

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 58
5389272

BETWEEN SHANNEN BROWN
Applicant

A N D RICHARD AND JENNIFER
ADAMS Trading As
UNTOUCHABLE HAIR AND
SKIN
Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
Dene Gavin, Counsel for Respondent

Investigation Meeting: 19 February 2014 and 27 March 2014 at Nelson

Submissions Received: 27 March 2014 from Applicant
27 March 2014 from Respondent

Date of Determination: 10 April 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably dismissed and suffered an unjustifiable disadvantage in her employment.**
- B. Costs are reserved.**

Prohibition from publication

[1] During the course of the Authority's investigation meeting, evidence was put before the Authority concerning a member of staff of the respondent who, it was alleged, subjected Ms Brown to sustained hostility and bullying.

[2] The staff member in question did not appear before the Authority, and it is not certain that she was even aware that allegations about her were to be aired in the Authority. As this staff member has not had the opportunity to comment to the Authority on any of the allegations against her, I prohibit from publication the name of this individual and any other information, other than that already set out in this determination, which could lead to her identity being discovered by the public at large. She shall be referred to as Ms X in this determination.

The employment relationship problem

[3] Ms Brown claims that:

- a. she was unjustifiably dismissed from her employment as an apprentice hairdresser on or around 28 February 2012;
- b. she suffered an unjustified disadvantage in her employment when the respondent failed to protect her from a staff member (Ms X) who subjected her to bullying;
- c. she was unjustifiably disadvantaged by being suspended from her employment;
- d. she was not given an employment agreement; and
- e. the respondent breached an agreement to pay an invoice in the sum of \$551.90 in respect of Ms Brown's training at the Nelson and Marlborough Institute of Technology.

[4] Ms Brown seeks reimbursement of lost wages, compensation for humiliation, loss of dignity and injury to feelings and also seeks penalties to be imposed in respect of an alleged breach of good faith and for the alleged failure to provide her with an employment agreement.

[5] The respondent denies that it unjustifiably dismissed Ms Brown. It states that it dealt with the alleged bullying insofar as it was aware of it but was not aware of other allegations now raised by Ms Brown. It states that it took steps to supply Ms Brown with an employment agreement and that it is not liable to pay the invoice for \$551.90.

Brief account of events leading to dismissal

[6] I preface this account by noting that many of the material events happened over two years ago and that there were considerable conflicts of evidence between the parties about key aspects of Ms Brown's allegations. Some of these conflicts revolved around the dates that certain events occurred and the order in which certain events occurred. These conflicts are largely, I believe, a function of the time that has elapsed between the events in question and the Authority's investigation meeting. I take this opportunity to urge parties and their advisers not to prevaricate unduly before seeking to resolve an employment relationship problem. The earlier that parties and their counsel can attend mediation and, if necessary, attend an Authority investigation meeting, the more likely the matter can be resolved satisfactorily.

[7] Ms Brown commenced working at the respondent's hairdressing salon in Nelson in around November 2010 and started studying hairdressing at the Nelson Marlborough Institute of Technology (NMIT) in May 2011. Ms Brown says that she entered into an oral agreement with the respondent prior to her commencing work that it would pay her NMIT fees in return for her promising to remain employed by the salon once the course had been completed.

[8] The respondent says that it was not aware that Ms Brown wanted it to pay her fees until November 2011 when she entered into a written agreement with the respondent which states that, in return for the respondent paying her Hairdressing Industry Training Organisation and Polytechnic fees, she would stay in full employment with the respondent for 15 months from the course completion date. It is common ground that no written agreement was entered into to this effect until 15 November 2011.

[9] The sum of \$551.90 that Ms Brown claims from the respondent relates to an invoice that she says was issued by the NMIT which the respondent did not pay and which her mother, Mrs Brown, paid in June 2012. The respondent says that this sum did not fall due to be paid, because the invoice was not issued until after Ms Brown had left its employment.

[10] In May 2011, September 2011 and November 2011 the respondent held review meetings with Ms Brown, at each of which Mrs Brown was present. Notes were made by the respondent prior to each meeting and they suggest that Ms Brown

was going to be given both positive and negative feedback. Ms Brown denies that there was any significant criticism of her in any of these review meetings. As no notes were produced by the respondent of what was said at these meetings, rather than what was intended to be said, it is impossible for me to judge who is correct. However, there were no written warnings, or file notes of oral warnings given, which suggests that the respondent was happy with Ms Brown's progress overall up to November 2011 at least.

[11] Around August 2011 Ms X started at the salon. Ms Brown alleges that, in around September 2011, Ms X confronted her saying *why the f *** have you been moving my lunch breaks?* Ms X is also accused of having said to Ms Brown that she was playing with *f *** ing fire*, and that Ms Brown *didn't know who* [she] *was playing with and that* [she] *would get what was coming to* [her].

[12] Ms Brown says that she believed that Ms X was going to hit her and that, after Ms X left, she burst into tears and rang her mother a little while later to tell her what had happened. She said that she felt that she did not have the confidence to go straight to Mr Adams (the owner of the salon) but instead told the floor manager (Ms Kelling) and another hairdresser (Mr Earl). Both these individuals deny that Ms Brown told them about this incident with Ms X. Ms Brown was aged 17, and Ms X was around 30 when this incident occurred.

[13] Ms Brown says that her mother contacted Mr Adams around a week later (in September 2011) and that a meeting occurred in which she told him that she was not comfortable with the aggressive and threatening way that Ms X had spoken to her at work, and that Ms X kept staring at Ms Brown. She says that Mr Adams seemed concerned about what she had to say but did not hear from him following that meeting. Mr Adams denies that he knew anything about the allegations until a meeting held on 19 January 2012.

[14] Ms Brown states that, after the meeting with Mr Adams, another incident occurred between her and Ms X where Ms Brown accidentally brushed against Ms X, who told her:

*Next time you f***ing touch me I'll f***ing waste you ya f***ing
rude c***. Say please you little b*** h!*

[15] Ms Brown says that a further incident occurred where Ms X told Ms Brown off in an abusive way for not telling her that one of her clients had arrived.

[16] Ms Brown says that Ms X lost her driver's licence around November 2011 and asked Ms Brown to take her to and from work, which she says she was uncomfortable with but complied with.

[17] Ms Brown says that a second meeting was held between Ms Brown, her mother and Mr Adams about Ms X. Ms Brown says that Mr Adams made a comment about whether Ms X was schizophrenic but did not suggest ways to help her deal with the situation. Mr Adams denies that he ever said that Ms X was schizophrenic.

[18] Ms Brown says that, on 23 December 2011, a customer gave three of the staff a \$10 tip which was placed on the notice board. The following day (Christmas Eve) Ms Brown received several texts from Ms X accusing her, in an aggressive way, of having stolen the money from the notice board. There is no need to set out the full exchange between Ms Brown and Ms X here, but it is clear that Ms Brown responded to Ms X's aggressive emails in a way that does not suggest that she was in any way intimidated by Ms X. Her evidence on this point was that she was trying to stand up to Ms X.

[19] Ms Brown says that she showed Mr Adams the texts when he returned to work from holiday on 3 January 2012, and told him that she was frightened of Ms X and the way that Ms X spoke to her, but that Mr Adams was not interested.

[20] Mr Adams produced to the Authority notes dated 4 January 2012 which he says he wrote prior to meeting with Ms X and Ms Brown, and then both together. These notes suggest that Mr Adams did deal with this incident by telling the two women that they were not allowed to have their cell phones with them whilst they were at work and that he expected them to be able to work together. Later notes shown to the Authority suggest that Ms Brown said that she had told Mr Adams that she could work with Ms X. Ms Brown's evidence was that Ms X was in the room when she was asked about this, and so had little choice but to agree.

[21] A further meeting took place around 19 January 2012 which Mr and Mrs Brown (Ms Brown's parents) attended with Mr Adams. Ms Brown was not present because she had a regular client at the time, although Ms Brown says that this client had been booked in unexpectedly by Mr Adams. This meeting appears to have been convened at the request of Mr Brown the previous evening, when he stated that Ms Brown had had *the worst day*, when Ms X allegedly swore at Ms Brown in relation to Ms Brown failing to telephone a client to remind him about an appointment. Notes prepared by Mr Adams for the meeting suggest that he did not believe that Ms Brown had been upset by the encounter with Ms X, in which she is alleged to have said to Ms Brown:

*Lucky he got his bloody reminder call that you f** ing did not do. Do your f*** ing job.*

[22] The notes of this meeting also suggest that Mr Adams also talked about complaints he had been getting from clients about Ms Brown's work, about her finishing early and about her not listening.

[23] Ms Brown says that, on 15 February 2012, a friend of hers told Ms Brown that another person (known as Gorgia) had told her that Ms Brown was going to be fired and that Gorgia was going to take her job. The respondent alleges that Ms Brown sent an abusive text to Gorgia, although Ms Brown denies this. I disallowed the production of evidence from the respondent that purported to prove this, because it was not produced until midway through the first day of evidence and because Gorgia was not present to authenticate the evidence. Ms Brown says that she put Gorgia's CV, which had been dropped into the salon about a week earlier, in the bin on the instructions of Mrs Adams. Mrs Adams denies this.

[24] On Saturday 18 February 2012 a meeting took place to which Ms Brown and her mother had been invited by Mr Adams the previous day, but without telling them what the subject matter of the meeting was. This is not denied by Mr Adams. Ms Brown says that, at this meeting, Mr Adams told her that she had cut her aunt's hair the previous Wednesday and had put four treatments on her hair. She says that Mr Adams was holding a plastic bag which he said contained the treatments but that when Ms Brown asked to see them, he refused. She says that Mr Adams *started yelling, calling me a liar and a thief*. She says that Mr Adams then changed his story and said that she had used two treatments not four. Ms Brown told the Authority that

she had not used any treatments on her aunt's hair, but if she had done, it would have been part of the flat rate \$30 that employees were told to charge relatives.

[25] Ms Brown said that Mr Adams then referred to receiving several complaints from clients but that he would not tell her their names and that he had received a letter of complaint from one client but would not show her the letter. Ms Brown says that she was in tears and feeling bewildered by Mr Adams' claims. Mr Adams then said, according to Ms Brown:

Right that's it your apprenticeship is over, your career is over. You won't ever get another job in hairdressing.

[26] Ms Brown says that Mr Adams then gave her the option to resign right then and there or he would fire her. When Mrs Brown said that he could not fire her, as she did not have any written warnings, Mr Adams replied that she did, but that he did not have a copy with him. He then went to get a piece of paper which was hand written and was not dated or signed. This document was shown to the Authority, and read as follows (intentionally showing a crossed out section):

Dear S

This letter serves as your first written warning since yr employment with us. There are several reasons for this.

The first is the growing number of our colour clients who have complained about the level of yr service and their stipulation that you do not touch their hair. It is increasingly difficult to accommodate and it is unprecedented in our time in hairdressing.

The second is the continued crossing out for early finishes. We have spoken on many occasions about this and the problem temporarily disappears then it creeps back in. On checking late last week you've crossed every Thursday back to 7pm and have crossed out 5 other occasions for birthday teas etc. None of those early finishes have been checked with either R or J.

The third is trust – we are a small operation and have to trust our staff to put our business first to the best of their ability. The two incidents that we have questioned you on and ~~given you ample chances to come clean~~ where you have outright lied, leaves a question over ~~our~~ what else is real or otherwise.

[27] Ms Brown said that Mr Adams then left the room taking the plastic bag and its contents with him. Ms Brown says she was crying and did not understand what he wanted them to do. She said that he returned a little later and said he would give her

one more chance to admit that she had stolen treatments and put them on her aunt's hair or he would fire her. She says that she told him she would not resign for something that she had not done. Ms Brown said that Mrs Brown then mentioned Gorgia but that Mr Adams denied any knowledge of her.

[28] Ms Brown said that Mr Adams then gave her until 0830 hours on Tuesday 21 February 2011 to decide what she wanted to do and that her parents would have to advise him whether she was resigning or whether he would fire her. He then told them to get out of the salon and demanded that she give her key to him. She says that he shouted that she was never allowed to return to the salon again.

[29] Mr Adams denies that he said the words attributed to him about Ms Brown's career being over, and about giving her the chance to resign or else he would dismiss her. He admits giving her the written warning and asking her for the key to the salon. He also says that he refused to hand the empty vials containing the treatments over, but did not refuse to show them.

[30] Ms Brown says that, on Tuesday 21 February 2012, Mr and Mrs Brown went to visit the salon (Ms Brown staying in the car) and Mr Adams told them that he was putting Ms Brown on one week's leave until she decided what to do.

[31] On 22 February 2012 Mr Adams telephoned Mrs Brown and again accused Ms Brown of stealing treatments but this time for her own hair after she had had it coloured by another hairdresser. Ms Brown admits that a treatment was put on her hair but says that staff members were allowed to put treatments on their own hair free of charge and that this had happened ever since she had worked there. She says that Mr Adams did not speak to her directly about this latest allegation.

[32] Ms Brown says that she received a letter on 24 February 2012 as follows:

Dear Shannen,

Following Tuesday's meeting when your employment was suspended on pay, we need to meet to discuss the situation further, hear your point of view and consider options for the future. I suggest we meet at the shop 9am on Monday morning. Both Jen [Mrs Adams] and I will be at the meeting and you are free to bring a solicitor, union delegate or other representative or support person.

We have serious concerns about your conduct which will be discussed at the meeting. This is a serious meeting and dismissal could be a consequence.

Please could you telephone to confirm 9am Monday morning at the shop or to discuss an alternative meeting time.

Yours faithfully

*Untouchable Hair
Richard Adams*

[33] Ms Brown attended the meeting with her mother and father. She says that the meeting became heated between her parents and Mr Adams and that the situation deteriorated pretty rapidly from there. She says that Mr Adams kept saying that he wanted her to resign and to admit the allegations that had been raised against her but that she refused to do so. She says that Mrs Adams then handed over a piece of paper which was a list of complaints about her.

[34] The Authority saw this document, which listed a number of dates between 22 November 2011 and 17 January 2012, with allegations of bad service from Ms Brown towards the respondent's clients, but with no client names. It also referred to Ms Brown crossing out times when she was supposed to work on 16 occasions; a first written warning *being underway*, the meeting on 19 January 2012, at which Ms Brown was accused of *screaming* at Mr Adams and calling him a liar, and of her sending an abusive text to *a young woman*.

[35] Ms Brown says that Mr Adams had never raised his concerns with her or her mother at the time in respect to the client complaints but that, when she started to seek clarification or provide responses, he would not let her talk and every time she tried he would interrupt her and tell her she was lying.

[36] Ms Brown said that the issue of her employment contract was raised and that Mr and Mrs Adams admitted that there was not one. The respondent denies this. She

says that Mrs Adams then suddenly announced that the meeting was over and Mr Adams told them to get out of the salon.

[37] Ms Brown says that on 29 February she received a letter from Mr Adams dated 20 February 2012 which stated as follows:

Dear Shannen

Following on from today's meeting at the salon where we gave you the opportunity to put your point of view across regarding our concerns, you chose to avoid these matters. Therefore we have decided to terminate your employment with us taking effect immediately

Yours sincerely

Richard Adams

The Issues

[38] The Authority must determine the following issues:

- (i) Whether Ms Brown was unjustifiably dismissed from her employment by the respondent;
- (ii) Whether Ms Brown was subjected to an unjustified disadvantage in her employment by way of the respondent's alleged failure to protect her from bullying by Ms X;
- (iii) Whether Ms Brown was subjected to an unjustified disadvantage in her employment by being suspended;
- (iv) Whether Ms Brown was issued with an employment agreement; and
- (v) Whether Ms Brown is due the sum of \$551.90 in respect of an invoice from NMIT that should have been paid by the respondent.

Was Ms Brown unjustifiably dismissed from her employment by the respondent?

[39] The statutory test for determining the justification for a dismissal, or alleged unjustified action, is well known, and is set out at s.103A of the Employment Relations Act 2000, as follows:

Section 103A Test of justification

(1) *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

(2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

(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.

(4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*

(5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*

(a) minor; and

(b) did not result in the employee being treated unfairly.

[40] The statutory requirement of good faith at s.4 of the Act is also relevant:

4 Parties to employment relationship to deal with each other in good faith

(1) *The parties to an employment relationship specified in subsection (2)—*

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) *The duty of good faith in subsection (1)—*

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

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

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.

*(1C) For the purpose of subsection (1B), **good reason** includes—*

(a) complying with statutory requirements to maintain confidentiality:

(b) protecting the privacy of natural persons:

(c) protecting the commercial position of an employer from being unreasonably prejudiced.

[41] There is a considerable amount of conflict in the evidence between Ms Brown and her family on the one hand and the Adamses on the other regarding the events that directly led to Ms Brown's dismissal. However, there are some aspects of the process followed that is not denied by Mr Adams, or which can be readily inferred, as follows:

- a. Mr Adams did not forewarn Ms Brown prior to the meeting on 18 February 2012 that he wished to discuss with her an allegation that she had applied treatments to her aunt's hair without charging her;
- b. He did not forewarn her that the meeting on 18 February was a disciplinary investigatory meeting;
- c. He did not forewarn her that the result of the disciplinary investigation meeting on 18 February could be Ms Brown's dismissal;
- d. He raised other issues in the meeting in relation to alleged client complaints, about which Ms Brown had not been forewarned;
- e. He handed her a warning that had been drafted earlier, without any prior disciplinary process having been followed in respect of the contents of that warning, and of which she had no knowledge.

[42] In addition, it appears that Mr Adams did not discuss with Ms Brown at the meeting on 18 February 2012 (or at any subsequent meeting) her understanding of

what the policy was concerning the use by a staff member of treatments on relatives or themselves. This is significant because Ms Brown maintains that she always understood that any process that was applied to the hair of the relative of a staff member was charged at \$30 (provided the staff member was not rostered to work at the time) and that any process that was applied to their own hair by a colleague was free. Anything that was taken home by them was recorded in a stock book and charged at cost price.

[43] Mr Adams says that all treatments would have to be paid for at cost price, even if used on the hair of a staff member, although I understand him to say that products used on staff as part of a colour service are not charged for. Products used on the relatives of staff as part of a colour service were charged at \$30. A *treatment* was distinct from a colour process, and is used for damaged hair he said. Mr Adams said that Ms Brown would have been told about the policy by Ms Keeling, the floor manager, although Ms Keeling said in evidence to the Authority that she could not be sure that Ms Brown had been told, and that she had not done so herself.

[44] No written policy was produced by the respondent which could guide staff about what products had to be paid for when used in the salon by staff on themselves, or on colleagues, and which could be used for free. I use the term *product* in its widest sense to mean any substance involved in any activity in the salon. The only written evidence I saw was a copy of a hand written note dated 18 February 2012, which I understand was prepared in advance of that meeting. It set out the following:

So let's talk about Rachel [Ms Brown's aunt] on Wednesday night...

Breakdown of actual cost – how much colour did you use?

<i>Tube</i>	<i>23</i>	
<i>Bleach</i>	<i>10</i>	
<i>Peroxide</i>	<i>10</i>	
<i>Foils</i>	<i>10</i>	
<i>Shampoo & cord</i>	<i>2</i>	
<i>Coffee</i>	<i>1</i>	

So that's roughly \$40 and you've charged her \$30 but that's fine because we've set that price.

Treatments?

[45] This acknowledges that certain products can be used on a relative of a staff member at the price of \$30. In the absence of a clear written policy about what is charged at \$30 and what is charged at an additional price, I prefer the evidence of Ms

Brown that she understood that any product can be used on a relative's hair at the total cost of \$30 and that treatments on staff members' hair were free.

[46] The failure of Mr Adams to investigate Ms Brown's understanding of the policy, his failure to address directly with Ms Brown her use of a treatment on her own hair without paying for it (rather than just telling her mother) and his jumping to an immediate conclusion that she was simply lying, rather than even contemplating that Ms Brown could have misunderstood the policy, leads me to conclude that he did not follow a fair disciplinary process, and that by doing so he acted in breach of ss.4 and 103A of the Act.

[47] In addition, although his evidence was that he did not dismiss Ms Brown because of the client complaints and her crossing time off her roster, he did raise these issues with Ms Brown during his meetings with her which led to confusion on the part of Ms Brown. One of the client complaints went back to November 2011 and one of the examples cited by Mr Adams in regard to crossed out times went back to 15 February 2011 (and the latest cited by him was dated 7 April 2011). It was not the action of a fair and reasonable employer in all the circumstances to raise, in an investigation of specific misconduct, historical examples of disgruntlement, which should have been raised as they arose, and aspects of poor performance, which usually require a different approach (namely, coaching where necessary and the giving of an opportunity to improve).

[48] In summary, I conclude that the process followed by Mr Adams in dismissing Ms Brown was seriously flawed to the extent that no fair and reasonable employer could have done the actions that Mr Adams did in all the circumstances. Accordingly, I find that Ms Brown was unjustifiably dismissed.

[49] There were other allegations about the process made by Ms Brown and her mother, which included Mr Adams shouting at Ms Brown, calling her a thief and a liar and him giving her an ultimatum of resigning or being dismissed. Whilst I do not have to make a finding on these issues in order to determine the fairness of the dismissal, having already concluded for other reasons that it was not justified, the allegations are relevant to remedies under s.123(1)(c)(i) of the Act.

[50] On balance, given the fact that Ms Brown was effectively barred from the premises on 18 February, that her parents visited the premises on 21 February (the

date that Ms Brown says she was given by which she had to decide whether she was to resign) and that Mr Adams only produced a letter after that date (which has the hallmarks of legal advice having been obtained for the first time) I conclude that the meeting of 18 February 2012 was conducted largely in the way alleged by Ms Brown and her mother.

[51] However, I believe that Ms Brown and her parents also became heated during their meetings with the Adamses, and acknowledge that this would have rendered difficult the Adamses' attempts to treat Ms Brown in accordance with a legally required process. However, ultimately, despite these difficulties, the responsibility lay with the Adamses to ensure that basic fair processes were followed in their treatment of Ms Brown during the disciplinary investigation.

Was Ms Brown subjected to an unjustified disadvantage by the respondent's alleged failure to protect her from bullying by Ms X?

Pre-January 2012

[52] Having considered the evidence from both parties, whilst I do not doubt that Ms X behaved towards Ms Brown in a manner that she would have found intimidating, given her young age at the time, I do not accept that Ms Brown or her mother raised their concerns with Mr Adams sufficiently clearly until mid-January 2012.

[53] I reach this conclusion because Mr Adams did take very seriously the episode of bad-tempered texting that took place between Ms Brown and Ms X on Christmas Eve of 2011. I do not believe, incidentally, that this episode itself could reasonably have been regarded by Mr Adams as bullying of Ms Brown by Ms X, given the extremely robust way in which Ms Brown engaged with Ms X in her texts.

[54] I also note the written reference made by Mrs Adams around 12 January 2012 to Ms Brown saying to Mr Adams that she could work with Ms X. This followed the incident of the texting between Ms Brown and Ms X.

[55] I also conclude that the Adamses genuinely care about their business and do not believe that they would have knowingly allowed one staff member to have repeatedly bullied another over a period of months. The Adamses have been employing young apprentices for many years and appear to appreciate their potential

vulnerability, which is why Mr Adams always had Mrs Brown present at any meetings.

[56] Finally, Ms Keeling told the Authority that Ms Brown had said to her that she and Ms X had been *having problems*, but Ms Keeling said that she did not enquire what they were and did not tell Mr Adams. I accept this evidence. Ms Keeling was not Ms Brown's employer, and did not have clear managerial responsibilities. She cannot be seen as the agent for the respondent in this respect therefore.

[57] In summary, as at 12 January 2012, I do not accept that the Adamses could have reasonably concluded that Ms Brown was concerned about bullying of her by Ms X.

From mid-January 2012

[58] I believe that the first time that Mr Adams became aware of any major concerns held by the Browns about bullying of Ms Brown by Ms X was in the meeting held on 19 January 2012 with Mr and Mrs Brown, convened at the request of Mr Brown. There is a reference in the notes made by Mr Adams prior to this meeting to a *threat* made to Ms Brown by Ms X.

[59] It is impossible to know for certain exactly what occurred in the meeting between the Browns and the Adamses on 19 January 2012, although it appears that it resulted in an exchange of bad tempered accusations and counter accusations, with the Browns making allegations about Ms X and Mr Adams making allegations about Ms Brown's alleged poor performance.

[60] The written notes prepared by Mr Adams in advance of the meeting on 19 January 2012 indicate a very defensive attitude about Ms Brown's concern of receiving a threat from Ms X, rather than an intention to genuinely investigate it. For example, I refer to the following passages:

Why didn't Shannen speak to R or J during the day or before she left? She popped her head in to Jennie's room and said a very cheery goodnight! If she'd spoken to us we could have talked to [Ms X] before she left.

If it was such a big deal, why didn't she come straight home and not go visiting friends etc. She left work just on 7pm & your father's call came at 9pm.

So, we had no knowledge of the incident and are then threatened by father that Shannen won't be turning up for work the next day.

[61] The test at section 103A of the Act contemplates that prejudging Ms Brown's concerns in the way indicated was not the action of a fair and reasonable employer in all the circumstances. Rather, a genuine enquiry by the employer into concerns raised by the employee was the appropriate approach. It appears that the Adamases had already lost trust in Ms Brown because of the client complaints they had been receiving and because they believed that Ms Brown had been crossing out her appointment times. However, a fair and reasonable employer would have held a full and fair investigation into these concerns before jumping to conclusions about whether it trusted her. Furthermore, it would have kept separate Ms Brown's report of a threat made to her by another employee and carried out a separate dispassionate and objective enquiry.

[62] In conclusion, whilst I do not accept that the Adamases knew about Ms Brown's concerns back in September 2011, they did know about at least one of them (a threat made to Ms Brown by Ms X) by mid-January 2012. Ms Brown was entitled to have that concern investigated, but it was not. This failure amounted to an unjustified disadvantage in her employment.

Was Ms Brown subjected to an unjustified disadvantage by being suspended?

[63] The suspension effectively occurred on 18 February 2012 and lasted until Ms Brown was dismissed by a letter mistakenly dated 20 February 2012, received by Ms Brown on 29 February 2012. The reason for Ms Brown being suspended appears to be that Mr Adams was concerned that Ms Brown had effectively stolen treatments from the salon, by putting them on her aunt's hair without paying for them.

[64] Whilst Mr Adams should have consulted with Ms Brown prior to suspending her, I accept that the relationship between Ms Brown and Mr Adams had broken down effectively by the end of the meeting on 18 February 2012, and that it would not have been practical for Ms Brown to have continued working in the salon while Mr Adams believed that she was dishonest. Whilst Mr Adams failed to carry out a fair and thorough investigation into his prior to dismissal, a fair and reasonable employer could still have suspended Ms Brown in all the circumstances in my view. Therefore,

I decline to find that Ms Brown suffered an unjustified disadvantage in her employment by being suspended.

Was Ms Brown issued with an employment agreement?

[65] It is accepted by Mr Adams that Ms Brown was not given a copy of her employment agreement. His evidence is that he gave it to one of his more senior staff members to give to Ms Brown, but it appears that this staff member did not do so. Whilst responsibility for issuing Ms Brown with her employment agreement ultimately lay with Mr Adams, I do not believe that it is appropriate to impose a penalty on Mr Adams for this failure, as there was no intention on his part to deprive Ms Brown of an employment agreement, or the relevant provisions of the Act.

Is Ms Brown due the sum of \$551.90 in respect of an invoice from NMIT that should have been paid by the respondent?

[66] The bonding agreement signed by Ms Brown states as follows:

Date 15 Nov 2011

Agreement Between Shannen Campbell Brown and Richard and Jennie Adams Trading as Untouchable Hair and Skin

I hereby agree that in return for Untouchable Hair and Skin paying my ITO and Polytec fees, I will stay in full employment with Untouchable for 15 months from the course completion date. If illness or leave is required for any unforeseen reason, this period of illness or leave will be added onto the agreed time. If I do not complete the time commitment, I will completely repay these costs to you in full.

Signed Shannen Brown

Richard and Jennie Adams

[67] Mr Adams says that he did not receive the invoice from Ms Brown for \$551.90 until February 2012 at the earliest, and relied upon a letter from the NMIT that confirms that the invoice for the 2011 ITO Course Fees was not issued until 24 February 2012. This is denied by the Browns, but in the light of the letter from NMIT, I accept what Mr Adams says.

[68] However, despite not receiving the invoice until February 2012, the Adamses entered into an agreement to pay Ms Brown's college fees. There is nothing in the agreement that says that relevant invoices must be received by a certain time, or even, prior to the employment ending. The agreement clearly contemplates all of the college fees being paid in return for a promise that Ms Brown would remain in employment for 15 months from the course completion date. There is no evidence that Ms Brown intended to breach her side of the bargain and the fact that Ms Brown did not remain employed for 15 months from the course completion date was because she was dismissed, unjustifiably I have found. Therefore, the Adamses' liability to pay the invoice for \$551.90 remains, even if the invoice was not presented until 2012, which was through no fault of Ms Brown in any event.

[69] There is one other issue arising from this situation which needs to be explored. That is, Ms Brown's NMIT fee was paid by Mrs Brown, not by Ms Brown. It is understood that Ms Brown seeks reimbursement of this fee pursuant to s.162 of the Act, which gives the Authority the same powers as the High Court and the District Court to make any order under any enactment or rule of law in respect of any matter related to an employment agreement. Where there has been a breach of an agreement by a contracting party, the standard remedy is an award of damages for losses flowing from that breach suffered by the other party to the agreement.

[70] Mrs Brown was not a party to the bonding agreement between Ms Brown and the Adamses. She is also not a party to these proceedings before the Authority. She was also under no legal obligation to pay the fees owed by Ms Brown to NMIT. She chose to do so out of a sense of parental love and duty, I believe. Ms Brown argues that she was not in a position to pay the fees, as she was unemployed, and that she will pay back her mother when she is in a position to do so.

[71] Ms Sharma reminds me that the role of the Authority is to establish the facts and make a determination according to the substantial merits of the case, without regard to technicalities (s.157(1) of the Act). However, I do not believe that this section requires the Authority to ignore fundamental principles of common law that a party must have suffered a loss in order to be awarded damages.

[72] If I could be satisfied that Ms Brown had a legal obligation to pay back Mrs Brown, I could order the Adamses to pay damages to Ms Brown, as she will have incurred an indebtedness arising out of the legal obligation that Ms Brown has had to

assume towards her mother, which in turn arises out of the respondents' breach of contract in not paying the fee of \$551.90.

[73] In *Law of Contract in New Zealand*, fourth edition, Burrows, Finn & Todd, at section 5.3.2, the learned authors state: *the courts will be slow to discover a contractual intention underlying an agreement between a parent and her or his child*. This statement is made in the context of a domestic arrangement, which I believe characterises Mrs Brown's agreement to pay NMIT.

[74] However, Ms Brown did state in evidence that she intended to pay back her mother once she can afford to do so. Bearing in mind the Authority's duty under s.157 of the Act, I believe that natural justice favours an award in her favour of \$551.90 in order that she may discharge this duty towards her mother.

Remedies

[75] Having established that Ms Brown was unjustifiably dismissed, I must now consider what remedies she is entitled to. Section 123(1)(b) of the Act provides that the Authority may provide the reimbursement of a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that, subject to s.123(3) and s.124, the Authority must, whether or not it provides for any other remedies, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. Section 123(3) provides that, despite subsection (2), the Authority may, in its discretion, order the employer to pay a sum greater than provided in subsection (2).

[76] Ms Brown states that, at the time of her dismissal, she was earning \$11.20 an hour gross and regularly worked a 40 hour week. However, when I analyse the time and wage records of the respondent, I find that, over the preceding 12 months prior to her dismissal, Ms Brown worked on average 34.5 hours a week (rounded up and ignoring the Christmas and New Year period). This equates to \$386.40 gross a week.

[77] Ms Brown seeks reimbursement of lost wages for 40 weeks, from 27 February to 4 December 2012. I am satisfied that Ms Brown made reasonable efforts to find new employment, not just in hairdressing but also in other local organisations, such as bars and retail organisations. She also took courses to enhance her employability. The fact that she was not successful in finding a new apprenticeship until December

2012 is probably mainly attributable to Nelson being a reasonably small town with few employment opportunities for someone with Ms Brown's then limited experience.

[78] For this reason, I believe that it is appropriate for the Authority to award Ms Brown more than three months' loss of wages, and to exercise its discretion under s.128(3) to award more than that provided in subsection (2). However, I do not believe that it is appropriate to award a full 40 weeks loss of wages to Ms Brown because of the concerns the Adamses had about her performance, which may have resulted in her dismissal in any event, after a fair process had been followed. Under the circumstances, I believe that it is just to award Ms Brown 26 weeks' lost wages, at 34.5 hours per week. This amounts to \$10,046.40 gross.

[79] Turning to s.123(1)(c)(i) of the Act, I accept that Ms Brown suffered humiliation, loss of dignity and injury to her feelings as a result of being dismissed from the employment of the respondent. Ms Brown says that she made a huge effort to find new employment with another hair dressing salon, and then tried looking at other options, but when she could not get work she became very depressed and down. She said that she felt that she had lost everything, including her apprenticeship, and started to believe that there was no way out.

[80] Ms Brown says that she reached a point where she felt so low it started to seriously affect her health and well-being. She sought medical assistance, she says. Her mother, a former nurse, testifies that Ms Brown started to suffer symptoms of anxiety and consulted the family doctor on 30 April 2013. Ms Brown says she was diagnosed with anxiety and depression. However, Mrs Brown testifies that the family GP attributed Ms Brown's anxiety partly to *subsequent ongoing stress relating to intimidation by [Ms X] following her dismissal*, for which the Adamses cannot be held responsible.

[81] Ms Brown seeks \$20,000 under s.123(1)(c)(i) of the Act, although this sum includes humiliation, loss of dignity and injury to her feelings for the disadvantage she suffered arising out of the way the Adamses dealt with the allegations of bullying. I deal with that aspect of Ms Brown's claim separately, below.

[82] I believe that an award of \$7,500 is a reasonable sum to award Ms Brown in respect of her unjustified dismissal.

[83] Turning to the humiliation, loss of dignity and injury to her feelings that Ms Brown suffered arising out of the way that the Adamases dealt with her allegations of being bullied by Ms X, I accept that Ms Brown suffered such effects when Mr Adams failed to investigate her concern about being threatened by Ms X in January 2012 and, instead, turned the conversation to client complaints and Ms Brown's perceived failings. These effects were relatively short lived however, given that Ms Brown was dismissed at the end of February 2012.

[84] It is hard to assess accurately the effects of the disadvantage suffered by Ms Brown, but I believe that the sum of \$2,500 is a reasonable amount of compensation in respect of the disadvantage suffered.

[85] Turning to s.124 of the Act, I must consider whether the remedies awarded should be reduced to reflect the extent to which Ms Brown's actions contributed towards the situation that gave rise to the personal grievance. With regard to the dismissal, whilst I believe that Mr Adams genuinely believed that Ms Brown had dishonestly used treatments on her aunt's hair and her own hair without paying for them, he reached this conclusion without having checked her understanding of the policy.

[86] In the absence of him having done so and, further, not having produced evidence to show that Ms Brown had been told expressly what the policy was (instead of saying what Ms Brown *would have been told*, as he did in evidence) it would be unsafe for me to conclude that Ms Brown knew Mr Adams' policy regarding treatments and so did dishonestly use treatments without paying for them. Accordingly, as Mr Adams says he dismissed Ms Brown for the use of treatments without payment, and not for any other reason, I cannot find that Ms Brown contributed to the situation that gave rise to the personal grievance of unjustified dismissal. I therefore decline to reduce the award of remedies under ss.123(1)(b) and 123(1)(c)(i).

[87] With respect to the award of compensation in respect of the disadvantage in employment suffered by Ms Brown, I do not believe that Ms Brown contributed in any way to Mr Adams' failure to investigate her concern about Ms X threatening her. It is arguable that the heated way that Ms Brown's parents engaged with Mr Adams on 19 January 2012 bears a contributory factor in that failure, but that cannot be

blamed on Ms Brown. Accordingly, I decline to reduce the award of compensation made under this heading.

[88] Ms Brown also seeks a penalty for *the way that* [Mr Adams] *deliberately undermined the employment relationship*. Presumably, this is a claim for a penalty under s.4A(b)(iii). I do not accept that Mr Adams deliberately set out to force Ms Brown out of her employment, as alleged. I do not accept the allegation that Mr Adams agreed to employ another person (Gorgia Redmond) prior to dismissing Ms Brown (as Ms Redmond's employment agreement does not support such a contention). Whilst Mr Adams did not conduct his investigation of Ms Brown's alleged misconduct fairly, I do not accept that this was a deliberate act to undermine the employment relationship.

[89] Accordingly, I reject the claim that a penalty should be imposed upon the respondent.

Orders

[90] I order the respondent to pay to Ms Brown the following sums:

- a. The gross sum of \$10,046.40 in respect of wages lost by Ms Brown as a result of the grievance, together with interest on this sum at the rate of 5% per annum, accruing from the date of this determination until the date of payment;
- b. The sum of \$10,000 pursuant to s.123(1)(c)(i) of the Act; and
- c. The sum of \$551.90 in respect of the NMIT fee for 2011.

Costs

[91] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. In the absence of agreement within 28 days of the date of this determination, any party seeking costs are to serve and lodge a memorandum of counsel within a further 14 days. Any response is to be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority