exercise its discretion to order a penalty.

*Information related to the sale of the Studio*

[98] Ms Worth says Ms Nicholson offered to sell her the Studio but did not provide her with any information regarding the proposed sale. She says this is a breach of good faith and seeks a penalty.

[99] The matters to which the statutory duty of good faith applies are set out at s 4(4)(a) to (g) of the Act. The duty of good faith under s 4(1) of the Act does not apply to discussions between a business owner and a prospective purchaser about the sale of the business.

[100] Even if such discussions did fall within one of the categories set out under s 4(4) of the Act, the requirements for a penalty under s 4A(a) are not met, in that this action was not deliberate, serious and sustained. This is consistent with Ms Worth's own evidence that she told Ms Nicholson that "There was no way that I could afford to purchase the Studio...It never went any further than that ...".

[101] No penalty is ordered in respect of this.

*The reopening of the Studio*

[102] In terms of Ms Worth's claim that Ms Nicholson deliberately misled her about the Studio reopening, this does not succeed.

[103] Ms Worth's evidence is that Ms Nicholson told her that "... she would look at either reopening the Studio after one month or rebranding and opening at another location, depending on the terms of her lease." Ms Nicholson made no firm commitment to Ms Worth as to the resumption of her employment. Instead, what Ms Nicholson conveyed can best be described as the expression of a hope of what might

happen, should certain conditions eventuate. This is not a situation where a promise was made to Ms Worth, and Ms Worth relied on the promise to her detriment.

[104] Ms Nicholson says that because she had least obligations to meet, she did reopen the Studio for a period, and she worked in the Studio largely by herself.

[105] Georgina Nicholson's evidence is that after the Studio closed, she leased premises in Cambridge from which to operate her virtual assistant business, GeeAssist. She says that she decided she would set up Gallery G to operate in conjunction with GeeAssist. She says Gallery G "had nothing to do with the Garden Art Studio and nothing to do with Leigh [Worth]... I opened Gallery G all on my own to work there by myself."

[106] When Ms Worth's employment relationship with Ms Nicholson ended, that was the end of the matter. It was not a situation in which shares had been transferred to a new owner (such as Georgina Nicholson), but the employing entity had remained the same.

[107] Ms Nicholson's evidence was that after the Studio closed, she "gifted all the IP to Georgina". This was an action which Ms Nicholson was entitled to do.

[108] The Authority declines to exercise its discretion to order a penalty in relation to this alleged breach of good faith.

#### *The failure to provide information prior to dismissal*

[109] It is not clear to the Authority how this breach of good faith is distinct from the personal grievance claim for unjustified dismissal. As set out above, the Authority has awarded Ms Worth personal grievance remedies. As such it is not clear why a penalty should be ordered, payable to Ms Worth. The Authority declines to exercise its discretion to order a penalty in relation to this alleged breach of good faith.

#### **Holidays Act claim**

[110] Ms Worth seeks a determination that by withholding holiday pay on termination, Ms Nicholson breached the provisions of the Holidays Act. She does not seek interest, penalties or other remedies in relation to this issue.

[111] Ms Worth's evidence is that her holiday pay claim was resolved following mediation which took place in March 2023. Having considered the evidence presented,

and the fact that no monetary remedies are sought, I decline to make any findings in relation to the Holidays Act.

### **Summary of orders**

[112] Within 28 days of the date of this determination, Alison Nicholson must pay to Leigh Worth the following amounts:

- (a) compensation in the sum of \$18,500.00 (without deduction) under s 123(1)(c)(i) of the Act; and
- (b) reimbursement of lost wages in the sum of \$6349.00 (gross), under s 123(1)(b) of the Act.

### **Costs**

[113] The parties are encouraged to resolve this issue between them. If this is not possible, Ms Worth is to lodge and serve a costs memorandum within 14 days of the date of this determination, and Ms Nicholson may lodge and serve any reply memorandum within a further 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[114] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>10</sup>

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>10</sup> For further information about the factors in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).