IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 77
CRC 11/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RICHARD & JENNIFER ADAMS trading as UNTOUCHABLE HAIR & SKIN Plaintiff
AND	SHANNEN BROWN Defendant

Hearing:	4, 5, 6, 17 March and 1 April 2015 (heard at Nelson)
Appearances:	T Stallard, counsel for the plaintiffs A Sharma, counsel for the defendant
Judgment:	28 May 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In November 2010, Ms Brown commenced work as an apprentice hairdresser at Untouchable Hair & Beauty operated by Mr and Mrs Adams. Ms Brown had just left college. Mr and Mrs Adams had operated the salon for some 30 years, frequently employing apprentices. From time to time Mr Adams met with Ms Brown and her mother to discuss her progress. Eventually matters of concern surfaced; for her part Ms Brown believed she was being bullied by Ms X[1] who she believed had a criminal background; and for their part Mr and Mrs Adams became concerned as to whether Ms Brown was working proper hours, and whether she was

[1] Name anonymised. This staff member did not give evidence and did not have the opportunity of commenting on any of the matters relating to her circumstances. It is appropriate for her name not to be published, as was the case before the Employment Relations Authority.

correctly operating a discounted service available for staff, family and friends. There were also concerns relating to her performance.

[2] In early 2012, a series of meetings were conducted where these matters were discussed. Thereafter the employment relationship deteriorated significantly so that on 18 February 2012 there was a stormy meeting resulting in Ms Brown's suspension. During the suspension period, Mr Adams obtained further information which he believed confirmed Ms Brown had been dishonest. After a final meeting on 27 February 2012 involving Ms Brown and her parents on the one hand, and Mr and Mrs Adams on the other, Ms Brown was dismissed on the grounds that she had been given an opportunity to provide explanations on various matters but had not done so.

[3] In its determination the Employment Relations Authority (the Authority) held that Ms Brown had suffered an unjustified disadvantage because the allegations of being bullied by Ms X had not been dealt with adequately, and because she had been unjustifiably dismissed.[2] Ms Brown was awarded $10,046.40 for lost wages with interest thereon, and $10,000 as compensation for humiliation, loss of dignity and injury to her feelings in respect of both personal grievances. Mr and Mrs Adams were also ordered to pay the sum of $551.90 in respect of a fee which related to hairdressing studies at the Nelson Marlborough Institute of Technology (NMIT).

[4] Mr and Mrs Adams challenged the Authority's determination as to liability and remedies except that relating to the NMIT fee; and Ms Brown cross-challenged asserting that the Authority should have found that the circumstances of the suspension amounted to unjustifiable action; and that she was entitled to more significant remedies than those awarded by the Authority.

[5] The issues which the Court must resolve are:

a) Did Ms Brown suffer an unjustified disadvantage because her allegation of bullying was not properly investigated?

b) Was Ms Brown unjustifiably disadvantaged by being suspended from her employment?

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2 *Brown v Adams t/a Untouchable Hair & Skin* [2014] NZERA Christchurch 58 at [62].

c) Was Ms Brown unjustifiably dismissed from her employment?

d) If one or more of the foregoing personal grievances are established, what remedies should be awarded?

e) Did Mr and Mrs Adams fail to provide a contract of employment to Ms Brown despite requests and if so, is a penalty payable?

[6] Mr and Mrs Adams each gave evidence, supported by evidence from two employees. Ms Brown gave evidence, as did each of her parents; testimony was also called on her behalf from two previous employees of the salon.

[7] As was submitted by counsel for the plaintiffs, a key problem in this case is that the parties seemed to be "on different planets". Each party's account differs from that of the other in many significant respects. Each asserts that the other is so incorrect that their case must be rejected in its entirety.

[8] Mr and Mrs Adams particularly rely on a denial by Ms Brown that she sent a very inappropriate text to a third party; it is submitted that the evidence that she did so is incontrovertible. It is contended that she has misled the Court, and that her evidence is therefore completely unreliable for all purposes.

[9] For her part, Ms Brown, supported by her parents contends that the employer has attempted to overcome a serious workplace bullying allegation by raising baseless performance issues. It is also suggested that they have created a paper-trail after the event to support their case in the form of a series of handwritten notes which Mr Adams says he relied on at various meetings, and by altering entries in a client appointment book so as to support his chronology.

[10] I commence my consideration of the evidence by summarising the facts. In doing so I will, where necessary, indicate key factual conflicts which it will then be necessary to go on and resolve.

Chronology

[11] In September 2010, Ms Brown was aged 16 and still at college. She attended an interview at Untouchable Hair & Beauty and then undertook a trial for a hairdressing apprenticeship position. She was initially interviewed by Nicole Kelling, Anneliese Smith and Tracey Clayton.

[12] Soon after, Ms Brown and her mother attended an interview with Mr Adams who was the effective manager of the salon and a practicing hairdresser. She was offered and accepted a position as an apprentice, but was not given an employment contract at the time. Mr Adams says he explained that the salon allowed staff to perform hair treatments on family and friends at discounted rates.

[13] On 2 November 2010, Ms Brown commenced her employment as an apprentice. Later in the month, a hairdressing industry training organisation (HITO) document was signed by the parties which recorded the apprenticeship. It was described as a training agreement for a National Certificate in Hairdressing (Professional Stylist) level four. Pursuant to the agreement, the obligations for the apprentice included learning the skills of the industry and the employer agreed to provide the prescribed training.

[14] For the first seven months of the apprenticeship there were no particular issues. From time to time progress meetings were held, although there is controversy as to when some of these actually took place.

[15] On 31 May 2011, Mr Adams says there was a meeting between him, Ms Brown and her mother. A variety of performance issues were discussed and some positive remarks were made as to Ms Brown's progress.

[16] In June 2011, Ms Clayton resigned and Ms X commenced employment at the salon in the following month; she was an experienced hairdresser in her early thirties.

[17] In September 2011, there was an incident between Ms Brown and Ms X which Ms Brown said occurred in the kitchen of the salon. Ms Brown says that Ms X stormed up to her, glared at her close-up, and accused her in aggressive

language of moving her lunch-breaks in the appointment book. Ms Brown says she was upset, and later told Ms Kelling what had happened. She recalled Ms Kelling told her that she would inform Mr Adams what had occurred, and that the behaviour of Ms X was unacceptable.

[18] For her part, Ms Kelling says that she was told by Ms Brown that there was a problem, but she did not know the specifics. She told Ms Brown that she should not have to deal with it by herself and she would need to tell Mr Adams. Ms Brown says she also spoke to Mr Earl, the floor manager, about this incident although he did not confirm such a discussion when giving evidence.

[19] Mr Adams says that in September 2011 he became aware that there was some jealousy on Ms Brown's part towards Ms X. He considered this was because Ms X was more experienced than Ms Brown so that she would be asked to perform more technically advanced hairdressing work. However, he said that he had not witnessed Ms X bullying Ms Brown. Other staff who gave evidence confirmed that although the workplace was confined, they did not notice bullying behaviour.

[20] Mrs Brown told the Court that a few weeks after this incident she asked Mr Adams if she and her daughter could meet with him about the bullying concerns. She said that such a meeting occurred in "late September", and that at this meeting her daughter told Mr Adams that Ms X would often be verbally aggressive and threatening; she informed Mr Adams that Ms X had a police record.

[21] Mr Adams denies that such a meeting occurred. He says that what took place in September was a performance meeting. He said this was held on 8 September 2011. He contends that this is confirmed by notes which were prepared by Mrs Adams for the purposes of the meeting; he also says that the appointment book confirms he and Ms Brown were at work that day. The appointment book does not contain a reference to the holding of such a meeting, although it does confirm Ms Brown's presence at work. Mr Adams says that the notes confirm that Ms Brown's performance was discussed. I observe that the notes also record that in general Ms Brown was thorough and there were very few mistakes.

[22] Mr Adams says there was a further performance-related meeting on 15 November 2011. In his evidence he told the Court that there were by this time "a

few quite big problems with Ms Brown". The notes which were prepared for the meeting referred to questions about the correct application of the discount policy, and that Ms Brown could not be trusted if she was utilising the discount inappropriately. The notes also recorded that Mr Adams would be asking Ms X to help Ms Brown more. A reference was also made to the fact that Ms Brown was leaving the premises for lunch 10 minutes early.

[23] There is controversy between the parties as to whether there was a meeting at all on 15 November 2011. Ms Brown and Mrs Brown say this did not occur because according to a payroll summary that was produced after Ms Brown's termination, it was recorded that she took holiday leave on that date. Mr Adams says the reference to taking holiday leave on 15 November 2011 was a mistaken reference to it being taken on 5 November 2011.

[24] From time to time meetings were held with representatives of HITO. Although their emphasis was on whether various training milestones had been achieved, HITO tutors considered Ms Brown was making positive progress.

[25] Ms Brown said that there was a second incident where Ms X attempted to intimidate her in the kitchen area of the salon. She thought Ms X was going to hit her and she felt terrified. She felt as if such incidents were affecting her confidence. The date for this incident was not specified. However, about the same time Ms X lost her drivers' licence and Ms Brown agreed to pick her up when driving to and from work on a regular basis, along with Ms Kelling.

[26] Ms Brown said that she discussed the second incident with her parents and as a result there was a second meeting with Mr Adams, sometime in late November 2011. Mrs Brown said she explained to Mr Adams that the bullying was a very serious matter and that it was his responsibility to resolve it. She said that she also reiterated that Ms X had a police record for violence and assault. Mr Brown told the Court that about this time he contacted a police officer who he knew informally, and that he was advised to keep a low profile with regard to Ms X. Mrs Brown said that a week afterwards when she was at the salon, Mr Adams told her that he had spoken to Ms X although he did not provide any details.

[27] For his part Mr Adams reiterated that the only meetings which occurred were those for which notes were prepared. He also said that there were no discussions at this stage with Ms X regarding her interactions with Ms Brown; and that he was not aware of Ms X's criminal past until January 2012.

[28] Shortly before Christmas 2011, a grateful client gave Ms Brown, Ms X and an NMIT student undertaking work experience a $10 tip, which was placed on a notice board in a back room of the salon. The next day, Ms X initiated a series of aggressive texts with Ms Brown alleging that Ms Brown had taken the money for herself. Ms Brown strongly denied taking the money. Then Ms X accused her of being a liar. Ms Brown responded in a robust way in her texts stating that Ms X should raise the matter with Mr Adams if she had concerns.

[29] Ms Brown said that she was upset at being called a thief and a liar when she had done nothing wrong; she discussed the incident with her parents and another work colleague. Mr Adams was away at the time. Upon her return to work in 2012 she showed Mr Earl the texts. He said Ms Brown was aggressive and angry at being accused of taking the money.

[30] Mr Adams' account was that on 24 December 2011 he received a text from Ms X requesting an urgent meeting. When he returned from leave on 3 January 2012, he was shown the text messages by Ms Brown which he glanced at briefly, noting that there was a lot of swearing. He thought they were childish. He decided to meet with both Ms Brown and Ms X the following day separately, before meeting them together. The appointment book records appointments for him on 3 January 2012 together with Ms Brown; and that both of them and also Ms X had clients scheduled for the following day, 4 January 2012.

[31] Notes were prepared in advance for the individual and joint meetings on 4 January 2012. Mr Adams' evidence is that as planned he spoke to each employee, and then jointly in terms of the pre-prepared notes. One of these recorded that Ms Brown's parents had "become involved" because Ms X had sent such offensive texts to Ms Brown. In the note relating to the meeting with Ms Brown, it was recorded that legal advice had been taken, and that it would be necessary to work through a procedure and that both should be given written warnings. The note

relating to the joint meeting recorded that if there was a recurrence "termination of employment will follow". Because of the nature of the texting incident, cell phones were to be turned off and handed in at the front desk. There was to be no communication between the two by texting or by any other means, except for work purposes. The note for the joint meeting also recorded that prior to Christmas, Mrs Adams had spoken to Ms X regarding the issues with Ms Brown; she had said these issues were resolved and that the two employees were getting on well. It was expected they would be able to work together for the good of the business and their careers.

[32] It is also relevant to mention that on New Year's Eve, Ms Kelling, who had departed on maternity leave in early December 2011, had visited the premises to leave a present for Mrs Adams' fiftieth birthday. On that occasion she noticed Ms Brown and Ms X were getting on well with each other, having just worked on each other's hair.

[33] Ms Brown asserts that the meetings which Mr Adams described did not occur on the dates referred to by him. She says that Mr Adams was away until the following week, which is when she showed him the texts. Ms Brown says that she definitely recalled a joint meeting taking place with Ms X, but she was unspecific as to when this occurred.

[34] Mr Adams says that a subsequent meeting was set up to take place between Ms Brown and Mrs Brown on 12 January 2012. Again, a handwritten note was prepared in advance on the evening before it took place. It referred to two complaints which had been received; also, that Ms Brown and Ms X were not to have possession of their cell phones during work time; finally it referred to meetings which had occurred in the previous year when performance issues were discussed. Ms Brown and Mrs Brown deny that this meeting occurred because they say Mr Adams had not returned from leave.

[35] An incident occurred on 18 January 2012. Ms X advised Mr Adams that Ms Brown had not made a reminder call for a regular client despite being asked to do so, and that she had also booked in another client for insufficient time. Mr Adams understood Ms X had questioned Ms Brown as to why this had occurred.

[36] He said that he then asked Ms Brown whether she had called the client as requested; her response was that she had attempted to do so four or five times. However he said that a check of the outward calls on the salon phone did not support Ms Brown's assertion. He also telephoned the client who confirmed he had not received any calls from the salon.

[37] After discussing this issue with Ms Brown and concluding that the relationship between the two had deteriorated, he told Ms X that if the situation did not improve they would need to consider involving the police, presumably over the issue of the alleged theft of $10. Ms X had said she was unconcerned as to this possibility.

[38] That night, Mr Adams said he received a very aggressive phone call from Mr Brown, who stated that his daughter had suffered "the worst day" because of Ms X's behaviour, and that she would not be attending work the next day. Mr Brown says he cannot recall when he first spoke to Mr Adams, but denies he was aggressive towards him. While Mr Adams says it was these events which led to a meeting being arranged for 19 January 2012, Mr and Mrs Brown told the Court that Mrs Brown had organised a meeting with Mr Adams some days previously.

[39] In any event, it is common ground that a meeting did take place on 19 January 2012. Mr Adams says that notes were prepared in advance for the meeting; they anticipated that Ms Brown would be present. However, as she had an appointment at the scheduled time Mr Adams met with Mr and Mrs Brown only, offsite.

[40] The prepared notes for the meeting make reference to questions which had been raised about a threat and when it had been made. They went on to record there had been a discussion on 12 January when Ms Brown had assured Mr Adams she could work with Ms X. Then reference was made to the booking issues which had arisen the previous day including whether a reminder call or text had been attended to by Ms Brown. The notes recorded that it seemed Ms Brown resented having to assist Ms X. Next the notes referred to Mr Brown having telephoned Mr Adams, and that he had "threatened" that Ms Brown would not be turning up to work the next day. It was also recorded that a number of clients were refusing to have Ms Brown

work on their hair because she did not execute the work properly or engage with them; this was said to be "unprecedented". Also referred to was an issue as to finishing early; it was noted that Ms Brown was required to work at the salon until 8.00 pm two nights per week unless otherwise directed.

[41] Mr Adams' evidence was that he worked through the issues set out in the prepared notes at the meeting. There is no record of any responses that may have been given by Mr and Mrs Brown, nor did Mr Adams indicate what those might have been in his evidence.

[42] The evidence from Mr and Mrs Brown was that they reiterated their concerns regarding Ms X's volatile and abusive attitude towards Ms Brown. They considered Mr Adams was not interested in their concerns, and were surprised that he raised performance issues. Their description of these was consistent with the content of the pre-prepared notes. Mrs Brown said that she responded to the effect that if there were performance issues, they had not been addressed by Mr Adams as their daughter's employer, despite the regular meetings. They felt their concerns as to workplace bullying were not being addressed. The meeting became heated and Mr Adams left to return to the salon.

[43] Both Mr Adams and Mrs Adams say it was at this meeting that it was asserted for the first time that Ms X had a violent past. Mrs Adams said that her husband returned from the meeting quite shaken up over the issue. Mr Adams said he asked Mr Earl if he had seen anything untoward; he had not. He stated that he also contacted Ms Kelling, and she had seen nothing. Later in his evidence he also said that he spoke to all staff that were working with Ms Brown and that no one had witnessed anything inappropriate. Ms Kelling gave no evidence that she was contacted and was asked about this issue in January 2012. Neither did Mr Earl.

[44] On 24 January 2012, Mr Adam met with Ms Brown alone. The appointment book confirms a meeting on that day with Ms Brown. On this occasion Mr Adams himself prepared a short note for the meeting. Although it is not recorded, Mr Adams states that on this occasion they discussed the incident regarding the appointment reminder calls for clients and Ms Brown admitted she had not made the calls. He says that he hoped they could move on from the incident but that he was

"not prepared to be lied to". He also said that he was still unhappy with Ms Brown's current working standards. Ms Brown concedes that there was a discussion over the reminder call; it is her evidence that she told Mr Adams she was certain she had made that call. She denies that he referred to her as having lied, or that he was unhappy with her current work standards.

[45] Ms Brown says that after that meeting Ms X again confronted her over the reminder call issue in a rude and aggressive fashion. Ms Brown says she spoke to Ms Kelling about this. Ms Kelling was in fact away on maternity leave at the time, and did not refer to such a conversation in her evidence.

[46] Mr Adams stated that on 7 February 2012, Mr and Mrs Brown arrived at the salon unannounced and launched into him at the front counter. He did not say what this was about. He said that he told them he was not prepared to discuss his business with them in the salon, but was prepared to make an appointment and have a meeting if that was what was required. Mrs Brown denies there was such an encounter. It is unclear as to what may have precipitated such a visit.

[47] Mr Adams states that he and his wife commenced drafting a written warning for Ms Brown. He told the Court that the document was in the course of being prepared when a day or two later he received a telephone call from a client stating that they were unhappy with Ms Brown's work, so it was not finalised until the issue could be discussed further with the client. This handwritten document is dated 17 February 2012 but he said it was prepared on 7 February 2012; the discrepancy was not explained. In summary it referred to a growing number of complaints, a practice Ms Brown had adopted of crossing out time in the appointment book so that she could finish early despite the issue having been discussed on previous occasions, and an issue as to trust.

[48] Mr Adams told the Court that this final topic was a reference to two incidents. The first was the issue which he said had been raised with Ms Brown on 15 November 2011 as to family and friends attending the salon on a Saturday at discounted rates; and the second referred to the question of whether Ms Brown had in fact made a reminder call as requested. The draft document concluded by stating that Ms Brown had "outright lied" and left "a question over what else is real".

[49] The appointment book contains an entry for 9 February 2012 when colour was to be applied to Ms Brown's hair by Ms X. This entry is relevant for the purposes of later events.

[50] On 10 February 2012, Georgia Redmond left her curriculum vitae (CV) at the salon as she was seeking hairdressing work. Mr Adams said that he learned from Ms X that Ms Brown attempted to bin this and she told Ms Brown it was not her place to do so.

[51] It is alleged that on 12 February 2012, Ms Brown sent an abusive text to Ms Redmond. According to Mr Adams such a text was received by Ms Redmond from a cell phone number that he believes belonged to Ms Brown. This assertion is strongly contested and is considered in more detail below.

[52] In her evidence, Ms Brown said that on 14 February 2012 the situation took an unexpected and positive turn. She recalled a conversation with Mr Adams about 3.30 pm that day, when he said he would put the reminder call incident behind him. He also said that Ms X was not allowed to bully her and that he thought it was a good idea that she did not give her rides to work. Ms Brown claims that during the meeting he said that if Ms X continued to bully her she should go to the police. She believed the situation would now improve. Mr Adams responded to this evidence by stating only that as he finished on the particular day at 2.30 pm and Ms Brown at 3.00 pm, it was difficult to see how the discussion could have taken place. It appeared to be his position that the conversation did not occur – at least then.

[53] On 15 February 2012, Ms Brown said that she had lunch with Vienna Norris-Hopkins who informed her that a friend of hers, Ms Redmond, had told her that Ms Brown was to be fired because she had two written warnings and that Ms Redmond was about to take her job. She said that Ms Redmond had sent texts to others to this effect and had made reference to the issue on Facebook. Ms Brown said she later conveyed this information to Mrs Adams who denied any knowledge of these facts, but told her to throw Ms Redmond's CV in the bin because they did not want anybody like that working for them. Ms Brown said that she did just that.

[54] On this issue Mrs Adams said that the first she learned of this account was at the Authority's investigation meeting. She denied such a conversation had occurred. She said that the first CV which Ms Redmond had delivered "went missing", and that a second CV dated 15 February 2012 was then provided.

[55] Mr Adams said he had no knowledge of the matter at the time. However, he said he had since spoken to Ms Redmond and her mother, and they confirmed that a second CV was provided. He said that the first CV had "disappeared".

[56] Also on 15 February 2012, Ms Brown worked on her aunt's hair. Mr Adams said he witnessed Ms Brown applying two treatments to her aunt's hair, which was not recorded on Ms Brown's stock bill nor was it paid for. Mr Adams said that each treatment requires a mixing of the contents of two vials; that he observed the work Ms Brown was undertaking for some 10 to 20 seconds; and that he subsequently found four used vials in the salon's rubbish. That there were four vials suggested two treatments had been applied; no other such treatments had otherwise been applied that week at the salon.

[57] Mrs Brown stated that on the evening of Friday, 17 February 2012, she received a telephone call from Mr Adams requesting that she attend a meeting with him and Ms Brown the next day, after their morning shift. He did not explain the reason for the meeting. Mr Adams did not deny that this was how the meeting was scheduled.

[58] Diverse accounts are given as to what occurred at the meeting the next day:

a) Mr Adams says that he raised a concern as to whether Ms Brown had applied treatment to her aunt's hair on 15 February 2012, and that when pressed she said "maybe I did". He asked Ms Brown whether she had ever had a treatment herself at the salon and she replied she had not. Mrs Brown asked to see the vials which he had with him in a bag, but because he considered Ms Brown had been less than honest with him and because Mrs Brown was becoming angry and volatile he did not produce them. He said that for the remainder of the meeting they refused to discuss his concerns and wanted to discuss only the bullying issue. As they were getting nowhere, he asked Ms Brown to return the

key of the premises as he felt there had been a breakdown in trust, and he could not now trust Ms Brown with his clients, stock and business. He denies that he called Ms Brown a "liar and a thief", though he did say he felt he could no longer have trust and confidence in her given her behaviour. He said that after a break of approximately five minutes, he went back into the meeting and advised that he would suspend Ms Brown for one week on full pay. He told Ms Brown and her mother that a warning letter had been drafted but had not been given to Ms Brown because other complaints had come in. Mrs Brown, he said, asked to see it so he left the meeting to obtain it; following which he presented it. He considered the meeting was volatile, difficult and stressful, and that because of Ms Brown's denials he needed to carry out a further investigation. The account he gave was consistent with notes which had been prepared in advance by Mrs Adams.

b) Mrs Brown said that Mr Adams seemed agitated and stressed at the commencement of the meeting. He commenced by referring to the reminder call issue, repeatedly asking Ms Brown whether she had made the call. Ms Brown told Mr Adams that she had made the call, and this seemed to aggravate the situation. She said that Mr Adams called Ms Brown a liar, and accused her of not making the call. Eventually Ms Brown said something like "I'm pretty sure I did Richard, but if I did not it was a genuine mistake". According to Mrs Brown, Mr Adams responded by stating Ms Brown was a liar and that she had not made the call on purpose so as to get Ms X in trouble. Then the accusation relating to the application of treatments to her aunt's hair was raised. Mrs Brown said that her daughter denied the claim that she had applied four treatments at once. Ms Brown asked to look at the contents of the bag which Mr Adams had with him, but he refused to allow this. She said that Mr Adams then changed his story and said that Ms Brown had used two treatments. He continued to call Ms Brown a "liar and a thief". Ms Brown was in tears. She says Mr Adams then told Ms Brown that she was sacked and that her employment was terminated. He demanded the key to the salon. Mrs Brown told

Mr Adams there were no prior warnings in place, and Mr Adams said this was not the case. He left the room and returned with a handwritten letter which she read. She says that it was at this point Mr Adams suggested Mrs Brown and Ms Brown should meet in private to discuss the situation; he left the room so this could happen. She says that when he returned, Mr Adams told Ms Brown he would give her one more chance to admit she had stolen four treatments and used them on her aunt's hair. If she did not do so she would be fired. He gave Ms Brown an option to resign, but he said they would need to get back to him by 8.30 am on 21 February 2012 with an answer.

c) Ms Brown's account is similar to her mother's; she emphasised that Mr Adams called her a liar, said that her apprenticeship was over and that she would never obtain another hairdressing job. She said the meeting concluded by Mr Adams shouting at her that she was never to return to the salon again.

[59] On 20 February 2012, Ms Brown and Mrs Brown arranged to meet Ms Hoban from HITO. Although she was sympathetic to Ms Brown's situation she said it was difficult for HITO to intervene with an employer unless it concerned a matter of service or technique. Mr Adams said that Mr and Mrs Brown also called at the salon on the same day for a meeting that lasted only five minutes. Mr and Mrs Brown did not refer to such a meeting in their evidence.

[60] It is common ground that on Tuesday, 21 February 2012 Mr and Mrs Brown visited the salon. Ms Brown waited in the family car, but was ready to commence work that day if she could. Mr Brown who had some experience in employment matters spoke to Mr Adams about his legal obligations as an employer. It appears this request caused Mr and Mrs Adams to review the issue of whether there was a signed employment agreement. Mrs Brown requested a copy of the bonding agreement which she had signed some months previously, but it was not provided.

[61] Mr Adams agrees that the issue of Ms Brown's status was discussed, although he says this was at the brief meeting of the previous day. He said that he confirmed

she had not been fired, but that she had been suspended. According to Mrs Brown, Mr Adams indicated he would be speaking to his lawyer.

[62] He did so, and this resulted in an undated letter being sent which referred to "Tuesday's meeting" when Ms Brown's employment was suspended on pay, and that a meeting needed to be convened to discuss the matter further so as to hear Ms Brown's point of view and consider options for the future. It was proposed that this take place at 9.00 am on the following Monday, that is 27 February 2012. The letter referred to serious concerns about Ms Brown's conduct and that dismissal could be a consequence of the meeting.

[63] Later that week, Mr Adams spoke to Ms X regarding the hair treatment Ms Brown had received on 9 February 2012 according to the appointment book. She said she did not complete this as she had to go home and Ms Norris-Hopkins, who worked at a nearby salon, was asked to assist. Mr Adams rang Ms Norris-Hopkins. She confirmed she had applied treatments at Ms Brown's request when she washed her hair on 9 February 2012 at the salon, and that Ms Brown said she would note them in her stock book. Mr Adams says he also had discussions with Ms Kelling about the matter, asking her whether Ms Brown had in the past received treatments which she had not recorded in her stock book. Ms Kelling had confirmed that she had given treatments to Ms Brown who said she would note them in her stock book. He considered there were numerous past examples where Ms Brown had paid for additional treatments implying she knew what the terms of the salon's policy were.

[64] Mr Adams stated that he then contacted Mr Brown by telephone and confirmed he was aware Ms Brown had received treatments but she had not recorded those in her stock book or paid for them. Mrs Brown stated that the call was to her, and that Mr Adams said he now knew that the treatments about which he had been concerned previously had in fact been used by Ms Brown on her own hair, as confirmed by another hairdresser who had applied them. Mrs Brown stated that the conversation became heated, and she suggested that a mediator might well be needed to assist in resolving the problem. She said that Mr Adams asked to speak to Mr Brown but he was unavailable.

[65] On the basis of the telephone conversation, Mr and Mrs Brown understood Mr Adams' notification of inappropriate use of product by Ms Brown herself to be a change of story; they thought he was no longer accusing Ms Brown as having wrongfully used treatments on her aunt, but only in respect of herself. Mr Adams told the Court that there were in fact two different allegations.

[66] A final meeting occurred on the following Monday, 27 February 2012, as arranged. Shortly beforehand Ms Brown sent an email to Ms Smith stating that Mr Adams was accusing her of stealing a treatment because on 9 February 2012 a colour had been placed in her hair followed by a treatment; she said that Mr Adams claimed no one ever did this and that it amounted to theft. In her email she said she had tried to tell him that she and others had always done this. She said that another problem was his assertion that she had been finishing early for months on a Thursday night, but that she had understood her hours on a Thursday were from 9.00 am to 7.00 pm, unless the salon was too busy for her to go home or unless she booked a client in with herself.

[67] The meeting commenced amicably, but quickly became heated. Mrs Adams handed out a pre-prepared document entitled "Summary of facts leading to our employment dispute with [Ms Brown]".

[68] The summary recorded:

- One-line summaries in respect of eight complaints received from customers as to Ms Brown's service between 22 November 2011 and 7 January 2012:

- The crossing out of time on 16 occasions over six weeks; it was stated that Ms Kelling had confirmed Ms Brown had definitely been informed she needed to work late nights until 8.00 pm, and always to check with either Mr Adams or Mrs Adams about time off.

- The fact that a first written warning was "underway" around 7 February 2012.

- The issues relating to alleged unpaid treatments for Ms Brown's aunt, and for Ms Brown herself.

- The sending of what was described as an "unacceptable/threatening text to a young woman who dropped her CV into the salon".

[69] Mr Adams stated that he went through these issues. He said Mr and Mrs Brown became abusive. Because the concerns were not being addressed Mrs Adams left the meeting within about five minutes. Mrs Adams gave similar evidence.

[70] At some point, the question of whether there was a written employment agreement was raised. Mrs Adams accepted that she and Mr Adams now realised that such an agreement was not in place.

[71] Ms Redmond's involvement in the situation was also discussed. Mrs Brown said that Ms Redmond was an associate of Ms X's; that there was discussion as to how she was able to send texts to others concerning the likely termination of Ms Brown's employment, and to write about her knowledge of the situation on Facebook. She said that Mr Adams denied this and accused Ms Brown of lying. Mrs Brown also said that Mr Adams admitted he may have terminated Ms Brown's employment at the meeting of 18 February 2012, and had then tried to force her resignation in anger. For his part, Mr Adams acknowledged that the topic was referred to because Ms Brown said "I'm building a workplace bullying case against you".

[72] Later that day a brief letter of termination of Ms Brown's employment was sent to her. It was stated that an opportunity had been given to her to express her point of view, but that she had chosen to avoid matters. The employment was terminated with immediate effect.

Credibility issues

[73] As mentioned earlier, the parties' respective accounts as to what occurred differ in many significant respects. It is necessary for me to determine whose evidence I find to be more reliable on any given issue.

[74] The Court's responsibility is to carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what occurred. The evidence has to be evaluated in a commonsense but fair way. All elements have to be evaluated. A finding of credibility is unlikely to be based on only one element to the exclusion of all others, and will instead need to be based on all the factors by which it can be tested in the particular case.[3]

[75] This is not a case where I consider that demeanour of witnesses when giving their evidence is determinative. There are well recognised difficulties in assessing credibility through demeanour alone.[4] Important also are contemporary materials, objectively established facts and the apparent logic of events.[5]

[76] Mr and Mrs Adams placed significant reliance on the handwritten notes created for the various meetings which were conducted. They were prepared by Mrs Adams because Mr Adams has writing difficulties. They were intended to be an *aide memoir*, and Mr Adams told the Court that he always adhered to them. I make the following observations about those documents and the evidence given by Mr Adams and Mrs Adams:

a) Mrs Adams was present at only one of the meetings under review, the final one. Consequently what she has recorded in notes created for previous meetings can only have been as relayed to her by Mr Adams.

b) Whilst Mr Adams said that he routinely proceeded through the pre-prepared notes in a sequential fashion, I do not accept that this was necessarily the case. Mr Adams' statement as to how he approached

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3 *Faryna v Chony* 1951 CarswellBC 133 (B.C.C.A), 4.W.W.R (N.S) 171, [1952] 2 D.L.R 354, at [8]-[9].

4 *E (CA 799/2012) v R* [2013] NZCA 678, at [32].

5 Supra at [30].

matters does not allow for the possibility that responses would have given rise to discussion. It is inherently unlikely that Mrs Brown and Ms Brown, and towards the end Mr Brown, would not have responded as the various issues were traversed particularly those that were controversial.

c) The notes are, I find, a reasonably reliable indicator of events that were discussed in the early stages when matters were relatively straightforward, that is until late 2011. They are not necessarily an accurate account of subsequent meetings, especially in relation to the meetings which occurred when matters became very contentious; those of 18 and 27 February 2012.

d) Mr Adams' evidence proceeded on the assumption that the pre-prepared notes recorded the content of the meetings accurately. That cannot be so given the absence of any record of what actually occurred at the meetings.

e) Ms Brown and Mrs Brown told the Court that they did not observe Mr Adams relying on his pre-prepared notes, and in effect contended that the notes were created after the event for the purpose of Ms Brown's claim. The information contained in the notes is broadly consistent with the developing issues which both parties describe; but they also contain a level of detail which it is implausible to suggest was fabricated after the event when Ms Brown raised her personal grievances.

f) Some elements of the events are referred to in other documents. One example relates to the dates at which the meetings are alleged to have been held. The dates can be cross-checked by reference to the appointment book. It was contended for Ms Brown that the appointment book may have been altered, since entries were made in pencil only. It is natural that this would occur so as to allow for the possibility of clients altering appointments. I am not satisfied that

entries in the appointment book have been altered to bolster the Adams' defence.

g) In short, the notes do assist in reconstructing the chronology. The content, however, may not be so reliable. Mr and Mrs Adams explained that the notes were usually prepared the evening prior to a relevant meeting. They refer to events that occurred up to several weeks previously. They are not contemporaneous notes. They are based on Mr Adams' descriptions of events to Mrs Adams at some point prior to their creation. These factors have to be considered when assessing their accuracy. As I have already mentioned the notes do not record what actually occurred at any particular meeting.

h) Mr Adams relied extensively on the pre-prepared notes for his description of events when giving evidence. He proceeded on the basis that meetings took place in accordance with the notes. That is not necessarily the case.

i) In fact there are many aspects of Mr Adams' account where he has had to resort to memory. In those situations, he tended to describe events according to what he assumed would have occurred. In some instances, that led to inconsistencies. For example, the extent to which he investigated the concerns raised with him as to whether Ms Brown had been bullied following the meeting of 19 January 2012. Initially Mr Adams said that he spoke to Mr Earl and Ms Kelling. Then he stated by contrast that he had spoken to all employees; his evidence was inconsistent. A further example is given by his assertion that when he rang the Brown household to raise the question of whether Ms Brown had applied treatments to her own hair after the meeting of 22 February 2012, he spoke to Mr Brown. Mrs Brown was clear that she spoke to Mr Adams; given her detailed recollection I consider it is more likely that she is correct.

j) Evidence was also given as to prior staff issues that arose because a forthright approach had been adopted by Mr Adams; this confirms a

somewhat controlling personality where Mr Adams was completely confident that his own beliefs and recollections were correct, and rejected those advanced by others if they differed from his. This was evident not only from the way Mr Adams gave his evidence, but also from the firm and at times peremptory way in which he conducted meetings involving Ms Brown, particularly those which occurred in the later stages of her employment.

[77] I turn now to consider the credibility issues relating to Ms Brown's case:

a) The first issue which requires detailed consideration is an assertion that arose from Ms Brown's denial that she sent an abusive text to Ms Redmond on 12 February 2012. This allegation is based on a photographic image of a cell phone screen which shows an abusive text message. It is shown as having been sent to a cell phone which Mr Adams says was that of Ms Redmond. The text number from which the message was allegedly sent is a 2degrees number, ending 5646.

b) A letter dated 21 February 2012 which Ms Brown acknowledges she sent when seeking work, records her cell phone as being the same 2degrees number ending 5646. Whilst she acknowledges she wrote the letter, she also says that she did not place that particular cell phone number on it because that was not her number. She says she had one cell phone only to which a Telecom number was assigned. It was she who produced the letter to the Authority's investigation meeting as a result of which it came into Mr Adams' possession who produced it at the hearing of the challenge.

c) The same number appears on a Facebook profile page which Ms Brown acknowledged was hers; on the particular exhibit there was another series of messages which she denies she sent, but I attribute no significance to that since it is not clear that this is related to the same profile page.

d) The effect of Ms Brown's evidence to this point is that somehow the documentation placed before the Court has been manipulated to display a cell phone number that is not hers.

e) Following her denial and after the evidence had been closed, counsel for the plaintiffs' sought an order of third-party disclosure requiring 2degrees Mobile Limited and Facebook Limited to provide confirmatory information with regard to the cell phone number in question and or as to the sending of the text. Facebook Ireland Limited through Californian lawyers declined to do so on the basis that there was insufficient URL information for it to provide subscriber information. 2degrees Mobile Limited responded by stating:

> 2degrees Mobile Limited holds data back to 2012 – but there is no text message on 12/02/2012 sent from 22…5646
>
> …
>
> The connection to 22…5646 was prepay with no subscriber details registered and we no longer have any record of how credit was purchased and applied to the account.

f) I do not accept Ms Brown's evidence that she did not use a 2degrees cell phone number ending 5646. There is an irresistible inference to be drawn from the fact the same number appears both in the letter she wrote and on her Facebook profile page. There is no evidence that establish these documents were altered by a third party. While there is evidence that Ms Brown also used a Telecom cell phone number because such a number was provided to HITO, that does not rule out the possibility that she used a second cell phone number notwithstanding her denial of that possibility. I find that she was responsible for placing the 022 number on the letter which was produced to the Court.

g) On the issue of whether she sent the abusive text on 12 February 2012, the contextual evidence might suggest that she did so because she was acutely concerned as to the possibility she would lose her job. However, Ms Redmond was not called as a witness and I have only hearsay evidence that she indeed was the recipient of the abusive text.

Furthermore, the evidence obtained from the third party discovery order at the request of the plaintiffs is to the effect that no text message was sent between the two subject cell phones. That being so, I find on the balance of probabilities that the plaintiffs have not established that Ms Brown is the author of the threatening text.

h) However, Ms Brown has misled the Court as to her use of a cell phone number. Her evidence was deliberately given. The giving of false evidence to any Court is a matter of considerable concern. It is completely unacceptable.

i) Whilst that could lead to an inference that she was attempting to persuade the Court that she was not the author of the abusive text, motive was not explored with her in cross-examination and it is not for the Court to speculate.

j) It was submitted for the plaintiffs that the effect of this conclusion would be to render Ms Brown's evidence completely unreliable. This submission is supported by reference to other statements which are inherently implausible. For instance it was suggested that Ms Brown's denial that the meetings regarding the text exchange between Ms Brown and Ms X did not take place on 3 and 4 January 2012 was improbable. Having regard to the meeting notes and the related references in the appointment book I find that the meetings did occur on the dates referred to by Mr Adams. Relevant to this particular point is Ms Brown's own evidence that "I don't know my dates very well".

k) It is also submitted that another example of unreliable evidence from Ms Brown relates to the fact that because she does not accept the meeting notes were prepared, she does not accept that meetings occurred at all. I agree that the denial is implausible.

l) Whilst these are all legitimate challenges to the reliability to be placed on Ms Brown's evidence, that does not necessarily lead to a conclusion that her evidence should be rejected in its entirety. Much of it is

supported by her mother's account, and to some extent that of her father.

m) That said, there are elements of Mrs Brown's account that conflict in significant respects with Mr Adams' evidence. For example Mrs Brown stated that Mr Adams did not return to work until after 16 January 2012, and that the first meeting she held with him was on 19 January 2012, which related to the texting incident. Because I accept the meeting notes assist in establishing a chronology, I find that Mrs Brown is incorrect in her recollection of the sequence of meetings in early January 2012.

n) In fact, like Ms Brown, Mrs Brown did not accept that Mr Adams had pre-prepared notes with him at meetings. She also appeared to believe that the notes must have been created after the event, an assertion which I have rejected.

o) Another contested issue related to whether Mr Adams was correct when he said that one of the meetings occurred on 15 November 2011. Mrs Brown and Ms Brown both said the date was incorrect. This was because after Ms Brown's employment ended, Mr and Mrs Adams produced a payroll document which implied Ms Brown had taken leave that day; the appointment book suggested she was at work. Mr Adams later said there was an error in the payroll summary, and that the date of leave was in fact 5 November 2011. That is a plausible explanation since the balance of the evidence favours the view that Ms Brown attended work on 15 November 2011; in particular Ms Brown had clients assigned to her that day according to entries in the appointment book. I find that Ms Brown and Mrs Brown's evidence on this point is incorrect.

p) For completeness, I refer to the evidence given by Ms Brown and Mrs Brown that their signatures on the HITO document which was produced to the Court were forged, although it was unclear by whom. This was a bald assertion only. Although confidently made it was

unsupported by any expert evidence as would have been necessary to establish such a serious allegation. That the assertion was made in this way reflected adversely on the evidence of Ms Brown and Mrs Brown.

q) As Ms Brown confirmed, she regularly told her parents what was occurring in the workplace. That is understandable given that she was a young woman starting out with her first full-time job. Mr and Mrs Brown have understandably relied on what they were told. They have naturally supported their daughter. However, I treat with considerable caution information which they have conveyed to the Court that can only have come from Ms Brown, since there is doubt as to the accuracy of some aspects of her testimony.

[78] In summary, the evidence called for both parties was at times unreliable and exaggerated. Against that background I now consider the particular issues on which key findings must be made.

Bullying issue

[79] I have referred already to the two "kitchen incidents" where Ms Brown says she was the subject of abuse by Ms X; she says the first of these occurred in September 2011.

[80] Mr Adams confirmed that he had learned of a problem by then. I am satisfied that an issue had indeed arisen by this time because Ms Kelling acknowledged that she was told about it by Ms Brown, although Ms Kelling did not know the details. I accept her evidence that she told Ms Brown she should talk to Mr Adams about it, and that she should not have to deal with the issue herself. In the event neither Ms Brown nor Ms Kelling spoke to Mr Adams; however in the close confines of the salon he realised there was an issue which he put down to jealousy on Ms Brown's part.

[81] Ms Brown was an apprentice aged 17 by late 2011, and Ms X was an experienced and competent hairdresser in her early 30s. Understandably Ms X was favoured for certain types of work; she also trained Ms Brown on some tasks as was

recorded in the meeting notes for 8 September 2011. Other employees did not observe untoward conduct, and indeed Ms Kelling referred to positive exchanges between Ms Brown and Ms X in late December 2011; Ms Brown also agreed to assist Ms X by driving her to and from work.

[82] As regards events to that point, the main factual issue is whether Mrs Brown asked to see Mr Adams to tell him that Ms X had spoken in an aggressive and threatening way towards Ms Brown, and that she told him Ms X had a police record for violent offending.

[83] I am not satisfied that these conversations occurred, at least in the way in which they are now described. This is because:

a) Ms Kelling was a senior employee, present in the workplace until early December 2011. As already mentioned, Ms Brown raised an issue with her which she advised Ms Brown to discuss with Mr Adams. To that extent she was aware of an apparent problem, but there is no evidence that thereafter she observed any further untoward conduct. I am satisfied that if there had been inappropriate conduct up to the time she left on maternity leave in early December, she would have observed it. Mr Earl was also a senior employee who also observed no untoward conduct by Ms X in the workplace at that time.

d) Mr and Mrs Adams were both aware of a problem which they described as jealousy, to the point that shortly before Christmas 2011 Mrs Adams discussed with Ms X whether a meeting was necessary "due to the difficult relationship with [Ms Brown]". I find that Mr and Mrs Adams knew that the relationship was difficult, but had not been informed that there had been aggressive behaviour, or that Ms X had a criminal background. I am not satisfied on the balance of probabilities that Mrs Brown expressly raised these issues with Mr Adams.

b) There is no single reference in any of the contemporaneous documents up until the end of 2011 which suggests that this information was known to Mr Adams. By contrast, when Mr Adams was told that a

threat had been made, reference was made promptly to this in the relevant meeting notes dated 18 January 2012.

c) I accept Mrs Adams' evidence that after Mr Adams was told about Ms X's violent past, he conveyed this information to her in a manner that indicated he was "quite shaken up".

[84] Ms X initiated an aggressive texting exchange with Ms Brown shortly before Christmas 2011. The timing and content of meetings held with both Ms X and Ms Brown as described in the prepared notes are a plausible response to what had occurred. Mr Adams told the two employees that when at work, they should leave their cell phones at the front desk turned off. Nor was there to be any communication between the two by texting or by other means, except for work purposes. A warning would follow if need be.

[85] I have considered whether Mr Adams when dealing with this particular aspect of the matter needed to do more, given the fact that Ms X was a more senior employee who initiated the inappropriate texts, and that Ms Brown was a young and inexperienced employee. The difficulty is that Ms Brown's responses were also aggressive indicating that she gave as good as she got. She said in evidence that she needed to provide a strong denial. Mr Adams was required to consider a text exchange which was inappropriate on both sides. I find that the process he undertook for dealing with the issue was not unreasonable; as far as the outcomes were concerned, he did not in fact impose any warning but focused on encouraging cooperation within the workplace. That too was appropriate.

[86] This outcome was confirmed at the meeting which I find did occur on 12 January 2012 as described earlier. Then during the evening of 18 January 2012, Mr Adams received a telephone call to the effect that Ms Brown had suffered "the worst day ever" because of a threat made by Ms X to Ms Brown. I find that the telephone discussion was with Mr Brown since the call was recorded as such in a note prepared that night for a meeting to be held on the following day. Ms Brown did not attend that meeting although she was the employee; it was attended by her parents and Mr Adams at a nearby bar.

[87] Mrs Brown recalled that this meeting was in response to the texting issues. I consider her evidence has conflated matters that were discussed on both 12 and 19 January 2012. I accept that the precipitating event was as summarised in the notes which were prepared for the meeting on 19 January 2012. That event centred on whether Ms Brown had communicated as requested with a customer concerning an upcoming appointment with Ms X, and also whether sufficient time had been allowed for a long layers haircut. It appears that this incident led to an interaction between Ms X and Ms Brown which upset her; Mr and Mrs Brown became aware of her distress, but do not appear to have been aware of the details of the incident which precipitated the distress. I find that when the meeting was held, there was no effective discussion because Mr Adams was focusing on the performance issues, and Mr and Mrs Brown focused on the nature of the relationship between their daughter and Ms X with particular regard to the texting incident. Because Mr Adams saw the issues as relating to performance, this led him to refer to complaints which he said had been received.

[88] However, Mr and Mrs Brown did get their concern across to the extent that Mr Adams subsequently told his wife that they had said Ms Brown was being bullied by Ms X and that she had a police record. As already noted, Mrs Adams said Mr Adams was quite shaken up by this assertion. Mrs Adams said she then discussed the bullying concerns with Ms X who confirmed that she had a criminal past which she had not disclosed at the time of her employment. Mrs Adams was uncertain as to precisely when this occurred, but she thought it could have taken place after the disclosure by Mrs Brown as that would have been logical. A media account of the relevant convictions, however, did not come to the Adams' attention until the Authority's investigation meeting.

[89] No formal process was instituted to explore this issue further at the time. Ms Brown stated that Ms X was still attempting to confront her. She said Ms X would make a point of physically nudging her as she walked past. There is no reliable evidence as to further incidents. Ms Brown refers to two subsequent occasions, which she reported to Ms Kelling – but Ms Kelling was away on maternity leave.

[90] After the meeting with Mr and Mrs Brown, there was no direct discussion with Ms Brown as to her concerns.

[91] On 24 January 2012, there was a brief discussion between Mr Adams and Ms Brown. There was some discussion about the two moving on; for her part Ms Brown said she could move on if Ms X did not shout at her.

[92] In her evidence Ms Brown also referred to a similar conversation as having occurred on 14 February 2012, and that she thought this was an unexpected and positive turn. I find that this was in fact a reference to her discussion with Mr Adams on 24 January 2012.

[93] There is no reliable evidence that the difficulties with Ms X continued following that conversation with Mr Adams.

[94] In summary, the employer was aware of difficulties in the employment relationship which were the subject of discussion between Mrs Adams and Ms X shortly before Christmas 2011. There was an unfortunate texting incident which was dealt with appropriately by the employer in early January 2012. There was a later incident which was not investigated in any depth, but by late January 2012 Ms Brown considered the situation had taken a turn for the better.

[95] In those circumstances I am not satisfied that the allegation of unjustifiable action through failure to investigate a bullying complaint has been established.

Was Ms Brown unjustifiably disadvantaged by being suspended from employment?

[96] This assertion requires a consideration as to what occurred at the meeting held on Saturday, 18 February 2012. Mr Adams says his wife prepared notes for the meeting; his account proceeds on the basis that he was able to move through the notes. These referred to the discussion he had with Ms Brown on 24 January 2012 which included the fact that she and Ms X would work together for the good of the business; that at the meeting with Mr and Mrs Brown on 19 January 2012 he had expressed concerns about Ms Brown crossing time out from the appointment book,

and that there were issues as to Ms Brown applying treatment to her aunt's hair earlier in the week, without paying for a treatment. The notes go on to indicate that five minutes would be provided for Mrs Brown and Ms Brown to discuss the matter; finally there is reference to the word "key" in the notes.

[97] As can be seen from the description of Mrs Brown's evidence of this meeting earlier in this decision, she provided a very different account as to what occurred. She described a situation which rapidly degenerated.[6]

[98] Whilst Mr Adams may well have intended to discuss matters according to the pre-prepared notes, I am not satisfied they provide an accurate summary of the matters discussed; the problem is that no record was made of the responses given. It is plain that all participants became heated, particularly over the issue of whether Ms Brown had applied treatments to her aunt's hair without payment being made.

[99] This issue had disciplinary implications. It is in that context that Mrs Brown referred to the fact that no warnings had hitherto been imposed. Although Ms Brown's statement was correct, Mr Adams denied it and left the room to produce the draft handwritten document which had been prepared, he said, on 7 February 2012. He said this was a written warning that "we were going to give to [Ms Brown]", but this had not occurred because a further complaint had been received about which more information needed to be obtained.

[100] I pause to note that no proper process had been undertaken with Ms Brown in respect of the topics contained in the draft warning document, such as putting Ms Brown on notice that there were a range of concerns which persuaded the employer that he may need to impose a warning, and providing an opportunity to respond. In short, due process which would have justified the imposition of a warning had not to that point been undertaken. Mr Adams apparently believed that the production of the draft document at the meeting on 18 February 2012 – despite the fact there had not been a proper process for investigating the concerns to which it referred – meant that he was justified in taking further disciplinary steps.

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6 Para 58(b) above.

[101] The draft document referred to two incidents which had occurred previously where it was recorded that Ms Brown had "outright lied". At the meeting on 18 February 2012, the discussion as to whether Ms Brown had applied a hair treatment for which she had not paid became contentious. Both Mrs Brown and Ms Brown say that Mr Adams called Ms Brown a liar and a thief. Mr Adams denies he would have used such language. However, as he had referred to Ms Brown being "an outright liar" in the 7 February 2012 document which was drafted as a formal letter of warning which he would provide to Ms Brown, I find that he became agitated and did use these terms.

[102] Mr Adams says that he did not start the meeting with the intention of it being a disciplinary meeting, but the reference to the word "key" in his pre-prepared notes suggests otherwise. It is common ground that he demanded that Ms Brown return the key to the salon premises – he said this was because he could not trust Ms Brown with his clients, stock and business. He also says that he needed to get to the bottom of what was going on and confirmed that Ms Brown would be suspended for one week on full pay to enable an investigation to take place.

[103] Ms Brown and her mother understood that Ms Brown was told not to come back to work. This was confirmed by the request for the key. She thought her employment was being terminated. The confusion which arose from this heated exchange was compounded by Mr Adams suggesting that she consider resignation with an answer to be given on that topic by the following Tuesday at a further meeting.

[104] It is significant that when Mr and Mrs Brown met with Mr Adams on the following Tuesday, it was necessary for him to confirm that her employment had not yet been terminated, but that she had been suspended on leave. I find that Mr Adams told Ms Brown she was not to return to work in such a way as led them to believe she was being "sent away" so that her employment was thereby terminated.[7]

[105] Confirmation of suspension was not given promptly in writing; such confirmation may have avoided the confusion which arose after the meeting. When

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[7] *Wellington Clerical IUOW v Greenwich* [1983] ACJ 965 (AC), (1983) ERNZ Sel Cas 95 at 103 - 104.

sent, the suspension letter itself was inaccurate. It referred to Ms Brown being suspended on pay "following Tuesday's meeting". The Court was told that this was an error and should have referred to the meeting which had occurred on the previous Saturday. This error compounded the confusion.

[106] I find that Mr Adams did not make it clear to Ms Brown at the Saturday meeting that she was being suspended. That was why it was necessary to clarify her status when Mr and Mrs Brown called to see him on the following Monday, naturally concerned at what had occurred.

[107] I further find that at the time Mr Adams prepared the proposed warning letter on 7 February 2012 he had been concerned as to issues of trust. He had concluded that Ms Brown was, as he put it, a liar. He considered that the circumstances relating to the treatment given to Ms Brown's aunt reinforced this conclusion, although there had not been an appropriate discussion with Ms Brown herself. He approached the meeting on the basis that he would be asking her for the key to the premises having determined before the meeting that Ms Brown would not return to the workplace.

[108] I turn now to discuss the legal position with regard to suspension. In *Singh v Sherildee Holdings Limited*, the Court expressed the following view:[8]

> [91] In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.

[109] As will be discussed more fully later, there was no employment agreement between Mr and Mrs Adams and Ms Brown; consequently there was no express contractual provision authorising suspension.

[110] As to whether there is an obligation to provide an employee with an opportunity to comment on a possible suspension, Chief Judge Colgan stated in *Graham v Airways Corporation of New Zealand Limited*:[9]

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8 *Singh v Sherildee Holdings Ltd* AC53/05, 22 September 2005, Judge Couch.

9 *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587.

> [104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from *Tawhiwhirangi* set out at para 90 of this judgment confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately a test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others it may not.

[111] Judge Couch in the subsequent decision of *B & D Doors Limited v Hamilton* held that it would only be in very few cases that a decision to suspend would be justifiable without the employee having had an informed opportunity to be heard before the decision is made, a proposition with which I respectfully agree.[10]

[112] The only reason advanced by Mr Adams for the decision to suspend was that Ms Brown could not be trusted with his stock and business. I do not consider that the circumstances were such that due process was unnecessary. An inadequate discussion had taken place on the question of whether Ms Brown had wrongfully used product when providing a hair treatment to her aunt. The discussion became heated. These circumstances did not provide an adequate opportunity for rational discussion. There was no reason why Mr Adams could not have indicated that the meeting would need to resume in a structured fashion at a subsequent point, and that the possibility of suspension would be considered in the interim, offering Ms Brown an opportunity to comment on that possibility. There was no evidence that Ms Brown would use the salon key in the meantime to her employers' disadvantage. Such a possibility was unlikely given the focus on Ms Brown's integrity. Nor was it essential for Ms Brown to retain a salon key for the purposes of her continued presence in the workplace.

[113] It is obvious that an informed discussion as to the prospect of suspension did not take place. In summary, Mr Adams led Ms Brown to believe she was being

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[10] *B & D Doors Ltd v Hamilton* (2008) 8 NZELC 99, 258, (2007) 5 NZELR 69, at [80].

dismissed; and belatedly clarified that she was suspended from employment without there being a contractual right to do so. Furthermore, Mr Adams did not offer Ms Brown an opportunity of responding to this possibility. His actions were not what a fair and reasonable employer could have done in all the circumstances; those actions amounted to unjustifiable action by the employer, and caused disadvantage to Ms Brown.

Was Ms Brown unjustifiably dismissed?

[114] Mr Adams' evidence as to the events which followed his suspension of Ms Brown has already been summarised. After speaking with Ms Kelling and Ms Norris-Hopkins he concluded that Ms Brown had received treatments for herself that were not recorded in her stock book or paid for. He said he rang Mr Brown and advised him of this, a new allegation. Mrs Brown says that the conversation was in fact held with her, and she understood him to be asserting that the treatment vials discussed at the meeting of 18 February 2012 had been used by Ms Brown on her own hair, and not on her aunt's hair. Mr Adams did not discuss the matter with Ms Brown herself, or provide her with an opportunity to respond to the new allegation in an appropriate way.

[115] The meeting of which notice had been given in the letter sent to Ms Brown was held as arranged on 27 February 2012. Although Mrs Adams attended for the purpose of taking notes, she did not do so. It started amicably but it quickly became heated, and there is a dispute as to what occurred.

[116] Mr Adams contends that he referred to a range of topics that were outlined briefly in a handwritten document, a copy of which was made available to Mrs Brown and which she handed to Ms Brown. Despite the range of matters that were referred to in that summary, the central issue as far as Mr Adams was concerned was his belief that Ms Brown had personally used a treatment product for which she had not paid when she knew she was required to pay for it. Brief mention was made of this towards the end of the summary document which he produced. Although Ms Brown was aware that she was being accused of theft as mentioned earlier, she told Ms Smith in an email she sent shortly before the meeting that she

had applied colour and treatment to her hair ever since she had worked there, as had others. This reflected her understanding of the policy as to the cost of treatments.

[117] Mr Adams told the Court that he had obtained information by telephone from Ms Norris-Hopkins, and that he conveyed that information to Mr Brown prior to the meeting. He said that the issue had thereby been adequately investigated.

[118] However, the key issue which needed to be explored was what the salon policy on discounts was, whether Ms Brown's understanding of it was correct and then ascertain from Ms Brown what had in fact occurred.

[119] Mr Adams himself considered the policy was crystal clear. The application of colour only meant a discounted rate of $30 would apply; if there was any additional treatment then the price would normally be $45. Such treatments were not part of a colour service.

[120] Ms Kelling expressed the policy in a different way. She said that shampoo, retail items and skincare items were available at cost plus GST, and employees were permitted a complimentary colour every four to six weeks. Anything else had to be paid for. She said she had given Ms Brown treatments after getting her hair coloured and that she would enter the appropriate amount in the retail book, although she had not observed this.

[121] A former employee, Amber Waghorn, explained that she would normally apply some type of treatment after every colour process and that the discounted cost for staff and family members for this was $30. She considered that the application of a treatment was part of the colour process. She said there could be an additional and separate treatment process which would involve massaging the client's hair intensely for 15 to 20 minutes; in that instance the staff member would need to make payment for that particular treatment, or enter an appropriate entry in the stock book.

[122] When responding to Ms Brown's email, Ms Smith said that staff always put treatments in their hair after colour had been applied. Ms Smith did not give evidence. She later sent an email to Mr Adams which he produced stating that certain products were required to be paid for at cost price. Her statements are not necessarily contradictory.

[123] I find from the evidence placed before the Court there was a common understanding that the application of certain treatments would be regarded as a legitimate part of the colour process where the discounted rate would apply. Other types of treatment were to be paid for at cost. The policy for staff in this regard was not recorded in writing, and the employers' expectations were open to misinterpretation and misunderstanding. Ms Brown's practice was consistent with the practice adopted by some other employees. Ms Brown was aware that some treatments were to be paid for. She gave an example of an entry she made in the retail book for an "extra treatment" on 23 August 2011. These issues needed to be explored carefully given the seriousness of the allegation; they were not.

[124] Although the alleged theft of salon products was central to the dismissal, the various other concerns raised in the summary document were also considered by Mr Adams and Mrs Adams to be serious since a document summarising them was prepared and presented in the context of a meeting where dismissal had been raised as a possible outcome.

[125] Some of those topics had been referred to previously, but the document contained new allegations – the complaint which had been made after 7 February 2012, the assertion that as at 18 February 2012 there were 16 examples of time being crossed out without authority; and reference to an unacceptable/threatening text sent to a young woman who had left her CV at the salon.

[126] In the brief meeting which occurred, there was not a proper opportunity to work through any of these allegations, particularly the new assertions which were now being relied upon.

[127] Mr Adams said he had received advice that these issues needed to be properly investigated. It was his position that the meeting provided Ms Brown with an opportunity of putting her point of view in relation to the concerns he had raised, especially those regarding treatments. He said that he and his wife were entitled to dismiss Ms Brown since she chose not to engage in rational discussion.

[128] Whilst the meeting became heated to the extent that Mrs Adams decided to leave it after only five minutes it did not mean that matters had been properly

explored or that there were no other options. Both sides had by that time sought legal advice, and the possibility of obtaining external assistance was an obvious option.

[129] At the very least there needed to be a process by which Ms Brown was provided with details of the particular allegations that were of concern, if need be in writing; and that she then had the opportunity of considering her response and providing them, again if need be in writing. Mr Adams then needed to conduct any further enquiries which may have arisen from such a process and subject to any necessary further responses from Ms Brown – whether in writing or at a meeting as was appropriate – consider the totality of the information thereby obtained.

[130] Section 103A(2) of the Employment Relations Act 2000 (the Act) requires consideration of whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in the circumstances at the time the dismissal occurred. The issue of justification must be determined objectively. Section 103A(3) provides:

> …
>
> (3) In applying the test in subsection (2), the Authority or the court must consider–
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[131] The Court may consider any other factors it considers appropriate. Defects in process which are minor and do not result in the employee being treated unfairly will not lead to a conclusion that a dismissal is unjustifiable.

[132] I find that in this instance the employers did not fulfil any of the requirements of s 103A(3) of the Act. In particular, I conclude with regard to each paragraph of that provision:

a) There was not a sufficient investigation before the decision to dismiss was taken. Mr and Mrs Adams were experienced employers who regularly employed apprentices such as Ms Brown. Employing persons of limited experience in any particular field will inevitably require careful management. Mr and Mrs Adams appear to operate a successful and busy hairdressing salon. They were in a position where they could and did take legal advice. An incomplete investigation as occurred here could not in this instance be justified on the basis of lack of resources.

b) I am not satisfied that the concerns were adequately raised with Ms Brown before the decision to dismiss was made; they were raised in a cursory fashion only.

c) Nor was Ms Brown provided with a reasonable opportunity to respond to those concerns before the decision to dismiss was made.

d) I have already found that Ms Brown's belief as to the terms of the policy which applied to treatments for staff, family and friends was not properly investigated so that her understanding of it could not have been properly considered; nor was she properly questioned as to what had occurred on 9 February 2012. As regards the various other matters referred to in the summary document, there is no evidence that these issues were adequately discussed at the meeting – indeed in relation to the allegation that Ms Brown sent the threatening text message, there is no evidence that it was discussed at all. These issues were important enough to be on the employers' agenda when dismissal was under consideration. All issues needed to be addressed in a way that facilitated the provision of an explanation which could then be genuinely considered.

[133] Following the meeting, Mr Adams wrote to Ms Brown stating that an opportunity had been given to her to give her point of view regarding the various concerns, and that she had chosen "to avoid these matters".

[134] The process did not provide for an adequate opportunity to give an explanation. It was incorrect to assert that Ms Brown had chosen to avoid the matters raised. The sole reason given for termination was accordingly incorrect.

[135] It was submitted for Ms Brown that the decision to terminate was pre-determined; this assertion was based on hearsay evidence that Ms Redmond had said on Facebook that Ms Brown was going to be dismissed because two warnings had been issued against her. This evidence was wrong in fact, of a hearsay nature and is inherently unreliable; it does not support a conclusion of pre-determination. Nor am I satisfied that Mr and Mrs Adams resolved to terminate Ms Brown's employment because issues had arisen regarding Ms X.

[136] I find that having regard to the significant procedural flaws, the decision to dismiss was not one which a fair and reasonable employer could have taken in all the circumstances at that time. Because there was not compliance with fair and reasonable procedures, a substantive outcome has resulted which is also unfair and unreasonable. The procedural defects were more than minor and did not result in Ms Brown being treated fairly.

Remedies

[137] In this section I consider whether the remedies which are sought by Ms Brown should be awarded. She seeks reimbursement for lost income, compensation for hurt, humiliation, loss of dignity and injury to feelings, and applies for recovery of a penalty for failure to provide a written contract of employment.

Lost income

[138] Ms Brown claims lost income from the date of 27 February 2012 when her dismissal took effect, to 4 December 2012 when she obtained permanent employment at another hairdressing salon. The claim is based on a 40-hour week at $11.20 per hour for 40 weeks and totals $17,920.

[139] The first issue to be resolved is the number of hours worked on a weekly basis. While Ms Brown asserts that she worked 40 hours per week, Mr and Mrs Adams provided a calculation of total gross earnings which produces average weekly hours of 34.61 for the period 27 November 2010 to 25 February 2012.

[140] Ms Brown's assessment of hours per week was based on an assertion that she worked eight and a half hours on Tuesdays, nine hours on Wednesdays, 10 hours on Thursdays, eight hours on Fridays and six and a half hours on Saturdays; she says that this was the case each week. It is preferable to rely on the summary of actual gross earnings, although as I indicate below this should be based on the 12-month period which preceded dismissal.

[141] I consider first the three-month period following dismissal. Section 128(2) of the Act provides that there must be an order that the employer pay to the employee the lesser of a sum equal to lost remuneration or to three months' ordinary time remuneration. The evidence is that no income was received for the three months following dismissal. Ms Brown has provided evidence of her efforts to obtain work in that period. I am satisfied that reasonable efforts to mitigate the loss were taken. The claim for three months' ordinary time remuneration accordingly succeeds. I agree with the approach adopted by the Authority that it is appropriate to assess the gross wages received for the 12 months prior to dismissal which produces a figure of 34.5 hours a week, which rounded up and ignoring the Christmas/New Year period produces a figure of $386.40 gross a week.

[142] Any award beyond that minimum period is a matter of discretion under s 128(3) of the Act, subject to a consideration of the obligation to mitigate any loss. The authorities established that the actual loss suffered by the employee sets an upper ceiling on any award as a logical starting point, but full compensation must be assessed in light of all contingencies which might have resulted in termination of the employee's employment.[11] Moderation is to be applied by the Court.

[143] Here, Ms Brown claims for a total period of 40 weeks; after the minimum period of 13 weeks that is a claim for 27 weeks lost remuneration.

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[11] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81].

[144] For the employer it was asserted that Ms Brown in fact had employment at a hair salon from June 2012. The evidence establishes, however, that from this date Ms Brown was engaged in unpaid work experience although she was obtaining the benefit of instruction on some matters. This was not paid employment, and does not alter the fact that such did not commence until 4 December 2012. I am satisfied that Ms Brown made reasonable efforts to obtain work with a range of potential employers, and enrolled in courses which might have assisted in obtaining employment.

[145] In assessing contingencies it is necessary to take into account the fact that Ms Brown's employment may have been terminated having regard to the multiple concerns the employer held, had appropriate processes been followed. There were a number of performance issues, although there were also many positive statements from customers and HITO representatives. But some allowance must be made for this contingency. I must also consider the possibility that there were difficult relationships within the workplace which may have led to Ms Brown resigning. Assessing those contingencies I reduce the 27 weeks claimed to 10 weeks.

[146] The result is that Ms Brown is entitled to 23 weeks lost remuneration, a total of $8,887.20. This conclusion is subject to any reduction which may be appropriate under s 124 of the Act for contributory conduct.

[147] Having regard to the circumstances, I am not persuaded that it is appropriate to award interest on this sum.

Claim for humiliation, loss of dignity and injury to feelings

[148] Ms Brown and her parents gave detailed evidence as to the consequences of the workplace issues. Also produced was a letter from her General Practitioner (GP) which referred to multiple significant physical effects flowing from an adjustment reaction, also described as "stress". The GP considered that a significant contributor to that stress was the workplace bullying. The allegation of a failure to investigate an allegation of bullying has not succeeded. The focus of the claim under s 123(1)(c)(i) must be on the consequences of the unjustified suspension and dismissal.

[149] There is also a significant hearsay component to the claim in that reference is made to rumours, and vague assertions that Mr Adams contacted third parties to Ms Brown's detriment, some of whom are unnamed; this evidence cannot be relied upon.

[150] That said, I have no doubt that the events which the Court has had to review had a significant impact on Ms Brown. She had just left school as a teenager, and was working as an apprentice in her first permanent full-time role. She was naïve and the events were no doubt traumatic.

[151] Counsel referred to the recent dicta of the Court in *Hall v Dionex Pty Ltd*:

> Commentators have recently noted that average compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect it might otherwise be expected to have increased them. They further note that while in *NCR(NZ) Corp Ltd v Blowes* the Court of Appeal attempted to set an "upper limit" on compensatory awards of $27,000, consistent with inflation from the award of $20,000 made in *Telecom South v Post Office Union Inc*, if a similar inflationary approach was applied today an upper limit for compensation would be $33,000. By contrast, between July 2013 and July 2014 awards in this Court were said to have ranged from between $3,000 and $20,000 with the average award before taking contribution into account being $9,687.50.[12]

[152] In the circumstances of this case, and having regard to the factors just discussed, the appropriate quantum is $7,000, prior to consideration of any contributory conduct issues.

Contributory conduct

[153] Section 124 requires the Court, in deciding the nature and extent of the remedies to be provided in respect of an established personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies which would otherwise have been awarded. It is well established that the actions of the employee must be both causative of the outcome and blameworthy:

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[12] Kathryn Beck and Hamish Kynaston, "remedies – we've been thinking…" (paper presented to New Zealand Law Society 10th Employment Law Conference, October 2014) at 457 – 458, citing *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [40] – [42], and *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA), cited in *Hall v Dionex Pty Ltd* [2014] NZEmpC 29 at [87].

Goodfellow v Building Connexion Limited t/a ITM Building Centre;[13] *Zhang v Sams Fukuyama Food Service Limited*.[14]

[154] The primary basis on which Ms Brown's claim has succeeded has related to the significant procedural flaws which resulted in her being suspended and then dismissed. As discussed earlier, the main ground relied on related to Mr Adams' belief that Ms Brown had misapplied the discount policy; initially he considered this was the case in respect of a family member; then he concluded that she had also taken advantage of the policy with regard to personal hair treatments. The evidence does not establish that there was a deliberate attempt to subvert that policy; the possibility of mistake or misunderstanding was not able to be ruled out, a possibility that was not investigated. Although, at the dismissal stage reference, was also made to other concerns in the summary document provided to Ms Brown, they too had not been adequately investigated.

[155] At the heart of several of the concerns raised by the employer was whether Ms Brown was trustworthy and whether she had told the truth when confronted over some issues. Although I have found that Ms Brown misled the Court on an aspect of her evidence, it does not necessarily follow that she also misled her employers.

[156] The significant procedural flaws do not permit a conclusion on the merits of the employers' concerns. It is not established therefore that Ms Brown's actions contributed to the situation which gave rise to the personal grievances as made out: the unjustified suspension, and the unjustified dismissal.

[157] Accordingly, there shall be no reduction for s 124 purposes.

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13 *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at [49].
14 *Zhang v Sams Fukuyama Food Service Ltd* [2011] NZEmpC 28 at [32] – [33].

Penalty

[158] I assume the claim for penalty is made under s 63A of the Act.[15] It imposes requirements for bargaining for an individual employment agreement, or individual terms and conditions in an employment agreement. The liability for a penalty arises where an employer does not:

a) Provide to the employee a copy of an intended agreement.

b) Advise the employee that he or she is entitled to seek independent advice about an intended agreement.

c) Give an employee a reasonable opportunity to seek advice.

d) Consider any issues that the employee raises and does not respond to those issues.[16]

[159] The statement of claim which pleads Ms Brown's cross-challenge does not indicate which statutory provisions of the section are relied upon. The only claim which can be advanced by Ms Brown in relation to this issue is the failure to provide her with a copy of an intended agreement and a failure to advise that she was entitled to seek independent advice.

[160] The evidence is that Mr Adams, who as the representative of the employer dealt with this issue, relied on one of the three staff members who interviewed Ms Brown to provide a copy of an employment agreement to her. Ms Kelling was one of the interviewers and she said she was not involved in the provision of an employment agreement. Neither of the other two staff members were called to give evidence.

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15 Section 64 of the Act provides that an employer must retain a copy of an individual employment agreement, and provide a copy to the employee if requested by the employee. A breach of the section may lead to the imposition of a penalty, but such an outcome can only be as a result of an action brought by a Labour Inspector – (s 64(4)). Consequently that section is not relevant in the present case.

16 Employment Relations Act 2000, s 63A(2).

[161] Ms Brown states that such a document was not provided to her. There is no evidence that she showed the document to her parents. Given the level of communication between herself and her parents on employment issues, it is probable she would have done so had she received the proposed employment agreement. I accept it was not provided to her.

[162] It follows that there is a breach of s 63A(2).

[163] A relevant factor when considering the possibility of imposition of a penalty is whether harm has been caused by the lack of an employment agreement.[17] A template of the employment agreement as utilised by the employer was produced. Had it been correctly completed, work hours could have been specified. However, in one of the completed examples provided to the Court the relevant provision stipulated that hours were "as displayed on roster". Further, the agreement emphasised that flexibility as to hours was important. I consider the issues that arose in this case as to hours were not necessarily due to failure to provide an employment agreement, but a failure to specify adequately how flexibility was to operate in practice. This could have been achieved by the provision of a policy or rules so as to provide clarity.

[164] Similarly, with regard to the discount policy. On the evidence before me, I consider this was not necessarily a matter that would have been included in the employment agreement if one had been completed. That said, the failure to stipulate the policy in writing may well have led to the difficulties that arose in this instance.

[165] However, the failure to provide an employment agreement was inadvertent; whilst there have been unexpected consequences which a properly completed employment agreement might have avoided, I consider that the imposition of a penalty is not appropriate. In this case, the financial remedies should be those awarded above.

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[17] *The Wellesley Ltd v Adsett* WC31/07, WRC11/07, 3 December 2007, (EmpC) at [74] – [77] per Judge Shaw.

Conclusion

[166] The decisions to suspend Ms Brown and then dismiss her were not conclusions which a fair and reasonable employer could have reached in all the circumstances of the case at the time those events occurred, as assessed on an objective basis.

[167] Mr Adams and Mrs Adams are to pay Ms Brown lost remuneration in the sum of $8,887.20, and compensation for humiliation, loss of dignity and injury to feelings in the sum of $7,000.

[168] The claim that an allegation of workplace bullying was not adequately investigated is dismissed, as is the application for recovery of a penalty.

[169] To this extent, the challenge partially succeeds and the cross-challenge partially succeeds.

[170] I reserve any issues as to costs. If any application is made, I will need to consider whether the misleading statement made to the Court should have any consequences, and if so to what extent. Any application should be made supported by evidence and submissions within 14 days, with a right of response within 14 days thereafter.

B A Corkill
Judge

Judgment signed at 2.20 pm on 28 May 2015