IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 175
EMPC 464/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LYNETTE SALLY O'BOYLE First Plaintiff
AND	O'BOYLE LAW LIMITED Second Plaintiff
AND	JANIS MARY MCCUE Defendant

Hearing:	28 and 29 May and 16, 17 and 30 June 2020 (Heard at Auckland)
Appearances:	C W Stewart and D Church, counsel for the plaintiffs D Grindle and C Kumar, counsel for the defendant
Judgment:	29 October 2020

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] This judgment resolves a range of employment relationship problems which developed during Ms Janis McCue's employment by Ms Lynette O'Boyle.

[2] In the course of a four-year period of employment, issues arose as to whether wages, holiday pay and other entitlements had been properly paid. Ultimately, an impasse was reached between the parties. Ms McCue resigned raising personal grievances, and then claims for unpaid entitlements.

[3] The issues came before the Employment Relations Authority, which concluded Ms McCue had been unjustifiably disadvantaged by the failure of her employer to provide a written employment agreement and to keep compliant holiday and leave records; and that her employment had ended as a result of breaches of her terms of employment by Ms O'Boyle that amounted to a constructive dismissal.[1]

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[1] *McCue v O'Boyle Law Ltd* [2019] NZERA 648 (Member Arthur) [*McCue* substantive determination].

[4] Remedies for the personal grievances were awarded, along with an order that the unpaid entitlements be paid. Ms O'Boyle was also ordered to pay penalties for failure to keep a written employment agreement and compliant holiday and leave records to the Crown account. Costs were subsequently awarded in Ms McCue's favour.[2]

[5] Soon after, Ms O'Boyle and O'Boyle Law Ltd (OBL), which Ms O'Boyle asserted had part way through the employment period became Ms McCue's employer, commenced a challenge de novo.

[6] In essence, she asserted that none of the Authority's conclusions were justified and should be set aside. Ms McCue, for her part, contended that correct conclusions had been reached by the Authority. Her position is that all the awarded remedies were appropriate, although at the hearing she no longer sought penalties.

Overview and issues

[7] Ms McCue commenced working for Ms O'Boyle, a lawyer practicing on her own account, on 22 September 2014. Ms McCue's role was that of a legal secretary; it typically included typing, filing, compiling affidavits, preparing minutes, memoranda and legal aid applications, diary management and other administrative tasks. She worked for Ms O'Boyle until she resigned on 4 October 2018.

[8] For most of the period of her employment, Ms McCue was the sole employee for the practice. She originally worked 25 hours per week, but before long her hours increased to 37.5 hours per week.

[9] On the whole, the working relationship was positive and constructive. That said, the role was demanding. From time to time it was stressful as might be expected in a small, but busy, family law practice. On occasion, additional hours had to be worked to meet particular work demands.

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2 *McCue v O'Boyle Law Ltd* [2019] NZERA 683 (Member Arthur) [*McCue* costs determination].

[10] The evidence before the Court establishes there were a number of underlying issues which led to a difficult sequence of events which occurred between 18 September and 4 October 2018, at which point Ms McCue resigned.

[11] The first problem related to the fact that at no time was Ms McCue asked to bargain for or sign an individual employment agreement (IEA); nor were any of her terms and conditions reduced to writing.

[12] A second and related issue is whether the identity of Ms McCue's employer changed in May 2017, from Ms O'Boyle in her personal capacity, to OBL.

[13] A third and long-running problem related to payroll issues. Initially, a payroll system was operated by an external accountant, Mr Michael Stone. Subsequently, an alternative payroll provider associated with Mr Stone's accountancy firm, Thankyou Payroll Ltd (TYPL), provided those services.

[14] As I will describe later, each party's understanding of the payroll issues has changed over time. In order to bring some order to the multiple issues the parties raised in connection with alleged incorrect payments and entitlements, in the course of the hearing I directed them to prepare a Scott Schedule, so as to record their respective positions on those matters.[3] This resulted in consensus being reached on some matters, with others remaining for resolution by the Court.

[15] An aspect of the payroll issues concerned holiday entitlements. Ms McCue became very concerned about these in mid-September 2018. After several exchanges in writing Ms McCue and Ms O'Boyle met which resulted in a stormy discussion following which Ms McCue left her place of work. Then followed a succession of emails and letters. Ms McCue remained absent from work. Ms O'Boyle issued a formal warning to Ms McCue, asserting she was taking unauthorised leave. Soon after, Ms McCue's lawyers wrote to Ms O'Boyle providing a medical certificate which said Ms McCue was experiencing work-related stress, but that she should be able to

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[3] A Scott Schedule is a table. It provides a means by which the position of each party can be listed in vertical columns, allowing a response to be recorded for each party on a per allegation basis, together with references to relevant documents or other evidence. A separate column is reserved for the Judge to record a finding for each allegation when considering the matter in chambers.

return to work once the issues were resolved. They were not; two days later she resigned.

[16] In summary, the issues for resolution by the Court relate to:

a) the fact there was no written employment agreement;

b) whether the identity of Ms McCue's employer changed;

c) with regard to payroll matters:

- whether Ms McCue is now owed any arrears of wages for holiday and leave entitlements;
- whether holiday and leave records were maintained in accordance with statutory requirements;

d) whether Ms McCue was constructively dismissed;

e) whether there was unjustified action on the part of the employer because there was no IEA; because an unjustified warning was issued; and/or because payroll issues were not dealt with properly;

f) to the extent that either personal grievance is established, whether remedies should be ordered.

[17] The Court received extensive evidence on all these issues. That evidence, and counsel's submissions, will be referred to where appropriate.

Issue one: no written IEA

Submissions

[18] Mr Grindle, counsel for Ms McCue, submitted that being employed without the benefit of an IEA was a breach of the law, and disadvantageous; a basic statutory right would accordingly be denied.

[19] Ms Stewart, counsel for Ms O'Boyle, said Ms O'Boyle acknowledged Ms McCue did not have a written employment agreement and that she should have. She had expressed her regret that this was the case, and acknowledged it was incorrect for her to assert it was not a legal requirement. However, at the time of the resignation Ms O'Boyle was endeavouring to set up a written employment agreement, and was attempting to engage, unsuccessfully, with Ms McCue about this.

Analysis

[20] In assessing this issue, it is necessary to record the circumstances which led to Ms McCue's employment. Ms McCue said that in about June 2014, she saw an advertisement for a legal secretary for Ms O'Boyle's practice. She applied for the role but did not hear anything back.

[21] On 22 September 2014, a temporary secretary employed by Ms O'Boyle phoned her and asked if she was still looking for a job and if so, whether she would attend for an interview. She did so that afternoon, when she was asked by Ms O'Boyle to work the rest of the day given the temporary secretary was finishing the next day. She worked for Ms O'Boyle from then on.

[22] There was no initial discussion or bargaining as to her proposed terms and conditions of employment. Nor was she asked to consider a proposed IEA. The terms of her employment were verbal and established over time.

[23] Initially her hours were 25 per week at $22 per hour. Subsequently, these increased to an average of 37.5 hours per week at $30 per hour.

[24] It is surprising that Ms O'Boyle, as a lawyer, did not appreciate an employment agreement needs to be in writing. She took the position this was not required. This was a view she held until the end of the employment relationship. Even at that stage, when Ms McCue pointed out that a written employment agreement was a statutory requirement, Ms O'Boyle was adamant it was not.

[25] The Employment Relations Act 2000 (the Act) establishes a process for the bargaining and retention of IEAs. Section 63A stipulates that statutory bargaining is to occur in relation to the terms and conditions of an IEA, including any variations to it, if no collective agreement covers the work done or to be done by the employee.[4]

[26] In that case, the employer must do at least the following things:[5]

- provide to the employee a copy of the intended agreement under discussion;
- advise the employee that he or she is entitled to seek independent advice about the intended agreement;
- give the employee a reasonable opportunity to seek that advice; and
- consider any issues that the employee raises and respond to them.

[27] Section 64 provides that an employer must retain a copy of the IEA or, where an employee has not signed an intended agreement, a copy. Further, the employer must then, as soon as reasonably practicable, provide the employee with a copy of the IEA or any intended agreement.

[28] Section 65 of the Act states that the individual employment agreement of an employee must be in writing, and must include:

- the names of the employee and employer concerned;
- a description of the work to be performed by the employee;
- an indication of where the employee is to perform the work;

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4 Employment Relations Act 2000, s 63A(1)(e).
5 Section 63A(2).

- any agreed hours of work specified in accordance with s 67C or, if no hours of work are agreed, an indication of the arrangements relating to the times the employee is to work;

- the wages or salary payable to the employee; and

- a plain language explanation for services available for the resolution of employment relationship problems, including a reference to the period of 90 days in s 114 within which a personal grievance must be raised.

[29] An IEA may contain such other terms and conditions as the employer and employee think fit providing these are not contrary to law, or inconsistent with the Act.[6]

[30] The signing of an IEA is the end-point of a process, each step of which is significant. The importance of these provisions is reinforced by the fact that an employer who does not fulfil any of the statutory requirements is liable to a penalty.[7]

[31] Ms O'Boyle said that in late 2018 she proposed that an IEA be signed by Ms McCue, for the purposes of a restructuring of her practice which she wished to effect early in the following year. That, however, does not mitigate the non-compliance which had existed for several years up to that point. In any event, Ms McCue left before such a step was implemented.

[32] It will be necessary later in this judgment to discuss whether disadvantage arose through these failures.

Issue two: identity of employer

Submissions

[33] Mr Grindle submitted that, from the outset, it was irrefutable that Ms McCue's employer was Ms O'Boyle. He also said there was no documentation to support the

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6 Sections 65(1)(b) and 65(2)(b).
7 Sections 63A(3), 64(4) and 65(4).

proposition that the original employment relationship was severed and subsequently transferred to the company which Ms O'Boyle incorporated.

[34] Ms O'Boyle's case was that OBL became Ms McCue's employer in May 2017, when Ms McCue agreed to the transfer of her leave balance to that company, that it paid her wages thereafter, and that it was plainly the employer from that point onwards.

Analysis

[35] It is common ground that Ms O'Boyle was Ms McCue's employer from 22 September 2014, in her personal capacity.

[36] On 30 September 2016, Ms O'Boyle incorporated OBL.

[37] At some stage after the incorporation, Ms O'Boyle asked Ms McCue to arrange for reprinting of the letterhead relating to her law practice, on which the name of the new entity was placed. She said that it was only because of this request that she became aware a company had been incorporated.

[38] It appears Ms O'Boyle then used the company as the practice entity, although in 2018 she used a letterhead to write to Ms McCue for formal purposes that did not refer to the company.

[39] Ms O'Boyle said that after the incorporation she told Ms McCue the terms of her employment would change, and that she would become an employee of the company, rather than her personally. It is unclear from her evidence as to when this conversation may have occurred.

[40] She said that the change took effect on 1 May 2017, when TYPL closed a payroll account operated in Ms O'Boyle's personal name and opened a new one in the name of OBL. The payroll records are consistent with these arrangements.

[41] Ms McCue says she was not told about the proposed change of employer at all. She presumably knew her payslips bore the name of the company and appears to have thought it was the paying party, though not the employer. It is also the case there is

no documentation which records either a change of employer or the inception of a new employment relationship.

[42] Some evidence was given as to events which took place on 18 May 2017. At 5.59 am on that day, Ms O'Boyle sent an email to TYPL stating she wanted to cancel the original payroll account in her name and arrange for Ms McCue's payments to be sent under the name OBL, with leave records being "merged". She asked how this would work.

[43] In the afternoon of 18 May 2017, a response was provided by TYPL in which it was stated that a balance of 17.82 annual leave days would be transferred to Ms McCue's credit.

[44] Then, an email was sent from Ms O'Boyle's email address to Mr Stone; Ms McCue was shown as the author of the email. It referred to the fact that Ms O'Boyle had been sorting out payroll issues and noticed that Ms McCue's holiday balance was incorrect. Ms McCue had been credited with three weeks' holiday entitlement, when it should have been four. It was also noted that payroll settings indicated Ms McCue was working approximately 20 hours a week over four days, when on average she was working 37.5 hours per week over five days. Mr Stone was asked to check the settings to see if they were correct, as Ms McCue wished to ensure she was receiving her correct holiday entitlements.

[45] Ms McCue said that she had no recollection of sending the email, but that if she had a response would have gone to Ms O'Boyle and not her.

[46] As I shall explain more fully later, Ms McCue had long-running concerns about holiday entitlements. The content of the email is consistent with those concerns. I find it is more probable than not that she did send the email, albeit from Ms O'Boyle's email address.

[47] Ms O'Boyle said there was also a discussion at this time with Mr Stone by telephone, at which Ms McCue was present. Ms O'Boyle said that in the course of the discussion, she asked Ms McCue whether she wished her outstanding leave

balance of 17.82 days to be paid out in a lump sum, to be followed by a new leave arrangement with OBL. Ms McCue denied that the conversation took place.

[48] It is probable there was a conversation which referred to the extent of Ms McCue's leave balance. That was the issue on which she was focussed. I am not persuaded she realised this might have implications as to the status of her employer. There is no reliable evidence that she agreed to such a possibility. Whether the leave balance was in fact correct is a different question which I will consider later.

[49] The only other material which is relevant to the issue of identity of employer are letters and emails sent at the end of the employment relationship by Ms O'Boyle, when the parties were experiencing difficulties. In a number of her communications she referred to the employer as being OBL. For her part, Ms McCue was adamant in that correspondence that she had never been approached about a change of employer, or as to transfer of leave. She said if this had happened, she should have been provided with a new contract. Her responses confirm the absence of an agreement to work for OBL.

[50] There are many decisions in which the courts have been required to determine the correct identity of an employer. For present purposes, the following observations of Judge Colgan in *Mehta v Elliot (Labour Inspector)* are of assistance:[8]

> [22] The question of who was the employer must be determined at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. Because Messrs Sheikh and Mehta give different accounts of who they believed employed Mr Sheikh, it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was Mr Sheikh's employer when he commenced employment?

[51] Also relevant are the bargaining provisions to which I referred earlier. Section 63A(1)(e) makes it clear that an employer must, when effecting a variation, provide to the employee a copy of the intended varied agreement for independent advice, and for

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8 *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451 (EmpC).

the opportunity of providing feedback. The section also applies if a new IEA is to be entered into.

[52] I apply those principles accordingly.

[53] In summary, I find:

a) Ms O'Boyle carries the onus on the issue of employer identity, since she is its proponent.

b) There is no doubt that she was the employer from the outset of the employment relationship.

c) There is no single document showing compliance with s 63A to verify either a variation of the original agreement as to the identity of the employer, or the offering of a new employment agreement.

d) Nor was there any agreement that either of these steps would be taken. Ms O'Boyle said she told Ms McCue the employer would change. She did not say Ms McCue agreed to this occurring. I am not satisfied from an objective standpoint that Ms O'Boyle has established Ms McCue agreed there could be a variation or new IEA. The fact that wages were paid by OBL is clearly established. But that does not mean Ms McCue gave any assent to a change of employer.

[54] In summary, the statutory requirements for a variation of an IEA, or the establishing of a new one, were not satisfied; and there was no agreement that such a change would be made. Ms O'Boyle remained as Ms McCue's employer.

Issue three: payroll problems

Submissions

[55] Mr Grindle submitted that fundamental to the payroll issues was the obligation arising under the Holidays Act 2003 (the HA) to keep records in sufficient detail to demonstrate that the employer had complied with the minimum entitled provisions; he

cited ss 4B and 81 of the HA, and s 130 of the Act. He argued that Ms O'Boyle's administration of holidays and leave was confusing and chaotic.

[56] Mr Grindle said Ms O'Boyle had failed to pay Ms McCue for multiple statutory holidays; she failed to pay bereavement leave which was due; the entire week ending 6 June 2016 was paid as public holidays instead of hours worked; in June 2017, Ms McCue took five days' annual leave, and Ms O'Boyle deducted nine days; and in August 2018, Ms O'Boyle placed two weeks' work through as one, which meant Ms McCue paid double tax. These submissions were developed with regard to further examples of alleged inaccuracies in the maintenance of an accurate payroll record.

[57] Ms Stewart made three overall submissions about Ms McCue's holidays:

a) The Scott Schedule demonstrated much more than the details of the respective parties' positions. It showed that they could, with perseverance, reach agreement on many of the leave issues.

b) Despite Ms McCue claiming without justification she had been trying to get leave matters resolved for years, the evidence showed to the contrary that, when matters were raised, Ms O'Boyle investigated them and corrected them.

c) While it was regrettable that amounts owing for holiday pay had not been paid sooner, this ultimately came back to Ms McCue's unwillingness to engage to resolve matters. A "sorting out" of leave issues would have been far preferable to litigation.

[58] After analysing particular examples, Ms Stewart submitted that Ms McCue's assertions about leave were riddled with inaccuracies, and she had adopted a pernickety approach to leave which almost bordered on obsessiveness.

Relevant HA provisions

[59] It is necessary to summarise some key provisions of the HA, since these must underpin discussion of the issues raised by the parties.

[60] The following is not intended to provide a complete summary of all obligations under that statute – only those which are relevant to this case.

[61] As to annual holidays:

a) At the end of each completed 12 months of continuous employment, an employee is entitled to not less than four weeks' paid annual holidays.[9]

b) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose; if an employee elects to do so, the employer must allow the employee to take at least two weeks of his or her annual holidays' entitlement in a continuous period. When annual holidays are to be taken by the employee is to be agreed between the employer and employee. An employer must not unreasonably withhold consent to an employee's request to take annual holidays.[10]

c) An employer may require an employee to take annual holidays, with at least 14 days' notice, if the parties are unable to reach agreement as to when the employee will take his or her annual holidays, or the provisions relating to closedown periods apply.[11]

d) An employer may allow an employee to take an agreed portion of the employee's annual holidays entitlement in advance.[12]

e) An employer must pay an employee for an annual holiday before the holiday is taken, unless the employer and employee agree the employee is to be paid in the pay that relates to the period during which the holiday is taken, or the employee's employment has come to an end.[13]

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9 Holidays Act 2003, s 16.
10 Section 18.
11 Section 19.
12 Section 20.
13 Section 27.

f) An employee who is entitled to annual holidays at the commencement of a closedown period, as defined in s 29, must if required to do so by his or her employer take annual holidays during that period, whether or not the employee agrees to take holidays then. An employee who is not yet entitled to annual holidays at the commencement of a closedown period must, if required to do so by his or her employer, cease working during a closedown period; the employee is to be given not less than 14 days' notice of such a requirement.[14]

[62] With regard to public holidays:

a) The purpose of the public holiday provisions is to provide employees with an entitlement to eleven public holidays, if these fall on days that would otherwise be working days for the employee.[15]

b) If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay not less than the employee's relevant daily pay or average daily pay for that day.[16]

c) An employer must pay an employee at least time and a half for working on a public holiday.[17]

d) An employee is entitled to another day's holiday, or alternative holiday, instead of a public holiday, if the public holiday falls on a day that would otherwise be a working day for an employee and the employee works on any part of that day.[18]

[63] With regard to sick leave and bereavement leave:

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14 Section 32.
15 Section 43.
16 Sections 9A and 49.
17 Section 50.
18 Section 56.

a) An employee is entitled to sick leave and bereavement leave after the employee has completed six months' current continuous employment with the employer.

b) An employee is entitled to five days' sick leave and bereavement leave for each 12-month period of continuous employment, beginning at the end of the first six-month period of employment.[19]

c) An employer must allow an employee to take three days bereavement leave for specified types of bereavement.[20]

[64] With regard to holiday and leave records:

a) An employer must at all times keep a holiday and leave record showing details as specified by the statute.[21]

b) An employee may request an employer to provide access to, or a copy of, or a certified extract from, information in the holiday and leave record relating to that person.[22] An employer receiving such a request must comply as soon as practicable by allowing the record to be viewed, or by providing a copy or certified extract of the information involved.[23]

Analysis

[65] Before describing the many payroll issues which have troubled the parties, it is necessary to describe the processes which were adopted for recording time, payment of wages, and leave entitlements.

[66] From 22 September 2014 until 30 March 2015, Ms McCue was required to record her hours of work in a notebook which the parties called "the Red Book". Initially Ms O'Boyle conveyed these figures regularly to Mr Stone. He calculated

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19 Sections 63(2) and 65.
20 Sections 69 and 70.
21 Section 81.
22 Section 82(1).
23 Section 82(2).

PAYE, and the net amount to be paid as wages. He advised Ms O'Boyle of these figures by text, or by telephone. Payment was then arranged.

[67] When issues arose between the parties in September 2018, including as to wage entitlements, Ms O'Boyle told Ms McCue that the original Red Book had been lost. For her part, Ms McCue said she had taken screenshots of her entries in the Red Book at the time. She produced these to the Court. Ms O'Boyle did not produce any records as may have been maintained by Mr Stone, or copies of payslips for that period.

[68] From late March 2015, TYPL appears to have become responsible for processing payroll information for Ms O'Boyle. The Red Book system continued with Ms McCue recording her hours and leave. Red Book records from this time onwards were available to the Court. As before, Ms O'Boyle advised either Mr Stone or the associated payroll provider of those hours, and/or when Ms McCue took leave. TYPL produced both an employer's copy and an employee's copy of each fortnightly payslip.

[69] However, I find Ms O'Boyle was directly in control of the transfer of information to the external payroll provider, and therefore of the process which led to payment of wage entitlements to Ms McCue.

[70] Shortly before the Authority's investigation meeting, the advocate acting for Ms O'Boyle disclosed TYPL records. These included leave reports, although they were not accurate. Ms O'Boyle said she received annual leave reports, as employer. There is no evidence that Ms McCue received these, although Ms O'Boyle said this information could be accessed on the TYPL system for which Ms McCue possessed the relevant password.

[71] A balance of the annual leave entitlement as at the end of Ms McCue's period of employment was recorded on her final payslip as being 7.3 days. Such a balance was not recorded on previous employee payslips, or for that matter on the employer's copy of each payslip.

[72] Against the background of these record-keeping practices, a great deal of confusion appears to have developed as to their accuracy, and as to the parties' understanding of the correct position as to payments and entitlements.

[73] Ms McCue says she raised such issues on many occasions. For her part, Ms O'Boyle says that she reasonably relied on the external payroll providers to ensure that her wage and leave records were maintained in good order.

[74] She also said that when issues were raised with her, she took action. She cited two occasions when she said a "comprehensive audit" was undertaken, and that these showed leave balances had been correctly recorded in the payroll records.

[75] In her oral evidence, Ms O'Boyle stated that one such audit occurred when the transfer of leave was made on or about 18 May 2017, as already described.[24]

[76] No audit documents were produced to support the suggestion that an audit was undertaken. All the Court can conclude on the evidence provided is that Mr Stone provided a figure for Ms McCue's annual leave entitlements in May 2017, which was duly transferred to OBL's payroll account. How he established that figure is unknown.

[77] Ms O'Boyle said there was an earlier audit. Again no documents to verify this were produced, and she was unable to say when this occurred except it was in 2016; nor could she advise what it was about.

[78] On the material before the Court, I am not persuaded there were two comprehensive audits. On the basis of the TYPL record-keeping as at the date of resignation, which ultimately was accepted as being incorrect, I am not satisfied that the external provider dealt with annual leave issues correctly.

[79] Prior to the Authority's investigation meeting, Ms McCue prepared a detailed schedule based on the information she held in support of her claim that she was owed 13 unpaid public holidays, three days bereavement leave, and 38.5 days of annual leave.

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[24] Above at [42]–[48].

[80] On the evidence considered at the investigation meeting, the Authority accepted the first two of these claims; and it said there was agreement between the parties that Ms McCue was owed 30 days annual leave. Orders were made accordingly.

[81] However, Ms O'Boyle did not accept these findings. She said that the words she had used at the investigation meeting had been twisted by Ms McCue's counsel. She had said Ms McCue took 30 days annual leave during 2018. She had not said Ms McCue was owed 30 days annual leave at the time of resignation. She told the Court that when giving instructions for the challenge, she instructed her recently retained counsel she was liable for only 7.3 days of annual leave as at the date of Ms McCue's resignation, for four public holidays only, and for three days bereavement leave.

[82] Following advice, Ms O'Boyle paid the sums for which she accepted she was liable on 9 December 2019, at the time the challenge was being raised. It is unclear why she had not paid these sums earlier.

[83] Further developments occurred shortly before the hearing of the challenge. A payment in respect of Anzac Day 2015 was made on 22 May 2020.

[84] Then, TYPL told Ms O'Boyle's counsel there had been an error when it concluded Ms McCue's annual leave entitlement at resignation was 7.3 days. They acknowledged there had been a failure to take account of the accrued annual leave of 25 days which arose on the anniversary of her employment on 22 September 2018. Having regard to 3.7 days she had taken in advance, the amount actually due was 21.3 days. Ms O'Boyle said there should also be an allowance for 10 days' leave taken in advance. She concluded that after allowing for payments already paid, she owed Ms McCue four days annual leave, which she paid on 27 May 2020. She said her error as to the anniversary leave entitlement was unintended and arose because she had relied on the advice of the payroll provider at all times.

Scott Schedule

[85] As mentioned earlier, during the hearing the parties completed a Scott Schedule, which listed the parties' position on each of Ms McCue's claims. The completion of the Schedule meant the Court was presented with a logical summary of the various claims and counter-claims, which the Court could consider on an issue by issue basis. There was a total of 29 claims in respect of annual leave, two in respect of sick leave, 13 in respect of public holidays and three in respect of bereavement leave.

[86] The result may be summarised in tabular form:

	Position of Ms McCue	**Position of Ms O'Boyle**
Annual Leave	From a total entitlement of 90 days, 61.5 days have been taken, leaving a balance of 28.5 days owing at the date of resignation.	From a total entitlement of 90 days, 69 days have been taken leaving a balance of 21 days owing at the date of resignation; if the leave balance of 17.82 days in May 2017 is allowed, the balance at date of resignation was 14.3 days.
Unpaid Public Holidays	13 public holidays were unpaid at the date of resignation.	Six statutory public holidays were unpaid at the date of resignation; there are no records one way or the other in respect of the balance claimed.
Sick Leave	On 1 October 2018, Ms McCue had an accrued sick leave balance of 6.2 days; this should have been made available to her following production of a medical certificate the next day.	Ms McCue's accrued sick leave as at 4 October was 5.2 days; the medical certificate produced the next day was unreliable, so no sick leave was payable.
Bereavement Leave	Three days bereavement leave should have been allowed for during the employment relationship.	Agreed.

Annual leave issues

[87] Three annual leave issues remain for resolution by the Court. The first relates to the fact that five days of annual leave were taken for the period 11 to 15 January 2016. However, in the week following the taking of the leave, the entitlement was reversed, and a deduction was made from the wages to reflect that fact. The payslips clearly establish these events.

[88] The dispute between the parties relates to an entry made in a separate annual leave record which was maintained by TYPL. In that record, leave is shown as having been taken on 11 – 15 January 2016; but no subsequent reversal is shown. No explanation has been given by Ms O'Boyle or TYPL as to why the payslips conflict with the summary of annual leave. The payslips are to be preferred, since they confirm the payment initially made on the basis leave was properly taken, and then the reversal and deduction of the sum involved. I conclude that the annual leave was disallowed for the days of the second week; accordingly, there should have been no debiting of the annual leave balance for that week in the Scott Schedule balance.

[89] The second issue between the parties relates to issues concerning time taken off for sick leave. Ms McCue was paid sick leave on 18, 19 and 20 April 2018, but was in fact ill on only one of those days, working the other two. This is confirmed by the appropriate entries in the Red Book.

[90] Subsequently, in August 2018, Ms McCue recorded in the Red Book that she was sick on 9 and 10 August 2018. She also noted that she should be paid ordinary wages on this occasion, because of the previous error. Ms O'Boyle said that subsequently she established Ms McCue had been studying on these days, and they should accordingly be treated as annual leave, justifying a deduction in the annual leave balance of the Scott Schedule. Ms O'Boyle did not dispute the earlier error as to sick leave.

[91] In the result, there should either be an annual leave allowance for the two days taken in August for studying, or an allowance for the erroneous debit to sick leave which occurred in April 2018. Accepting Ms O'Boyle's evidence as to studying, I prefer the latter. On the Scott Schedule, there should be a two-day reduction of the annual leave balance, and a two-day increase of the sick leave balance.

[92] The third issue relates to what occurred on 14 September 2018. There is an entry in the Red Book stating, "STUDY DAY 4.5 HRS HOL PAY". Ms McCue says this meant 4.5 hours were worked, and the balance of the working day was devoted to study. Ms O'Boyle says "study day" should be construed as meaning that an entire day was devoted to study. Ms O'Boyle's explanation does not have sufficient regard

to the reference to the figure of "4.5"; when considered in context, it is clear the figure was a reference to hours worked. The Scott Schedule entry should be adjusted accordingly.

[93] The final issue is whether any regard should be given in the analysis to the entry recorded by TYPL in May 2017, that Ms McCue's annual leave balance was 17.82 days. It was submitted by Ms Stewart that this was an agreed figure which establishes a reliable basis for any subsequent assessment of annual leave entitlements. I disagree. Counsel made no attempt to reconcile the figure with parties' agreed starting point of 90 days for the entire employment period; and the Court has not been provided with sufficient information to do so. The figure of 17.82 days must be placed to one side.

Unpaid public holidays

[94] Turning to public holidays, Ms O'Boyle paid Ms McCue for six statutory holidays.[25] She says she cannot access records relating to other public holidays because Mr Stone is now deceased. This means, she says, that she cannot accept Ms McCue's claim that the seven statutory holidays in the period between 27 October 2014 and 6 February 2015 were unpaid.

[95] As I shall elaborate shortly, I am not satisfied that a full holiday and leave record has been maintained under s 81 of the HA since none has been produced. As an employer, Ms O'Boyle was responsible for maintaining that record. On the evidence before the Court, that responsibility has not been discharged. The inability to access such a record has led to Ms McCue not being able to bring a claim based on an accurate holiday record. Section 83(3) of the HA therefore applies. Her evidence on this topic must prevail, which is that these public holidays were not paid.[26]

[96] Accordingly, Ms McCue's claim for the further seven unpaid statutory holidays succeeds, and the Scott Schedule should be adjusted accordingly.

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[25] For the period 3 April 2015 to 6 February 2017.

[26] See also the discussion as to these obligations in *Hatcher v Burgess Crowley Civil Ltd* [2019] NZEmpC 117 at [21]–[24] following.

Sick leave

[97] There are three issues which need to be considered with regard to sick leave entitlements.

[98] The first issue relates to a problem which arose on 26 May 2016, where it is common ground that annual leave was taken but paid as sick leave instead of holiday pay; a one-day entitlement for sick leave therefore arises.

[99] The second issue relates to the question as to whether sick leave should have been available to Ms McCue on the basis of the medical certificate she obtained after seeing her GP on 1 October 2018, that is, for 5.2 days. It is convenient to discuss this issue fully when dealing with the circumstances relating to Ms McCue's personal grievances. It suffices to say at this stage that I consider the medical certificate was valid, that Ms McCue had been paid up to and including 24 September 2018, and that a fair and reasonable employer could be expected to pay her sick leave from the next day onwards given her verified stress condition. There is accordingly an entitlement for 5.2 days of sick leave.

[100] There is a third issue which relates to the sick leave taken on 19 and 20 April 2018, as discussed earlier; for these dates, a two-day entitlement arises.[27]

[101] In the result, the Scott Schedule should be adjusted to show an entitlement for sick leave of 8.2 days. That entitlement will cover the period of employment which was not paid, that is, from 25 September to 4 October 2018, the date when Ms McCue resigned.

Bereavement leave

[102] It is common ground that Ms McCue had an entitlement of three days bereavement leave which she took in April 2015.

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[27] See above at [89].

Conclusions as to payment of arrears

[103] On the basis of the adjusted Scott Schedule entries, counsel will now be able to calculate Ms McCue's entitlements as at the date of resignation, taking into account all relevant factors including employer KiwiSaver obligations. Credit must then be given for the payments made by Ms O'Boyle from the date of resignation onwards.

[104] Ms McCue is entitled to interest on those entitlements as from 5 October 2018 under the Interest on Money Claims Act 2016; the calculation will need to take into account the dates and amounts of post resignation payments made by Ms O'Boyle. The date of payment should be assumed as being 21 days after the date of this judgment. A joint memorandum is to be filed by counsel confirming the correct calculations within 14 days, following which I will make the necessary order.

Section 81 of the Holidays Act 2003

[105] I have already explained that s 81 of the HA imposes a mandatory obligation on an employer to keep a holiday and leave record. That section states that at least the information specified in the section must be kept in written form or in a manner that allows the information to be easily accessed and can be converted into written form.

[106] Ms O'Boyle stressed that she relied on the external payroll providers to ensure that appropriate records were maintained. As I have explained, Ms O'Boyle was not thereby relieved of the statutory responsibility which falls on an employer under the HA. Furthermore, she was involved in providing information that made up the record.

[107] Once that information had been processed by the payroll providers, for instance by calculating wages due, PAYE, and KiwiSaver entitlements, she received the employer copy of the payslip containing the relevant figures, and was, for example, able to confirm the accuracy of the figures used for a starting point, namely hours worked which were replicated on those payslips. She candidly accepted, however, she did not check the figures when they were made available to her.

[108] It is evident from entries in the Scott Schedule that numerous errors arose, particularly with regard to annual leave and public holiday entitlements. Some of these were transfer errors of information from the Red Book to TYPL.

[109] The material before the Court shows that there was also a lack of understanding as to public holiday entitlements from the outset.

[110] As will be discussed more fully later, Ms O'Boyle held a fundamental misunderstanding as to annual leave entitlements. This was particularly evident in September 2018, when she insisted Ms McCue was incorrect in stating she was entitled to her full entitlement to annual holidays as from the anniversary of her employment which was 22 September in each year, a contention which Ms O'Boyle strongly disputed. Ms O'Boyle told the Court that TYPL had told her annual leave was accruing. There was no evidence as to when this occurred. In any event, when the issue came into sharp relief in September 2018, Ms O'Boyle, as employer, could have been expected to check the position. The provisions of the HA clearly spell out what was due.

[111] I do not agree with Ms Stewart's submission that Ms McCue took a "pernickety approach" to her leave entitlements which almost bordered on obsessiveness. As already noted, the HA makes it clear that the responsibility for proper records falls on the employer. The wealth of material before the Court relating to leave issues establishes that Ms O'Boyle's administration of holidays and leave was inadequate.

[112] Ms Stewart submitted that Ms McCue had also made errors, which she had conceded during the negotiations for the Scott Schedule. Whilst that is so, Ms McCue should not have been placed in the situation where it was necessary for her to take extensive steps, in an attempt to reconstruct her leave record.

[113] Had Ms O'Boyle ensured that accurate holiday and leave records were being maintained, many of the difficulties which arose subsequently would likely have been avoided or at least mitigated.

Issue four: was Ms McCue constructively dismissed?

Submissions

[114] In summary, Mr Grindle submitted Ms McCue was constructively dismissed because:

- There had been significant irregularities with regard to the calculation and payment of holiday pay entitlements, catalysed by the absence of an IEA.

- There was a heated discussion on 25 September 2018, at which Ms O'Boyle invited Ms McCue to leave the workplace.

- She was then subjected to a barrage of demanding email and text messages, many of which made reference to or intimated adverse consequences for Ms McCue.

- An unjustified written warning was given.

- Ms O'Boyle refused to accept Ms McCue's legitimate request to commence a period of sick leave and acted in an aggressive and hostile manner towards her making urgent demands and requests within unreasonable timeframes.

- She requested Ms McCue to attend a further disciplinary investigation, founded on baseless accusations.

- The manner in which Ms O'Boyle dealt with Ms McCue's employment-related concerns was dismissive and heavy-handed, especially given that in the fullness of time, the concerns were proven to be true and legally correct. Ms McCue reasonably lost trust that her terms of employment would be honoured in future.

- It was foreseeable Ms McCue would resign rather than putting up with being disadvantaged and not having her concerns addressed.

[115] In summary, Ms Stewart submitted:

- Ms O'Boyle showed willingness at all times to address leave and other issues constructively, whether at proposed meetings, by having an accountant check entitlements, or by attending mediation.

- Ms McCue failed to engage with any of these processes.

- She had failed to show that it was the conduct of her employer which motivated her to resign, or that her resignation was reasonably foreseeable.

- Ms O'Boyle was entitled to investigate legitimate concerns which arose; instigation of a disciplinary process could not give rise to a constructive dismissal.

- The medical certificate obtained by Ms McCue was vague and retrospective; it was reasonable for Ms O'Boyle not to accept it without further investigation.

- The assertion that Ms McCue suddenly lost faith in her employer because she learned from her own lawyers Ms O'Boyle had been wrong about the need for a written employment agreement, or because of her reaction to the medical certificate, was not plausible.

- Ms McCue's argument that she resigned because of a dispute over leave balances does not withstand scrutiny. It was the raising of performance concerns, not leave, which caused her to storm out of Ms O'Boyle's office; then she refused to cooperate over the issue.

- The decision of *New Zealand Institute of Fashion Technology v Aitken* is on point.[28] It shows that where there is a genuine dispute between parties as to their rights, neither party may use the stance of the other as either a ground of dismissal, or as a resignation intended to be treated as a dismissal. The facts showed Ms O'Boyle genuinely wished to resolve matters so both parties could move forward constructively.

Key facts

[116] For the purposes of the fourth issue, it is necessary to describe in some detail the extensive interactions between the parties between 18 September and 4 October 2018, noting that prior relevant events have already been summarised.

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[28] *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 (EmpC).

[117] Early on 18 September 2018, Ms McCue sent Ms O'Boyle a text stating that she had been reviewing her payslips and could not work out her leave. In February 2018, she had booked eight days off, and now wished to check her entitlements. She asked for a copy of the leave record. In her text she said this would make it easier for a person who was going to help her assess the position.

[118] Ms O'Boyle sent Ms McCue an email that evening, attaching some payslips which had been generated by TYPL. She referred to the fact that there were others in a payroll book which she needed to locate.

[119] Ms O'Boyle also proposed a planning meeting for 20 September 2018. She said she wished to avoid the repeat of an incident which had occurred in the previous week, where Ms McCue wished to have a day's leave at short notice to study. To facilitate this, Ms McCue had to work overtime, the cost of which had fallen on Ms O'Boyle. She had been required to pay a day's leave; and Ms McCue was not available to the business, which placed pressure on it. She said this was unfair.

[120] She also said the purpose of the planning meeting was to check Ms McCue's availability until the end of the year, as well as the hours that the office would operate during the Christmas vacation. She said it was not appropriate for an external person to be present, because the meeting would involve internal issues.

[121] However, a further meeting to discuss leave and any other matters could be arranged; a support person could be present at such a meeting.

[122] Then she said she was giving notice of her intention to change Ms McCue's employment agreement, so as to place her on a salary. She proposed a process for effecting these arrangements.

[123] The parties duly met on 20 September 2018, reaching agreement as to opening and closing hours for the subsequent vacation.

[124] Emails were exchanged on Sunday, 23 September 2018. First, Ms McCue responded to Ms O'Boyle's email of 18 September 2018. She described her

understanding as to outstanding leave entitlements, including public holidays, bereavement leave and annual leave. She noted her figures were at odds with the TYPL records and requested a meeting to try and resolve the differences and sort out discrepancies.

[125] Ms O'Boyle responded later in the day. She commenced her email by noting that Ms McCue had booked the eight days' leave, but according to the TYPL system, had a leave entitlement of only 7.3 days. She noted that whilst leave could be taken in anticipation, that could only be at the employer's discretion. She declined to approve such a possibility whilst there were unresolved matters. Consequently, if Ms McCue wished to have time off she would have to take it as leave without pay. Then she asked for details and reasoning as to why Ms McCue thought the TYPL records were incorrect.

[126] That evening Ms McCue responded in detail. After referring to an incident she said had occurred in 2015 when a PAYE issue had arisen, Ms McCue referred to leave issues. She noted that Ms O'Boyle had not allowed for the five weeks' leave entitlement which would accrue on the anniversary of her employment, 22 September 2018. She said that it was up to Ms O'Boyle as employer, to provide details of annual leave, hours worked, and how that had been calculated, all as required under the HA. She said she had already spent a lot of time trying to resolve this with Ms O'Boyle without getting anywhere. It had been necessary for her to calculate her own holidays, as either the information provided to TYPL by Ms O'Boyle was incorrect, or they had been calculating her entitlements incorrectly. Ms McCue said she was very disappointed with these issues and wanted them sorted out for once and for all. She had felt confused by Ms O'Boyle's responses, including as to the suggestion that there was a company involved in her employment issues. She suggested it would be a good idea for Ms O'Boyle to talk to TYPL and perhaps her accountant, if agreement could not be reached.

[127] These problems escalated on Tuesday, 25 September 2018. At 5.38 am that morning, Ms O'Boyle sent Ms McCue an email with regard to a meeting she wished to hold later that week on Friday, 28 September 2018. She said she wished to talk about Ms McCue's work performance issues, and her reaction to a particular

work-related request. She did not want Ms McCue to continue to engage in a negative way with OBL. She appreciated what Ms McCue had done but wondered if she was suffering ongoing stress in her personal life which she was bringing to the workplace. She acknowledged that the workplace was "very stressful".

[128] She then listed a number of issues she said she wished to talk about, and how OBL could support Ms McCue through what she described as a "difficult time". She did not, however, wish to discuss the leave issues at that time. She said that was a matter which could be taken to mediation.

[129] Ms O'Boyle said that Ms McCue did not react well to the email. When she arrived at work at about 9.00 am, Ms McCue was aggressive and hostile towards her. She demanded there be a meeting to discuss the leave issues immediately, rather than several days later.

[130] For her part, Ms McCue said that she was at work first, and found the email which had been sent to her by Ms O'Boyle that morning. She said she was surprised at the reference to performance issues, as there had never been any previous complaints of that nature. She said she was upset by the email exchanges that had occurred, and the manner in which Ms O'Boyle was dealing with the leave issues she had raised.

[131] It is evident that Ms McCue told Ms O'Boyle that she wanted to discuss the leave issues then and there, believing Ms O'Boyle had time to do so because a client meeting had been cancelled. Ms O'Boyle did not wish to do so; she said this was because she was about to meet with a client whom she had arranged to see.

[132] Amongst the issues which were briefly discussed, Ms McCue said she wished to be credited with the 25 days' leave entitlement she was due on 22 September 2018. Ms O'Boyle was of the opinion that such leave accrued fortnightly over time.

[133] Ms McCue said that matters became tense, and that Ms O'Boyle then said:

> I am the lawyer in this place and I run this place and if you want to run this place you go to Law School and then your name can be above that door, but now it's my name above the door and if you don't like it you can leave.

[134] Ms O'Boyle said that while she is unable to recall exactly what was said, she has no recollection of making this statement, or using such words. However, she acknowledged heated words may have been exchanged, although this was in the context of Ms McCue being somewhat insubordinate by demanding an immediate meeting.

[135] There then followed a lengthy exchange of emails and texts over the remainder of the day. A short time after the meeting, Ms O'Boyle sent an email to Ms McCue stating that she had "just walked off the job", and that absence without leave for a period were grounds for instant dismissal. She suggested Ms McCue take an hour to calm down, and that she would get someone to look at the payroll and have it audited again, but that the other issues would have to wait for the Friday meeting.

[136] Ms McCue responded by saying she had not walked off the job; rather, she considered she was not being employed as the legislation required, and that she could no longer work under these conditions. She recorded that she understood Ms O'Boyle was not going to pay her outstanding entitlements.

[137] In several subsequent communications, Ms O'Boyle asked Ms McCue to return to work, suggesting again that the leave entitlements could be audited, and that the leave issue could be taken to mediation. She also proposed that there be a meeting on the following Thursday afternoon, when a colleague would be available to meet with the two of them to discuss the issues.

[138] That evening, Ms McCue responded by email. She confirmed she had not abandoned her job, and she had understood Ms O'Boyle to say that if she did not like things the way they were, she should leave, so she did.

[139] She said she would be prepared to attend a meeting on the following Thursday, but she was not prepared to come into work before then or afterwards unless all issues were resolved. She noted she was:

> ... [a] bit stressed at the moment but it is nothing to do with my personal life, which I am quite happy with, or my financial circumstances. My only stress at the moment is work related. Work has been extremely stressful the past few months and in particular the last few days.

[140] She went on to refer to personal circumstances which had affected Ms O'Boyle's availability, which she understood but which had left her having to deal with difficult clients. She said she considered herself a loyal employee but had not been treated as such. She had been relied on and taken for granted. She said she was "bamboozled" with the wages and entitlement issues, as she had no idea as to what the correct position was.

[141] Earlier, Ms O'Boyle had said in one of her emails that Ms McCue was an employee of OBL. In her response, Ms McCue said she had always regarded Ms O'Boyle as the employer; she had never been approached as to a change of employer, or as to a transfer of leave. She noted that if this had happened she would have had a new contract. She felt she was not valued enough as an employee, because matters she had raised frequently in the past had not been sorted out.

[142] In a further email sent a short time later, she reiterated her clear understanding that she should be credited with 25 days holiday leave on the anniversary of her employment.

[143] To this last point, Ms O'Boyle responded a short time later asserting that Ms McCue should get some legal advice about the accrual issue, because she was wrong. She said Ms McCue accrued leave at about 0.98 days a fortnight.

[144] Then, at 10.05 pm, Ms O'Boyle sent Ms McCue a formal letter, requesting her to return to work, which she said Ms McCue had refused to do. She had said in writing on more than one occasion that there was to be no more leave taken in anticipation until outstanding issues of leave were resolved and Ms McCue had a positive leave balance. She said Ms McCue was not on leave and was not authorised to be away from her employment. Such a circumstance amounted to abandonment.

[145] Then she said an accountant was looking at the issue of leave, but Ms McCue had refused to accept this process. She noted that a restructure of OBL needed to occur and would take place; however, since it appeared Ms McCue had abandoned her employment, there was no legal requirement for Ms O'Boyle to include her in the process. She went on to say that if Ms McCue was not going to return to work, work

property should be returned, and a software licence held on Ms McCue's home computer should be removed.

[146] On 26 September 2018, Ms McCue responded to the formal letter. Again she stated she had not walked off the job; she said she had been told to leave.

[147] She asked for confirmation as to the legislative provision Ms McCue was relying on as to the consequences of not returning to work when there was a work-related dispute.

[148] She had said she was prepared to attend another meeting, the purpose of which would be to provide her with a written agreement which she should have had all along.

[149] Then she repeated the fact that her upcoming leave entitlements should be recognised. She noted she had asked for holiday and leave records and was given payslips which was not what she had requested, and which did not contain details about holidays. She asked for these records again, referring to s 80 of the HA.

[150] On 27 September 2018, Ms O'Boyle emailed Ms McCue acknowledging receipt of her letter of the previous day, stating that a number of comments had been made which were not accepted. She asserted that holiday records had already been provided. But as further information had now been sought, this too would be given as soon as practicable. She said Ms McCue had refused to attend work for two days. Ms O'Boyle emphasised she had to manage the practice during a very busy time without support which had a huge impact on the business. She could not continue to operate OBL without support, and that to do so would result in serious consequences to clients and would breach ethical obligations.

[151] Later that day, Ms O'Boyle sent a formal warning letter to Ms McCue, on the basis of what she described as unauthorised absence from work for two days. She said Ms McCue had failed to attend work, and to meet so as to resolve matters. This, she said, showed Ms McCue's actions did not meet a fair and reasonable standard for the clients of OBL; Ms McCue was not acting in good faith.

[152] The letter was described as being a first warning letter. Ms McCue was told her employment may be terminated if she continued not to attend work when asked. Ms O'Boyle stated Ms McCue was required to attend work the next day, and that no leave would be granted for that day. The warning letter would have effect for 18 months and would be placed on her personal file.

[153] It was also noted that a meeting was scheduled for the next day at 9.00 am when the fact of the warning letter could be discussed or responded to.

[154] It is common ground that Ms McCue did not attend work the following day, and the meeting which had earlier been proposed did not take place.

[155] On Monday, 1 October 2018, Ms O'Boyle sent Ms McCue a text stating she was worried about her and would ring her later as she would not mind meeting up for a chat if that suited.

[156] In fact, that day Ms McCue attended her GP who completed a medical certificate as follows:

> [Ms McCue] was assessed by me today and the history I have obtained is she is experiencing work-related stress and has been unable to work since Wed 26th Sept and should be able to return to work once the issues are resolved.

[157] Ms McCue emailed a copy of the certificate to Ms O'Boyle late that day.

[158] On 2 October 2018, a lawyer now acting for Ms McCue, Ms Kumar, wrote to Ms O'Boyle. She stated Ms McCue was currently on sick leave as a result of stress, her GP having identified that stress as being work-related. A copy of the medical certificate was attached.

[159] Ms Kumar also made a request for copies of Ms McCue's personnel file, employment agreement, record of hours worked, annual leave records and sick leave records as a matter of urgency. Clarification was sought as to the name of the entity that Ms O'Boyle contended had been Ms McCue's employer since the commencement of her employment. The letter concluded by stating that once the documents sought

were received, Ms Kumar would be able to write more fully about Ms McCue's position.

[160] At 3.39 pm, Ms O'Boyle emailed Ms McCue's lawyers. Attached was a formal letter which recorded that OBL did not accept Ms McCue was on sick leave because of work-related stress. Ms O'Boyle said that until she received the medical certificate, she did not know Ms McCue was claiming to be on sick leave. Ms O'Boyle said it was a requirement under the legislation for notification to be given to an employer that the employee is sick. This had not occurred.

[161] Then she referred to events that had occurred since 25 September 2018. She stated Ms McCue had failed to provide information requested of her so that an accountant could attend to the third audit Ms McCue had requested of her leave since she had been in Ms O'Boyle's employment. She said the accountant was working on the leave audit, but until the information requested of Ms McCue was received, it could not continue.

[162] Ms McCue had failed to attend a disciplinary meeting on 28 September 2018 or provide any alternative dates when this could occur. She had failed to engage and had not acted in good faith.

[163] Ms O'Boyle said that if Ms McCue wished to claim sick leave on the basis of workplace stress, further investigations would need to be made regarding the medical certificate, the contents of which were not accepted. She emphasised OBL would not be paying Ms McCue sick leave on the basis of the certificate.

[164] She went on to state that unless there was a response by 5.00 pm that day, she would have no other choice but to assume Ms McCue had terminated her employment. She had failed to act in good faith or advise her of her movements over the previous five days and had failed to attend a performance meeting. Ms O'Boyle said Ms McCue had acted with total disregard to her and her business and the clients she represented.

[165] Ms O'Boyle concluded her response by saying that was not possible to make necessary business decisions when faced with a medical certificate which stated Ms McCue would not come back to work until matters were resolved.

[166] That evening, Ms O'Boyle sent a further email to Ms McCue's lawyer responding to the various requests for documents. She said she did not keep a file on employees, although she had documents she would not disclose as they were privileged. She said there was no employment agreement, but the terms and conditions were clear: hours worked, annual leave and sick leave records were all contained in payslips provided to Ms McCue, copies of which had been forwarded to her. She went on to say that she had requested information from Ms McCue which had yet to be provided; it was requested urgently.

[167] Then she stated that she was happy to have a new accountant undertake a third leave audit, but OBL would not be paying for it. A payroll system was used which had been approved by IRD, and if Ms McCue disputed its operation, there would need to be grounds for doing so. She said there was a recurring pattern of leave problems being raised by Ms McCue when she needed further leave entitlements. She emphasised that the current leave balance was correct. If Ms McCue took eight days of leave in October as booked, she would have insufficient leave to take in December 2018/January 2019 when OBL closed for its annual shutdown. She would accordingly need to take leave without pay for 3.5 weeks. She concluded the email by stating Ms McCue was required to return to work immediately.

[168] On 3 October 2018, Ms Kumar emailed Ms O'Boyle to state she would be meeting with Ms McCue the next day and would be in a position to advance matters then.

[169] Ms O'Boyle replied to this email, noting that Ms McCue had once again not attended employment, and had not advised as to her whereabouts despite a request to do so.

[170] Ms O'Boyle went on to state that a colleague had advised her on a confidential basis that Ms McCue had applied for a position at a local firm which had a

temporary/possible permanent position. She said it was hard for Ms McCue to argue she was on sick leave when she was applying for other jobs. She was not acting in good faith. I interpolate Ms McCue told the Court she had indeed made an enquiry of a recruitment firm that was advertising for a role at Ms O'Boyle's office because she wanted to find out if her job was being advertised.

[171] Then Ms O'Boyle stated Ms McCue had been receiving work-related emails to her personal email address which had occurred as recently as the previous day. She said that a client had also advised that Ms McCue had been sending Facebook messages to her personal account. This was in breach of OBL's client confidentiality and employment policies, as Ms McCue knew. She requested Ms McCue to return all client information and data she had received within the previous four years, within 24 hours. As there was a serious client confidentiality issue, Ms McCue was required to attend a disciplinary meeting at 4.00 pm on 5 October 2018 to discuss why these events had occurred, and to provide an explanation. The meeting would not be rescheduled since Ms McCue had failed to attend the last disciplinary meeting, nor had she offered a satisfactory explanation for not doing so.

[172] On 4 October 2018, there were further exchanges between Ms O'Boyle and Ms Kumar.

[173] Ms O'Boyle noted that Ms McCue had been absent from the workplace for nine working days. She said she was making up Ms McCue's pay for the few days she had worked in the last fortnight and asked whether this would be Ms McCue's final pay.

[174] Ms Kumar responded stating that she was meeting with Ms McCue to receive instructions, and a response would be given prior to the close of business. Ms O'Boyle responded by seeking confirmation as to whether Ms McCue would be attending the disciplinary meeting which had been scheduled for the next day.

[175] Ms Kumar then wrote at length to Ms O'Boyle. She said she had been authorised to convey Ms McCue's "unconditional resignation" from the firm's employment with immediate effect. In lieu of working out her notice period,

Ms McCue would remain on paid sick leave, and asked for information as to the current sick leave entitlement.

[176] Personal grievances were raised for failure to provide a written employment agreement; breach of statutory employment and holiday obligations; unjustifiable disadvantage for the written warning given in the previous week; and unjustifiable constructive dismissal as a result of the foregoing.

[177] Ms O'Boyle responded stating a substantive reply would be given shortly but noted in the meantime that Ms McCue was required to give 10 working days' notice; and that Ms McCue had failed to attend work for nine working days, prior to which she had removed her belongings from her workplace.

[178] On 12 October 2018, an advocate responded to the grievance claims. The advocate stated that Ms McCue's allegations did not stack up, and he was instructed to defend her claims vigorously, seeking costs.

Constructive dismissal principles

[179] In *Auckland Shop Employees' Union v Woolworths (NZ) Ltd*, the Court of Appeal accepted that a constructive dismissal could arise in situations such as where:[29]

a) an employer had given an employee an option of resigning or being dismissed;

b) an employer had followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or

c) a breach of duty by the employer led an employee to resign.

[180] The third breach of duty limb was considered further by the Court of Appeal in *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)*.[30] There, the Court accepted the employee

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[29] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA) at 374–375.

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

had been constructively dismissed, but added foreseeability to the test in the following way:[31]

> In such a case as this we consider that the first relevant question is whether the resignation is being caused by a breach of duty on the part of the employer. To determine that question *all the circumstances of the resignation have to be examined*, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.
>
> (Emphasis added)

[181] Thus, the focus of a claim of constructive dismissal is on the employee's motivation for ending the employment; and the test is objective.[32] Justification is an aspect of the analysis, which under s 103A of the Act must involve an objective assessment.

[182] The submissions of counsel differed as to the period each party contended fell for analysis when assessing the circumstances of the resignation. The effect of Mr Grindle's submission is that the totality of the employment relationship was relevant to the assessment. Ms Stewart's submission restricted the focus to Ms McCue's last few days of employment, because prior to 2 October 2018 she had not been intending to resign; she argued that it was only when Ms O'Boyle responded to her lawyer's letter of 2 October 2018 that Ms McCue confirmed she would resign, doing so on 4 October 2018.

[183] Circumstances of the kind described by Ms Stewart require consideration of what are sometimes described as "the final straw" cases. The Court of Appeal of England and Wales first enunciated the applicable principles in *London Borough of Waltham Forest v Omilaju*,[33] subsequently summarised by the English Employment Appeal Tribunal as follows:[34]

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31 At [419].

32 *Edmonds v Attorney-General* [1998] 1 ERNZ 1 (EmpC) at 13−14.

33 *London Borough of Waltham Forest v Omilaju* [2004] EWCA Civ 1493, [2005] IRLR 35 at [19]−[22].

34 *GAB Robins (UK) Ltd v Triggs* [2007] IRLR 857 (UKEAT).

[32] We derive the following principles from *Omilaju*:

(1) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

(2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

(3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the "final straw" consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

(4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.

[184] In *Pivott v Southern Adult Literacy Inc*, Judge Ford noted that although overseas authorities need to be approached with a degree of caution, there was no reason in principle as to why these statements should not have equal application to constructive dismissal cases in this jurisdiction.[35] I respectfully agree.

[185] For present purposes, these principles show that last straw events may not in and of themselves provide a justification for an employee to resign constructively; rather, such events need to be assessed carefully in the context in which they arose, with a view to determining whether or not a series of events has ultimately resulted in a breach of duty.

Credibility

[186] Each party asserted strongly that statements made by the other, either at the time or at the hearing, reveal significant inaccuracies so that the evidence of the opposing party must be regarded as unreliable.

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35 *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236, [2013] ERNZ 377 at [62].

[187] In my view, the oral evidence of both parties was at times problematic. Recall of both Ms O'Boyle and Ms McCue was not complete on some issues, as can be seen from findings which I have already made as to leave issues.

[188] However, in the main, a proper understanding as to events relevant to Ms McCue's decision to resign is obtained from the contemporaneous documents. The numerous texts, emails and letters which were exchanged provide an entirely reliable basis for assessment of the grievances.

[189] Thus, any relevant credibility issues on aspects of the chronology can be readily resolved by considering not only what was said in evidence, but what is recorded in contemporaneous documents.

[190] That assessment is also assisted by a correct understanding of the relevant legal obligations, particularly those falling on an employer under the HA as to the granting of leave entitlements, and as to proper record keeping.

[191] A broader point should be made as to context. In assessing what was said and done it is necessary to note the inherent power imbalance which existed between Ms O'Boyle as employer and Ms McCue as employee.

[192] At times, each said the other was not acting in good faith . Chief Judge Inglis has drawn attention to the aspect of good faith which requires parties to an employment relationship "to act consistently with reasonable standards (the level at which those standards are set will depend on the circumstances, *having regard to the interests of the parties*)."[36] I respectfully agree. All these observations provide an appropriate framework for assessing what occurred.

Events prior to September 2018

[193] It is clear from the findings made earlier that there were numerous issues relating to the terms and conditions of Ms McCue's employment from the outset.

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36 Christina Inglis, Chief Judge of the Employment Court "Defining good faith (and Mona Lisa's Smile)" (paper presented to Law@Work Conference, Wellington, 31 July 2019) at 9 (emphasis added).

[194] Right at the start, the failure to bargain correctly as required by the Act, or to offer an IEA to Ms McCue, were significant failures on the part of Ms O'Boyle. It is reasonable to assume that had those steps been taken, a clear statement of annual leave entitlements and public holiday entitlements would likely have been provided; that the anniversary date of Ms McCue's employment would have been recorded; and that provision for variation of the terms and conditions of employment would have been stated.

[195] Problems arose at an early point. As already explained, public holidays were not properly offered within the first 12 months. It is surprising that those providing the external payroll services did not advise Ms O'Boyle appropriately in that regard, but that is an issue between her and them. Ms O'Boyle bears the ultimate responsibility as employer.

[196] In the course of the email exchange on 18 May 2017, Ms McCue stated her holiday entitlement had been paid on the basis of three weeks, rather than four. There is no documentary evidence to support a conclusion that three not four weeks had been allowed for. Ms McCue said she had noticed a reference to three weeks only on a screen. Since she sent an email on this topic from Ms O'Boyle's email address, without objection from Ms O'Boyle, I find it is likely this problem had arisen.

[197] Then, confusion arose between the parties as to when an offer made by Ms O'Boyle that annual leave would be increased from four weeks to five weeks would take effect.

[198] Nothing turns on these issues now, because the parties have agreed what the total annual leave entitlement for the entire employment relationship period was; however, the problem is symptomatic of issues that arose because aspects of the employment relationship were not adequately recorded at the time.

[199] There appears to have been no clear understanding as to the correct rate for the payment of annual leave, a problem which was catalysed by the fact that Ms McCue's regular hours increased, but the rate of payment for annual leave did not immediately follow.

[200] No bereavement leave was paid when it should have been.

[201] These are all examples of entitlements and pay arrangements not being recorded which led to misunderstanding and confusion, and to Ms McCue's view that proper records were not being kept.

[202] Further problems arose because of the rudimentary system which was adopted for recording hours of work in a notebook. The use of a dedicated payroll book containing provision for, at least, ordinary and overtime hours worked, and the recording of holiday and leave balances, were steps a fair and reasonable employer could have maintained in the circumstances.

[203] Related to these issues was the fact that there was not a readily accessible and complete holiday and leave record showing days taken together with accrued entitlements, which would have provided clarity. A fair and reasonable employer could have realised within a relatively short time that the informal systems which were operating could likely lead to difficulties. The raising of concerns on an ongoing basis by Ms McCue were an obvious red flag.

[204] As already discussed, there is no evidence that actual audits were undertaken. A fair and reasonable employer could be expected to have done so. Ms O'Boyle's insistence, both at the time and in evidence, that "comprehensive audits" had been undertaken is an example of her defensive and overstated reaction to Ms McCue's legitimate requests for clarification.

[205] I referred earlier to Ms Stewart's submission that Ms McCue took a pernickety approach to leave issues which bordered on obsessiveness; and that in a number of instances she was wrong as to some of the alleged errors which she claimed had occurred on her payroll records. Whilst that may be so in a very small number of instances,[37] she should not be criticised for this. There were fundamental errors in the maintenance of the holiday and leave record, as already discussed. Ms McCue was

[37] Two entries out of 47 disputed entries, being items 22 and 25; in fact, the second of these appears to have been a transposition error on the part of Ms O'Boyle, not picked up by Ms McCue.

doing her best to sort the issues out as best she could, but I find Ms O'Boyle, as the employer having statutory responsibilities, did not address her concerns adequately.

[206] The obvious example of this problem relates to Ms O'Boyle's approach to the accrual of annual leave at each anniversary of Ms McCue's employment. As discussed, Ms O'Boyle took the position that the entitlement accrued from the date of the anniversary on a fortnightly basis. She held this incorrect understanding to the end, insisting throughout she was right.

[207] As best can be determined from the evidence, these problems festered and remained unresolved from at least May 2017 to September 2018; these were not the actions of a fair and reasonable employer.

Analysis

18 – 25 September 2018

[208] These issues escalated in the period 18 to 25 September 2018.

[209] For her part, Ms McCue was very concerned that she had leave entitlements available for the purposes of the eight days she wished to take in October 2018.

[210] Early on 18 September 2018, she requested a copy of the leave record; Ms O'Boyle forwarded a set of payslips as produced by TYPL, but this did not show a sequential summary of leave entitlements.

[211] Then followed further exchanges in which Ms McCue described her concerns, which were by now significant. This culminated in an email from Ms O'Boyle's early on 25 September 2018. A defensive approach was taken. Ms O'Boyle suggested Ms McCue was under personal stress; she countered by raising work performance issues.

[212] She obviously recognised that the leave issue had become difficult, because she suggested that the way forward would be for Ms McCue to particularise the inaccuracies she believed had arisen, supported by worksheets, to differentiate between leave owed by Ms O'Boyle personally or OBL, and her rationale and

argument as to why TYPL was wrong and she was correct. That is, she placed the onus on Ms McCue to establish her assertion that the records were irregular. She also proposed that those issues could then be taken to mediation, which was an obvious recognition that a significant employment relationship problem had developed. She told the Court such an initiative would be necessary because the issue could become "a bit heated".

[213] Then the difficult meeting occurred between Ms McCue and Ms O'Boyle. I accept Ms McCue's evidence that she arrived at the workplace first, for two reasons. First, it is logical that doing so meant she was able to read Ms O'Boyle's email of early that day, and then react to it when Ms O'Boyle arrived. Second, in a letter Ms O'Boyle wrote on 26 September 2018, the clear inference to be drawn from her description of events is that Ms McCue was seated at her workplace and did not greet Ms O'Boyle as she arrived.

[214] The meeting quickly became heated, with both parties adhering to their pre-existing views as to Ms McCue's leave entitlements.

[215] As to what occurred at the end of the meeting, Ms O'Boyle frankly conceded she could not recall exactly what was said. Approximately 15 minutes after the meeting ended, Ms O'Boyle asserted in an email that Ms McCue had just walked off the job; the next day she characterised what had happened as abandonment of employment.

[216] However, I find Ms McCue's evidence more plausible. In two emails sent on 25 and 26 September 2018, Ms McCue disputed the assertion of abandonment and said that Ms O'Boyle had told her that if she did not like things as they were, she should leave; so she did. I accept that this is what was said by Ms O'Boyle.

[217] There are further aspects of these events which require comment. The first relates to Ms O'Boyle's assertion that Ms McCue was suffering personal stress, which was impacting her work performance and, by implication, the way she was dealing with leave issues.

[218] Ms McCue countered these assertions by stating clearly in her email of 25 September 2018 that the only stress in her life was work-related. This is supported by Ms O'Boyle's own statement at the time that the workplace was very stressful. That this was the case is apparent from the nature of the law firm, which faced a range of pressing demands; and from the fact Ms O'Boyle was attempting to obtain additional administrative support which indicates that the practice required more than one staff member.

[219] At the hearing, Ms O'Boyle called a former client who said she had become friendly with Ms McCue in the course of seeking advice from Ms O'Boyle over a long period. She said Ms McCue had shared details of difficult personal circumstances she was enduring in 2018, including issues with her former husband, and that in July or August 2018, Ms McCue had said amongst other things that she wanted to quit and go on holiday.

[220] For her part, Ms McCue disputed the accuracy of the client's evidence, including the regularity of meetings between the two in 2018. She also said the client had been involved in a car accident suffering serious head injuries.

[221] It emerged that the client had contacted Ms O'Boyle after adverse publicity affecting her following the issuing of the Authority's determination. She thought the Authority's conclusion there had been a constructive dismissal was inconsistent with Ms O'Boyle's support of Ms McCue which she had observed, and that it did not take into account numerous pressures Ms McCue had in her personal life.

[222] The client told the Court, however, that Ms McCue had not referred to employment-related issues, except she felt she did not need extra help in the office which Ms O'Boyle had sought.

[223] She had also told Ms O'Boyle that she would supply copies of emails and text messages she shared with Ms McCue over the relevant period to support her assertion she had met frequently with her. These might have provided an opportunity to verify the accuracy of the client's evidence, but the documents were not produced.

[224] However, the real issue is whether Ms McCue was suffering significant personal stress which impacted on the circumstances which unfolded in September and October 2018. I am not satisfied that the evidence given by Ms O'Boyle's former client provides any real assistance on that issue.

[225] A related point raised by Ms O'Boyle concerns some materials located by Ms O'Boyle after Ms McCue's resignation. She said that in mid-December 2019, she discovered blister-packs for medication which she had located at the back of a drawer where Ms McCue had kept personal belongings. A Google search of the name of the medication revealed that it was prescribed to treat generalised anxiety disorders. She also discovered a medical certificate of late April 2018, which stated Ms McCue should stop studies she was undertaking for medical reasons and referred to an unspecified medical "condition".

[226] From this, Ms O'Boyle drew an inference that Ms McCue had suffered mental health concerns whilst in her employment of which she had no knowledge; moreover, she concluded Ms McCue had been taking anti-anxiety medication during the entire time Ms McCue worked for her.

[227] These issues were explored in the Court's interlocutory decision which dealt with an objection raised by Ms McCue to the production of her medical records.[38] As I recorded in that judgment, Ms McCue had told the Court that the stress she was under at the time of her resignation had been caused by Ms O'Boyle and was not caused by her personal or financial circumstances. She agreed she had been prescribed a particular form of medication in late April 2018, which was given to assist her concentration when studying for an exam. She took it for less than a week, found she did not like it, and asked to be taken off it. She did not use the medication after that time and said the blister-packs found by Ms O'Boyle were likely to be the medication she was prescribed, and which she had discarded. She also referred to an alternative form of anti-depressant which was prescribed soon after, but which she took for less than a week. She denied she had taken any anti-depressants or other medication in

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[38] *O'Boyle v McCue* [2020] NZEmpC 51.

relation to a mental illness for at least four months prior to her resignation. She said that the last time she consulted a doctor regarding anxiety was on 2 May 2018.[39]

[228] I find that Ms O'Boyle's inference that Ms McCue had been taking anti-anxiety medication throughout her employment is not supported by the evidence.

[229] To return to the central point, Ms McCue was suffering stress by late September 2018, but that was work-based. It was catalysed by the long-running leave issues, especially after the confrontation with Ms O'Boyle at the meeting of 25 September 2018. Ms O'Boyle was defensive at the meeting; she became emotional, and then unduly assertive when she told Ms McCue to leave.

[230] The second general point to flow from these events relates to Ms O'Boyle's own circumstances. She was facing particular challenges, both personal and professional. There is no doubt she was under pressure. It was clear from many of the answers she gave in her evidence to the Court that she saw herself as the victim in the process which unfolded with Ms McCue. This influenced her approach to the issues raised by Ms McCue, because she was not prepared to accept there was a genuine problem.

The imposition of the warning on 27 September 2018

[231] Following the meeting, Ms O'Boyle and Ms McCue exchanged a series of emails which centred on two particular themes. These included Ms O'Boyle's adamant assertions that Ms McCue misunderstood how holidays were supposed to accrue, that she would have someone look at the issue of the payroll, that the parties could attend mediation, and that she required Ms McCue to return to work with failure to do so being grounds for instant dismissal.

[232] For her part, Ms McCue repeated there had been an incorrect calculation of leave which she had requested be resolved on previous occasions, that she could no longer work if her entitlements were not respected, and she would be prepared to return once the issues were resolved.

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39 At [24]–[26].

[233] These themes were repeated in formal correspondence late on 25 September 2018 when Ms O'Boyle wrote to Ms McCue requiring her to return to work the next day. Ms McCue responded in her letter of 26 September 2018 repeating her concerns as to her leave entitlements, recording that Ms O'Boyle had she would not pay any further leave, and would not credit her with the 25-days leave which had been due on 22 September 2018.

[234] In response, Ms O'Boyle wrote to Ms McCue once again setting out her account of the events which had occurred, and at this point issued the formal warning.

[235] Mr Grindle submitted the warning was unjustified. He said there was no substantive justification given the stressful circumstances Ms McCue was facing; and there was no procedural justification in the absence of any prior consultation.

[236] Ms Stewart submitted that the warning was justified, given Ms McCue's absence from work without leave for two days, even when there had been a reasonable instruction to return to work.

[237] Although I will deal later with the question as to whether the issuing of the warning amounts to a discrete personal grievance, I find there was no substantive justification for the imposition of a warning. At the time it was issued, Ms McCue had been absent for a relatively short period after an incident when she had been told to leave Ms O'Boyle's office. Soon after that difficult meeting, Ms McCue had explained to Ms O'Boyle that work had been "extremely stressful the past few months and in particular the last few days".

[238] The escalation of the long-running leave problems clearly contributed to the pre-existing stressors of the workplace. All of that should have been obvious, but Ms O'Boyle was focused on her own professional demands and personal circumstances. I consider the imposition of a warning was not a step that a fair and reasonable employer could have taken in all the circumstances. The failure to consult effectively with Ms McCue before imposing the warning was a significant procedural defect.

28 September – 2 October 2018

[239] Ms O'Boyle ended the warning letter by referring again to the fact that she wished to hold a meeting at 9.00 am the next day. The purpose of that meeting was to discuss the range of issues she had first identified in her email of early 25 September 2018, which related in part to performance matters, and to Ms McCue's role. However, Ms O'Boyle had also said the leave issues would not be discussed, and that these would be taken to mediation.

[240] Ms McCue did not attend the scheduled meeting, or work, on 28 September 2018.

[241] Ms Stewart submitted that this was an example of Ms McCue failing to engage constructively with Ms O'Boyle, even when she had been requested on numerous occasions to do so, for instance by providing worksheets and other details as to why she contended there were leave discrepancies.

[242] By this stage, the unresolved leave issues were a paramount concern for Ms McCue. She had made it clear she could not continue to work until they were resolved. She had requested leave records. Payslips had been provided, but not leave records. She asked again, and Ms O'Boyle said she would forward them. This did not occur.

[243] Ms O'Boyle had also said a full audit would be carried out, and that she had instructed an accountant to that effect. She claimed in evidence that this could not be carried out without Ms McCue's input. However, an audit that clarified the days of annual leave and public holiday entitlements taken, against what was due according to the provisions of the HA, could not have been a difficult exercise, particularly since the responsibility for maintaining accurate holiday and leave records fell on Ms O'Boyle as the employer and there was a payroll provider in place who should have held this information. Proper advice would have established that the leave balance of 7.3 days was incorrect.

[244] Further, it was known to Ms O'Boyle that Ms McCue had said she was suffering stress. The prospect of attending a meeting to discuss apparent performance

issues, and not leave, was not a step which a fair and reasonable employer could have expected of Ms McCue in the very difficult circumstances which had arisen.

[245] On 1 October 2018, Ms O'Boyle did not, again, attend work. She did, however, consult her doctor, and a medical certificate from him was provided to Ms O'Boyle later that day by email.

[246] When Ms Kumar wrote to Ms O'Boyle the next day, enclosing a further copy of the medical certificate, Ms O'Boyle took strong exception to the contents of the medical certificate. It was her position then, and when giving evidence, that the certificate was vague and "retrospective". Ms Stewart submitted that she was reasonably entitled not to accept it without further investigation; it was also submitted that by its nature it created an impossible impasse between the parties because it stated Ms McCue would not return to work until the issues were resolved.

[247] The medical certificate has to be considered in context. The GP referred to the history he had been given, which was that Ms McCue was experiencing work-related stress and had been unable to work from 26 September 2018. A fair and reasonable employer could be expected to find that confirmation unsurprising in the circumstances. Ms McCue had alluded to the issue of workplace stress on the evening of 25 September 2018; her absence from work and obvious concerns about the unresolved leave issues were consistent with such a problem. The GP's statement that she would be able to return to work once the issues were resolved, whilst open-ended, was also unsurprising in the circumstances known to Ms O'Boyle.

[248] Also significant was the fact that Ms McCue had instructed a lawyer; the situation was plainly serious.

[249] I do not accept Ms O'Boyle's oral evidence that she was blindsided by the provision of the medical certificate because Ms McCue had not previously communicated she was suffering from work-related stress. I find that Ms McCue had done so in clear terms in her email of 25 September 2018.

2 – 4 October 2018

[250] Ms Stewart submitted that the provision of the medical certificate was inflammatory, and that Ms O'Boyle was understandably frustrated by it. I do not accept this submission.

[251] Ms O'Boyle's response was not that of a fair and reasonable employer. If there were concerns as to the content of a certificate which a GP was on the face of it satisfied he could provide, that could have been a topic for discussion, there now being a new line of communication with Ms McCue via her instructed lawyer.

[252] Ms Kumar, when forwarding the medical certificate, requested copies of relevant documents relating to Ms McCue's records of hours worked and leave records. It is apparent she intended to advance the outstanding issues.

[253] Although Ms O'Boyle had previously been seeking constructive engagement, her defensive reaction to the request for documents ruled that out. In addition, she not only challenged the reliability of the medical certificate, she also said she would not pay sick leave for days already taken or going forward, that any audit would be at Ms McCue's cost, and that the current leave balance was correct.

[254] The involvement of a lawyer for Ms McCue was an obvious means by which the resolution of issues could be advanced, if necessary by attending mediation as Ms O'Boyle had previously urged. However, such opportunities were not taken up.

[255] Then Ms O'Boyle said Ms McCue should return to work immediately. She said that unless it was confirmed by 5.00 pm that day that Ms McCue would return to work, Ms O'Boyle would assume the employment had been terminated. Regrettably, Ms O'Boyle continued to be focused on the needs of her law practice; a fair and reasonable employer could have recognised that there was a serious problem that required constructive dialogue before Ms McCue could realistically be expected to return to work.

[256] On 3 October 2018, Ms O'Boyle instituted a disciplinary process with regard to what was described as the receipt of work-related emails by Ms McCue at her

personal email address. In her evidence, Ms O'Boyle said that she accepted that the raising of these issues may have come across as "overly inflammatory" but she said it was symptomatic of the stress she was under as a result of Ms McCue's continued absence from work. She said that the real reason for sending the communication was that she wanted to meet with Ms McCue to discuss issues calmly; she was using a "carrot and a stick" approach to have Ms McCue return. This suggests the proposed disciplinary issues were not genuine.

[257] For her part, Ms McCue said that receipt of this letter was an important step towards her decision to resign. Information had been requested by her lawyer but not provided. The events were, she said, "cumulative", but the event that sent her "over the edge" was the raising of performance issues which she regarded as being without foundation.

[258] I conclude that the sending of the letter was indeed inflammatory, and not a step which a fair and reasonable employer could have taken.

The decision to resign and conclusion

[259] Ms McCue said that every piece of correspondence from Ms O'Boyle had caused her more stress and anxiety. She felt Ms O'Boyle became increasingly demanding. There were no attempts to empathise with her and no acceptance that there were possible deficiencies in annual leave and pay administration. She concluded that Ms O'Boyle was not being supportive of her when she was ill due to stress. There was no reason to think the employment relationship would be any better if she agreed with the demands being made of her to return to work. She felt the issuing of a written warning had been unfair and unreasonable. Ms O'Boyle's refusal to accept Ms McCue's circumstances and the medical certificate issued by her GP amounted to bad faith.

[260] She went on to say that she could see no method for resolving the dispute or recovering the annual and sick leave which was owed to her. Then, when her lawyer explained it was a requirement for employers to hold a signed employment agreement, she lost faith in Ms O'Boyle, because she had previously asserted that was not the

case. Accordingly, she instructed her lawyer to issue a letter confirming her resignation, and to raise personal grievances on her behalf.

[261] Ms Stewart submitted that Ms McCue had failed to show it was Ms O'Boyle's conduct which motivated her resignation, and/or that the resignation was reasonably foreseeable by Ms O'Boyle.

[262] In support of this submission, Ms Stewart referred to Ms McCue's evidence that when she walked out of the office after the difficult meeting, she was not thinking about resigning; and that even as late as 2 October 2018, this was still her view, in that she was hoping the issues which had created the workplace stress could be resolved, and she could return to work.

[263] It was submitted that the events which occurred between 2 and 4 October 2018 actually related to the repeated requests for Ms McCue to return to work, and the instituting of possible disciplinary action.

[264] Front and centre throughout the events that occurred on and after 25 September 2018 were Ms McCue's concerns about her leave entitlements which had not been properly resolved despite previous requests to do this. Following that meeting, Ms McCue requested records which had not been provided. There was an indication of an audit being conducted, but Ms O'Boyle now said this would have to be at Ms McCue's cost.

[265] Ms McCue was entitled to conclude that Ms O'Boyle's responsibility as employer to deal with these issues fairly had not been discharged, and there was no indication this would occur. Rather, a combative approach was adopted. This included a warning being given, with no prior opportunity being offered for consultation and feedback.

[266] It had also been confirmed by Ms McCue's lawyer that Ms O'Boyle was wrong in her assertions about whether a written IEA should have been held. Ms Stewart submitted that Ms McCue already knew this. However, Ms O'Boyle had consistently denied she was obliged to provide a written IEA. Ms McCue thought that as

Ms O'Boyle is a lawyer, her own understanding may not have been correct. However, the position changed when Ms McCue obtained legal advice. She then concluded that the legal position had been misrepresented to her.

[267] Related to that issue was the fact that Ms O'Boyle had consistently and incorrectly said Ms McCue was not entitled to further annual leave.

[268] Ms O'Boyle breached her obligations under the HA and showed no willingness to remedy the breaches, for example, by discussing the issues with Ms McCue's lawyer constructively or by proceeding to mediation.

[269] Pulling these themes together, the breach of duty which arose in this case related to dealing with legitimate leave concerns in a fair and reasonable way. Ms O'Boyle's responses perpetrated the issues, rather than resolving them. She over-reacted. A fair process for addressing the problems was not followed.

[270] It is plain, for all these reasons, that Ms McCue felt she could no longer maintain an employment relationship with Ms O'Boyle; what occurred in the period of 2 – 4 October 2018 was, I find, the final straw in a series of events, the cumulative effect of which had breached the relationship of trust and confidence.

[271] I do not consider that the facts of this case are analogous to those considered by the Court in *Aitken*.[40]

[272] In that case, the employee resigned following a dispute as to whether a pay recruitment bonus was properly payable, and where there had been an acrimonious performance appraisal. The Court found that the employee's interpretation of a bonus clause had been correct, and the employer had miscalculated it. It also found that the employer had overreacted in relation to the employee's absence from work and had tried to press on with a performance meeting even when prior leave was approved; a medical certificate had subsequently been provided to the effect the employee was unwell; and in threatening disciplinary action if the employee attended a meeting with a support person.

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[40] *Aitken,* above n 28.

[273] However, there are several distinguishing features. In that case, the Court found there was no doubt the employee had resigned as a direct result of her perception as to how she had been treated by the employer. But many of her concerns appeared to have preceded any breach of duty. It was concluded that the employee was upset at least as much by observations in a draft appraisal document that were critical of her, as she was by the disclosure of an apparent intention not to pay a bonus.[41]

[274] Later, the Court found that there was a genuine dispute between the parties as to their rights, and that they owed each other a duty to sort it out.[42] The employer had adopted a fair process for the purpose.[43] The conclusion was that the resignation was due to a mixture of reasons. In part, it had been caused by breaches of duty which were not major, and also by lawful decisions made by the employer.

[275] The circumstances in the present case are different. The dispute here was not a genuine one where each party adhered to their position on reasonable grounds. The continuing breaches of duty which ultimately led to Ms McCue losing trust and confidence in her employer persisted for a long period, became worse in September/October 2018, and ultimately reached the point where Ms McCue felt the relationship was incapable of continuing. As Ms McCue said, the problems accumulated, and eventually she was pushed over the edge.

[276] In short, the established breach of duty was serious enough to cause a reasonable employee to resign. This was not the position in *Aitken*.[44]

[277] Turning to foreseeability, Ms Stewart submitted that at no time from 25 September 2018 to her resignation on 4 October 2018 did Ms McCue put Ms O'Boyle on notice that she would resign if any matters were not resolved. This meant Ms O'Boyle had no reasonably opportunity to address that possibility before it happened.

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41 At [56].
42 At [66].
43 At [57]–[59].
44 At [69].

[278] That, however, is not the test, as the passage from the *Power Board* judgment cited earlier shows.[45] The question is whether it was reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; that is, whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach. The Court emphasised that all the circumstances of the resignation have to be examined.

[279] In my view, the decision to resign was reasonably foreseeable by Ms O'Boyle. On 25 September 2018, Ms McCue said in one of her emails:

> I can no longer work under these conditions. You have forced me into this decision.

[280] Ms O'Boyle herself then acknowledged that Ms McCue could resign in her formal letter of the same date when she said if Ms McCue was not going to return to work, she should return relevant property.

[281] On 4 October 2018, before the letter of resignation was received, Ms O'Boyle told Ms Kumar she was making up Ms McCue's pay for the previous fortnight and inquired as to whether it would be her final pay. Again, this was an acknowledgment that resignation could well occur.

[282] Accordingly, I conclude that Ms McCue has established that her resignation was foreseeable. It follows she was unjustifiably dismissed.

Issue five: disadvantage grievance

Submissions

[283] Mr Grindle submitted there were three elements to Ms McCue's claims for unjustified disadvantage. They were the failure to provide a written employment agreement; the failure to keep compliant holiday and leave records; and the manner in which the warning was given. He submitted that these allegations were all established, and that each of them caused disadvantage.

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[45] *Power Board*, above n 30.

[284] I referred to points made for Ms O'Boyle on these issues earlier; Ms Stewart also submitted that Ms McCue was not materially disadvantaged, and thus the grievance was not established.

[285] On these allegations, Ms O'Boyle must satisfy the Court that the steps she took in each instance met the test of justification.

[286] To some extent, there is an overlap between these particular allegations that there were disadvantage grievances, and the unjustified dismissal grievance, because the three factors relied on have been taken into account in concluding that the dismissal grievance is established. However, Ms McCue is entitled to findings on the three discrete disadvantage allegations she has raised.

No IEA

[287] I need not repeat my earlier findings as to the absence of a written employment agreement. The issue, at this stage, is whether there was a disadvantage as a result.

[288] I have already indicated that had the statutory processes been undertaken, it is more likely than not there would have been greater clarity as to Ms McCue's holiday and leave entitlements because they would have been referred to in an IEA. The date of inception of the employment relationship would have been recorded thus avoiding one of the issues that was later controversial. It is also more likely than not that the basis for calculating annual holiday pay, as described in s 21 of the HA, would have been referred to; and the basis on which public holidays could either be taken for or paid for under sub-pt 3 of the HA would also have been apparent. In the circumstances which unfolded, the absence of an IEA contributed to the long-running issues as to leave.

[289] Given the statutory obligations, I find a fair and reasonable employer would not have failed to bargain for and offer Ms McCue a written agreement, and that she was disadvantaged by this failure.

Inadequate holiday and leave records

[290] I refer again to my earlier findings that a compliant holiday and leave record was not maintained.[46]

[291] Had this been maintained and provided, it is probable a number of the issues which arose, for example, about annual leave and public holidays, would not have occurred.

[292] A fair and reasonable employer would be expected to maintain such a record and provide it when asked. These obligations were not met. Ms McCue was accordingly disadvantaged.

[293] This disadvantage grievance is also established.

Imposition of warning

[294] I deal first with the question of whether this claim was properly raised. In the letter sent by Ms Kumar to Ms O'Boyle on 4 October 2018, there was express reference to the fact that four personal grievances were being raised, one of which related to the unjustifiable disadvantage arising from the written warning.

[295] A narrative then followed. Brief mention was made of the written warning, which was described as being "in breach of law due to lack of process in order to provide our client with a chance of consultation and feedback."

[296] I am satisfied that Ms O'Boyle was then aware that a discrete disadvantage grievance was being raised on this topic; the elements were sufficiently spelt out as to put her on proper notice of the grievance. She was accordingly able to respond to that grievance, as the legislative scheme mandates.[47]

[297] As to the merits, I have already discussed the fact that the warning was neither substantively or procedurally justified. Its imposition was not a step which a fair and reasonable employer could have taken.

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46 Above at [105]–[113].
47 *Creedy v Commissioner of Police* [2006] ERNZ (EmpC) 517 at [36].

[298] As to disadvantage, I am satisfied that it served to escalate the pressure and stress which Ms McCue faced.

[299] Accordingly, this disadvantage grievance is also established.

Issue six: remedies

Submissions

[300] Mr Grindle submitted that the Court should order:

a) In respect of the established personal grievances, an award of $15,000 as compensation for humiliation, loss of dignity and injury to feelings.

b) Payment of the sum of $14,625 as reimbursement for lost remuneration.

[301] He also submitted that the Court should direct unpaid holiday and leave entitlements, together with interest.

[302] Ms Stewart submitted that no award for compensation should be made under s 123(1)(c) of the Act, or at best there should be a modest award only, having regard to what she said was sparse evidence as to the adverse consequences Ms McCue claimed for.

[303] With regard to the claim for lost remuneration, it was submitted that there was modest evidence as to Ms McCue's attempts to find alternative employment. Accordingly, there should be no award for such remuneration, or an award should be substantially reduced given the lack of detail with regard to mitigation.

[304] Ms Stewart referred to an issue which arose in evidence as to whether aggravating conduct had occurred in the post-employment period, when Ms O'Boyle was alleged to have made adverse comments about Ms McCue. In her evidence, Ms O'Boyle had denied the allegation; it was submitted there was no reliable evidence to the effect that she had made the comments in question.

[305] Finally, Ms Stewart submitted that there should be a substantial reduction in respect of any remedies under s 124 of the Act, in light of Ms McCue's conduct on and from 25 September 2018.

Compensation

[306] Because of the view I take as to the fact that the constructive dismissal was the culmination of a series of events, I consider it appropriate to assess compensation on a global basis. That is, I will not be making a separate award in respect of the disadvantage grievances, since those matters are bound up in the events that led ultimately to the unjustified dismissal.

[307] It is necessary, therefore, to stand back and assess both the pre-dismissal and post-dismissal events.

[308] I have previously referred to the effect of stress on Ms McCue. The problems relating to her leave entitlements were long-running. They became increasingly frustrating, to the point where she felt forced to leave the workplace. The issues showed no sign of being resolved constructively. I have found she suffered workplace stress as a consequence of these events.

[309] Turning to the post-dismissal effects, she said that the manner in which her employment ended caused significant hurt and humiliation. She said she was embarrassed that her employment had ended, and she regretted having to tell her children why she was no longer working. Although she did not need to see her GP again, she did feel despondent and disengaged.

[310] The Court received evidence about a statement Ms O'Boyle was said to have made at a meeting of lawyers on 30 October 2018. A few days later, one of the lawyers, Ms Manuel-Belz, wrote to Mr Grindle to advise him as to what had been said at the meeting by Ms O'Boyle, which was to the effect that Ms McCue had suffered a mental breakdown, was unwell, and that the breakdown and ill-health was caused by her difficult relationship property dispute.

[311] Ms O'Boyle told the Court that if she had said something about Ms McCue at the meeting, although she did not recall specifically doing so, she would have probably said something to the effect that she was worried about her. She would not have used the term "mental breakdown", as, she said, this would have been inappropriate; nor would it have made sense to say this because she did not believe at that time Ms McCue had been afflicted by a mental breakdown.

[312] When giving their evidence to the Court, both Ms O'Boyle and Ms Manuel-Belz were questioned about their previous dealings, which related to professional differences. Those details did not assist in resolving whether Ms Manuel-Belz's evidence was or was not accurate about what had been said at the meeting of lawyers.

[313] On balance, I accept her account. The letter she wrote to Mr Grindle was relatively contemporaneous. It was a serious step for a lawyer to take. She said the reason she wrote the letter was because she felt the remarks made were unkind and unprofessional. Her evidence is plausible.

[314] Its significance for compensation purposes is that these events naturally came to Ms McCue's attention. She said the remarks made about her mental health were untrue, that Ms O'Boyle would only have known the information about a relationship property dispute as a result of the employment relationship, and that she considered there had been a breach of her privacy and the good faith obligation that survived the employment relationship.

[315] Although this episode does not appear to have become a significant source of distress to Ms McCue, because her reaction to all those events were somewhat stoic, they are relevant.

[316] I am satisfied that sufficient evidence has been placed before the Court to enable a proper assessment to be made under this head.

[317] The amount sought, $15,000, is in the medium range of Band 2.[48] I accept that it is an appropriate award.

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[48] *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

Lost remuneration

[318] In the Court, Ms McCue sought the amount for which was awarded by the Authority, which was an award of three months' ordinary time remuneration, which the Authority calculated to be $14,625.[49] There is no challenge to that calculation.

[319] I interpolate reference to Ms McCue's entitlements when she resigned. Ms Kumar said in the letter of 4 October 2018 that Ms McCue was resigning with immediate effect, and that in lieu of working out her notice period, Ms McCue would remain on sick leave. I have found that the sick leave entitlement covers the period 24 September to 4 October 2018.[50] There was no further sick leave entitlement to cover the balance of the notice period.

[320] An issue as to mitigation is raised. Ms McCue told the Court that she started looking for new work in October and applied for her first formal vacancy on 1 November 2018. She listed a range of roles for which she had applied over a period of some four months until obtaining a job mid to late February 2019. I have no reason to doubt the fact that she made these applications, and the number of them suggest a reasonable effort was made. No other evidence was placed before the Court by Ms O'Boyle to challenge this effort. The claim for lost remuneration is restricted to three months. There is no sound reason for reducing this.

Contribution

[321] The first set of factors relied on in support of the submission that a contributory conduct finding should be made relate to the circumstances in which the meeting occurred on 25 September 2018, Ms McCue's departure from it, the fact that she did not return to work thereafter despite requests and did not meet with Ms O'Boyle or attend mediation as had been proposed.

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49 *McCue* substantive determination, above n 1, at [46].
50 Above at [101].

[322] I am not satisfied that any of these factors, in the circumstances, could be characterised as conduct which should be regarded as contributing to the ultimate constructive dismissal, or to that part of the disadvantage grievance which relates to the imposition of the warning.

[323] The final factor referred to was an assertion that prior notice should have been given of Ms McCue's intention to resign. Again, the relevant circumstances have been reviewed; the resignation could not have come as a surprise to Ms O'Boyle. It was her decision not to engage constructively from 2 October, when a potential line of communication became available with a lawyer who had been instructed to act for Ms McCue.

[324] For these reasons, I find that no reduction of the above remedies should be made under s 124 of the Act.

Conclusion

[325] The Authority's determination is set aside.

[326] Ms McCue's claim for unpaid entitlements succeeds in accordance with the contents of the Scott Schedule, as adjusted by the Court. Ms O'Boyle is entitled to credit for payments she has made to Ms McCue, from the date of resignation onwards. I do not understand there to be any controversy about the amount of those payments.

[327] Ms McCue is entitled to interest on those entitlements as from 5 October 2018, under the Interest on Money Claims Act 2016, with due allowance being made for subsequent payments made by Ms O'Boyle. It should be assumed the date of payment will be 21 days after the date of this judgment. A joint memorandum is to be filed by counsel confirming the correct calculations within 14 days, following which I will make the necessary order. If agreement cannot be reached, separate memoranda should be filed and served.

[328] Ms McCue has succeeded in establishing her personal grievances, both for her unjustified dismissal, and in respect of her unjustified disadvantages, being the failure to bargain for and offer an IEA, the failure to maintain compliant holiday and leave records, and the imposition of an unjustified warning.

[329] The remedies for these grievances have been assessed globally. I order payment to Ms McCue by Ms O'Boyle, within 21 days, the following sums:

a) $15,000 for humiliation, loss of dignity and injury to feelings; and

b) $14,625 for lost remuneration, less any applicable tax.

[330] Because Ms McCue did not press her application for a penalty at the hearing, and because the Authority's determination has been set aside, the penalty awarded by the Authority is of no further effect.[51]

[331] On 25 March 2020, a memorandum was filed by Ms O'Boyle's counsel, stating that the penalty awarded by the Authority was included in the sum of $45,721.71 which Ms O'Boyle would pay into Court as a condition of the awards ordered by the Authority being stayed. In fact, the sum of $41,721.71 was paid to the Registrar.

[332] In the joint memorandum which counsel are to file,[52] they are to advise as to whether there is agreement as to payment out of this sum and the interest which has accrued. If agreement cannot be reached, separate memoranda are to be filed and served.

[333] Ms O'Boyle's challenge has not succeeded. Ms McCue is entitled to costs on a 2B basis. Counsel should discuss the quantum of costs and any associated issues directly in the first instance. If these cannot be resolved by agreement, any relevant application should be filed and served within 21 days, with a response given within a further 21 days.

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51 Above at [6].
52 Above at [327].

[334] Ms O'Boyle brought a challenge to the costs determination made by the Authority, on the basis that if her substantive challenge was successful, she also challenged the costs awarded in Ms McCue's favour.[53] Since Ms O'Boyle's substantive challenge has failed, it is unnecessary to reconsider the costs award made by the Authority.

B A Corkill
Judge

Judgment signed at 4.45 pm on 29 October 2020

[53] *McCue* costs determination, above n 2.