

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 139
3177193

BETWEEN AARON YAQUB
Applicant

AND NEILSONS LAWYERS
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Daniel Erickson, for the Applicant
Angela Evans, for the Respondent

Investigation Meeting: 22 – 25 August and 15 September 2023

Further submissions and 15 September 2023
information received: 25 September 2023

Determination: 6 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Aaron Yaqub was employed by Neilsons Lawyers Limited (NLL) as a solicitor, undertaking commercial work from January 2017 until his resignation on 20 June 2022. He says he had no choice but to resign due to an unfair and unjustified investigation NLL undertook into alleged conduct of his and that his resignation was in law an unjustifiable constructive dismissal. Prior to the investigation and his resignation, he says his suspension on 28 April 2022 and its continuation was unfair and unreasonable and amounts to an unjustified disadvantage. Mr Yaqub has raised personal grievances in relation to these matters and seeks remedies to compensate lost income and hurt feelings consequent to such.

[2] NLL says Mr Yaqub was treated fairly and reasonably throughout his employment. It says its actions were necessary to investigate the well-founded concerns it held which included that he was setting up a competing business.

[3] In respect of those concerns NLL brings a claim against Mr Yaqub for breach of the parties' employment agreement and the statutory duty of good faith. It claims damages for loss suffered consequent to those breaches. NLL says Mr Yaqub's breaches are so serious that an award of a penalty is warranted.

[4] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three-month timeframe required by s 174C(3) of the Act.

Non-publication orders

[5] NLL seeks non-publication orders under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) of identified sections of witness statements filed in relation to this matter on grounds the material contained therein is of a highly personal nature which may cause material risk of adverse consequences.

[6] The information is not directly relevant to the matters before the Authority for investigation and determination and it is not necessary to refer, either directly or indirectly, to it in this determination. The orders sought are not necessary.

The Authority's investigation

[7] During the investigation meeting the Authority received evidence from Mr Yaqub, Jeffrey Putt, a client of NLL's and directors of NLL - Neha Jamnadas, Trent Bowler, Luke Meys and Nicholas Palmer.

[8] 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 evidence and submissions received.

Issues

[9] The following issues are identified for investigation and determination:

Mr Yaqub's claims

- i. Was Mr Yaqub unjustifiably disadvantaged in his employment by way of suspension?
- ii. Was Mr Yaqub unjustifiably constructively dismissed?
- iii. If so, is Mr Yaqub entitled to a consideration of remedies sought including:
 - a. Reimbursement for lost income;
 - b. Compensation for unjustified disadvantaged of \$20,000 under s 123(1)(c)(i) of the Act;
 - c. Compensation for unjustified dismissal of \$40,000 under s 123(1)(c)(i) of the Act;
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Yaqub which contributed to the circumstances which gave rise to his grievance?

Neilsons Lawyers Limited's counterclaim

- v. Did Mr Yaqub breach obligations owed under his employment agreement and/or the duty of good faith by:
 - a. deliberately withholding information from NLL about his intention to set up a competing business;
 - b. not charging for legal work;
 - c. failing to refer a potential customer; and
 - d. failing to complete his duties.
- vi. If so, should the Authority award:
 - a. a penalty a portion of which to be ordered to be paid to NLL?
 - b. damages for lost profit including refunding billable fees of \$4,360 and disciplinary investigation costs?

- vii. Is either party entitled to an award of costs?

Relevant law

The test for justification

[10] In considering personal grievances for unjustified action and dismissal, as here, the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer and decide, on an objective basis, whether the employer's actions were reasonable. In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b) which reads:

The duty of good faith in subsection (1)—

(a)

...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;

...

[11] Further, s 4(1A)(c) of the Act 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 to provide the employee affected with access to information, relevant to the continuation of the employee's employment, about the decision. This engagement is to occur prior to the decision being made.

[12] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law".¹

[13] In accessing the fairness and reasonableness of the employer's actions in a s 103A setting focus is required on the employment relationship overall. In *FMV v TZB*

¹ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

the Supreme Court discussed this emphasis in the Act and its relationship with the statutory good faith obligations:²

[46] ...As its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power. The result is that while the employment agreement remains very important, it is the employment relationship that is the real focus under the current Act. The scope of the employment relationship is wider than the employment contract and it adds an additional dimension to contractual rights and obligations. This is reflected in two important ways.

[47] The first is the statutory incorporation of the principle of good faith into the employment relationship. This principle underpins the Act's relational approach.

[48] Part 1, "Key provisions", begins by stating that the object of the Act is:

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship...

[49] This is to be done, first and foremost, by:

... recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour...

[50] Section 4 then provides that parties to an employment relationship "must deal with each other in good faith". This means, of course, that parties must not mislead or deceive one another, but its effect is wider than that. Parties must also actively and constructively establish and maintain a productive employment relationship; they must be responsive and communicative; and employers must comply with procedural fairness requirements...Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

The parties' employment agreement

[14] When Mr Yaqub commenced employment with NLL in January 2017 the parties entered a written employment agreement (the employment agreement). For the purposes of this determination the relevant provisions of the employment agreement include:

5. EMPLOYEE FIDELITY

² *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

5.1 The Employee agrees to place his/her duties to the Employer above all other business activities. The Employee shall not carry out work of the type being carried out for the Employer for others. If in the reasonable opinion of the Employer there exists a conflict or other reasonable grounds for abandoning or curtailing outside activities, the Employee shall abandon or curtail such activities so directed.

5.2 The Employee may engage in other activities such as University studies, personal business, charitable or professional work provided such external activities or interests do not interfere with the Employee's performance of their duties or obligations to the Employer or compete with its business (as may be determined solely by the Employer) and the Employee shall inform it forthwith of any such potential conflicting or competing external activities or interests.

17. EMPLOYEE WARRANTY

...

17.4 The Employee shall use his/her best endeavours to promote, develop and extend the Employer's business interests and reputation and not do anything to its detriment.

...

17.6 The Employee must declare any interest he/she has in any business or activity of any kind in which may conflict or compete with the business of the Employer.

...

30. DISCIPLINARY PROCEDURE

...

30.6 Prior to any disciplinary meeting, the Employee will be advised to attend a disciplinary meeting regarding a specific allegation and of the likely consequences should the allegation be substantiated. The Employee will also be advised of the entitlement to have a support person present at the meeting. During the meeting the Employee will be given an opportunity to admit explain or deny the allegation. Any explanation and any mitigating circumstances will be considered before a decision is made as to disciplinary action.

...

30.9 The Employer may suspend the Employee from his/her duties whilst the Employer conducts an investigation in relation to any matter that may concern the Employee if in all the circumstances the Employer considers it appropriate. The Employer will seek the Employee's input before suspension. Suspension will be on full pay.

[15] The employment agreement did not contain a restraint of trade.

Background

22 April – 27 April - NLL undertakes a preliminary investigation into Mr Yaqub's conduct

[16] At 9.46pm on Wednesday 27 April 2022 Mr Meys emailed Mr Yaqub a letter subject line “Notice of investigation meeting” copying in Mr Bowler, Ms Jamnadas and Mr Palmer (the directors). The letter had been drafted earlier that evening in a meeting the directors held in NLL’s city office. The letter included advice to Mr Yaqub that he was suspended on pay, described a number of allegations concerning his conduct which could amount to serious misconduct and advised he was to attend a meeting with the directors on Friday 29 April. No supporting information was attached though the letter stated the information would be provided at the meeting.

[17] The catalyst for the letter was information a member of NLL’s administrative staff (the first staff member) told Ms Jamnadas on 26 April. They (the first staff member) told Ms Jamnadas they had been told by another staff member (the second staff member) on 22 April:³

- (i) Mr Yaqub and a solicitor (the solicitor) who had recently been employed by NLL and their husband were starting their own firm;
- (ii) they were looking at premises near NLL with an estimated timeframe for the new firm being August/September that year; and
- (iii) they intended to offer positions to two identified NLL administrative staff (the other identified staff members).

[18] There is no dispute the first staff member did not have direct knowledge of the matters relayed to Ms Jamnadas. Notwithstanding Ms Jamnadas took the matters seriously. She told Mr Palmer. They then commenced an investigation. To that end, later on 26 April Ms Jamnadas and Mr Palmer met with the second staff member who told them as Ms Jamnadas’ file note of 27 April records:⁴

- (i) Mr Yaqub, the solicitor and their husband were looking for premises;
- (ii) one of the other identified staff members said they would leave NLL and go with Mr Yaqub; and

³ Refer Ms Jamnadas’ file note 27 April 2022.

⁴ Ibid.

- (iii) at a social event the solicitor told them and other people Mr Yaqub would be leaving NLL shortly to set up a firm with their husband and another employee of NLL who was present told them “to be quiet” and not share any details, to which the solicitor said it was obvious “they” would start their own business.

[19] Ms Jamnadas and Mr Palmer do not appear to have clarified with either staff member the details of how they became aware of this information or if they had received any of the information directly from Mr Yaqub. They continued their investigation. On the morning of 27 April, they contacted two consultants of the firm who independently confirmed they were aware Mr Yaqub wanted to start his own firm, were unaware he was soliciting staff and they knew or suspected he was looking for premises but did not know any details.⁵ Again, they did not clarify the circumstances of how they had come to know these matters.

[20] Ms Jamnadas and Mr Palmer then reviewed Mr Yaqub’s work emails.⁶ This review uncovered the following communications which further fuelled their concerns:

- (i) an email from March 2022 from one of the consultants to a person external to NLL, inviting them to join the consultant, Mr Yaqub, the former solicitor of NLL and their husband at an identified hospitality business for “a pizza and a beer” that evening;
- (ii) from January to March Mr Yaqub appeared to have completed work for the former solicitor’s husband which had not been billed and for which he had not recorded time;
- (iii) on 12 April Mr Yaqub had sent to his personal work email address a PDF of client google reviews with marginalia identifying the lawyer;
- (iv) he had recently used an email sign off which included only his personal mobile; and
- (v) he appeared not to have recorded or billed any time from 20 March 2022.

⁵ Refer Ms Jamnadas file notes dated 28 April 2022.

⁶ It is common ground Mr Yaqub was aware the directors had access to his work emails.

27 April – the directors draft a letter suspending Mr Yaqub

[21] Ms Jannadas and Mr Palmer then contacted Mr Meys and Mr Bowler with their concerns. The directors met later that day after 5pm in the city office to discuss the matter. They reviewed the information Ms Jannadas and Mr Palmer had received and gathered and decided given this context, additional matters in their knowledge were relevant to the matters concerning Mr Yaqub’s conduct at work. The directors then concluded it was reasonable to place Mr Yaqub on paid leave given the concerns about possible solicitation of staff and removal of confidential information. On this basis they drafted the suspension letter. In evidence to the Authority Mr Bowler said Mr Yaqub’s conduct presented “an existential threat” to the business.

[22] The suspension letter was addressed to Mr Yaqub and included:

- (i) a summary of obligations he owed to NLL under his employment agreement including utmost good faith and loyalty, use of confidential information, non-solicitation of clients and staff;
- (ii) referred to an undertaking in respect of confidential information Mr Yaqub had provided NLL during director negotiations in the previous year;
- (iii) NLL had received allegations about him or the effect of his conduct which the letter listed at (a) – (k);
- (iv) the allegations could amount to serious misconduct justifying disciplinary action up to and including dismissal;
- (v) he was required to attend an investigation meeting to be held on Friday 29 April at 4.40pm;
- (vi) further information in support of the allegations listed (a) – (k) in the attached letter would be provided at the meeting;
- (vii) he was welcome to bring a support person to the meeting;
- (viii) a request that he confirm what confidential information he had removed or copied from NLL and return such;
- (ix) he was placed on paid leave; and
- (x) made a request for his urgent reply.

[23] The allegations listed (a) – (k) in the letter are set out below:

- (a) Have been planning and setting up a competing law firm located near the Penrose office whilst at Neilsons;
- (b) Have solicited Neilsons' staff to join your planned new firm, including [three named support staff];
- (c) Have met with [the former employed solicitor and their husband] at a client premises, namely [a hospitality business], where the plan was discussed with staff who were being solicited;
- (d) Advised [a solicitor from another law firm] that Neilsons was disintegrating as a partner[sic] and staff were about to leave;
- (e) Have been doing work for your proposed new partner,... and/or [their] company..., without recording time on it;
- (f) Have recently changed your email signature to only have your personal cellphone number on it, instead of continuing the automatic Neilsons' standard signature format which includes general office contact numbers;
- (g) Have copied client phone numbers to your personal cell phone;
- (h) Advised Neha Jamnadas and Nick Palmer that the three of you should leave Neilsons and set up your own firm, taking its staff and clients;
- (i) Made disparaging comments about the trustworthiness of Neilsons' directors to [a solicitor in another firm] in front of Neilsons' client, [a hospitality business];
- (j) Have been using your company credit card for personal spending and/or for purposes other than Neilsons marketing in breach of company policy; and
- (k) Disclosed staff salaries to [two support staff] so they could see how much they were paid relative to others.

[24] NLL's decision and reason to place Mr Yaqub on paid leave is set out at [8] of the letter:

Due to the nature of the allegations and the potential effect on Neilsons we are placing you on paid leave while the investigation takes place. You must not communicate with staff or clients directly without seeking our consent. Please also temporarily return your office key, token and company iphone. Once the investigation is concluded these temporary measures can be removed.

[25] The letter was then emailed to a personal email address of Mr Yaqub's which Ms Jamnadas had located that evening on a social media platform. The directors accepted in evidence they had not used that email address before to correspond with Mr Yaqub. They said they used the personal email address to maintain confidentiality. They did not ring, text or otherwise contact Mr Yaqub to draw his attention to the emailed letter or its contents.

[26] In accordance with the suspension decision the directors then arranged removal of Mr Yaqub's access to NLL's computer systems and the removal of 20-30 files from his office.

[27] The consequence of the directors' decision to send the letter to a private email address and not contact Mr Yaqub to draw his attention to it was they could have no certainty he had received the letter before the start of the next working day.

[28] Unfortunately, this is not a consequence the directors appear to have turned their minds to and very likely occasioned the situation the parties found themselves in the next day when Mr Yaqub attended work at about 8am.

28 April - Mr Yaqub is suspended from work

[29] When Mr Yaqub arrived at work that day he found he was unable to log into his computer and files and papers he had been working on had been removed from his office. He walked towards Ms Jamnadas' office, adjacent to his, to ask her if the internet was down just as Mr Palmer and Ms Jamnadas were walking towards him from Ms Jamnadas' office from which he (Mr Yaqub) observed the office manager leaving. He saw Ms Jamnadas was holding a copy of his employment agreement in a yellow plastic sleeve. When they met Mr Palmer asked Mr Yaqub if he had checked his emails. Mr Yaqub said he could not and asked if the internet was down. Mr Palmer then said the directors wished to meet with him and when Mr Yaqub asked what about Ms Jamnadas suggested they meet.

[30] The three of them then sat in the board room. After, by Mr Yaqub's recollection, about 10 minutes, the meeting had not started Ms Jamnadas and Mr Palmer said they were waiting for Mr Bowler to arrive which he did soon after. He appeared to Mr Yaqub to have arrived straight from the gym. The meeting then commenced.

[31] At the meeting Mr Yaqub was handed a copy of the letter emailed to him the previous evening. No supporting information was provided. Mr Yaqub read it. Mr Palmer asked if he had any comment to make. Mr Bowler cautioned Mr Yaqub that he did not have to say anything. Mr Yaqub recalls making the following comments:

- (i) the allegations appeared to be based on hearsay;
- (ii) procedural fairness obligations seemed to have been breached; and
- (iii) he asked where the allegations came from.

[32] The directors did not respond directly to Mr Yaqub's comments. He then asked what he should do, and he says Ms Jamnadas asked him for a file handover. Mr Bowler reinforced the directions in the letter regarding not contacting staff or clients and asked Mr Yaqub to return NLL property in his possession which he did handing over his office keys, swipe cards and cell phone.

[33] Mr Yaqub then waited in the boardroom while Ms Jamnadas attended to other matters which are understood to relate to the employment investigation. Mr Yaqub's recollection is that he waited an hour and a half before Ms Jamnadas joined him to undertake the handover. During the handover Mr Yaqub offered to work from home to minimise disruption to clients and Ms Jamnadas said the offer would be considered.

[34] Ms Jamnadas denies a hand over was sought or undertaken. She said one was unnecessary because the system of work meant current issues were readily assessable. The directors' described the period Mr Yaqub remained on the premises as awkward.

[35] It is more likely than not Mr Yaqub understood he was asked to do some sort of file handover and that is why he waited but that this request was not fully pursued by NLL because the directors were dealing with the unexpected consequences of Mr Yaqub attending work.

[36] When Mr Yaqub went to leave the premises, as he passed through reception a staff member expressed surprise at seeing him because, she said she had been told by the office manager he was on leave that day. Mr Yaqub did not have planned leave that day. When he was in the car park another staff member, his personal assistant, ran towards him in tears saying she had just been in a meeting with the directors, they had asked about her relationship with him and she had told them he had not sought to solicit her from her employment at NLL. The following day another employee of NLL contacted Mr Yaqub and advised him she had had a similar meeting with NLL directors. Other employees also contacted him asking if he had been dismissed.

[37] Mr Yaqub said he felt utterly humiliated by the events of that morning. After that date he did not return to work at NLL.

29 April – 10 May

[38] On 29 April Mr Yaqub emailed the directors that he would not be attending the meeting scheduled for that day because he did not have sufficient time to prepare. In the email he also stated he was disappointed, distressed and humiliated by how he had been treated on 28 April including that staff had assumed he had been dismissed because files had been removed from his office.

[39] On 30 April Mr Yaqub attended an appointment with a doctor and received medication for anxiety and high blood pressure and was certified unfit to work for 30 days. He said he had had trouble sleeping since the events of 28 April, was feeling short of breath and had experienced panic attacks.

[40] By email dated 2 May Mr Meys replied to Mr Yaqub's 29 April email, attaching a schedule which provided more detail of the allegations of misconduct and supporting information including:

- (i) work done for the person NLL described as "your proposed new partner" and/or his legal practise; screen shots of Mr Yaqub's NLL email signature with his work and personal number and without the work number;
- (ii) information provided during the directorship negotiations including reference to information about staff salaries;
- (iii) Mr Yaqub's NLL credit card statements, submitted receipts in that year and NLL's credit card policy;
- (iv) his billing and timesheets for March and April; and
- (v) emails with a prospective client.

[41] The letter rescheduled the meeting to 5 May, asked Mr Yaqub confirm his attendance at such by 4 May and that if he could not attend, he would need to take sick or annual leave.

[42] On 5 May Mr Yaqub's then representative wrote to NLL he would not be attending the scheduled meeting because the information provided to date was not sufficient for him to understand and respond to the allegations. In particular the letter asked for signed statements from the staff who had alleged Mr Yaqub had sought to

solicit them to work at the alleged new firm, from those who were in attendance at the social event at the client premises, Mr Yaqub's billing for the preceding six months and other information which could be characterised as direct evidence of the matters alleged.

[43] Mr Meys responded that day acknowledging the advice Mr Yaqub was unwell providing a document titled "Schedule" which set out more information about the allegations:

- (i) listing the credit card transactions for which insufficient information had been provided;
- (ii) Mr Yaqub had received the information about staff salaries in early 2021 and had discussed them in October 2021 with Ms Jamnadas and on 1 April 2022 with Mr Palmer; and
- (iii) the email with prospective clients was relevant to the allegation Mr Yaqub had not recorded time since 18 March 2022 and was not saving documents as required which, with the timing of the meeting in the client premises, appeared deliberate.

[44] The letter raised a concern Mr Yaqub was not cooperating with the investigation by "...failing to follow a reasonable direction to co-operate with the investigation in good faith by refusing to meet with us and respond to the allegations". The letter also raised a potential conflict of interest with the representative.

[45] On 6 May Mr Yaqub's then representative advised NLL they were withdrawing from the matter. Mr Yaqub obtained a new representative.

[46] On 10 May Mr Yaqub provided a written response to the allegations to NLL. The letter is 15 pages long. It details the events of the morning of 28 April, his objection to the lawfulness and reasonableness of his suspension and his distress at how he was being treated by NLL. The letter then provides a detailed response to each allegation.

[47] Mr Yaqub denied any breach of obligation to NLL. It is necessary to set out in full his response to the first allegation given how this employment relationship problem developed between the parties in the coming weeks:

Allegation 1: Planning and setting up a competing law firm located near Neilsons Lawyer's Ltd's Pensore Office while still working for Neilsons Lawyers Ltd:

I am really unsure what this allegation relates to in terms of my legal obligations to [NLL].

My employment agreement does not contain a non-compete clause or a restraint of trade clause, meaning that if I were to leave [NLL] (for any reason), I would be free to work for any competitors(s) in any capacity I see fit and/or to set up a new law firm.

As you are aware, I made a decision not to accept the offer of Directorship at [NLL]...

The way I am being treated by the Directors and the direction the firm is going in has made me start to look at other opportunities in the legal services industry. I have no firm plans to do anything in particular at present and am unsure whether or not it is fiscally viable for me to establish a law firm from scratch on my own, to join another law firm as an employee, salaried partner or equity partner or to become a director of a law firm with another established entity.

While I have been looking at the cost of renting office space in a number of different Auckland suburbs, I have no plans to set up a competing law firm at this stage and have not used any work time to research other career opportunities or aspects of setting up in business on my own account. Any steps I have taken have been exploratory or at most preparatory. They are not a breach of any of my express or implied obligations of employment. For example, nothing I have done would be a breach of my implied obligations of fidelity.

On occasions, I have discussed the numerous opportunities I am considering with some friends, some of which work at [NLL]. At no time have I asked them to go into business with me or to work for me, whether in my own business or with me in any other form I may be employed by in the future.

[48] The response to the allegation regarding an alleged meeting at client premises included Mr Yaqub had been invited by one of NLL's consultants to join him for a drink after work with a former colleague, he did not know their partner would be there and that he (Mr Yaqub) had not invited staff to a meeting to discuss soliciting them to work for "...[the former colleague's partner] or any future firm I may or may not set up and choose to work for in some capacity".

[49] In response to the allegation regarding failing to record time on a matter for the former colleague's partner's firm - Mr Yaqub accepted he had done the work, that issues with the IT system, known, he said to NLL, had caused him to miss an advice deadline and this resulted in Mr Yaqub agreeing not to charge for that work. The

explanation continued this was known to the consultant who was aware of the work and the IT system difficulty which had caused it, was supported by a “disgruntled” email from the client and he would have billed for the work but for his suspension.

11 May – Mr Yaqub raises a personal grievance

[50] On 11 May Mr Yaqub’s solicitor wrote to NLL raising a personal grievance for unjustified disadvantage in respect of NLL’s decision to commence a disciplinary process, the suspension and what was described as an ongoing failure to provide information. The letter alleged a breach of the duty of good faith in NLL’s failure to provide the information sought by the previous representative and repeated the request including:

- (i) any documentation arising from the interviews of the witnesses NLL had named including witness statements, transcripts, notes, file notes or emails referencing the allegations; and
- (ii) written descriptions from Ms Jamnadas and Mr Palmer of the allegations they have made including dates, times and locations of the alleged conversations.

[51] The letter concluded “The impact on [Mr Yaqub] is profound. He is stressed and anxious. He is being treated by his doctor for acute depression and anxiety caused by Nielson’s actions. His employment is now at risk and his reputation has been damaged”. Mediation was proposed.

[52] On 16 May, after a follow up email from Mr Yaqub’s lawyer, Mr Meys replied to the personal grievance raising letter denying Mr Yaqub had been unjustifiably disadvantaged in his employment and that NLL had met its good faith obligations. The letter included:

- (i) Mr Yaqub was not subject to a disciplinary process. NLL was investigating serious allegations it had received which could give rise to a disciplinary process and findings of serious misconduct;
- (ii) NLL tried to make Mr Yaqub aware of its concerns before 28 April, the suspension letter had been emailed to him on 27 April, it was not

expected that he would attend work on the 28 April and any suggestion of the situation being awkward was of Mr Yaqub's own doing;

- (iii) under the parties' employment agreement NLL had a contractual right to suspend Mr Yaqub and could do so without consultation given the "potentially irreparable damage" to the business and its staff;
- (iv) NLL would consider any suggestions Mr Yaqub wished to make in respect of the ongoing suspension;
- (v) Mr Yaqub was reminded of his ongoing obligations to NLL; and
- (vi) confirmed its willingness to attend mediation.

[53] At about this time, Mr Meys spoke with the solicitor formerly employed by NLL who denied their husband and Mr Yaqub were going into partnership. Mr Meys said he did not put much weight on this information.

[54] On 17 May Mr Yaqub's solicitor replied to Mr Meys that the 27 April letter had been sent to an old email address which Mr Yaqub did not check regularly and given the events of 28 May Mr Yaqub was concerned the suspension had been predetermined and conducted without consultation in breach of the express provisions of the parties' employment agreement.

[55] On 23 May Mr Yaqub's solicitor wrote to NLL again raising Mr Yaqub's concern that he had not yet received all the information about the allegations and proposed the suspension be lifted with the condition Mr Yaqub work from home.

[56] On 25 May NLL replied providing further information as requested:

- (i) file notes including of Ms Jamnadas and Mr Palmer dated 27 and 28 April of their investigation prior to and the day after the suspension letter was sent, undated of Mr Meys of his recollection of providing financial information, including details of staff salaries to Mr Yaqub, Ms Jamnadas and Mr Palmer in March 2021, Mr Palmer's recollection of the 1 April discussion with Mr Yaqub about staff salaries;
- (ii) Mr Yaqub's timesheets over the year;
- (iii) the three receipts relating to credit card spending NLL understood Mr Yaqub had provided that year; and

- (iv) emails regarding Mr Yaqub's access to NLL's IT system

[57] Also attached were documents described as "client details that we understand [Mr Yaqub] may have recently emailed to himself" and advised that allegation 4 was withdrawn to avoid a client being drawn into the investigation. A meeting to hear from Mr Yaqub was proposed as "...a continuation of our investigation into the concerns first set out in our letter, dated 27 April..." on 27 or 30 May.

[58] With regard to Mr Yaqub's 23 May request to return to the office to work, information was sought as to the clients who had contacted him with concerns and who Mr Yaqub had referred these client's back to at NLL. The letter ended with reference to lifting the suspension "Pending your response and [Mr Yaqub's] interview we are not satisfied that the risks can be sufficiently addressed. Following our meeting with [Mr Yaqub] this week, we expect to be in a position to consider [his] continued suspension".

[59] On 30 May the parties attended mediation. The employment relationship problem was not resolved.

2 June – letter advising allegations in the 27 April letter no longer being investigated

[60] NLL instructed counsel and on 2 June they wrote to Mr Yaqub's solicitor that NLL sought to clarify its internal investigation process including "...apparent confusion about the nature and scope of the investigation" and that this letter sought to explain this and next steps. The letter stated the background to the current situation was the 26 April staff disclosure to Ms Jamnadas, the investigation she and Mr Palmer undertook that day including their review of Mr Yaqub's use of NLL's IT systems and the notice to him on 27 April of the investigation. The purpose and scope of the investigation was to investigate and determine if Mr Yaqub had engaged in conduct which breached the express provisions of the parties' employment agreement and the duty of good faith.

[61] The letter continued there were now no allegations being made against Mr Yaqub and concerns were being investigated as initially raised by employees. The letter also included:

On 10 May... [Mr Yaqub] provided written responses to the concerns raised by [NLL]. Mr Yaqub's failure to answer questions fully and honestly (on 10 May, and/or as the investigation progresses) could breach his existing obligations of good faith and fidelity.

[62] The letter confirmed NLL had provided Mr Yaqub with all the information it had reviewed and considered relevant. Actions to be taken were advised commencing with a meeting to "Interview [Mr Yaqub]...to receive his feedback on the information provided to him and receive any documents he would like [NLL] to review". The continuation of the suspension was confirmed, that feedback on the continued suspension had been sought on 16 May and on 25 May and NLL confirmed it would further consider if the suspension should continue after the meeting.

[63] Mr Yaqub, through his solicitor responded that day that he intended to cooperate fully with the investigation, including the proposed meeting but there were outstanding issues concerning the investigation to date which engaged the statutory good faith obligations and the justification test.

[64] In the context of the s 4(1A)(c) positive obligation to provide all relevant information Mr Yaqub sought more information to understand the allegations "...when the information provided to date is vague, lacks specific details and is in many instances incomplete". The letter goes on to detail the further detail sought.

[65] In respect of the suspension, the letter asked for more detail of the basis for the suspension and in particular the "risks" it sought to militate against and emphasised this had been asked for previously. His willingness to be return to work as set out in the 23 May letter was restated as was his concern that his suspension was without reasonable explanation and had been initiated in breach of the provisions of the employment agreement for which he reserved his position to take action against NLL.

[66] In response, on 7 June NLL's solicitors wrote to Mr Yaqub's solicitor including:

- (i) Mr Yaqub was not currently facing any allegations;
- (ii) an investigation process was ongoing and further information would be provided;
- (iii) the allegations set out in the 27 April letter were withdrawn;

- (iv) the scope of the investigation was contained in the 2 June letter;
- (v) Mr Yaqub's 10 May "...written responses raised questions as to whether [Mr Yaqub] was being honest and full in his responses to the firm's concerns. [NLL] is investigating whether [his] conduct could amount to a breach of his employment duties and/or what steps (if any) NLL should take now to protect its interests;
- (vi) NLL had provided, in answer to Mr Yaqub's request, all the information available to it of the details of how and when relevant third parties became aware Mr Yaqub was planning to set up his own firm; and
- (vii) NLL wished to receive Mr Yaqub's responses to the information contained in that information including the provided file notes rather than discuss the matter further with staff with the risk of causing further disruption and distress.

[67] With respect to the suspension, the 7 June letter advised it would continue on the following grounds:

- (i) Mr Yaqub's conduct was being investigated and if those concerns were upheld allegations of serious misconduct could arise;
- (ii) clause 30.9 of the parties' employment agreement permitted suspension while an investigation into conduct was ongoing and NLL considered suspension appropriate;
- (iii) NLL says the suspension was appropriate because existing employees who have been or may need to be spoken to during the course of the investigation could be influenced or pressured if Mr Yaqub's suspension was lifted, including allowing him to work from home;
- (iv) the basis of this concern was Mr Yaqub's seniority and influence in the business, NLL had "information that evidences [Mr Yaqub) may have solicited existing staff and may have sent client information to himself for an unlawful use;
- (v) NLL would give further consideration to whether the suspension should continue after the meeting; and
- (vi) if Mr Yaqub preferred NLL would agree to his being on paid special leave.

[68] The balance of the letter dealt with arrangements for the 9 June meeting.

[69] In addition the letter included about 350 pages of attachments:

- (i) a 1-page document described as email comments of Mr Palmer and Ms Jamnadas on 7 June 2022 recording their recollections of discussions with Mr Yaqub in late 2021 about starting a new firm;
- (ii) Mr Yaqub's last 6 pay slips and month-to-month reports for period 1 April 2021 to 31 March 2022; and
- (iii) over 300 pages of emails which are described as "...may be relevant";

The 9 June meeting

[70] As arranged the parties met on 9 June. Mr Yaqub attended with counsel. Mr Meys and Mr Bowler were there for NLL. The meeting was recorded by Mr Yaqub's representative and a transcript was provided to NLL following the meeting. For completeness the transcript was provided to the Authority.

[71] Mr Meys opened the meeting, referred to the ongoing employment relationship of the parties and their respective good faith obligations and posed to Mr Yaqub "In general, do you feel that you've been loyal and honest, acting in good faith towards Neilsons this year?". Mr Yaqub answered "I do" and Mr Meys then asked "And you don't think you've done anything wrong?" to which Mr Yaqub said "No".

[72] Questions on the following matters were put to Mr Yaqub to which he provided answers:

- (i) staff and clients of NLL Mr Yaqub had been in contact with since his suspension and the nature of that contact;
- (ii) facilitating a meeting with friends - a business and a potential investor - without NLL being an engaged;
- (iii) discussions to leave NLL and work with another lawyer (the lawyer) and the detail of the business proposal made by that lawyer to Mr Yaqub;
- (iv) discussions with staff about leaving NLL and options;
- (v) why he had not billed for work done for the lawyer that year;

- (vi) preparatory steps taken for the new business, including looking to lease premises;
- (vii) client details emailed to himself and sending work emails to a private email address;
- (viii) change to private mobile number in mid-April and how much Mr Yaqub used work and private mobile phones for NLL work;
- (ix) work expenses on NLL credit card without supporting receipts;
- (x) communications to secretarial staff about their working for him;
- (xi) the file notes of the directors of discussions with staff about their working for Mr Yaqub;
- (xii) disclosing information about staff salaries received during directorship negotiations; and
- (xiii) Mr Yaqub disclosing to NLL clients his intention to leave, “90%” of whom he characterised as friends.

[73] The NLL representatives advised at the meeting a forensic IT analyst had been contacted and it intended to undertake a full forensic examination of Mr Yaqub’s work computer. Also, at the meeting the following exchange occurred which is relevant to understanding the parties’ broad conceptualisation of this employment relationship problem:

Mr Meyes: So is it your view that everything that’s been discussed here today, that [NLL] directors should have been aware of, or were aware of it in some other way and it was no secret.

Mr Yaqub: That I intended to leave the firm?

Mr Meyes: Yes

Mr Meyes: Yes. I was completely transparent with [Mr Palmer], and out of respect for [NLL], because I didn’t want to just say “I’m going guys, see you later”. I was sort of saying “hey guys...” I was very transparent with them all the way through. [Mr Palmer] was saying “I want you to stay”, I said “loo man, I’m unlikely to stay”. So I’m trying to prepare and soften the blow...I was trying to work with you to try and soften the blow, because...”

[74] At the end of the meeting Mr Yaqub was invited to raise any issues or provide further responses to the information including to the file notes provided. He raised the following:

- (i) sought clarification as to the purpose of the meeting given the letter 7 June advised the allegations in the 27 April letter were withdrawn;
- (ii) asked which parts of his 10 May letter had raised concerns that he was not being honest and full in his responses contained therein;
- (iii) what had the forensic expert been engaged to look for and when NLL expected the terms of reference for the expert to be available;
- (iv) when NLL expected this process to be complete given he had been suspended since 28 April and this was causing damage to his career and reputation;
- (v) there was no justification for the suspension and he was prepared to work on limited duties or perform all duties from home and provide an undertaking to comply with his express and implied obligations; and
- (vi) whether the staff witnesses had consented to the file notes being disclosed to him.

[75] Substantive answers to these issues were not provided by NLL at the meeting.

[76] On 15 June Mr Yaqub's solicitor wrote to NLL's solicitors:

- (i) confirming a copy of the meeting audio and transcript had been provided to them and NLL;
- (ii) confirming the 27 April allegations were withdrawn and the ongoing investigation related to the concerns in the 2 June letter – NLL had been advised “at least, one” employee was leaving to work with Mr Yaqub, an initial review of NLL's IT systems raised questions about whether Mr Yaqub was meeting his ongoing duties to NLL and whether Mr Yaqub was being honest and full in his responses to NLL's concerns;
- (iii) the change in approach calls into question the justification for the ongoing suspension;
- (iv) the remaining concerns are vague and, to date, not supported by credible evidence;
- (v) detailing and analysing the lack of credibility of the evidence;
- (vi) it was increasingly apparent NLL had no reasonable basis to suspend Mr Yaqub;

- (vii) since then NLL had been seeking to ‘fill in the gaps’ by generating new concerns;
- (viii) NLL is entitled to investigate specific allegations of misconduct or serious misconduct;
- (ix) an objective observer would conclude the current process was a ‘fishing expedition’ because there was no attempt to substantiate the original allegations and they did not withstand scrutiny;
- (x) Mr Yaqub remained willing to cooperate with reasonable requests for assistance, including answering questions;
- (xi) there was no fair or reasonable basis for the ongoing suspension which was causing unnecessary distress and damaging his reputation;
- (xii) sought advise by 5pm 15 June of NLL is prepared to lift the suspension;
and
- (xiii) if agreement could not be reached on that, instructions were to apply for interim reinstatement.

[77] On 17 June NLL’s lawyers provided Mr Yaqub’s lawyer with a copy of the email exchange referred to in the 9 June meeting. The email exchange is from late January to 2 February 2022 requesting advice on a commercial lease and including a suggested work referral from Mr Yaqub to the lawyer NLL alleged was his intended partner in a new law firm. NLL did not respond to the concerns raised in the 15 June letter about the suspension and NLL’s investigation. The suspension was not lifted.

20 June - Mr Yaqub resigns

[78] Over the weekend of 18–19 June Mr Yaqub considered resigning from NLL and came to the conclusion this was his only option. He said he remained unclear as to why he had been suspended and the ongoing need for the suspension and the manner of his suspension and the failure to consult with him he had found humiliating and coupled with the suspension continuing for so long he felt was damaging to his reputation. He said he also considered what he characterised as a “battle” to get information from NLL, he was concerned that his integrity had been questioned and he found this very difficult to accept particularly given the importance of integrity as a lawyer. Given all this he felt he would not get a fair hearing in any continued investigation process.

[79] On 20 June Mr Yaqub tendered his resignation:

This letter is to advise that I am resigning from my position... This is a decision I am making reluctantly, but I am left with no choice given how I have been treated in recent weeks.

On 28 April 2022, I was suspended without prior notice or consultation. My concerns about this course of action have been raised in earlier correspondence from my lawyer and to date I have not received a satisfactory response.

The allegations against me were very vague. No supporting information was provided. Since then, and despite repeated requests from me and my lawyer, information has only been drip fed. Then I was told there were no “allegations”, only “concerns”. A new “concern” was raised, being that my written response to the original allegations was not honest or full. However, I am yet to be told specifically what I have done that is supposedly dishonest or not full. When [Mr Meys and Mr Bowler] were asked about this point in the investigatory meeting on 9 June 2022, [Mr Bowler] said there were no “allegations with specifics” and it was a “fact finding exercise”. Similarly, I have been told that a forensic IT person has been engaged to check my computer use. However, I haven’t been told what they are looking for because that information is legally privileged.

My suspension was obviously predetermined, in breach of the usual procedural fairness obligations and my employment agreement. I still have no clarity about what it is alleged I have done wrong, just vague concerns that are still being investigated, over seven weeks later.

Given what has happened to date, I can no longer be confident that [NLL] will adhere to even the bare minimum of its procedural fairness obligations. Instead, it appears [NLL] is on a witch hunt to try and find some reason to get rid of me. This has caused me significant stress and I am being medicated for anxiety and high blood pressure. My reputation with my clients and colleagues has been damaged, possibly irreparably, because I was removed from work with no warning and no satisfactory explanation.

Accordingly, please treat this letter as notice of my resignation.

...

[80] On 21 June NLL’s lawyers wrote to Mr Yaqub’s lawyer acknowledging his resignation and responding to the concerns raised:

- (i) the suspension and ongoing suspension were appropriate and lawful as set out in the letter 7 June;
- (ii) Mr Yaqub’s feedback on the continued suspension was sought on 16 May and on 7 June Mr Yaqub was given an option to go onto special leave;
- (iii) NLL did not accept the investigation process was vague – the specific scope of the investigation was provided in the letter 2 June and further clarified at the meeting 7 June, the 26 April letter set out the basis for

NLL's concerns and Mr Yaqub's 10 May response letter raised concerns as to the honesty and fullness of his responses;

- (iv) NLL was investigating whether Mr Yaqub's conduct could amount to a breach of his employment duties and/or what steps NLL should take to protect its interests;
- (v) Mr Yaqub had been told the forensic review was part of the ongoing investigation of specific concerns and he would be provided the material; and
- (vi) NLL had met and continued to meet its obligations to Mr Yaqub and there were no grounds for constructive dismissal.

[81] The letter included a proposal as to Mr Yaqub's notice period and reminded him of the post-employment restrictions to which he remained bound.

[82] On 28 June the parties reached agreement his last day with NLL would be 30 June.

8 August – Mr Yaqub's new law firm is incorporated

[83] Mr Yaqub accepted the proposal to go into partnership with the former colleague's husband and on 8 August their new law firm was incorporated.

10 August – NLL issues draft findings to Mr Yaqub for comment

[84] On 10 August NLL sent Mr Yaqub's lawyer its draft findings on the investigation which included:

- (i) Mr Yaqub intended to go into partnership with the former colleagues husband and this was widely known to staff and clients;
- (ii) this was potentially damaging NLL and may amount to a breach good faith and fidelity;
- (iii) his responses during the investigation had not been truthful;
- (iv) there was insufficient evidence to establish he had sought to solicit employees of NLL
- (v) it was likely by mid-March Mr Yaqub had ceased referring and performing work for NLL's benefit;

- (vi) he performed work for the former colleague's husband without an intention to charge and referred work to him instead of NLL; and
- (vii) had breached the credit card policy.

[85] Mr Yaqub, through counsel responded by letter dated 22 August refuting the draft findings.

[86] On 1 October Mr Yaqub's new firm commenced trading.

Discussion

- (i) *Did NLL unjustifiably suspend Mr Yaqub causing him disadvantage in his employment?*

[87] Mr Yaqub was suspended from his employment from 28 April until his employment ended about seven weeks later. The personal grievance relating to the suspension has two aspects – how the suspension was implemented and its continuation.

[88] The parties' employment agreement sets out how a suspension on pay is to be implemented and includes a requirement to seek the employee's input before the suspension is implemented:⁷

30. DISCIPLINARY PROCEDURE

...

30.6 Prior to any disciplinary meeting, the Employee will be advised to attend a disciplinary meeting regarding a specific allegation and of the likely consequences should the allegation be substantiated. The Employee will also be advised of the entitlement to have a support person present at the meeting. During the meeting the Employee will be given an opportunity to admit explain or deny the allegation. Any explanation and any mitigating circumstances will be considered before a decision is made as to disciplinary action.

...

30.9 The Employer may suspend the Employee from his/her duties whilst the Employer conducts an investigation in relation to any matter that may concern the Employee if in all the circumstances the Employer considers it appropriate. The Employer will seek the Employee's input before suspension. Suspension will be on full pay.

⁷ Mr Yaqub's individual employment agreement, clause 30.

[89] In addition to the terms the parties have agreed and, as with any aspect of or action taken within an employment relationship, the statutory obligation of good faith must apply and be met. That obligation includes being open and communicative in establishing and maintaining a productive employment relationship.⁸

[90] The following list of factors are also relevant in an assessment of the justification of NLL's suspension of Mr Yaqub from his employment:⁹

[74] It is appropriate, however, to reiterate a number of fundamental principles about suspensions from employment. They are not outcomes of a disciplinary process. A suspension is a temporary status determined by the employer where allegations of misconduct have been made, are being investigated, but have not been established or dismissed. It is the result of a decision by the employer that the usual employment relationship cannot function effectively while the investigation is continuing. It does not connote culpability and may benefit the employee as well as the employer in the sense of allowing the employee time to investigate and answer serious allegations. It is a serious step but its significance should not be overstated. To use a not entirely apt analogy, an employee suspended is entitled to the presumption of innocence of the misconduct being investigated.

[75] An employee should usually be provided with all relevant information on which a decision to suspend may be made and be given an opportunity to comment on or disabuse the employer of any views reached. All the circumstances should be such that the employer concludes, fairly and reasonably, that they are inconsistent with even temporary continuation of employment by the employee pending outcome of the investigation. The age and nature of the complaints and the strength of them will be factors to be taken into account in deciding whether to suspend.

[91] NLL accepts it did not consult with Mr Yaqub before suspending him. It says it was justified in doing so because the directors considered there was an imminent risk, described in oral evidence to the Authority as an "existential threat" of harm to the firm.

[92] NLL also says the lack of consultation regarding the decision to suspend is ameliorated because NLL consulted with Mr Yaqub after he arrived at work on 28 April, consulted with him on an ongoing basis about the suspension continuing and on 7 June provided Mr Yaqub with the alternative of agreeing to a period of paid special leave. Furthermore, it says the reasons for suspending Mr Yaqub were subsequently discovered to be well founded given Mr Yaqub communicated with staff and clients after he was suspended and during the course of the investigation, messaged a consultant of the firm and a staff member on 28 April, on 29 April advised a client he

⁸ Employment Relations Act 2000, s 4(1A).

⁹ *Tawhiwhirangi v Chief Executive, Dept of Corrections* [2007] ERNZ 652, [74] – [75].

was under investigation and attended drinks with NLL staff while suspended and during the course of the investigation.

[93] NLL have not complied with the express obligations entered under the employment agreement with Mr Yaqub that it "...will seek the employee's input before suspension".^{10 11}

[94] This failure was not a minor or technical flaw, and this is especially so given the resources available to NLL as a law firm offering dispute resolution services. Further, on the information before NLL at the time the suspension decision was made it could not reasonably have held more than a suspicion of any misconduct on Mr Yaqub's part given the following:

- (i) NLL had no direct information of Mr Yaqub's action in allegedly soliciting staff or setting up a competing business – the information was, as Mr Yaqub described "hearsay"; and
- (ii) NLL, without a reasonable basis failed to take reasonable steps available to it to understand the basis of the suspicion including by speaking with the directly concerned staff and consultants in more detail about their knowledge of the matters of concern. It very likely had time to do so – the inquiry was office based and the first disclosure was made on 22 April, three full working days before Mr Yaqub's suspended;
- (iii) the disciplinary letter containing the suspension letter was sent outside the standard hours of work as described in the employment agreement (8.30am to 5.30pm) and no direct contact was made with him to give him a "heads up" the letter was or had been sent.¹² NLL could have no reasonable basis to believe Mr Yaqub would receive the suspension letter before attending work on 28 April;
- (iv) no supporting information was provided with the suspension letter and the complete information was not provided until some weeks later and after repeated and specific requests from Mr Yaqub or his representative.

¹⁰ IEA clause 30.9.

¹¹ This assessment is about conduct and behaviour not solely about the interpretation and operation of the employment agreement.

¹² Schedule of the parties' employment agreement signed 9 December 2016.

Again, this was inexplicable given NLL's ready access to the information being either its existing work records or file notes from directors; and

- (v) as to the issue of urgency and risk, while it is accepted NLL was concerned by the information received, it has been unable to establish to the necessary standard and specificity as to the exact nature of the risk and urgency and how that might be expressed in allegations of misconduct to put to Mr Yaqub.

[95] For these reasons NLL's suspension of Mr Yaqub on 28 April was all the circumstances unjustified and unreasonable and caused him disadvantage to his employment.

- (ii) *Was the continued suspension of Mr Yaqub during the subsequent investigation fair and reasonable?*

[96] NLL submits it was necessary to suspend Mr Yaqub while its investigation continued due to:

- (i) Mr Yaqub's seniority and influence at NLL and the risk employees may not feel able to speak fully and frankly;
- (ii) concerns he had solicited existing employees and this risk was ongoing if he continued to have access to those employees;
- (iii) the concern he may have sent confidential client information to himself for an unlawful use; and
- (iv) if the concerns were upheld the allegations could amount to serious misconduct.

[97] The continued suspension was unjustified and unreasonable. As stated above, it remains unclear what reasonable basis NLL had at suspension. This lack clarity continued particularly given the investigation quickly uncovered no direct evidence of solicitation, as confirmed in the draft findings, the issues between Mr Yaqub and the subsequently appointed directors were clearly stale and the information gathered by NLL has not established the preparatory steps Mr Yaqub was taking to explore other options were anything other than that.

[98] NLL's reorientation to an "investigation" on 2 June could not reasonably be treated as allowing a continuation of the 27 April disciplinary investigation, and with it the suspension. This reorientation was significant. A fair and reasonable employer, in the circumstances of this matter could have drawn a clear line between the disciplinary allegations and the investigation including a fresh consideration of suspension on grounds as they existed at 2 June. In my view this did not occur because the ongoing suspension was coloured by the flawed original approach.

[99] NLL's offer to replace the paid suspension with special leave does not mitigate the above failings. The parties' employment agreement does not contain special leave and NLL took no steps to describe special leave to Mr Yaqub.

[100] Mr Yaqub repeatedly asked for the suspension to be lifted. He offered to work from home and described the negative impact on him of the continued suspension. On the information before the Authority, these requests were not fairly considered by NLL and its continuation of the suspension, in reliance of clause 30.9 was unfair and unreasonable. Mr Yaqub has established a personal grievance in relation to the ongoing suspension.

(iii) Was Mr Yaqub unjustifiably constructively dismissed?

[101] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether NLL's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the alleged dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Yaqub being treated unfairly.¹³ The Authority's task is to examine objectively NLL's decision-making process and determine whether what it did and how it was done were steps open to a fair and reasonable employer.

[102] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop*

¹³ Employment Relations Act 2000, s 103A.

Employees Union v Woolworths (NZ) Ltd held that constructive dismissal includes, but is not limited to, cases where:

- (i) An employer gives an employee a choice of resigning or being dismissed.
- (ii) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (iii) A breach of duty by the employer causes an employee to resign.¹⁴

[103] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.¹⁵

[104] Mr Yaqub says his resignation amounts to an unjustified constructive dismissal because:

[105] NLL has failed to meet its contractual obligations to Mr Yaqub and also failed to meet its broader obligations, including in respect of being active and constructive in maintaining the employment relationship, providing relevant information and considering what Mr Yaqub had to say with an open mind before reaching a concluded view namely the suspension decision and the decision to continue the suspension in breach of the express provisions of the employment agreement and in the face of Mr Yaqub's clear and repeated opposition. When Mr Yaqub continued to raise questions about NLL's actions it abandoned the disciplinary allegations and commenced an open-ended investigation process, without apparent regard to the written terms the parties had agreed and in the face of Mr Yaqub's clearly articulated concerns as to the fairness and reasonableness of its actions. NLL appears to have justified this action on the basis of Mr Yaqub's alleged failure to engage honestly and openly with its process but did not state the grounds of such a serious allegation and when directly asked on 7 June, no answer was forthcoming.

¹⁴*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

¹⁵*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

[106] A breach of duty by an employer that causes the employee to resign amounts to a constructive dismissal, provided it is reasonably foreseeable that resignation would occur having regard to the seriousness of the breach.¹⁶

[107] NLL submits the true reason for Mr Yaqub's resignation is his intention to set up a competing business. Such a conclusion would be based on strands of circumstantial claims. I find the conclusion invited is not one reasonably open to the Authority particularly given Mr Yaqub's direct evidence otherwise and the documentary, contemporaneous evidence which does not provide the basis sought by NLL including the lease documents provided at the investigation meeting which is evidence of action taken after his employment ended.

[108] The evidence in this matter supports a claim that NLL's breach caused Ms Yaqub's resignation, and that resignation was reasonably foreseeable. Mr Yaqub was unjustifiably constructively dismissed in all the circumstances.

Remedies

[109] Mr Yaqub has established a personal grievance for unjustified disadvantage and unjustified constructive dismissal. He is entitled to a consideration of the remedies sought.

Reimbursement of lost wages

[110] Mr Yaqub claims lost wages of \$20,424 - the difference between what he would have earned in the six months following his employment with NLL ending if his employment had continued and what he did earn.¹⁷ After reviewing the evidence of loss and Mr Yaqub's attempts to mitigate that loss the Authority is satisfied, he is entitled to an award of lost wages of 3 months ordinary earnings less what he has earned in that period.¹⁸ I decline to exercise my discretion and award more than three months given

¹⁶ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA); and *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA).

¹⁷ Employment Relations Act 2000, s 128(3).

¹⁸ *Board of Trustees of Southland Boys High School v Jackson* [2022] NZEmpC 136 at [52].

the reduced earnings were likely occasioned by the start of a new business and should not be visited on NLL.¹⁹

Compensation for humiliation, loss of dignity and injury to feelings

[111] Mr Yaqub gave clear and compelling evidence of the profound and negative impact on him of the suspension, investigation and circumstances of his dismissal. He said his health has been undermined, his integrity as a lawyer called into question and the experience had created uncertainty and stress to himself and his family which has had an ongoing negative impact.

[112] The Authority is satisfied Mr Yaqub has experienced harm under each of the headings in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, Mr Yaqub is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$20,000 for the unjustified disadvantage and \$20,000.00 for the unjustified dismissal.

Contribution

[113] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[114] Mr Yaqub did not contribute in a blameworthy way to the circumstances which led to his personal grievances. There are no deductions from the monetary remedies for reasons of contribution.

NLL's claim – breach of good faith and/or breach of duty of the parties' employment agreement

¹⁹ If the parties cannot agree the wages reimbursement sum they have leave to bring this issue back to the Authority for determination.

[115] This part of the employment relationship problem concerns NLL's claim that Mr Yaqub breached obligations owed under his employment agreement and/or the duty of good faith by:

- (i) deliberately withholding information from NLL about his intention to set up competing business;
- (ii) not charging for legal work completed for the lawyer who has made him an offer;
- (iii) failing to refer a potential customer to NLL; and
- (iv) failing to complete his duties in relation to time recording and saving documents on NLL's system.

What duty did Mr Yaqub owe NLL?

[116] Mr Yaqub owed obligations to NLL under the terms of the employment agreement and imposed by statute.

[117] The employment agreement contains the following express terms:

- (i) an express duty of fidelity which required Mr Yaqub to place his duties to NLL above all other business activities (clause 5);
- (ii) an express duty to promote, develop and extend NLL's business interests and reputation and not do anything to its detriment (clause 17.4);
- (iii) an express duty to declare any conflict or competing interests (clause 17.6); and
- (iv) during employment, a restriction on obtaining an interest in any business or activity which may compete with NLL (clause 17.7).

[118] The statutory duty of good faith is as described earlier in this determination. The duty of fidelity described in *Robb v Green* is guidance for how to approach the assessment of this issue:²⁰

The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to her employer to act towards him with good faith.

²⁰ *Robb v Green* [1985] 2 QB 315 as referred to in *SGS New Zealand Limited v Nortel (1998) Limited & Ors* [2007] HC Whangarei.

[119] In *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 the Employment Court considered the duty of fidelity in relation to post-employment plans:²¹

As to the extent of that duty and the particular circumstances of this case, I am not persuaded that the law has reached a point that the duty includes disclosing either one's own or one's fellow employee's intention to simply leave and compete. To so hold would be to undermine the freedom of movement of employees and be contrary to the authorities which allow preparatory competitive steps to be taken, provided these are not in breach of the obligation not to compete or to damage the employer, whilst the employee is still under the duty of fidelity, trust and confidence.

[120] NLL invites the Authority to make the following findings as to Mr Yaqub's conduct amounting to breach of the duty of fidelity:

- (i) in early April, when he received what he described as a 'formal offer' to set up in a competing business he had an obligation to inform NLL particularly given he had informed employees of the firm and Mr Palmer had asked why he was staying at NLL (refer 1 April discussion);
- (ii) on 27 April, he was obliged to tell NLL when he had received its concerns as to his intention to set up in business;
- (iii) on 10 May, again he was obliged to inform NLL in his written response to its concerns; and
- (iv) on 9 June, at the workplace investigation meeting.

[121] The factual findings necessary to establish the findings of breach sought by NLL as to Mr Yaqub's conduct is of something more than mere preparatory steps to leave and compete. This cannot be established on the evidence given the following:

- (i) directors of NLL were aware Mr Yaqub was planning to leave the firm and thinking about starting his own firm - it was known to NLL following the end of Mr Yaqub's directorship negotiations and the appointment of Ms Jamnadas and Mr Palmer as directors and, I find Mr Yaqub told Mr Palmer, a director of NLL that he was looking at other opportunities;

²¹ *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [142].

- (ii) NLL did not engage formally with Mr Yaqub as to his intentions following the end of the directorship negotiations or subsequent to his discussion with Mr Palmer;
- (iii) Mr Yaqub's relationship with the lawyer with whom he subsequently formed a law firm and their partner, who made Mr Yaqub the April formal offer, was part of the employment environment at NLL²² – the lawyer's partner appears to have spoken openly at NLL and at social functions at which a range of NLL employees were present of their partner's intention to bring on a commercial partner, one of NLL's senior and much respected consultants was aware of the work undertaken by Mr Yaqub for the lawyer and arranged and was present at a social function where Mr Yaqub and the couple were present;
- (iv) the 26, 27 and 28 April file notes, which form much of the evidential basis of the NLL's concerns as to Mr Yaqub's conduct, do not disclose how the staff spoken to became aware he was starting his own firm;
- (v) there is no evidence at the time of suspension or up to the date of resignation that Mr Yaqub had responded to the 'formal offer' made by the lawyer. Such a finding would be critical to the "real prospect" as invited by NLL;
- (vi) Mr Yaqub's 10 May letter answers directly the allegations as framed by NLL in the 27 April suspension letter and makes his intentions clear, as at that time. The issue as to his honest, raised first in broad terms in the 2 June letter, and an animating feature of the 9 June meeting, although not detailed with any specificity, was without reasonable foundation; and
- (vii) given this and at the relevant period, it was reasonable Mr Yaqub did not consider the invitation received breached the obligations he owed to NLL and was not dishonest conduct or evidence of dereliction of duty.²³

[122] This claim is unsuccessful.

Did Mr Yaqub not charge for legal work?

[123] On the evidence before the Authority this claim is not established:

²² Employment Relations Act 2000, s 3(a).

²³ N18 *Rob v Green*.

- (i) Mr Yaqub's evidence was he told the practice manager he was unable to record time due to issues with the time recording system. This evidence was not directly challenged and is accepted;
- (ii) similarly, Mr Yaqub's practice of value billing was not directly challenged and is accepted given, other aspects of his evidence which were not challenged that he worked autonomously and developed a billing methodology under the tutelage of senior employees of NLL and the documentary evidence supports the practice;
- (iii) he billed \$48,000 for March prior to his suspension; and
- (iv) his suspension impacted his ability to bill at the end of April.

Did Mr Yaqub fail to refer a potential customer to NLL?

[124] The evidence falls short to establish this claim. Mr Yaqub's evidence was he was unaware the directors could have done the subject work, this was not otherwise established and it was not established the client would have instructed NLL's director's if it had been referred.

Has NLL suffered loss consequent to Mr Yaqub's breach of obligations?

[125] NLL seeks damages for losses suffered as a result of Mr Yaqub's failure. The general principles applicable in an assessment of damages are:

- a. damages are to compensate the injured party for the loss it has sustained;
- b. the injured party is not entitled to a windfall;
- c. the respondent can only be held liable for consequences which can convincingly be said to have been a result of the respondent's conduct; and
- d. the onus is on the applicant to prove loss, and the extent of loss on the balance of probabilities.²⁴

[126] The objective of any damages award would be to put NLL, as far as a calculation of money could, in the position it would have been in if Mr Yaqub had not committed the various breaches of his contractual duties as claimed.²⁵ A claimant for damages

²⁴ *Medic Corporation Ltd v Barrett (No2)* [1992] 3 ERNZ 977 at 983-984.

²⁵ *Civil Remedies in New Zealand* (2003) Blanchard & Ors 1.3.1 at 9.

arising from a loss must take all reasonable steps to mitigate the loss and cannot recover losses that can be avoided.²⁶ The revenue received from invoiced services does not deduct any costs or expenses associated with operating the business. Profit is the amount of income that remains after accounting for all expenses, debts, additional income streams and operating costs.

[127] There are three aspects to NLL's claim:

- (i) lost profit on work undertaken but not invoiced;
- (ii) loss suffered consequent to a discounted invoice; and
- (iii) special damages for the legal fees incurred in the workplace investigation

[128] These claims are not established:

- (i) that active matters may not yet be billed was a readily foreseeable consequence of the suspension. Mr Yaqub did not have access to NLL's systems when on 23 June he was asked to prepare file notes for active matters and prepare draft bills and cover matters;
- (ii) the loss identified by NLL resulted from its decision to discount a fee on work performed by Mr Yaqub without reference to him or providing objective evidence the discount resulted directly from a breach of duty by Mr Yaqub; and
- (iii) it is accepted legal fees were incurred by NLL in relation to the workplace investigation. Those fees are not recoverable from Mr Yaqub – the breaches on which the claim might be made are not established.

Summary of orders

[129] The Authority orders as follows:

Within 28 days of the date of determination Neilsons Lawyers Limited is ordered to pay Aaron Yaqub the following sums:

- (i) \$40,000 under s 123(1)(c)(i); and

²⁶ *Rooney Earthmoving Limited v McTague* [2012] NZEmpC 63 at [113].

- (ii) three months ordinary wages less earnings under s 123(1)(b).

Costs

[130] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The costs matter between NLL and Mr Yaqub's new firm remains unresolved. If this cannot also be resolved, advice of that should be advised within 21 days of the date of this determination.

[131] If they are not able to do so and an Authority determination on costs is needed Mr Yaqub may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Neilsons Lawyers Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[132] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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 required an upward or downward adjustment of that tariff.²⁷

Marija Urlich
Member of the Employment Relations Authority

²⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.