IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 28
EMPC 398/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GLEN KEIGHRAN Plaintiff
AND	KENSINGTON TAVERN LIMITED Defendant

Hearing:	21 September 2023 (Heard at Whangarei) and further documentation filed on 11 and 25 October 2023
Appearances:	A Fechney, advocate for plaintiff D Reeves, counsel for defendant
Judgment:	23 February 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Keighran worked at Kensington Tavern from November 2018. He was promoted to restaurant manager in March 2019. On 5 September 2020 Mr Keighran was advised that he would no longer be managing the restaurant; rather he would be managing the bar. Mr Keighran left the workplace and did not return. He pursued a claim in the Employment Relations Authority for constructive dismissal, unjustified disadvantage, breach of good faith and the imposition of a penalty for failure to provide a written employment agreement.

[2] The Authority found that Mr Keighran had been unjustifiably disadvantaged and ordered $5,000 compensation in his favour. The Authority dismissed the remainder of his claims. Mr Keighran challenged the Authority's determination on a de novo basis.

The facts

[3] The Tavern is owned and operated by Mr Woods and Mrs McLean-Woods. Mrs McLean-Woods takes the lead role in managing staff.

[4] It is clear that, at least in the initial stages, both Mrs McLean-Woods and Mr Woods valued Mr Keighran's input into the business and his preparedness to work "above and beyond" to ensure that it was a success.[1] It is equally evident that Mr Keighran did not feel as though his efforts were being sufficiently reflected in his pay, which was $23 per hour. On 25 July 2020 he sent an email to Mrs McLean-Woods requesting a pay rise by way of a weekly/monthly bonus based on a percentage of the turnover for that period. Mrs McLean-Woods took time to consider the request, and advised Mr Keighran that it was declined.

[5] An incident occurred on 26 July 2020, outside of the workplace, and involved a teenage co-worker who worked with Mr Keighran at the Tavern. The incident led to Police involvement. Mr Keighran was subsequently charged with indecent assault and he was convicted sometime later, well after his employment came to an end (an appeal against conviction has not yet been determined).

[6] The complainant (who I will refer to as Ms A) talked to her manager following the incident. The manager raised the issue with Mrs McLean-Woods. In the meantime, members of Ms A's family had become aware of the incident and were very upset. Some members of the family worked at the Tavern and at the next door establishment (which was also owned by the Woods). Members of Ms A's family made their concerns known, and Mrs McLean-Woods advised Mr Keighran that he should remain at home as an interim measure, and in light of concerns she had about

---

1 See, for example, a letter of recommendation written by the Woods in respect of Mr Keighran dated 7 June 2020.

a possible altercation. Mrs McLean-Woods also took advice from the Hospitality Association. Mrs McLean-Woods understood that there was a need to protect the safety of both Ms A and Mr Keighran and to manage the tensions within the workplace in an appropriate manner.

[7] On 5 August Mrs McLean-Woods emailed Mr Keighran. She advised Mr Keighran that Ms A had now made a formal complaint to her, as employer, and that Ms A had asked not to be at work when Mr Keighran was. Mrs McLean-Woods indicated that it would be difficult to accommodate Ms A's request. She suggested that Mr Keighran work from home for the upcoming week, with a review of the situation on 12 August. She proposed that during this time Mr Keighran could perform business related tasks and duties, noting that it was difficult to run the business without his input. Mr Keighran agreed to the proposal.

[8] On 11 August Mr Woods and Mrs McLean-Woods met with Ms A and her family. Ms A confirmed that she had gone to the Police and had been advised that criminal matters could not be resolved quickly. Mrs McLean-Woods explained to Ms A and her family that things could not continue as they were, that Mr Keighran was important to the business and that he needed to return. Mrs McLean-Woods gave evidence that Ms A accepted what she had to say.

[9] Mrs McLean-Woods wrote to Mr Keighran on 14 August, noting that she had met with Ms A, two members of her family and other employees. She said that while she supported a temporary separation between Ms A and Mr Keighran via the roster, that was not sustainable and a permanent solution was needed. She advised that Ms A and her family had no problem with Mr Keighran coming back to work as they "understand your importance to the business". She went on to say that while she accepted that Mr Keighran might feel uncomfortable with returning to work (because of fears he had about his safety) it had not been her actions that created the situation that made him feel unsafe. Mrs McLean-Woods concluded by stating that:

> We have a fully booked restaurant tonight and tomorrow and hope you will return to work this evening. We suggest should you feel the need for additional time off at any stage you have holiday pay hours available to you.

[10] At 7.12 pm Mr Keighran responded. He referred to his rate of pay (which he continued to regard as too low) and the absence of security cameras at the workplace. He said that he felt like he was risking his life coming back into work, and that:

> I do so much for you guys and can do so much more and the cost of a couple hundred dollars a week in a rise will literally make you hundreds of thousands a year in profit I don't think I'm asking for … anymore than what's fair.

[11] In the event Mr Keighran did not go into the workplace that evening; he remained on paid leave, though continued to liaise with customers, staff and IT professionals while working from home. On 16 August Mr Keighran advised Mrs McLean-Woods that he was going to take the following two weeks off on annual leave. In doing so he returned to the pay issue, noting that while he respected her decision not to give him a pay rise he trusted that she would:

> … take the opportunity over the next two weeks to reconsider what I have put forth as I intend to formally hand in my notice of resignation as the risk to reward ratio is unviable to continue my employment under the current arrangement. I believe I could easily attain a new job with a similar pay rate and none of the associated dramas.
>
> …
>
> … I don't believe that prior to [Ms A's] allegations your answer would have been a flat out no to the email I sent you requesting a raise. …
>
> If you believe I've done all I can to help your business prosper then I'm happy knowing you'll accept my resignation without regrets.
>
> Otherwise I will need you to put an offer on the table that is worth my consideration.

[12] Mrs McLean-Woods replied that evening, noting the unprecedented economic climate the country was in because of COVID-19. While acknowledging the points made in support of his request, she advised that a pay rise was not something the business was willing to accommodate, emphasising that this was the position that had previously been communicated to him. She said that she was deeply disappointed that Mr Keighran had advised her that he intended to take two weeks' leave the day before his next shift but that, in spite of the last minute notification, she hoped he enjoyed his break "as we have made arrangements to accommodate your rostered shifts".

[13] On Friday 28 August Mrs McLean-Woods wrote to Mr Keighran in the following terms:

> Hey Glen. How are you doing? Your holiday is nearing an end so what are your intentions with work?
>
> We are doing rosters for next week so need to know. We are hoping you will be returning but we are unable to give you any pay increase at this time.
>
> If you intend to hand in your resignation it will be difficult to find a suitable replacement immediately, so we would like you to work out your notice please.
>
> Should you be staying we will include you in next week's roster for floor & bar shifts. Please advise your intentions asap.

[14] Over the weekend Mr Keighran visited Mrs McLean-Woods and Mr Woods at their home and he indicated that he would be returning to work on Monday. Mrs McLean-Woods convened what was referred to as an "ice-breaker" meeting shortly before his first shift started that day. The meeting involved Ms A, members of Ms A's family, Mr Keighran and Mrs McLean-Woods. It was agreed that everyone involved would act professionally in the workplace, with Ms A working in the kitchen and Mr Keighran remaining out of the kitchen so as to avoid contact with her. It appears that by this stage Mr Keighran understood that the Police had become involved, although he was not spoken to by them for seven months, well after his departure from the Tavern.

[15] From an early stage Mrs McLean-Woods was clear that she was not forming a view on the complaint and that the intention was to "remain impartial to both parties". She gave evidence that she was concerned to ensure that a fair approach was adopted, and which recognised a need to protect Mr Keighran's safety at work. Her evidence in this regard is reflected in the contemporaneous documentation to this point in the chronology, and the efforts to which she went to accommodate Mr Keighran during what was a challenging time for all concerned.[2]

[16] Things took a turn for the worse following Mr Keighran's return to work. A few days later Mrs McLean-Woods raised a number of concerns at a team meeting, aided by some notes she had prepared beforehand. The meeting occurred on 5

---

[2] Including the installation of security cameras at Mr Keighran's request.

September. She started with an observation that she had been concerned about a change in the restaurant that Mr Keighran had made the previous evening. She went on to say that he appeared to be more comfortable working behind the bar, and that was what he was good at; that since he had been away senior staff had lost respect for him and management had lost confidence in his ability to manage the floor and that she had decided that he would now manage the bar rather than the restaurant. His position, she said, had been made redundant.

[17] Mrs McLean-Woods confirmed that the new arrangement would start that evening, that two other staff members would now manage the floor, do the tills, do the rosters and the closing, and that she would take over managing the restaurant and marketing. She went on to say that Mr Keighran's pay and hours would remain the same; all that was effectively being done was to move him "sideways". I pause to note that while Mrs McLean-Woods sought to characterise this in evidence as a temporary arrangement, that is not reflected in a transcript of a recording of the meeting and was not what I accept Mr Keighran reasonably took from what she had to say.

[18] During the course of the meeting Mr Keighran asked why the conversation was taking place in front of other staff and queried whether it was one that ought to be conducted in private, between him and a support person and Mr Woods and Mrs McLean-Woods. Mrs McLean-Woods did not accept this, emphasising that it was "a joint decision".

[19] Mr Keighran went outside and sat in his car. Mrs McLean-Woods went to speak to him; she says that she apologised for the way in which the conversation had unfolded. But even accepting that to be what happened (which Mr Keighran did not accept but which was corroborated by another witness for the defendant, who gave evidence that they were able to hear the conversation from inside the building through an open window), the salient point is that she did not resile from the substance of what had been said. Mr Keighran remained very upset by what had occurred. He sent a message to Mrs McLean-Woods shortly afterwards advising that he was unwell and was unable to work, and that he would be back at work as his "cherry self" on Thursday. Mr Keighran did not return to work. He went on sick leave.

[20] The next roster had him working 20 hours, a reduction in the hours of work he had previously enjoyed. Mr Keighran saw this as a further sign that Mrs McLean-Woods did not want him working at the business anymore. That conclusion was reasonably open to him in the circumstances and against the backdrop of the meeting that had occurred. Mr Keighran notified a personal grievance claiming, amongst other things, constructive dismissal on 17 September.

Unjustified termination

[21] The Court of Appeal in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* established three (non-exhaustive) categories of constructive dismissal.[3] The focus in this case is on the third category, namely whether a breach of duty by the employer led Mr Keighran to resign.

[22] Mr Reeves (counsel for the defendant) submitted that two factors were the primary catalyst for the resignation. First, that Mr Keighran did not want to continue working in an awkward environment and second, he wanted a pay rise and his earlier requests had been rebuffed. Mr Keighran gave evidence that while the incident had given rise to some "drama" within the workplace, that had settled down over time – a point that appears to be reflected in the outcome of the "ice-breaker" meeting. And while he accepted that his pay rate had been a bone of contention, he was firm that neither factor had been the driving force in advising of his resignation. The way in which events unfolded strongly suggests that what occurred at the team meeting was the triggering event for Mr Keighran's departure from the business, rather than a lingering dissatisfaction about his pay rate or discomfort at work.

[23] I accept that Mr Keighran's employment was unjustifiably terminated, and that he has made out a claim for constructive dismissal. He was told, without any prior discussion, and in front of other staff, that his position had been made redundant. He was advised that a decision had been made to move him out of the position he had been employed to do, against the backdrop of concerns he had not been advised of or given a chance to comment on.

---

3 *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

[24] While Mrs McLean-Woods said that she thought that Mr Keighran would be happier in the bar area and believed that the move would be one he would be comfortable with, her perspective differed sharply from Mr Keighran's and it remained unclear why, if she genuinely believed this to be the case, she did not approach the issue in a different way. And while I accept Mrs McLean-Woods' evidence that she considered that Mr Keighran had a number of strengths, it is equally apparent that by the time of the meeting the ground had significantly shifted from her perspective. That is reflected in the way she conducted the meeting and the things she had to say, prompted by notes she had prepared in advance.

[25] I accept Mr Keighran's evidence that he was left feeling that his employer did not want him to remain working in the business. The fact that Mrs McLean-Woods did not expressly state that she wanted him to leave is not the key point. The key point is that Mr Keighran reasonably believed that to be the position.[4]

[26] The defendant submitted that communications following the 5 September meeting undermine the claim of constructive dismissal, as they reflect an intention to continue working. The message from Mr Keighran advising that he would be returning to work on Thursday, and the delay between the meeting and his subsequent notice of resignation, were referred to by way of example. Those communications are relevant but must be viewed in context. I accept that Mr Keighran was shocked by what Mrs McLean-Woods had to say at the meeting and the way it was communicated. The reference to returning to work was Mr Keighran's attempt, under very difficult circumstances, to be professional. I accept too that it took some time to process matters.

[27] Receipt of the revised roster, which included reduced hours of work, was the nail in the coffin. It was not dissatisfaction with the revised roster that prompted Mr Keighran to resign; rather the way in which the roster was drafted fed into his assessment that he had no choice but to resign, which he then did, coupled with notice that he believed he had been constructively dismissed.

---

4 See, for example, *Commissioner of Police v Hawkins* [2008] NZCA 164, [2008] ERNZ 238 at [37]; *Harrod v DMG World Media (New Zealand) Ltd* [2002] 2 ERNZ 410 (EmpC) at [41]; *Auckland Shop Employees IUOW*, above n 3.

[28] I now turn to consider remedies for Mr Keighran's constructive dismissal.

Compensation for humiliation, loss of dignity and injury to feelings

[29] A banding approach is invariably applied when assessing compensatory awards under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). I accept that the company's breach impacted on Mr Keighran – that clearly emerged from the evidence. He described the significant financial and emotional toll that he had suffered. He gave evidence that he experienced a breakdown, felt suicidal, and had been obliged to seek help.

[30] Mr Keighran was blindsided by Mrs McLean-Wood's approach at the meeting, and the impact on him was heightened by the fact that what she said was conveyed in front of his colleagues. As Mr Keighran pointed out at the time, it was not a conversation that should have occurred in such a forum and nor was it one that was appropriately conducted without some foreshadowing and the opportunity to have a support person with him. I do not accept that what Mrs McLean-Woods said to Mr Keighran in the car following the meeting materially lessened the impact on him.

[31] There must be a link between the grievance and the loss; if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123. That is because remedies are directed at addressing the losses sustained as a result of the breach giving rise to the grievance.

[32] Mr Reeves pointed out that there was no corroborating medical evidence before the Court in support of Mr Keighran's claim for compensation under s 123(1)(c)(i). He also submitted that other factors contributed to the distress Mr Keighran described and that this ought to be taken into account in assessing loss flowing from any established breach.

[33] As to the first point, s 123(1)(c)(i) does not contain a requirement (express or implied) for medical evidence to be produced before anything other than modest loss is compensated for under s 123(1)(c)(i).[5] Medical evidence may be called, and may

---

5 *Pact Group v Robinson* [2023] NZEmpC 173, (2023) 11 NZELC 79-167 at [49].

be relevant, but is not a necessary touchstone where an employee seeks compensation for humiliation, loss of dignity and injury to feelings beyond a modest (band 1) level. Emotional harm of the sort s 123(1)(c)(i) compensation is directed at engages personal emotions, which the affected employee is likely to give best direct evidence of, and which can then be evaluated against other sources of evidence. However, where evidence is given that professional intervention has been required because of an employer's breach, it can generally be expected that such evidence is supported by relevant documentation and/or other evidence.

[34] What emerged during the course of evidence was the impact of other factors unrelated to the breach,[6] including the unresolved incident and Mr Keighran's ongoing dissatisfaction with his employer's failure to fairly acknowledge (from his perspective) his business acumen and contribution. Although I am not satisfied such matters were material in his decision to resign, they ought fairly to be put to one side when assessing the degree of hurt, humiliation and loss of dignity he suffered as a result of the company's breach.

[35] Assessing where the causal links and their comparative strengths lie in terms of determining quantum is an inexact science. Standing back I am satisfied that this case falls within lower middle band 2 for the purposes of s 123(1)(c)(i). A fair award having regard to the evidence before the Court and cross-checked against other cases is $14,000.

[36] No issues of financial capacity or third-party interest were identified by either party as relevant to an award under s 123(1)(c)(i).

Contribution

[37] Mr Reeves submitted that if any relief was to be awarded in Mr Keighran's favour it ought to be significantly reduced for contributory conduct, with the starting point for contribution being a 50 per cent reduction.

---

6 A point I understood Mr Keighran to accept during the course of evidence.

[38] Section 124 of the Act deals with the reduction of remedies for contributory conduct. It provides that:

> **124 Remedy reduced if contributing behaviour by employee**
>
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
>
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[39] As s 124 makes plain, the Court *must* consider whether there ought to be a reduction for employee contribution whenever it is satisfied that a personal grievance has been established. Two steps must be taken:[7]

- First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so

- Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[40] In this case the defendant submits that three actions are relevant to contribution: the incident; Mr Keighran's general behaviour when he returned to work from 31 August to 5 September; and the fact that Mr Keighran recorded the meeting on 5 September without advising Mrs McLean-Woods that he was doing so.

[41] The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.[8] It is the issue of causation, in respect of the company's arguments based on the incident, which has caused me the most difficulty in this case but which is ultimately resolved by a close examination of the evidence.

---

7 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC); *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [179].

8 *Macadam v Port Nelson (No 2)* [1993] 1 ERNZ 300 (EmpC) at 304-306.

[42] Mr Reeves described the incident as setting off a "domino effect" of events. The 5 September meeting would not, he said, have occurred in the way it did but for the earlier incident; accordingly the incident (which subsequently led to Mr Keighran's conviction) was relevant to the issue of causation.

[43] Without doubt the incident involving Ms A triggered a particularly challenging situation for the company. Mrs McLean-Woods was in a difficult position. She was obliged to manage conflicting rights and interests, seeking to ensure the safety of all concerned, while attending to the ongoing requirements of the business. While it would have been open to the company to consider other options, it chose to allow the complaint process with the Police to run its course, while maintaining impartiality in respect of Ms A's complaint and supporting Mr Keighran's presence in the workplace.

[44] By the time of the 5 September meeting Mr Keighran had been back at work for around four shifts.[9] It is clear that his return to work had not been particularly smooth. Other staff, notably Ms Gallagher and Ms Pomare (who effectively acted as Mr Keighran's second-in-command), had evidently enjoyed the enhanced responsibilities given to them during his period of leave (including management of the roster, closing up, customer complaints, large customer bookings, menus, beverages and food items, and floor management) and had made a number of changes to the way in which the restaurant had previously run (such as changes to the online booking system Mr Keighran operated). The evidence disclosed that on his return Mr Keighran had himself made changes which were not warmly received.

[45] When cross-examined on the basis for her concerns about Mr Keighran's return to work, Mrs McLean-Woods focused on his decision to stop having the cutlery wrapped because of the time involved in doing so, a matter that she had a different view on (particularly in light of COVID-19). The nature of her expressed concerns are reflected in the transcript of the meeting, directed at operational matters to do with how the restaurant was run, and an associated concern that Mr Keighran was failing to adequately engage with her about changes he was making in his role as restaurant manager.

---

9 There was a conflict in the evidence as to the precise number, which I do not regard as material.

[46] As I have said, during the 5 September meeting Mrs McLean-Woods advised Mr Keighran that "senior staff and management [had] lost trust in his ability to run the restaurant". In cross-examination she explained that the loss of trust she had been referring to was based on the fact that he was not turning up for shifts because of illness, and that they "felt disappointed" because he was not there. While Mrs McLean-Woods gave evidence-in-chief that her intention in making the changes had been to better manage the separation between Mr Keighran and Ms A, a point which was supported by another witness for the defendant, I am not satisfied that was so. Rather, Mrs McLean-Woods accepted in cross-examination that the changes did not really affect Ms A at all. She explained that: "… [Ms A]'s in the kitchen and she's down in that far corner in the right and she was comfortable there, and she was comfortable with the shifts that she was allocated and, again, if there had been an issue and she wasn't comfortable, then I thought that she would've come to us and spoken to us".

[47] Mrs McLean-Woods went on to confirm that Ms A had not raised any concerns about Mr Keighran's return to work which might otherwise have prompted some adjustments. In addition Mrs McLean-Woods gave evidence in cross-examination that she had 'absolute' trust in Mr Keighran's management of the separation.

[48] While two other staff members gave evidence touching on the incident and the impact it was said to have on the atmosphere of the workplace and the dynamics within it in the lead-up to what occurred at the meeting, I preferred Mrs McLean-Woods' evidence as to what was happening within the workplace at the time, including on an interpersonal level between staff and Mr Keighran, and what prompted her to raise the concerns she did at the 5 September meeting, which was the catalyst for the grievance.

[49] In summary, I am satisfied based on the evidence before the Court, particularly Mrs McLean-Woods' evidence, that it is more likely than not that issues about the situation involving Ms A had very little, if anything, to do with what transpired at the 5 September meeting and the matters Mrs McLean-Woods raised in that forum. The point is relevant in an assessment of the extent to which Mr Keighran might appropriately be said to have contributed to the situation giving rise to his personal grievance for the purposes of s 124.

[50] The leading authority on s 124 is the Court of Appeal's judgment in *Salt v Fell.*[10] Under the heading "What s 124 means" the Court made the following salient observations:

> [78] The words "the situation that gave rise to the personal grievance" mean, in this context, "the situation that gave rise to the unjustified dismissal". Mr Neutze is right when he says that, as a matter of logic, only actions of the employee about which the employer knows can have contributed towards the employer's wrongful decision to dismiss. As Judge Travis said in Paykel Limited v Ahlfeld [1993] 1 ERNZ 334 at 337-338, there must be a "causal link between the employee's conduct and the situation which gave rise to the dismissal"…
>
> [79] …It is clear that s 124 is intended to operate like a "contributory negligence" provision: if the employee, by his or her own behaviour, is partly the cause of the employer's hasty or ill-judged action (here, in dismissing the employee), then the employee should have the remedies to which he or she would otherwise have been entitled reduced.
>
> [80] This conclusion means that the authority and Judge Couch were wrong to reduce Mr Salt's entitlements by 50% under s 124. That is because, in reaching that figure, they took into account the emails. The sending of those emails in no way affected, however, the employer's decision to dismiss, as he was not aware of them.
>
> [81] This does not mean, however, that no reduction under s 124 should have been made. Judge Couch did not rely just on the emails when deciding s 124 was applicable and the extent of the reduction to be made under it. He considered Mr Salt's "entirely negative attitude", which had been amply demonstrated prior to his dismissal, to have contributed towards "the situation." He would have been entitled to make some reduction on account of that.

[51] A key difficulty I perceive with the defendant's argument that remedies should be reduced under s 124 for contribution because of the incident is one of logic – at the stage the company breached its obligations to Mr Keighran (ie the grievance crystalized) there was an allegation; no charges had been laid; Mr Keighran had not been spoken to by the Police and he denied any offending; the company was keeping an open mind and had not formed a view either way – rather it had proposed that Mr Keighran remain in the workplace. The company's proposal was accepted by both Ms A and Mr Keighran. And as I have said, the incident was not the catalyst for what occurred at the meeting, and the breach that occurred in that forum.

---

[10] *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155.

[52] To adopt the Court of Appeal's approach, the incident did not affect the employer's unjustified actions at the time those actions were taken. Accordingly there was insufficient causal connection between the incident and the events giving rise to the grievance to engage a reduction in remedies under s 124.

[53] The circumstances of this case materially differ from those which arose in *Waitakere City Council v Ioane.*[11] This was an earlier Court of Appeal judgment on the scope and application of the previous iteration of s 124 under the Employment Contracts Act 1991, which was in materially the same terms (though the Court of Appeal's judgment in *Ioane* is not referred to in either judgment in *Salt v Fell*). In that case Mr Ioane was dismissed against the backdrop of failures to follow reasonable instructions, aggressive behaviour towards his manager and steps his employer was seeking to take to address these issues via a disciplinary process. While the employer made procedural errors it was Mr Ioane's misconduct that had given rise to the process that led to his dismissal. The chain of causation was, in other words, sufficiently unbroken.

[54] I note for completeness that, while finding that the Employment Court had erred in reducing remedies for contribution under s 124, the majority in *Salt v Fell* went on to suggest that misconduct of a truly significant nature not affecting the employer's decision-making at the time may be taken into account in reducing remedies under s 123 itself, having regard to s 189, in the Court's broad discretion.[12] Neither party in the present case advanced submissions on this possibility, and I take the matter no further,[13] other than to note that it has some attraction in a case such as this. It would likely engage issues (which may not be entirely straightforward) about the interrelationship between s 124 (a specific provision relating to employee conduct) with ss 123 and 189, which would benefit from full argument.

[55] As I have said, the defendant raised two additional arguments in respect of contribution. I do not accept the submission advanced on behalf of the company that

---

11 *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (EmpC).
12 At [83].
13 See *Air New Zealand Ltd v Cliff* [2007] NZCA 181, [2007] ERNZ 350 at [25].

Mr Keighran's behaviour was so difficult that it was untenable for him to continue working as a restaurant manager, and this contributed to the unjustified constructive dismissal. It emerged in cross-examination that the conduct which Mrs McLean-Woods appears to have regarded as particularly aggravating involved Mr Keighran's approach to wrapping cutlery; as restaurant manager it might be thought that this was firmly within his domain. A staff member gave evidence that they were surprised that Mr Keighran had returned to work following his leave and that there was a discernible change in his attitude. The staff member had, however, only worked with Mr Keighran for a short period of time (about a week) and was not well placed to draw conclusions about such matters. Another witness gave evidence about concerns they had about Ms A and the extent to which she was coping with Mr Keighran's return to work but their evidence did not reflect Mrs McLean-Woods' understanding of what was occurring in the workplace at the time.

[56] For completeness, even if I had been satisfied that step one of the contribution test had been satisfied, I would not have considered that teething problems following Mr Keighran's return to work "required" a reduction in remedies for the purposes of s 124. In short, I am not satisfied that the defendant's submission that remedies should be reduced for contribution based on return-to-work conduct has been made out.

[57] Similarly, I do not regard the third matter referred to by the defendant (the recordings) is materially relevant for the purposes of s 124. The fact that Mr Keighran recorded what went on at the team meeting was not known to Mrs McLean-Woods at the time and could not have contributed to his grievance[14] and nor (in a broader sense) do I regard it as blameworthy conduct in the circumstances.[15]

[58] Accordingly I am not satisfied that Mr Keighran's actions contributed to his constructive dismissal in the sense required by s 124 and decline to reduce remedies on this basis.

---

14 See *Salt v Fell*, above n 10.

15 See, for example, the discussion in *Henderson Travels Ltd v Kaur* [2023] NZEmpC 181 at [27]-[48].

Disadvantage

[59] Ms Fechney, advocate for the plaintiff, accepts that if the Court finds that Mr Keighran had been unjustifiably constructively dismissed his claim for disadvantage falls by the wayside. I do not need to consider disadvantage further, other than to note that the Authority ordered $5,000 compensation under s 123(1)(c)(i) in respect of the unjustified disadvantage it found, and that amount has been paid to Mr Keighran. It is convenient to simply note this fact, and that (as Mr Reeves points out) the amount must be set-off against the relief ordered in Mr Keighran's favour in this judgment.

Breach of good faith

[60] The plaintiff seeks a finding that the defendant failed to investigate the allegations made by Ms A or act impartially in respect of those allegations. I do not consider that the company can seriously be criticised for the way in which it handled the situation up to the team meeting. The company was effectively awaiting the outcome of the Police inquiries, and reserving judgment in the interim. Mrs McLean-Woods took steps to try to find a workable solution for all involved, and engaged with Mr Keighran, Ms A and Ms A's family in doing so. What is equally clear is that, in parallel, Mr Keighran had ongoing issues about his pay and the extent to which his contribution to the business was being acknowledged. I have already referred to this as being relevant to remedies under s 123(1)(c)(i).

[61] Mrs McLean-Woods readily acknowledges that she mishandled the meeting and says that she was suffering from stress and personal health issues at the time. I accept that was so and have no difficulty concluding that she was not acting maliciously or in bad faith. An absence of bad faith is not, however, a prerequisite for a finding of breach of good faith, though the level of culpability may be relevant to whether a penalty is imposed and (if so) quantum.

[62] The duty of good faith requires, amongst a non-exhaustive list of things, that parties be active and constructive in maintaining the employment relationship; be responsive and communicative; provide access to information relevant to the continuation of employment and an opportunity to comment on it prior to decisions

being made.[16] There was clearly an established breach of good faith in the way in which the meeting was conducted, and the decisions that were unilaterally made against Mr Keighran's interests and which had clearly been a topic of discussion and agreement with others, and which he had no opportunity to comment on in advance.

[63] Mr Keighran is accordingly entitled to a finding of breach of good faith by the company.[17]

Failure to provide written employment agreement

[64] All employers are required to retain a copy of an employee's individual employment agreement or current terms and conditions of employment, and must as soon as reasonably practicable provide a copy to the employee on request.[18]

[65] Mr Keighran says that he was not provided with a copy of his initial employment agreement, despite a subsequent request. Evidence was given on behalf of the company that Mr Keighran likely would have been provided with a copy while at the Tavern. However, and as acknowledged by another witness (who works predominantly in administration), no record of the agreement could be found despite searches of the system and despite what was said to be the company's usual business practices. And the person who had been responsible for such matters at the relevant time was not called to give evidence. On balance Mr Keighran's complaint under this head is made out.

[66] An affected employee is entitled to pursue a penalty for breach of the requirement in s 6. A penalty of $1,000 is sought. The maximum penalty for a single breach in relation to a company is $20,000.[19] Generally penalties for such breaches are at the lower end, particularly where (as here) there is no evidence of deliberate breach, or other aggravating factors. A modest penalty of $500 is appropriate in the circumstances, to underscore the importance of compliance with s 64 (including for

---

16 Section 4.
17 No penalty for breach of good faith was sought.
18 Section 64(3).
19 Employment Relations Act 2000, s 135(2)(b).

employers more generally) and to promote and reinforce the policy objectives of that provision. The penalty is payable to the Crown.

Lost wages

[67] Three months' lost wages are sought under s 128(2). The company submits that Mr Keighran had an obligation to mitigate his loss by seeking alternative employment and to establish this by putting detailed evidence of the steps taken to find work before the Court, citing *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")* in support of this proposition.[20] As was recently pointed out in *Robinson*, both *Allen* and the Court's subsequent judgment in *Radius Residential Care Ltd v McLeay*[21] now need to be read in light of more recent judgments of the Court, and do not (in my view) reflect the law as it presently stands.[22] As was observed in *Maddigan v Director-General of Conservation*:[23]

> It is well established that in ordinary breach of contract cases a plaintiff is under no duty to mitigate their losses. No positive duty emerges from the wording of the [Employment Relations] Act. The key question is not whether a legal duty exists but what the prerequisites for reimbursement are. The asserted duty on employees to mitigate their losses, which has become a well engrained mantra in this jurisdiction, tends to be used as an unhelpful shorthand which focusses the inquiry on steps taken, or not taken, by an employee rather than what – if anything – might reasonably have been expected in the particular circumstances.

[68] In a subsequent case, *Concrete Structures (NZ) Ltd v Ward*, the Court referred to a failure by Mr Ward to take up an offer of a return to work, relied on by the company to support a claim that Mr Ward had failed to mitigate his losses. The Court had no difficulty concluding that the failure to take up further work, given the background circumstances and having regard to the nature of the breaches that had occurred and the damage that had been caused, meant that the "failure" was reasonable.

[69] I am not satisfied, based on the evidence before the Court, that Mr Keighran failed to take reasonable steps to find work in the particular circumstances. The evidence reflects that he applied for a number of positions following his dismissal, at

---

20 *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")* (2009) 6 NZELR 530 (EmpC).
21 *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371.
22 *Robinson*, above n 5, at [55].
23 *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550.

a time during which there were limited jobs available in the area. While he retained secondary employment at a spa pool business the evidence suggests that he worked the same hours there during and after his employment with the defendant. I accept his evidence that it was not a viable option to increase his hours at the spa pool business following his dismissal.

[70] I consider that an award equivalent to three months' lost wages is appropriate to compensate Mr Keighran for remuneration lost as a result of his grievance.

Conclusion

[71] The challenge succeeds. The Authority's determination is set aside and this judgment stands in its place. The defendant is ordered to pay to the plaintiff the following sums within 20 working days of the date of this judgment:

- A sum equivalent to three months' lost wages;

- The sum of $9,000 (being $14,000 minus the $5,000 already paid to Mr Keighran by way of compensation in accordance with the Authority's determination);

- A penalty of $500 for failure to provide a written copy of Mr Keighran's employment agreement, payable to the Crown.

[72] Mr Keighran was in receipt of legal aid for these proceedings. If costs need to be resolved I will receive memoranda, filed within 20 working days of the date of this judgment.

Christina Inglis
Chief Judge

Judgment signed at 3.45 pm on 23 February 2024