

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 613  
3167343

BETWEEN                      GILLIAN WRIGHT  
   Applicant  
  
AND                                JOHN LOUIS DIEHL  
   Respondents

Member of Authority:        Philip Cheyne  
  
Representatives:              Keith Wright, advocate for the Applicant  
   John Diehl, the Respondent  
  
Investigation Meeting:        20 June 2023 in Queenstown  
  
Submissions Received:        10 July 2023 from the Applicant  
   20 July 2023 from the Respondent  
  
Date of Determination:        19 October 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     John Diehl was involved in the ownership and operation of a resthome facility in Alexandra known as Castlewood Home. Gillian Wright was employed there part-time as a Home Assistant Carer from 5 February 2020 until she resigned on notice effective on 15 October 2021.

[2]     Mrs Wright raised personal grievances (unjustified disadvantage and unjustified dismissal) with Mr Diehl by her letter of 4 November 2021. The letter referred to a number

of matters, but specifically raised personal grievances regarding Mr Diehl's actions on 13 August 2021 confirming his conclusions in response to Mrs Wright's formal complaint about an incident between her and another employee on 15 July 2021, and the termination of Mrs Wright's employment. Compensation is claimed as remedies for these grievances.

[3] Mrs Wright also says that Mr Diehl during the first part of her employment paid her at a rate lower than was payable to her under the Support Workers (Pay Equity) Settlements Act 2017. Further, Mrs Wright says that Mr Diehl did not comply with the Holidays Act 2003 with respect to Alternative Holidays and Annual Holidays. Mrs Wright claims arrears and interest.

[4] Mr Diehl says that Mrs Wright resigned because he did not agree to her request for a period of study leave. Mr Diehl says his actions with respect to Mrs Wright's complaint were justified, but in any event did not disadvantage her with respect to her employment. Mr Diehl also says that Mrs Wright is not owed any arrears of wages, alternative days and annual holidays.

[5] In his statement in reply, Mr Diehl did not dispute the claim that he had been the employer.

[6] Matters were not resolved, despite mediation.

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

[7] Statements of evidence were provided for Mrs Wright and her husband Mr Wright. Documents were provided with the statement of problem and before, during and after the investigation meeting. Both Mrs Wright and Mr Wright attended the investigation and gave evidence on oath.

[8] Mr Diehl provided some documents with the statement in reply and later, but did not lodge a statement of evidence ahead of the investigation meeting. At the investigation meeting, Mr Diehl declined the opportunity to question Mrs Wright and Mr Wright. However, he gave evidence on oath and answered questions. Mr Diehl also arranged for the other employee involved in the July 2021 incident to give evidence.

[9] Following the investigation meeting, further information was provided. Mr Wright and Mr Diehl also had an opportunity to provide submissions in writing. Mr Wright did not meet the original time for submissions. However, I was satisfied that it was fair to extend time. Mr Diehl's submissions were provided last as agreed, so he had a fair opportunity to respond to the information and submissions for Mrs Wright.

[10] I take nothing from Mr Diehl's decision not to cross-examine Mrs Wright and Mr Wright during the investigation meeting, or from him not providing a written statement of evidence beforehand. The disputed matters were largely apparent from the documented communications between those involved as events unfolded and following Mrs Wright's resignation. The statement of problem and the statement in reply also set out those disputes.

[11] Mrs Wright needs to satisfy me that her employment was affected to her disadvantage by actions by her employer which were not justified. I also need to be satisfied that Mrs Wright's resignation amounts to a sending away by her employer.

[12] The arrears and Holidays Act 2003 issues turn principally on considerations of the relevant statutory provisions.

[13] Mrs Wright claims that she was employed by Mr Diehl. For the most part, Mrs Wright's claims can only succeed against her employer. Mr Diehl at the investigation meeting gave evidence that Castlewood Home was owned and operated by a company and that Mrs Wright had been employed by a company. Both companies referred to by Mr Diehl during the investigation meeting had recently been removed from the register of companies.<sup>1</sup>

[14] The first issue must be whether Mrs Wright can claim against Mr Diehl personally. If not, some of the other issues need not be determined. I deal with the issues as follows:

- (a) Can Mrs Wright claim against Mr Diehl personally?

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<sup>1</sup> Castlewood Nursing Home Limited registered from 24 January 1990 to 1 May 2023 and J.L. Diehl Limited registered from 29 April 1999 to 19 April 2023.

- (b) Was there a default in payment to her of wages due under Mrs Wright's employment agreement and the Support Workers (Pay Equity) Settlements Act 2017 between February 2020 and August 2020?
- (c) Was there any other default in payment of wages with respect to hours worked by Mrs Wright and recorded by her on her timesheets?
- (d) If there was any default, what amount of arrears is established and should interest be ordered?
- (e) Did the employer comply with the provisions in the Holidays Act 2003 regarding alternative holidays and annual holidays?
- (f) Are any arrears of holidays entitlements proven?
- (g) Was Mrs Wright's employment affected to her disadvantage by an unjustified action by her employer?
- (h) Was Mrs Wright constructively dismissed?
- (i) If Mrs Wright has any personal grievance, what remedies follow?

**Can Mrs Wright claim against Mr Diehl personally?**

[15] Mr Diehl first told me that the company that employed Mrs Wright was called Castlewood Nursing Home Limited. He then told me that the company was J.L. Diehl Limited. Mr Diehl offered to get a statement from his lawyer and/or accountant to confirm that Castlewood Home always operated through a company. Both companies are removed from the register but I proceed on the basis that one of them owned and operated the business known as Castlewood Home. Confirmation of that from a lawyer or an accountant takes the matter no further.

[16] The Employment Relations Act 2000 by s 65(2)(a) stipulates that an individual employment agreement must include the names of the employee and the employer concerned. The written employment agreement at clause 1 "The Parties" records "JOHN DIEHL" as the

employer and “GILL WRIGHT” as the employee. Clause 5 “The Place of Work” states that the “Employee” shall perform their duties at ‘CASTLEWOOD’ or any other replacement office of the “Employer”. Clause 17 “Declaration” states “I JOHN DIEHL OF CASTLEWOOD offer this employment agreement to GILL WRIGHT”. It is signed by Mr Diehl. The agreement does not mention either company. That evidence is sufficient to find, as I do, that Mr Diehl personally was Mrs Wright’s employer.

[17] Even if Mr Diehl could prove that he signed the employment agreement on behalf of one of the companies, he would still be personally liable by effect of s 25(2) of the Companies Act 1993. Assuming the mention of “CASTLEWOOD” in clause 17 was intended to be a reference to a company, the company’s name is incorrectly stated in the employment agreement. Mr Diehl would be personally liable as the sole signatory for the company as he cannot prove that Mrs Wright knew that she was contracting with that company. Nor is there evidence to show that it would not be just and equitable for Mr Diehl to be liable.

[18] I find that Mrs Wright can proceed against Mr Diehl personally as her employer.

**Was there a default in payment of wages due under Mrs Wright’s employment agreement and the Support Workers (Pay Equity) Settlements Act 2017 between February 2020 and August 2020?**

[19] It is common ground that the Support Workers (Pay Equity) Settlements Act 2017 applied to Mrs Wright in her work at Castlewood.

[20] Under that Act, an employer must pay a support worker no less than the wage rate set out at Schedule 2 of the Act. Clause 2 set the following minimum rates applicable from 1 July 2019 to 30 June 2021: for a worker without a relevant qualification at \$20.50 per hour; and for a worker with a Level 4 qualification at \$25.50 per hour.

[21] Mr Diehl paid Mrs Wright at \$20.50 per hour from when she started work until the fortnight ending 9 August 2020. Mr Diehl increased Mrs Wright’s payrate to \$25.50 per hour from 10 August 2020. Mr Diehl further increased the payrate to \$27.00 from 1 July 2021 in accordance with Schedule 2.

[22] Mr Diehl's evidence is that he believed Mrs Wright when she claimed to have been a registered nurse. Mrs Wright had first told Mr Diehl that when she was employed. When Mrs Wright became aware that she was entitled to the Level 4 rate, she spoke to Mr Diehl about that several times between March and June 2020. However, her pay rate was not increased to the level 4 rate until Mrs Wright provided a copy of a letter from the Nursing Council confirming her qualification and registration, years earlier.

[23] In his statement in reply, Mr Diehl said that it is up to the employee to work out their pay level from the qualification list provided under the Act. He said it was not up to the employer to try and maximise an employee's pay. Mr Diehl said Mrs Wright produced a letter in July 2020 to show her "nursing training" and then received an increase. However, Mr Diehl also said his impression was that the qualification Mrs Wright "claim[ed] to have" was not the equivalent of other former Registered Nurses.

[24] Section 14 of the Support Workers (Pay Equity) Settlements Act 2017 entitles a support worker to recover arrears if they are not paid in accordance with that Act. Mrs Wright's claim turns on whether she held a Level 4 qualification. For Mrs Wright, that means whether her Diploma of Nursing and Nursing Council of New Zealand registration are recognised by the relevant workforce development council as equivalent to a level 4 New Zealand Certificate In Health and Wellbeing issued by NZQA.

[25] I accept the evidence that Careerforce te toi pūkenga was the relevant workforce development council. Its website now directs inquirers to the following information on Te Whatu Ora Health New Zealand's website:<sup>2</sup>

New Zealand Nursing Qualifications – If you hold a NZ Bachelor's Degree in Nursing, an NZ enrolled nursing qualification or have had Registration with the New Zealand Nursing Council and are working as a care and support worker under the Act then your qualification is assessed as equivalent to Level 4.

[26] I find that Mrs Wright held a Level 4 qualification because she was registered as a nurse by the Nursing Council of New Zealand. It follows that Mrs Wright should have been paid \$25.50 per hour from her first pay for the period ending 9 February 2020.

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<sup>2</sup> <https://www.tewhatauora.govt.nz/our-health-system/pay-equity-settlements/care-and-support-workers-pay-equity-settlement/pay-equity-and-qualification-equivalencies>

[27] In submissions, Mr Diehl says that the original rate was agreed, that Mrs Wright agreed at the time that a qualification from 30 years earlier was not relevant and that there is no provision under the legislation for backpay. Even if the evidence supported Mr Diehl's first two points, such an agreement could not displace a statutory entitlement. Mr Diehl is mistaken about the third point. Underpaid wages are recoverable under s 131 of the Employment Relations Act 2000 by effect of s 14 of the Support Workers (Pay Equity) Settlements Act 2017.

[28] The payslips show that Mrs Wright worked a total of 781 hours between the pay periods ending 9 February 2020 and 9 August 2020. Mrs Wright's qualification entitled her to \$5.00 an hour more than she was paid. Mrs Wright is entitled to recover arrears of \$3,905.00 (gross). There will be an order against Mr Diehl for that amount.

[29] The payslips show that Mrs Wright worked on three public holidays over that period and was paid half time extra for 20 hours, based on \$20.50 as her ordinary time rate. Mrs Wright should have been paid half time extra based on \$25.50 as her ordinary time rate. There will be further arrears of \$100.00 (gross), given s 50 of the Holidays Act 2003.

**Was there any other default in payment of wages with respect to hours worked by Mrs Wright and recorded by her on her timesheets?**

[30] Mr Diehl's evidence is that he paid time and a half if an employee worked more than 8 hours on any shift. Not all timesheets have been produced. The timesheets produced in evidence show that Mrs Wright occasionally worked shifts longer than 8 hours. However, payslips compared to such timesheets show that Mrs Wright was usually paid ordinary time, not time and a half. An aspect of the arrears is based on payment at ordinary rates, not time and a half.

[31] The difficulty with this aspect of the claim is that the employment agreement does not provide for payment of time and a half for working more than 8 hours on a day. The agreement includes an "Entire Agreement" provision. It also requires any variations to be in writing and signed to be binding. If Mr Diehl did pay time and a half for work in excess of 8

hours on any day, it must be seen as a voluntary action on his part. This aspect of the arrears claim cannot succeed.

[32] In submissions, Mr Wright has referred me to s 130(4) of the Employment Relations Act 2000 as an “additional remedy”. That section makes every employer who fails to comply with a requirement under the preceding subclauses liable to a penalty imposed by the Authority. The preceding subclauses provide for wages and time records to be kept and to be produced on request.

[33] I would not impose a penalty at this point. An action in the Authority for a penalty must be commenced within 12 months of the breach of the statutory provision. The statement of problem did not include a penalty claim. I do not consider that an action for a penalty has been properly commenced by a request in submissions, after the investigation meeting, for a penalty to be imposed.

[34] In submissions, Mr Wright refers to other penalties. It is not necessary to set out the details. For the reasons outlined above, I decline to impose these penalties.

[35] Mrs Wright is concerned that Mr Diehl may have altered her timesheets and paid her on that basis at different points during her employment. That was one of the reasons for her request for access to wage and time records. Mr Diehl did not provide a complete set of Mrs Wright’s timesheets. Mr Diehl did not provide a complete set of timesheets to the Authority, despite a direction.

[36] If Mrs Wright had identified time she had worked but had not been paid for, I would have applied s 132 of the Employment Relations Act 2000. However, Mrs Wright’s evidence took the matter no further than her concern that she might not have been paid for every hour she had recorded on her timesheets. I am not satisfied that there was default in payment to Mrs Wright of wages payable to her under her employment agreement, except as fixed elsewhere in this determination.

**Did Mr Diehl comply with the provisions in the Holidays Act 2003 regarding alternative holidays and annual holidays?**

[37] Mrs Wright worked the following fifteen public holidays: Monday 23 March 2020 (Otago Anniversary); either Easter Friday or Easter Monday; ANZAC Day (4 hours); Queens Birthday; Labour Day (6.5 hours); Christmas Day and Boxing Day 2020 and New Years Day and the following day 2021; Waitangi Day; Monday 22 March 2021 (Otago Anniversary); Easter Friday and Easter Monday; ANZAC Day; Queens Birthday.

[38] The employment agreement provided that where the employee works on a public holiday, on a day that would otherwise have been a working day, they shall receive:

... an alternative paid holiday of one day at a later date, the timing of which is to be determined by agreement between the Employer and the Employee, or in the absence of agreement according to the Holidays Act.

[39] Public holidays are provided by the Holidays Act 2003. The Act confers minimum statutory entitlement which cannot be abrogated. The Act is complied with when an employee works on a public holiday, that day falling on a day that would otherwise be a working day for the employee, they are entitled to an alternative holiday as well as payment for working on the public holiday.<sup>3</sup> The entitlement to an alternative holiday remains in force until the employee has taken the holiday or they have been paid for the holiday in accordance with s 60(2) or s 61 of the Holidays Act 2003.<sup>4</sup>

[40] Under s 57 of the Act, the alternative holiday must be taken on a date that is agreed between the employer and the employee, it must be on a day that would otherwise be a working day for the employee, be a whole working day off and must not be taken on a public holiday. If the employer and employee cannot agree on when the alternative holiday is to be taken, the employer may on a reasonable basis determine the date. However, the employer must give at least 14 days' notice of the requirement to take an alternative holiday.

[41] Under s 60 of the Act, the employer must pay the employee for the alternative holiday in the pay for the pay period in which the alternative holiday is taken. If the employee has not

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<sup>3</sup> Holidays Act 2003 s 48(2)(b).

<sup>4</sup> Holidays Act 2003 s 56(3).

taken the alternative holiday during the employment, the employer must pay the alternative holiday with the final pay.

[42] Under s 61 of the Act, an employee may request to exchange the alternative holiday entitlement for a payment, but only if 12 months have passed since the entitlement arose.

[43] Payslips show that Mrs Wright was paid for Alternative Holidays in the pay periods endings 19/4/2020, 22/11/2020, 31/1/2021, 28/2/2021, 25/4/2021 and 29/8/2021.

[44] The fact of these payments together with the extra payment for time worked on the public holidays confirm that the fifteen public holidays set out above all fell on days that were otherwise working days for Mrs Wright.

[45] Mrs Wright never requested to exchange her entitlement for an alternative day for payment. Mrs Wright never asked to take an alternative holiday on a day that was otherwise her ordinary working day and there was never any agreement with Mr Diehl to that effect. Mr Diehl never determined a date on which Mrs Wright was to take an alternative holiday. The payments were simply made to Mrs Wright instead of carrying forward her entitlement to alternative holidays. Mr Diehl treated alternative holidays as interchangeable with annual holidays, at his election.

[46] The payments were not consistent with the employment agreement. I also find that the payments made to Mrs Wright breached the Holidays Act 2003.

[47] There were emails between Mrs Wright and Mr Diehl in September 2021. To summarise, Mrs Wright questioned the payments and sought reinstatement of alternative holiday entitlements. Mr Diehl arranged for some alternative holiday entitlements to be reinstated, but for the equivalent entitlement to be deducted from Mrs Wright's annual holiday balance. Matters were not resolved, hence the present claim.

[48] When the employment ended in October 2021, Mrs Wright retained an entitlement to 15 alternative holidays. Mr Diehl was required by s 60(2)(b)(ii) of the Act to pay her for those fifteen alternative holidays in her final pay, but did not.

[49] Mrs Wright was entitled to payment at not less than her relevant daily pay. Mrs Wright's standard shift was 8 hours, so her relevant daily pay at the end of her employment was \$216.00. Arrears of \$3,240.00 (gross) are proven.

**Have any arrears of holiday entitlements been established?**

[50] Mrs Wright commenced employment on 31 January 2020. On 31 January 2021, the one-year anniversary date, Mrs Wright became entitled to 4 weeks' annual leave.

[51] An employee may take annual leave in advance with the agreement of their employer. Once the employee is entitled to annual leave, when they are taken is to be agreed between the employer and the employee. When employment ends, the employer must pay the employee the balance of any untaken annual leave plus 8% of gross earnings since the anniversary date.

[52] Mr Diehl has not provided a complete set of Mrs Wright's timesheets. However, all of the payslips have been produced. Mrs Wright also produced photos of weekly rosters.

[53] The timesheets show that Mrs Wright requested four days annual leave (in advance) for 22 – 24 November 2020 and 18 January 2021. The first three of those days are recorded as "AL" on the rosters. The payslips record one day "Alternative Holiday", two days "Annual Leave" and one day "Alternative Holidays" for the fortnights ending 22 November, 20 December 2020 and 31 January 2021 respectively. The days marked "Alternative Holidays" should properly be regarded as annual holidays in advance, as per Mrs Wright's request. I find that Mrs Wright took annual holidays in advance and was paid for each of those days. Mrs Wright took four days annual leave in advance.

[54] Timesheets show that Mrs Wright requested annual holidays for 28 February 2021, 19 – 24 April 2021 (6 days), 21 and 22 August 2021, and 2 October 2021. Payslips show payment of one day "Alternative Holidays" in the fortnight ending 28 February 2021, six days "Alternative Holidays" in the fortnight ending 25 April 2021, two days "Alternative Holidays" in the fortnight ending 29 August 2021 and one day "Annual Leave" in the fortnight

ending 10 October 2021. I find Mrs Wright took and was paid 10 days annual leave on these dates. The 10 days takes the total annual leave to 14 days.

[55] The roster for the week ending 7 February 2021 shows “A/L” for Mrs Wright on 5 – 7 February but the payslip covering that fortnight shows that Mrs Wright worked on 6 February and was otherwise paid ordinary time in the fortnight. The relevant timesheet has not been produced. I find that Mrs Wright did not take and was not paid annual holidays for these February dates.

[56] Mrs Wright marked her timesheet “Day in Lieu please” for 28 – 29 May, 31 May and 1 June 2021. The payslips record payment of four days “Annual Leave”. Mrs Wright’s evidence is that she never requested alternative holidays, so I take her request and the time off as attributable to annual holidays, as recorded. A further four days takes the total annual leave to 18 days.

[57] Timesheets show that Mrs Wright requested “Annual Leave please” on 8 July and again on 10 – 15 August 2021 (6 days). Payslips show one day “Annual Leave” in the fortnight ending 18 July 2021 and four days “Annual Leave” in the fortnight ending 15 August 2021. A further five days takes the total annual leave to 23 days.

[58] Mrs Wright generally worked either four days or five days per week. Most shifts were 8 hours, but Mrs Wright usually worked a short shift of about 2 hours on one day a week. Payment to Mrs Wright of 23 days annual holidays at eight hours per day exceeded her entitlement to 4 weeks’ annual holiday based on what constitutes her working week.

[59] The payslips provided show that Mr Diehl did not pay Mrs Wright 8% final holiday pay on her gross earnings since her anniversary date (31 January 2021), as required by s 25 of the Holidays Act 2003. There is an “Employee Accrued Leave Report as at 26/6/22” in evidence, but it too does not record payment of final holiday pay. This report shows that Mrs Wright received \$35,841.48 in gross earnings following 31 January 2021. Final holiday pay on that amount is \$2,867.32. To that sum must be added 8% on the arrears of wages and alternative holidays fixed elsewhere in this determination. Those arrears total \$7,245.00 so 8% is \$579.60. The 8% calculation comes to \$3,446.92.

[60] Mr Diehl is entitled to bring to account the value of annual holidays taken in advance: see s 25(2)(a) of the Holidays Act 2003. The finding that Mr Diehl paid Mrs Wright 23 days annual holidays must include some annual holidays in advance, to the extent that 23 days exceeds Mrs Wright's statutory entitlement to four weeks holiday.

[61] I will reserve leave for Mr Diehl to provide calculations to establish how much of the 23 days annual holidays should be regarded as annual holidays in advance. Mrs Wright will have an opportunity to comment on those calculations, following which I will fix the amount of final holiday pay due under s 25 of the Holidays Act 2003.

**Was Mrs Wright's employment affected to her disadvantage by an unjustified action by her employer?**

[62] There was an incident between Mrs Wright and the Kitchen Manager (Kerri) on 15 July 2021. Mrs Wright completed an incident report as follows:

From the beginning of the day Kerri was unhappy. ... I was in the kitchen preparing morning tea and she asked me if I wanted a sharp knife to cut the scones. I said no thanks. She produced a large carving knife and I took a step back and she told me not to be stupid. I said don't speak to me like that and she repeated that back to me. We had an argument and I swore to myself with frustration. She told me she is my boss, and told me not to swear at her. I said she does not pay my wages. The whole situation is very tense and difficult to work in.

[63] At some point after the incident report, Mrs Wright discovered that her car had been scratched ("keyed") on the passenger door. Her car had been parked next to Kerri's car. Mrs Wright thought Kerri had keyed her car.

[64] On 19 July 2021, Mrs Wright made a written complaint to Mr Diehl about the Kitchen Manager, headed "knife threat and car damage". The complaint added some detail about events in the kitchen.

[65] Ian Cooney was the facility manager. Mr Cooney acknowledged the written complaint and invited Mrs Wright to a meeting on 22 July 2021. Mrs Wright attended with her husband. Mr Diehl was also present.

[66] Before the meeting, Mr Cooney interviewed another employee who was present for at least some of the exchange in the kitchen. The notes made by Mr Cooney record that person disagreeing that Kerri pointed the knife at Mrs Wright in a threatening manner. The person claimed that Mrs Wright instigated the incident. Kerri was also interviewed.

[67] Following the meeting, Mr Diehl wrote to Mrs Wright on 28 July 2021. Mr Diehl started with a summary of Mrs Wright's complaint. The summary gives the wrong date and time for the incident and the wrong date for the complaint. In the summary, Mr Diehl says that the third employee heard the interaction from a side room, where they were not visible. He said that he had a detailed account from Kerri. That account was not disclosed to Mrs Wright, nor were notes of the third person's account.

[68] Mr Diehl expressed "Preliminary Findings" and "Further Preliminary Findings" that:

- a. No knife was used by yourself or Kerri in a threatening manner.
  - b. You escalated the discussion by being sarcastic and swearing.
  - c. You sought to provoke Kerri by belittling her position, and by saying that she "doesn't pay the wages".
- ...
- a. I believe that you have been dishonest in an attempt to cause another employee to be dismissed.
  - b. I am aware that what I have found to be your false claim against Kerri has made it into the Alexandra community. This casts a shadow over Castlewood. Your Employment Agreement requires you to not do anything to damage the reputation of Castlewood. I find that you are in breach of your duty to do nothing to damage the good reputation of Castlewood

[69] Mr Diehl invited Mrs Wright to raise any further information that might affect his decision. If his "findings" were finalised, then Mrs Wright's behaviour would amount to serious misconduct justifying her dismissal, but he would take no further action. His letter would be retained on Mrs Wright's file for five years and would be taken into account if there were further incidents.

[70] There followed exchanges between Mrs Wright and Mr Diehl about the time he was prepared to allow for her further information. It is not necessary to canvass that.

[71] Mrs Wright provided a comprehensive response to Mr Diehl's "preliminary findings". It is not necessary to canvass the details except to say it identified factual and logical flaws in

Mr Diehl's "preliminary findings". Mrs Wright also stated that she had said her central concern was her safety and health while at work, that she had never suggested that Kerri's conduct was grounds for dismissing Kerri and that she had not spoken to anyone in the wider community about the incident to damage Castlewood's reputation.

[72] Mr Diehl responded on 13 August 2021. Mr Diehl stated that careful consideration had been given to the complaint, he had taken into account statements from other witnesses and was entitled to form a view and make judgements, that it was appropriate to add his findings to Mrs Wright's file but would include her reply. Mr Diehl said that after careful consideration "we have not changed our view as set out in our letter off 27th of July" and the matter was now at an end.

[73] In rejecting Mrs Wright's complaint, Mr Diehl concluded that Mrs Wright had been dishonest in an attempt to cause Kerri's dismissal, that she had breached her duty not to damage Castlewood's reputation because others in the community apparently knew of her false claim against Kerri and that Mrs Wright's behaviour amounted to serious misconduct justifying instant dismissal. These "findings" would be taken into account in any further incidents for five years.

[74] Mr Diehl's correspondence had the same effect as a formal warning. I note that Mr Diehl is noted as having told Police that he had issued Mrs Wright a formal warning as he believed the event never happened. The Police file note is likely to be an accurate record of his comment at the time.

[75] I find that Mr Diehl's conclusions recorded in his correspondence affected Mrs Wright's employment to her disadvantage.

[76] Whether Mr Diehl's actions were justifiable must be determined on an objective basis by assessing whether his actions and how he acted were what a fair and reasonable employer could have done in all the circumstances at the time. I must consider whether Mr Diehl sufficiently investigated the matter considering available resources; whether he raised his concerns with Mrs Wright before his 13 August 2021 decision; whether he gave Mrs Wright a reasonable opportunity to respond to the concerns beforehand; and whether Mr Diehl

genuinely considered Mrs Wright's responses beforehand. Other factors may also be considered.<sup>5</sup>

[77] Mr Diehl's actions and how he acted were not what a fair and reasonable employer could have done in the circumstances at the time.

[78] In response to my questions about the "Further Preliminary Findings", concerning the "reputation of Castlewood" Mr Diehl gave evidence that he had heard rumours in the community at an unspecified time before 28 July 2021 about Castlewood being late with payment of wages. Even if true, that did not answer my question. Mr Diehl could not tell me anything about the supposed rumours in the community about Mrs Wright's "false" complaint against Kerri. Mr Diehl has not established that such rumours existed. The evidence, which I accept, is that Mrs Wright was appropriately discrete about her complaint. In the absence of any grounds to support Mr Diehl's reputation finding, it is unnecessary to detail his procedural failings in forming the view that Mrs Wright breach duties she owed to Castlewood.

[79] I reach a similar conclusion about Mr Diehl's "Further Preliminary Findings" that Mrs Wright was dishonest in an attempt to cause Kerri's dismissal. It is undisputed that there was an incident between Mrs Wright and Kerri in the morning on 15 July 2021. A fair and reasonable employer had no grounds to form the view that Mrs Wright initiated the incident and then complained about it to cause Mr Diehl to dismiss Kerri. Mrs Wright never raised that as a proposed outcome. When I asked Mr Diehl about why he formed that view, he spoke vaguely about workplace factions in the context of a mostly female workforce. That was never raised with Mrs Wright. There is no proof of Mrs Wright being part of some faction. To the contrary, the two performance appraisals in evidence confirm that Mrs Wright co-operated with team members<sup>6</sup> and met all other obligations. There is also a reference from Castlewood's RN who confirmed "[Gill] is very well regarded by her peers..." In the absence of any grounds to support Mr Diehl's "dishonest ... attempt" finding, it is unnecessary to detail his procedural failings in forming that view.

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

<sup>6</sup> Subject to one immaterial exception.

[80] I find that Mr Diehl's "preliminary findings" that no knife was used in a threatening manner, that Mrs Wright escalated the discussion by being sarcastic and swearing and that she sought to provoke Kerri by belittling her position were reached in a procedurally deficient manner. Mr Diehl failed to disclose to Mrs Wright notes of Kerri's and the third employee's accounts.

[81] There was also a significant element of predetermination about Mr Diehl's views. On 29 July 2021, Mr Diehl wrote to Kerri setting out his findings, having "fully investigated" the "17<sup>th</sup> July 2021" incident. To summarise, Mr Diehl in his unsolicited 29 July 2021 letter exonerated Kerri of any blame for the incident. However, Mr Diehl in his 28 July 2021 letter to Mrs Wright characterised his views as "preliminary findings", subject to her further input. In his evidence, Mr Diehl could not explain why he wrote to Kerri setting out his findings having "fully investigated", while at the same time telling Mrs Wright that his views were "preliminary findings". I conclude that the letter to Kerri proves that Mr Diehl predetermined the outcome of Mrs Wright's complaint.

[82] Mr Wright's evidence is that he gained an impression at the 22 July 2021 meeting that Mr Diehl had a preconceived view. While I accept that was Mr Wright's genuine view, I put little weight on it. However, I place some significance on the inconsistencies in Mr Diehl's 28 July 2021 letter as against undisputed facts, including incorrect statements about the complaint and sequence of events. The inconsistencies show Mr Diehl's failure to carefully consider the information he had available.

[83] There is a further departure from the standard of a fair and reasonable employer. Mr Diehl's response to Mrs Wright's complaint was to turn it into an investigation into Mrs Wright's supposed serious misconduct. However, Mr Diehl failed to advise Mrs Wright that he was considering an allegation of serious misconduct against her.

[84] I find that Mrs Wright has a personal grievance by her employment being affected to her disadvantage by unjustifiable actions by Mr Diehl.

[85] I will consider remedies for this grievance later.

**Was Mrs Wright constructively dismissed?**

[86] Mrs Wright's employment ended by her notice of resignation given on 30 September 2021.

[87] A dismissal is a sending away at the employer's initiative. It can include a resignation in certain circumstances. Commonly, there are three types of constructive dismissal cases. Where the employer gives the employee a choice of resigning or being fired, where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee's resignation, or where a breach of duty causes the employee to resign. The last two are potentially relevant here.

[88] In a breach of duty constructive dismissal case, the resignation must be caused by a breach of duty by the employer and the breach must be sufficiently serious to make it reasonably foreseeable by an employer that there was a substantial risk of the resignation.

[89] I should give more context to the resignation.

[90] Mrs Wright's CV includes reference to her having worked as a registered nurse (RN). There is an email from Castlewood's Nurse Manager querying whether Mrs Wright sought an RN or a caregiver position. Mrs Wright's evidence, which I accept, is that she told Mr Diehl at interview that she was an RN but did not have a practicing certificate.

[91] Mr Diehl's background and his ownership interest in Castlewood meant he should have been aware of the pay equity settlement, minimum rates and its recognition of service and qualifications. Even if Mr Diehl was not aware, by August 2020 at the very latest, Mrs Wright had done enough to oblige Mr Diehl in good faith to acknowledge her entitlement to backpay as well as correcting her pay rate. Mr Diehl only attended to the latter point.

*April 2021 - concerns*

[92] In April 2021 Mrs Wright raised with Mr Cooney a claim that Kerri had been rude and intimidating to her. Mr Cooney asked if Mrs Wright wanted to change shifts, but she did not want to lose hours. The matter was never resolved.

*July - complaint and findings of serious misconduct*

[93] The conduct and outcome of Mr Diehl's investigation into Mrs Wright's complaint and his conclusions about serious misconduct by her are a significant part of the context for Mrs Wright's resignation.

*August annual leave issue*

[94] Mr Diehl was responsible for rosters. In May 2021, Mrs Wright requested leave in the period from 10 – 18 August 2021. Mr Diehl approved her request. However, in July 2021 Mrs Wright noticed that she had been rostered for shifts over those dates. Mrs Wright sent a txt message to Mr Diehl about that. In reply, he said that it appeared there was an error on the rosters and he would fix it up when he returned. Mr Diehl did not "fix it up".

[95] Mr Diehl in his 3 August 2021 letter to Mrs Wright, took issue with her having "unilaterally altered rosters" having "given yourself leave from work for 10, 11, 12 August and again for 16, 17, 18 August". Mr Diehl stated the actions "are in breach of your employment agreement with us" and that Mrs Wright had "chosen to ignore the procedures to advantage yourself". Mr Diehl cautioned Mrs Wright that disciplinary action would ensue if it ever happened again. Mr Diehl had not raised these concerns beforehand with Mrs Wright.

[96] Mrs Wright responded in writing on 3 August 2021. Mrs Wright explained that Mr Diehl had only fixed up one shift, so she had arranged a replacement for the other shifts. Mrs Wright also swapped a shift with another employer in the week before her leave, to avoid having to work eight days in a row.

[97] Mr Diehl sent Mrs Wright a further letter dated 6 August 2021. Mr Diehl repeated and enlarged on his criticism of Mrs Wright's actions.

[98] Mr Diehl's criticisms were unfounded. Mrs Wright was entitled to annual leave. In May 2021, Mrs Wright requested and Mr Diehl agreed to her taking leave between 10 – 18 August 2021. When he produced the roster for that period, Mr Diehl mistakenly rostered Mrs Wright to work during her annual leave. Mrs Wright correctly brought it to Mr Diehl's attention. He confirmed it was an error that he would fix up when he returned. However, he

did not properly do so. Mrs Wright corrected Mr Diehl's error. There was no policy in place at the time prohibiting staff agreeing to swap shifts.

[99] Mrs Wright took annual leave over the August 2021 dates in accordance with the May 2021 agreement, but Mr Diehl did not retreat from his criticisms.

*Alternative Holidays issue*

[100] As set out earlier, Mr Diehl generally paid out Alternative Holiday entitlements rather than accumulating the entitlement, as a matter of practice.

[101] Mrs Wright raised this issue as a general point with Mr Diehl on 21 September 2021. Mrs Wright sought an explanation of and justification for Mr Diehl's practice of paying out rather than accumulating Alternative Holidays. Mrs Wright also asked that her Alternative Holidays entitlement be reinstated.

[102] Mr Diehl responded on 24 September 2021 and said "I find your emails offensive and incorrect and will be putting them on your file". His letter outlined his view about "Alternative leave" and "regular leave" and confirmed that the leave balances would be altered to reflect Mrs Wright's "demand to have regular leave instead". Mr Diehl later confirmed that Mrs Wright's alternative leave had been reinstated and her "regular leave" reduced accordingly. Mrs Wright questioned that as her view was that annual leave and "Alternative Leave Days" are "completely unrelated". Mr Diehl responded that leave had to come off a leave balance.

[103] The payslip Mrs Wright received for the fortnight ending 26 September 2021 recorded 16 hours had been taken off her annual leave balance and 16 hours added to her alternative holidays balance. Mrs Wright wrote again to Mr Diehl pointing out that she was accumulating her Alternative Holidays, unrelated to use of her annual holidays entitlement. She sought but did not receive a further explanation.

[104] In summary, Mrs Wright correctly questioned the lawfulness of Mr Diehl's treatment of Alternative Holidays. Her correspondence was not "offensive". Mr Diehl's statement that he would be "putting them on your file" was intended to deter her pressing the issue further.

*Study Leave*

[105] Mrs Wright was offered an opportunity to do a course of two weeks' study and six weeks placement, to qualify for a practicing certificate as a registered nurse. Mrs Wright wrote to Mr Diehl on 27 September 2021 to request study leave "to enrol in a course of study related to aged care" from 15 October 2021 to 12 December 2021.

[106] Mr Diehl replied to Mrs Wright's "letter requesting long term study leave" on 29 September 2021. He said that Castlewood's staffing requirements did not allow for that amount of study leave and "If you decide to do this course you would need to resign".

[107] Mrs Wright replied on 29 September 2021, saying that her resignation would have the same impact on staffing as her study leave request. Mrs Wright asked if Mr Diehl preferred her to resign or to take study leave without pay and return to Castlewood.

[108] Mr Diehl's answer was that Mrs Wright had received his decision in the previous letter. Mr Diehl also said "There is no provision for long term study leave in your employment agreement".

[109] Mrs Wright gave notice of her resignation the next day.

[110] The employment agreement provided:

**8.6 Unpaid Leave**

Applications for unpaid leave will be given reasonable consideration by the employer, but shall be granted only at the Employer's sole discretion having regard to the requirements of the Employer's business and operations. Applications for unpaid leave will be considered in situations such as for compassionate reasons; to undertake a course of work-related study; or to gain additional work-related experience.

[111] Mr Diehl was wrong to say that Mrs Wright application for study leave was not covered by her employment agreement. Mr Diehl breached the agreement by not giving "reasonable consideration" to Mrs Wright's application for unpaid leave to undertake a course of work-related study.

*Sending away by Mr Diehl*

[112] I find that Mr Diehl sought Mrs Wright's resignation by refusing her request for study leave and advising her she would need to resign if she decided to do the course. Mr Diehl sought to end the employment relationship because of his unfounded criticisms about Mrs Wright.

[113] Mrs Wright's decision to resign was caused by Mr Diehl's breaches of duty. Those breaches were Mr Diehl's handing of Mrs Wright's July complaint, his criticism of her about the August leave and roster issue and his response to her raising the Alternative Holidays issue.

[114] A substantial risk of Mrs Wright's resignation was reasonably foreseeable. The breaches on their own were each quite serious, but taken together it was foreseeable that an employee would not be prepared to continue working in those circumstances.

[115] I find that Mr Diehl dismissed Mrs Wright.

[116] Mr Diehl's actions and how he acted were not what a fair and reasonable employer could have done in the circumstances at the time. I find that Mrs Wright was unjustifiably dismissed and has a personal grievance against Mr Diehl.

**Personal grievance remedies**

[117] Mrs Wright seek compensation for humiliation, loss of dignity and injury to her feelings as a result of her personal grievances. A single award of \$40,000.00 compensation is sought.

[118] I agree that it is appropriate to assess compensation on a global basis. The July breach of duty was a significant part of the circumstances that gave rise to the constructive dismissal. The harm caused by the July grievance was overtaken by the harm caused by the dismissal. Assessing the harm overall is appropriate.

[119] I accept Mrs Wright's evidence that she became increasingly physically unwell and her mental health deteriorated following the July matter. I accept Mr Wright's evidence that

Mr Diehl's actions added to Mrs Wright's feelings of defeat and betrayal. I also accept his evidence about Mrs Wright's declining mental state. Mr Wright gave evidence, which I accept, about Mrs Wright's poor physical health and state of distress leading up to her resignation.

[120] In short, the harm resulting from both grievances was significant. It is properly remedied by payment to Mrs Wright of compensation of \$30,000.00.

[121] There is no claim for lost remuneration.

[122] Mrs Wright did not contribute in a blameworthy manner to the circumstances giving rise to either personal grievance.

### **Summary and orders**

[123] Mr Diehl personally employed Mrs Wright.

[124] Mr Diehl paid Mrs Wright at a rate lower than was legally payable to her under the Support Workers (Pay Equity) Settlements Act 2017 from 31 January 2020 until 9 August 2020. John Diehl is to pay Gillian Wright arrears of wages of \$3,905.00 (gross), by no later than 28 days after this determination.

[125] Mr Diehl paid Mrs Wright less than time and a half with respect to the public holidays on which she worked in the period from 31 January 2020 to 9 August 2020, because payment at the time was based on \$20.50 per hour not \$25.50 per hour. John Diehl is to pay Gillian Wright arrears of wages of \$100.00 (gross) in accordance with s 50 of the Holidays Act 2003, by no later than 28 days after this determination.

[126] When Mrs Wright's employment terminated, there were fifteen alternative holidays which she had not taken. John Diehl is to pay Gillian Wright \$3,240.00 (gross) for alternative holidays, by no later than 28 days after this determination.

[127] With respect to the calculation of final holiday pay in accordance with s 25 of the Holidays Act 2003, leave is reserved for Mr Diehl to provide calculations to establish the amount owed to Mrs Wright, within 14 days of this determination. Mrs Wright may then

respond to those calculations. I will determine the amount owed based on the findings in this determination with regard to those further submissions.

[128] Mrs Wright has personal grievances of unjustified disadvantage and unjustified dismissal against Mr Diehl. To settle these personal grievances, John Diehl is to pay Gillian Wright compensation of \$30,000.00 (without deduction), by no later than 28 days after this determination.

#### *Interest*

[129] There is a claim for interest on all arrears. The Authority has discretionary power to order interest in accordance with the Interest on Money Claims Act 2016 on the whole or on part of money recovered. The purpose is to compensate the successful party for not having the use of the money from when it should have been paid.

[130] Here, Mrs Wright was paid for alternative holidays during her employment when Mr Diehl should not have paid, but should have accumulated the entitlement. Mrs Wright had use of that money earlier than she would have received it. While early payment did not discharge the alternative holiday entitlement, I can have regard to the payments as part of considering the claim for interest. Overall, Mrs Wright received a greater amount from those early payments than would result from ordering interest on all the arrears from when each cause of action arose to the date of this determination. I decline the claim for interest.

#### *Costs*

[131] There is a claim for costs. Mr Wright's submission is that the time spent on this case is considerable, as are the resulting loss of potential earnings. I am referred to the Authority's standard daily tariff approach. Costs may be ordered where the successful party incurs legal costs to engage an advocate or a lawyer to prepare and/or present their case in the Authority. Mr Wright is not in business as an advocate so Mrs Wright has not incurred any legal costs for his representation. Neither Mrs Wright nor Mr Wright can claim costs to defray the loss of potential earnings caused by spending time to pursue this claim.

[132] However, Mrs Wright is entitled to costs against Mr Diehl to cover the lodgement fee of \$71.56 she paid to commence this application. John Diehl is to pay Gillian Wright costs of \$71.56 by no later than 28 days after this determination.

Philip Cheyne  
Member of the Employment Relations Authority