IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 113
EMPC 53/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RICHORA GROUP LIMITED Plaintiff
AND	WAI YING (MELODY) CHENG Defendant

Hearing:	19-20 June 2018; written submissions filed on 29 June 2018 (Heard at Rotorua)
Appearances:	M Moncur, advocate for plaintiff E Reilly, counsel for defendant
Judgment:	26 September 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] Wai Ying (Melody) Cheng says that she was unjustifiably dismissed from her employment with Richora Group Ltd (Richora). She successfully pursued a claim in the Employment Relations Authority.[1] The company challenged the determination. The challenge was heard on a de novo basis.

[2] The essence of the company's claim is that Ms Cheng began working with Jerry Li and Nina Li (the Chief Executive Officer and director of the company) to benefit herself (in order to learn some skills) and to assist her husband in his business endeavours. While the company accepts that an employment relationship developed some time later, on 22 February 2017, it was short-lived. Ms Cheng voluntarily departed from the company when Mr and Mrs Li raised concerns that she may have reported the company to the Inland Revenue Department (IRD).

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1 *Cheng v Richora Group Ltd* [2018] NZERA Auckland 28.

[3] Ms Cheng's case is that she became an employee on 21 January 2017; that her requests for an employment agreement and for payment for work were ignored; and that Mr and Mrs Li erroneously assumed that she had contacted IRD, leading them to terminate her employment.

[4] The parties are at odds on a number of matters, including numerous facts and what can be drawn from key events. It is not necessary to resolve each of these issues. It is, however, necessary to traverse the background in some detail in order to put Ms Cheng's claims of unjustified constructive dismissal and unpaid wages, and the company's response to these claims, into context.

The facts

[5] Mr and Mrs Li run Richora, a company which specialises in exporting manuka honey, predominantly to the Asian market. They emigrated to New Zealand from China about two years ago. Ms Cheng and her husband, Horlick Hon, came to New Zealand as students a number of years ago, married and settled in Rotorua. Mr Hon runs a security installation business. He met Mr Li through the Chinese business community in Rotorua and they struck up a friendship.

[6] Ms Cheng has suffered from depression and anxiety for some time and had left her previous employment three years previously under unhappy circumstances. She found the intervening period difficult and was apprehensive about re-joining the workforce for a number of reasons. Mr Hon thought it would be beneficial for Ms Cheng to pick up some work and he discussed matters, and his wife's predicament, with Mr Li. Mr Hon, Ms Cheng and Mr Li met over a meal towards the end of 2016. The details of what was discussed are in dispute.

[7] It is not necessary to resolve the conflict in evidence on this point. What clearly emerges is that some time towards the end of 2016, Ms Cheng was offered work with the company; that Mr Li was aware that Ms Cheng was in a relatively fragile state and suffered from depression; and that Mr and Mrs Li made it plain that they would take her under their wing.

[8] The basis on which Ms Cheng initially undertook work for Mr and Mrs Li is uncertain. Both parties agree that an employment relationship was entered into in early 2017: Ms Cheng says it was on 21 January 2017; Mr and Mrs Li say she became an employee on 22 February 2017.

[9] The evidence tends to support the earlier start date. First, it fits more comfortably with the resignation and subsequent departure of Mr and Mrs Li's office administrator in mid-January 2017. Ms Cheng says that Mrs Li asked her to take over the role as an employee, and that she accepted the position. Second, it fits with the date in a subsequently prepared draft employment agreement in respect of what was described as a "salary repayment … of [Ms Cheng's] service to the employer (hours worked), for the period of 21st January 2017 to the date of this contract …".

[10] Third, other contemporaneous documentation is revealing. The documents clearly show that from January 2017 Ms Cheng was frequently contacted via WeChat,[2] by both Mr and Mrs Li, with various tasks to complete, most of which were related to office administration. One example suffices. On 26 January 2017 Mr Li sent Ms Cheng the following message:

> 26 Jan 2017 9:59 AM
>
> Melody, morning! I sorted out today's tasks, as plentiful as usual: 1. input the PSPA purchase invoice and check it with LIHUA; 2. meeting with GINEY, exchanging design plans on PSPA lightbox and display window, and using the [INVOICE] drawn by ICING; 3. visit Nancy and give the New Year gift; …

[11] In cross-examination Mr Li suggested that the message set out a list of tasks which *he* had on for the day, rather than setting out various tasks for Ms Cheng to complete. When asked why he would do such a thing he said:

> Ms Cheng and her husband always asked me what I do for the day, everyday
> …
> …
> … I'm telling Melody what I do for the day so that to help her husband's business so it's a goodwill gesture from me.

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2 A Chinese multi-purpose messaging and social media mobile application.

I was not drawn to the evidence on this point, including because of Ms Cheng's recorded reply to Mr Li's list of tasks: "Ok", "I just got it done. I am ready to leave." - to which Mr Li responded: "Good, I am coming to pick you up."

[12] Mrs Li was also cross-examined on the nature, content and extent of the WeChat messages that Ms Cheng received prior to 22 February 2017 (the date on which Mr and Mrs Li say Ms Cheng became an employee). Mrs Li pointed out that the messages were sent to a chat group. She said that the messages were to no-one in particular and were not designed to set out various tasks for Ms Cheng to complete each day. She was unable to satisfactorily explain why the group was entitled "group of Melody" and why, if they were not tasks for Ms Cheng, they were couched as if they were. Ms Cheng plainly interpreted the messages as directed at her, reflected in the way she responded to them, advising what action she had taken. Nor is there a discernible change in the nature and content of the "task" messages over time. On 6 March 2017, for example, Mrs Li messaged Ms Cheng as follows:

> Melody, please share the priorities of daily tasks in the morning; before working hours are over please update the progress of each task and share it as well

[13] I preferred Ms Cheng's evidence in relation to the way in which the relationship unfolded. In particular, that Ms Cheng effectively took over the role left vacant in mid-January 2017. It is notable that Ms Cheng messaged Mrs Li on 22 February 2017 and made the point that:

> *It has been a month since I took over [the office administrator's] work*. I'm wondering if it's possible get paid? In fact, transportation, food and other expenses cost me a lot in the month. Can we please talk about this? Thank you.
>
> In fact, [Mr Hon] thought I had been receiving wages, so I have never asked you.
>
> (emphasis added)

[14] Ms Cheng was also provided with business cards, headed with the Richora logo, prior to the date the plaintiff contends Ms Cheng commenced work as an employee. Mr Li denied that he had arranged for such cards to be made available to her, but the contemporaneous documentation points the other way.

[15] I have already referred to Ms Cheng's message to Mrs Li on 22 February 2017, the date on which Mr and Mrs Li say that Ms Cheng became an employee. I have concluded that Ms Cheng was in an employment relationship from an earlier date, namely 21 January 2017. The relationship was not, however, formally documented.

[16] I pause to deal with another area of disagreement between the parties, namely what was or was not happening in terms of work during the period of Chinese New Year. Mr Hon returned to China. Ms Cheng says she continued to work for the company during this time. Mr and Mrs Li were adamant that Ms Cheng had not been asked to do any work over this period and that she had not completed any tasks for the company. Their recollection of events was not supported by the documentation. In this regard a number of work related messages were sent from Mr and Mrs Li to Ms Cheng during this time, on dates which Mrs Li accepted in cross-examination had fallen within Chinese New Year.

[17] Ms Cheng was not coping well with the demands being placed on her by Mr and Mrs Li and asked for a reduction in her hours. It is common ground that from around 10 February 2017 her hours reduced to 20 hours per week.

[18] On 22 February Ms Cheng sent Mrs Li a message noting that she worked five days a week, four hours a day, and the nature of her tasks. She recorded that the going rate for the position was $19.72. Mrs Li responded "OK", queried the tax rate and suggested that Ms Cheng draft a contract.

[19] A draft agreement was prepared in early March. It set out Ms Cheng's role as "Sales Assistant". The rate of pay was specified as "$19.72 per hour." The duties were referred to, focusing on office administration. The agreement was never finalised. Events arising out of an alleged complaint about the company to IRD intervened.

[20] Mr and Mrs Li say that on 7 March 2017 they travelled to Auckland and that they advised Ms Cheng of their travel plans in advance. It appears from the documentation that Ms Cheng was expected to continue working while Mr and Mrs Li were away and would be at the office that day. At some stage during the day the

locks to the office were changed at Mr and Mrs Li's behest. The sequence of events in relation to what occurred on 7 March remained unclear. Mr and Mrs Li say that while they were driving up to Auckland they received a telephone call from a friend advising them that there was someone in the office. This prompted them to check the CCTV footage. They saw Mr Hon in the office changing the security cameras. Mr Li says he rang Mr Hon and told him to leave the building, which Mr Hon did. I understood Mr Li's evidence to be that the locks were changed because he was concerned about Mr Hon's presence in the office. He also said that during the journey to Auckland he received a call from the company's accountant advising that he had been contacted by IRD and that a complaint had been received from a woman about the company's failure to pay wages, and tax issues. Mr and Mrs Li gave evidence that they were concerned that Ms Cheng may have contacted IRD and they wished to discuss their concerns with her.

[21] Mr Hon says that he went to the plaintiff's office to install security cameras, as he had previously been asked to do by Mr Li. Ms Cheng was doing work errands and he met her for lunch. They then returned to the office. By the time they got there the locks had been changed and they could not get in. Ms Cheng says she tried to ring Mr and Mrs Li to find out what was going on but could not get through to them. She then organised for a locksmith to come and change the locks so they she could get into the workplace. She was concerned that the painters, who had been undertaking work at the premises, may have removed her laptop, and she contacted them to discuss matters. However, once Ms Cheng and Mr Hon had made their way into the office they looked at the security footage, and saw that it was Mr and Mrs Li who had entered the office and taken her laptop.

[22] As I have said, the details of what occurred at the company's office on 7 March 2017 remained confused, and no security footage or other records were before the Court to assist in clarifying what had gone on. What is clear, however, is that Mr and Mrs Li arranged for the locks to be changed and failed to take any steps to let Ms Cheng know that this had occurred, or why. Mr Li then sent Mr Hon a text telling him that he and Ms Cheng would need to have a "serious meeting" at 10 am the following day, 8 March 2017. Mr Li did not say what the "serious meeting" related to, the

intended focus of the discussion, or what the potential ramifications of the meeting (on Ms Cheng's employment) might be.

[23] Ms Cheng was unwell and did not attend the meeting, which proceeded in her absence. Mr Hon says, and I accept, that Mr Li made it plain that he believed that Ms Cheng had contacted IRD and that if she resigned from her employment the company would pay her $3,000. Mr Hon said that he did not think that his wife had contacted IRD and that he would check with her, which he did. She told him that she had not taken such a step and Mr Hon passed this on to Mr Li. Mr Hon attempted to provide Mr Li with information to support his wife's position but Mr Li was unreceptive. Despite the fact that contact with IRD was denied, and the fact that he had not spoken to Ms Cheng directly about his concerns and provided her with a fair opportunity to respond, Mr Li continued to press for a quick "solution" to the problem. Ms Cheng and Mr Hon viewed Mr Li's behaviour as threatening.

[24] The proposed solution that Mr Li was pressing for involved Ms Cheng signing an employment agreement, accepting a payment and resigning. I was not drawn to Mr and Mrs Li's evidence to the contrary, and their assertion that they simply wanted Ms Cheng to sign the employment agreement, notwithstanding that documenting the relationship had not been a priority to this point and the fact that they had serious concerns (on their own evidence) that she had complained about them to IRD, a step they plainly regarded as egregious.

[25] In the early hours of the morning on 9 March 2017 Ms Cheng suffered an acute stress reaction and made a suicide attempt.

[26] I have already rejected Mr and Mrs Li's suggestion that they had not formed a concluded view as to Ms Cheng's involvement in the IRD complaint, and that they wanted her to sign the draft employment agreement and engage with them further. Indeed Mr Li's subsequent actions strongly point in the other direction. On 21 March 2017 he posted to the Rotorua Chinese Community of Commerce online chat group. Amongst other things he stated:

> … Should we set some basic requirements for the business integrity and ethical standards of the members of the Community? The case is as follows: We just established a company. A member from the Community *** recommended his wife to work at my company and told me how tragic his wife was and how she was bullied by others, which resulted in her long-term recuperation at home. I agreed and promised to provide lots of training so she can improve. … After the Chinese New Year, as per his wife's request, we provided a sample of the standard employment agreement, clarified the past remuneration and asked her to provide the bank account number and IRD number, so that the company could pay her salary! But something I would never expect happened. She had no sense of gratitude and turned back on us after everything I have done for her, and reported us to IRD, claiming that we haven't paid wages nor settled partner's accounts. … I couldn't even believe that on the day she reported us, she send me a greeting message through WeChat in the morning.
>
> I really appreciate the natural environment in New Zealand, and the working environment is also great for the hard-working Chinese, but I really cannot imagine in such a beautiful city, there is such a despicable and shameless person, looking gentlemanly on the surface but villainous underneath. …

[27] In a further post the same day Mr Li wrote:

> Therefore, friends in Community, it is really not easy to start a business in New Zealand. As business owners, we not only need to concern about the sales and the business, but also pay extra attention to employees. People who are not normal and positive or defective in moral and ethics really shall not be employed. They just want more money by using this abnormal approach. I hope everyone could take it as a warning!

[28] As Mr Hon pointed out in evidence, the Chinese community in Rotorua is relatively small and tight-knit. People tend to know each other and who works where. While Mr Li made much of the fact that he had not specifically named Ms Cheng in his letter, he had named himself and his company, and had made it clear that he was talking about a female employee. Ms Cheng was the only person working in the Rotorua office at this time. I have no doubt that Ms Cheng suffered further emotional harm as a result of the posts. I return to whether this additional harm is compensatible in the context of Ms Cheng's unjustified dismissal claim below.

[29] A letter from the company's lawyer was sent to Ms Cheng's lawyer on 31 March 2017. The letter referred to Ms Cheng working on a casual basis "to assist the business during its busy start to 2017" at an agreed rate of $19.72 (net) per hour, and set out an offer to pay her for the work she had completed between 21 January and

6 March 2017. The reference to 21 January speaks for itself; as does the reference to an "agreed" rate of $19.72 (net) per hour.[3]

[30] By this time Ms Cheng had instructed her lawyer to raise a personal grievance. There were delays in actioning those instructions. On 11 April 2017 Ms Cheng's lawyer wrote to the company's lawyer notifying a personal grievance on the basis that Ms Cheng had been unjustifiably dismissed.

Analysis

[31] Based on the evidence before the Court, I have no difficulty concluding that Ms Cheng was an employee of the plaintiff company from 21 January 2017. There were no records before the Court of her hours of work, even from the date the company accepts she became an employee. As Ms Reilly, counsel for Ms Cheng, points out, the onus is on the employer to show that hours of work claimed are incorrect.[4] The plaintiff has not discharged that onus.

[32] I accept Ms Cheng's evidence that she was required to work long hours for Mr and Mrs Li in her role. The evidence reflects the demanding nature of the position and the fact that she was expected to be available to answer queries on demand, including well into the evening and while she was at home. The following exchange, which occurred just after midnight on 9 February 2017, underscores the point:

> 9 Feb 2017 12:18 AM
>
> [Mr Li]
>
> Melody, have you gone to bed?
>
> [Ms Cheng]
>
> Almost [emoji]
>
> What's up

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3 I was not drawn to what I understood to be Mr Li's suggestion that the date and rate references simply reflected a pragmatic approach by the company at the time the letter was written, and the letter was not couched in this way.

4 Employment Relations Act 2000, ss 130, 132(2); see also, for example, *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136, [2014] ERNZ 275 at [21]; *Shetty t/a Shamiana Indian Restaurant v Shetty* AC70/00, 17 August 2000 (EmpC) at 3; *O'Shea v Pekanga O Te Awa Farms Ltd* [2016] NZEmpC 19, [2016] ERNZ 94 at [34]-[36].

[Mr Li]

Has Joyce sent you the document in three pages

She's already gone to bed, however, I need the document immediately

[Ms Cheng]

Forwarded to you already

[33] I find that from 21 January through to 12 February 2017 Ms Cheng worked 56 hours per week as claimed. From 10 February 2017 her hours reduced to 20 hours per week. The applicable rate of pay for each of these hours was $19.72 (net).

[34] Nor do I have any difficulty concluding that Ms Cheng was constructively dismissed and that the dismissal was unjustified. She was locked out of the workplace by Mr and Mrs Li without prior notice or explanation. They made it clear that they believed she had contacted IRD to complain about them and that they were very displeased. It became apparent that Mr and Mrs Li considered that the employment relationship was over. It is equally clear that this was communicated in no uncertain terms. The fact that it was not expressly stated is irrelevant.[5] The plaintiff's position was reflected in an insistent, and aggressively pursued, push for resolution. Resolution would be by payment of $3,000 on resignation. Ms Cheng was unwell at the time, which Mr and Mrs Li knew. They were also well aware of the fact that Ms Cheng suffered from pre-existing health issues at the time they took these steps. In the circumstances, it is not surprising that Ms Cheng believed she had effectively been dismissed.

[35] There were significant deficiencies with the way in which Mr and Mrs Li dealt with matters, including a failure to adequately engage with Ms Cheng, failing to advise her of the purpose of the meeting on 8 March 2017 and pressing on with it in her absence; failing to provide her with a reasonable opportunity to respond to their concerns; and pushing her to resign on terms. The company's actions fell well below the minimum standards expected of an employer.

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5 See, for example, *Commissioner of Police v Hawkins* [2008] NZCA 164, [2008] ERNZ 238 at [37]; *Harrod v DMG World Media* [2002] 2 ERNZ 410 (EmpC) at [41]; *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, [1985] ACJ 963, (1985) Sel Cas 136 (EmpC) at 139.

[36] I find that Ms Cheng's employment was unjustifiably terminated on or around 7 March 2017.

Remedies

Unpaid wages

[37] Ms Moncur, advocate for the plaintiff, accepted that Ms Cheng was owed wages. The debate revolved around the applicable timeframe that Ms Cheng was employed, and the rate of pay. I have resolved that debate in Ms Cheng's favour.

[38] The plaintiff is ordered to pay the defendant a sum by way of unpaid wages, calculated on the basis that Ms Cheng worked 56 hours per week from 21 January through to 10 February 2017, and 20 hours per week from 10 February to 7 March 2017. The applicable rate of pay for each of these hours was $19.72 (net). Ms Cheng is also entitled to holiday pay on these amounts.

[39] These sums are to be paid within 21 days of the date of this judgment.

Lost remuneration

[40] Ms Cheng claims three months' lost remuneration. She was unwell and was unfit for work in the period following termination of her employment with the company. A sum equivalent to three months' lost wages, based on 20 hours per week at $19.72 (net) per hour, is sought, is appropriate in the circumstances and is ordered accordingly. Such sum is to be paid within 21 days of the date of this judgment.

Compensation for humiliation, loss of dignity and injury to feelings

Step 1: Harm

[41] I am satisfied that Ms Cheng experienced harm under each of the heads identified in s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). It is evident that Mr and Mrs Li's peremptory action in changing the locks, forming a concluded view that Ms Cheng had complained about the company to IRD, and

demanding a meeting (without identifying what it was about or the potential ramifications of it), which she could not attend and which was held anyway, and then pressurising her to resign on terms, damaged Ms Cheng's self-esteem and made her feel significantly devalued. She experienced depression, acute stress and anxiety as a result of the plaintiff's unjustified actions.

Step 2: Extent of loss

[42] It is a truism that what may be devastating to one employee may be 'water off a duck's back' to another. Evidence is key, and the evidence in this case was compelling. The company's actions were not 'water off Ms Cheng's back'; rather, they significantly affected her. The losses she suffered as a result of the plaintiff's breach were acute, and manifested in a dramatic decline in her physical and mental health, a suicide attempt on 9 March 2017 and medical intervention. Medical records before the Court reinforce the seriousness of the harm experienced by Ms Cheng as a consequence of the company's breach.

[43] Ms Moncur submitted that the fact that Ms Cheng suffered from a pre-existing condition was relevant to an assessment of the compensatible harm she suffered. I was not referred to any cases in which the issue has arisen, including the extent to which foreseeability of harm is – or is not – relevant to the assessment process. While I accept that the relative weight of liability in circumstances involving a pre-existing condition falls to be assessed on a case-by-case basis, including in terms of assessing whether a sufficient causal connection exists between the loss suffered and the employer's breach, in this case such issues do not arise. It is plain that Ms Cheng experienced significant harm, the severity of which was no doubt compounded by her pre-existing vulnerabilities; her vulnerabilities were well-known to Mr and Mrs Li; and it would have been readily apparent that their actions would have a serious negative impact on her.[6]

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[6] Note that in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, [1997] 3 All ER 1 (HL) at 7, Nicholls LJ said that "… if it was reasonably foreseeable that a particular type of loss of this character [in that case, impairment of employment prospects] was a serious possibility, and loss of this type is sustained *in consequence of a breach*, then in principle damages in respect of the loss should be recoverable." (emphasis added)

Relevance of post termination conduct?

[44] A further issue arises in relation to Mr Li's subsequent actions in communicating with the local Chinese business community. As will be apparent from the chronology, it is claimed that Ms Cheng's employment terminated in early March 2017; Mr Li's communication was written on 21 March 2017, so after her employment ended.

[45] There is authority for the proposition that such action may be taken into consideration in setting an appropriate award of compensation under s 123(1)(c)(i). In *McCulloch*, for example, the Court increased the amount that would have been awarded under s 123(1)(c)(i) having regard to the retaliatory conduct of the employer following termination, noting that such conduct can have "a profound impact on a former employee's level of distress."[7] In *Lawless v Comvita New Zealand Ltd* the employer subsequently conveyed to other staff that the plaintiff had been dismissed for theft. The Court took this into account, observing that "it is the effect of the employer's conduct on the grievant and not the wisdom or otherwise of its actions that must be reflected in the compensation level."[8] And in *Nelson v Katavich* the Court took into consideration steps the ex-employer took to cause "maximum hurt and humiliation" to the plaintiff in trying to force her to abandon her claim.[9] Finally, in *Sisson t/a Edgeware Law v Lewis* the Court described a "firm practice of this Court" that subsequent conduct could be taken into account in assessing remedies.[10]

[46] In the present case the applicable cause of action giving rise to compensation is Ms Cheng's unjustified dismissal. The fact of the dismissal and the way it was executed caused her significant distress. She suffered further distress some time later, when her ex-employer posted derogatory comments to the Rotorua Chinese Community of Commerce online chat group. Are the post-dismissal posts and the impact of them on Ms Cheng relevant in assessing compensation for the unjustified dismissal? I do not regard the issue as straightforward.[11]

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7 *Smith v McCulloch and Partners* CC7/04, 19 April 2004 (EmpC) at [20].
8 *Lawless v Comvita New Zealand Ltd* [2005] ERNZ 861 (EmpC) at [90].
9 *Nelson v Katavich* [2016] NZEmpC 48 at [116].
10 *Sisson t/a Edgeware Law v Lewis* [2004] 1 ERNZ 200 (EmpC) at [75].
11 See, for example, the reservations expressed in *Cross v Onerahi Hotel Ltd* [2014] NZEmpC 26, (2014) 11 NZELR 467 at [40].

[47] While there is a clear link between the posts and the employment relationship, given that Mr Li would likely not have written the posts if the relationship had not deteriorated, it is otherwise difficult to see the losses arising from the communications as a consequence of the breach itself. Nor do I think that the wording of s 123 supports an all-encompassing approach, whatever reprehensible conduct the employer/ex-employer engages in up to trial which causes emotional harm. In this regard s 123(1) refers to remedies "settling *the* grievance"; s 123(1)(b) to money lost as a result of *the* grievance; s 123(1)(c)(ii) to benefits which the employee might reasonably have been expected to obtain if "*the* personal grievance had not arisen"; s 125(1)(b) to "the remedies sought by … an employee in respect of *a* personal grievance …".

[48] All of this suggests that the required link is between the grievance and the loss; and if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123, however egregious the ex-employer's subsequent conduct might be. The position can be contrasted with, for example, subsequently developing and/or long term non-monetary losses sustained by the employee as a result of the grievance (such as post-traumatic stress disorder). And while it is well established that damage to reputation may be taken into account in considering the extent of harm to an employee, that too is damage caused by the grievance itself (unjustified termination of employment and, for example, the way in which it was carried out).[12] As the Court of Appeal emphasised in *Paykel v Ahlfield*:[13]

> The payment contemplated is compensation for *the effects* on the employee *of the grievance*, and it is not intended to be a penalty imposed on the employer to indicate the [Court's] disapproval of the employer's conduct.
>
> (emphasis added)

[49] It is possible that the sort of post-termination communication that occurred in this case could give rise to an action in the ordinary Courts, outside the jurisdiction of the Employment Court. But that then raises the question of whether any such avenue of redress would be undermined if the conduct had already been taken into account in setting an enhanced award of compensation under s 123(1)(c)(i).

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12 *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC); *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 34 at [129]-[130]. See also *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [180].

13 *Paykel Ltd v Ahlfield* [1993] 1 ERNZ 334 (EmpC) at 342.

[50] I have not had the benefit of full legal submissions on the issue or the extent to which other areas of the law might assist in the analysis - such as the way in which damages for defamation are assessed in relation to subsequent aggravating (or mitigating) conduct by the transgressor; or the approach to such issues in comparable jurisdictions elsewhere. Nor, in any event, is it necessary to reach a concluded view on the issue in this case. While I have no doubt that the actions of Ms Cheng's previous employer in denigrating her online ensured that the wider Chinese business community were aware of its view of her actions ("despicable", "shameless" and "villainous") and caused her additional non-monetary loss, the issue of whether it is appropriate to increase the award I would otherwise have made under s 123(1)(c)(i) is moot. That is because the defendant has only sought $20,000 compensation (a point I return to below) and that amount is more than fully justified, without having any regard to the plaintiff's subsequent conduct and the impact of it on Ms Cheng.

[51] If I had been required to decide the point I would have approached the issue, absent further, fuller submissions, on the following basis. The Act provides that where the Court has determined that an employee has a personal grievance, it may provide remedies.[14] The remedy is directed at addressing losses sustained as a result of the breach giving rise to the grievance. Those losses may be more or less depending on the circumstances, including the way in which the harm was inflicted. Losses which otherwise arise, such as those occurring in this case, may give rise to relief via a separate action but ought not to inflate an award of compensation under s 123(1)(c)(i). Accordingly I would not have had regard to any harm suffered as a result of Mr Li's post-termination communication.

Step 3: Where on the spectrum of cases does this case sit in terms of harm suffered?

[52] Counsel for Ms Cheng submitted that the circumstances of this case fell within the mid-range of loss or injury (band 2) by way of reference to the bands identified in *Waikato District Health Board v Archibald*.[15] Ms Moncur submitted that they fell within the lower *Archibald* band (band 1).

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14 Employment Relations Act 2000, s 123(1).

15 See *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62]. Band 1 – low level loss/damage injury; band 2 – mid-level loss/damage injury; band 3 – high level loss/damage injury.

[53] The extent of harm suffered was significant. Ms Cheng was vulnerable, as Mr and Mrs Li knew. She was seriously impacted by the way in which they suddenly acted to end her employment, including because of the high esteem in which she had held them and the value she had placed on their relationship, including that both parties were part of a small Chinese community in their locality. Ms Cheng made a suicide attempt the day after it became clear that Mr and Mrs Li blamed her for contacting IRD and that they did not wish her to continue in her role. I find that they also made it clear that they did not wish to engage actively with her in order to hear a response to their concerns. Rather, they wished to engage with her in order to secure her agreement to resign on the terms they had proposed.

[54] Contrary to the submissions of both parties, I consider that the harm suffered by Ms Cheng in the present case falls squarely within the high end of the *Archibald* bands (namely within band 3).

Step 4: Where on the spectrum of cases does this case sit in terms of quantum?

[55] Assessing where, on the quantum spectrum, a particular case should sit is no easy matter. A number of factors arise for consideration. I start with the ones which I do *not* consider relevant in this case.

Type of grievance

[56] A review of compensatory awards in this jurisdiction suggests that the type of grievance may impact on the amount ultimately awarded under s 123(1)(c)(i),[16] although it is not immediately apparent why that should be so. The focus is the impact of the employer's unjustified actions on the employee, not the characterisation of the breach itself. In this case Ms Cheng suffered an unjustified constructive dismissal. That is not, in and of itself, relevant to an assessment of the degree of compensatible harm she endured as a result.

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16 C Inglis "Compensation for humiliation, loss of dignity and injury to feelings" (paper presented to The Law @ Work Conference 2018, Auckland, June 2018) at 8; figures showing Employment Relations Authority mean and median awards for different types of grievance for the periods 2013-2016; 2016-2018 (showing, for example, that an award for an unjustified finding of serious misconduct is likely to be higher than an unjustified finding of poor performance).

Length of employment

[57] I understood Ms Moncur to submit that the quantum of any award ought to be effectively discounted because Ms Cheng had not worked with the plaintiff company for very long. While this is a factor which is sometimes referred to in assessing compensation, I perceive difficulties with the approach Ms Monur appears to suggest.

[58] A number of variables might operate to undermine such an assumption. The impact of an unjustified dismissal on a short-term employee may be less than it would be on a long-term employee, but it may not. Where, as here, the unjustified action occurs against the context of a working relationship of significant importance to the employee with high levels of reliance, respect and trust (the deference with which Ms Cheng regarded Mr and Mrs Li being reflected in the way she addressed them - as older brother and older sister), and where Ms Cheng had devoted herself to the company and saw benefits in the relationship for her husband's business endeavours, the impact may be more severe than (for example) a case involving a disengaged long-term employee already looking for alternative work at the time the unjustified action occurred.

[59] The point is that while a claim of substantial humiliation, loss of dignity and injury to feelings, sustained after a very short working relationship, may well warrant close scrutiny, the degree of harm cannot be measured by reference to timeframe alone. Accordingly, I do not think it appropriate to automatically adopt a sliding scale of award having regard to length of employment. A more informed and case-specific approach is required.

Relevance of awards in the Human Rights Review Tribunal?

[60] Reference was made in the defendant's submissions to the very recent determination of the Human Rights Review Tribunal in *Dotcom v Crown Law Office*.[17] In that case the Tribunal awarded Mr Dotcom $60,000 compensation under an equivalent provision to s 123(1)(c)(i), for the injury to feelings and loss of dignity

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17 *Dotcom v Crown Law Office* [2018] NZHRRT 7.

found to have been suffered as a result of the handling of his requests for information.[18] In addition, the Tribunal ordered $30,000 compensation (under the equivalent of s 123(1)(c)(ii) of the Act) by way of loss of a benefit (the lost benefit being knowledge as to what information was held about him). In setting the award of $60,000, the Tribunal referred to the banding approach adopted in its earlier decision in *Hammond v Credit Union Baywide*, where over $100,000 had been awarded to an ex-employee for humiliation, loss of dignity and injury to feelings caused by the employer's breach (which included taking steps to damage her employment prospects).[19] In both cases the Tribunal held that the harm was in the high band, high-band compensation exceeding $50,000.

[61] While there are obvious synergies between the two jurisdictions (not the least being the wording of the provisions under which compensatory awards for emotional harm are made), there is a demonstrable divergence in the approach to quantum – in the case of particularly egregious breaches of rights on the part of the employer, higher awards appear to be made in the Tribunal than in either the Authority or the Court.

[62] Appeals from the Tribunal are heard by the High Court. It does not appear that the Court of Appeal has had the opportunity to consider the approach to compensatory awards made in the Tribunal, or the extent to which it might be desirable to harmonise awards for emotional loss across the jurisdictions. The fundamental point for present purposes is, however, that the Court of Appeal *has* considered awards under s 123(1)(c)(i) and (ii) of the Act on a number of occasions and the Employment Court must be guided by what the Court of Appeal has had to say.

[63] In this regard it is notable that over time the Court of Appeal has emphasised a range of factors relevant to the assessment process in employment cases, other than solely the impact of the breach on the individual concerned. Factors which the Court of Appeal has suggested may be relevant include the need for "moderation" in awards, the impact (in setting an award) on the employer and third parties (such as other

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18 Treated as vexatious and not genuine, at [254].

19 *Hammond v Credit Union Baywide*, above n 12, at [173]-[176], a decision which was also referred to by counsel for the defendant in submissions.

employees), the current economic climate and broader social expectations.[20] The equity and good conscience jurisdiction of the Employment Court, and the broader objectives of the Act (including to build productive employment relationships) may also be said to be broadly relevant to compensation setting in this jurisdiction, although the way in which these identified factors will be weighed from case to case remains to be worked through.

[64] All of this suggests that the inquiry, at least in this jurisdiction, may require other factors to be weighed with the emotional harm suffered by the individual concerned as a result of the employer's breach. On this basis I consider it appropriate to look to the developed jurisprudence in relation to compensation-setting in the Employment Court and Court of Appeal.

Awards in other comparable cases

[65] The present case, in terms of impact of the employer's breaches on Ms Cheng, can be compared with others where significant effects on mental health have ensued from an unjustified dismissal:

- *Whanau Tahi Ltd v Dasari*: The defendant found himself in a desperate financial situation, compounded by visa problems, because of the employer's unjustified actions; he contemplated suicide; he was awarded $10,000.[21]

- *Matheson v Transmissions and Diesels Ltd*: Mr Matheson killed himself the day after his employment terminated and $50,000 was awarded to his estate by the Employment Court; this was reduced on appeal to $25,000 plus a $10,000 gratuity.[22]

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20 See, for example, *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [85]; *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275 at [28], [1992] 1 ERNZ 711 (CA) at 717.

21 *Whanau Tahi Ltd v Dasari* [2016] NZEmpC 120, (2016) 14 NZELR 359 at [25]. Inflation adjusted, this would amount to $10,252.16.

22 *Matheson v Transmissions and Diesels Ltd* [2001] ERNZ 1 (EmpC); *Transmissions and Diesels Ltd v Matheson* [2002] 1 ERNZ 22 (CA). Inflation adjusted, this would amount to $34,777.57.

- *Ora Ltd v Kirkley*: The defendant was too ill to attend the hearing; this was the result of mental illness due to workplace stress; she was awarded $27,000.[23]

- *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")*: The plaintiff faced serious financial difficulties and experienced depression, going so far as suicide planning. He developed other medical symptoms, including a stammer, immediately following his dismissal, and was awarded $20,000.[24]

[66] A review of compensatory awards in the Authority and the Employment Court over the last four years reflects a significant upswing in quantum. That suggests that older judgments need to be considered through an up-to-date lens so as to avoid a distorting effect. None of the more recent awards appear to have been made against such a grave factual background as is now before the Court. In the recent case of *Archibald*, $20,000 was referred to as a moderate award, and appropriate in the particular circumstances – the harm Mrs Archibald suffered was found to sit around the middle of the middle band.[25] In the even more recent case of *Marx v Southern Cross Campus Board of Trustees*, Judge Perkins awarded $25,000 compensation under s 123(1)(c)(i).[26] Mrs Marx gave evidence, which was not challenged, that the unjustified actions of her employer made her life in the following years "hell", that she was unable to face others through the shame of being accused of serious misconduct and that she had contemplated suicide. Judge Perkins placed Mrs Marx's distress in the middle band.

[67] Drawing the threads together, I approach the three bands across the spectrum of cases in terms of quantum as $0-$10,000 (band 1); $10,000-$40,000 (band 2); over $40,000 (band 3).

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23 *Ora Ltd v Kirkley* (2009) 7 NZELR 102 (EmpC). Inflation adjusted, this would amount to $28,298.77.

24 *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")* (2009) 6 NZELR 530 (EmpC). Inflation adjusted, this would amount to $22,932.21.

25 *Archibald*, above n 15, at [62]-[66].

26 *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76.

[68] I would place this particular case in band 3. In doing so I have put to one side (for the reasons I have already traversed) any increase in quantum arising from the plaintiff's post-termination conduct.

Step 5: What is a fair and just award in the present case?

[69] No issues of financial capacity or third-party interest were identified by either party as relevant. The primary focus was a submission advanced by the company that any compensatory award ought to be minimal having regard to Ms Cheng's contribution to the loss she sustained. Particular reference was made to Ms Cheng's failure to engage with Mr and Mrs Li following the 8 March meeting and that this amounted to a breach of the mutual obligations of good faith. Contribution is a separate inquiry, as s 124 makes clear. I deal with it now for convenience.

[70] In the present case I do not accept that a reduction for contribution is appropriate in this case. Ms Cheng was very unwell. The meeting proceeded in her absence, even though Mr Li knew she was unwell. It was made very clear at the meeting that Ms Cheng was blamed for contacting IRD and it was also made clear, both at the meeting and subsequently, that there was no future for her at the company. While I accept that attempts were made to communicate with Ms Cheng following the meeting, and that she did not respond, the lack of response was entirely explicable and needs to be seen in context. First, the reason why Mr and Mrs Li were attempting to contact Ms Cheng was to persuade her to agree to a settlement to facilitate her departure. It was not to patch things up and restore the employment relationship. Declining to engage in the particular circumstances does not amount to blameworthy contributory conduct, does not amount to a breach of good faith and does not amount to a failure to be responsive and communicative. Second, Ms Cheng was not in a fit state to deal with Mr and Mrs Li, given her state of health - that would have been apparent and was a situation which was made worse by their actions.

The compensatory sum sought and what ought to be awarded

[71] Ms Cheng was awarded $20,000 by way of compensation under s 123(1)(c)(i) in the Authority. Her statement of defence pleads that the award made by the Authority

was appropriate. When invited to address issues relating to quantum of compensation by reference to recent cases under s 123(1)(c)(i) (including *Archibald*), the amount sought was confirmed.

[72] As I have said, I would have placed this case in the high-end band, both as to extent of loss and quantum. Nevertheless I feel constrained to limit the award to what has been sought by the defendant, including having regard to previous Court of Appeal authority on the point. In *McCulloch and Partners v Smith* the Court of Appeal affirmed the general principle that the Employment Court does not have jurisdiction to award amounts higher than those claimed and suggested that, for a higher amount of compensation to be awarded, the claimant would need to amend their pleadings.[27]

[73] I pause to note that a different approach has been adopted in the High Court in respect of awards for non-pecuniary loss under the Privacy Act 1993. In *Chief Executive of the Ministry of Social Development v Holmes* the Court rejected an argument on appeal that the Human Rights Review Tribunal did not have jurisdiction to order an amount in excess of that which had been sought in the original pleadings.[28] The Court noted that there was no statutory requirement to nominate a sum sought by way of damages; the "special" nature of the jurisdiction; and observed that the Act:[29]

> … should be interpreted and applied in a manner which is not legalistic and does not place barriers, especially of a technical nature, between the claimant and a just outcome.

[74] The High Court referred to the Court of Appeal's approach in *McCulloch*, but concluded that:

> We do not think the *McCulloch* decision applies on these facts. We think it would be quite wrong for a Tribunal or this Court to be bound by an applicant for damages under the Privacy Act before the Tribunal, very often without the benefit of legal advice, to be held to any figure nominated. Accordingly, we give no weight to this point.

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27 *McCulloch and Partners v Smith* CA133/03, 3 December 2003 at [3].

28 *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, (2013) 9 HRNZ 541. Mr Holmes had sought damages totalling $7,000 for emotional harm in the Tribunal. The Tribunal awarded $17,000.

29 At [106]-[108].

[75] The special characteristics identified by the Court in *Holmes* have some parallels in this jurisdiction. Nevertheless, I regard the Court of Appeal's approach in *McCulloch* as binding, and leaving no room (absent an application to amend the pleadings, which was not a step the defendant took in this case) for the Court to increase the quantum of compensation sought in the original pleadings.[30]

[76] The plaintiff is ordered to pay Ms Cheng the sum of $20,000 by way of compensation under s 123(1)(c)(i) of the Act within 21 days of the date of this judgment.

Conclusion

[77] Ms Cheng was unjustifiably dismissed from her employment with the plaintiff.

[78] The plaintiff must pay Ms Cheng the sums referred to at [38], [40] and [76] above within 21 days of the date of this judgment.

[79] Costs are reserved. The parties are encouraged to seek to agree costs. If that does not prove possible the defendant may file and serve a memorandum seeking costs within 20 working days of the date of this judgment; the plaintiff within a further 10 working days of the date of this judgment; and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 4 pm on 26 September 2018

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[30] Compare *McCulloch* on referral back to the Employment Court for reconsideration: *Smith v McCulloch and Partners* CC7/04, 19 April 2004 (EmpC).