ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION AT PARAGRAPHS [1, 2, 3 & 4] OF THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 405
5445206

	BETWEEN	ERIN BURKE Applicant
	A N D	EMPLOYERS & MANUFACTURERS ASSOCIATION (NORTHERN) INCORPORATED Respondent

Member of Authority:	David Appleton
Representatives:	Ms Burke, for herself, assisted by Emma Miles, Counsel Richard Upton, Counsel for Respondent
Investigation Meeting:	22-24 July 2014 at Hamilton (held in private)
Submissions Received:	19 August and 29 September 2014 from Applicant 15 September 2014 from Respondent
Date of Determination:	6 October 2014

DETERMINATION OF THE AUTHORITY

A. The applicant was not unjustifiably constructively dismissed.

B. The applicant was not unjustifiably disadvantaged in her employment.

C. There was no breach of the applicant's employment agreement or duty of good faith, and so no penalties are imposed upon the respondent.

D. The respondent owes the applicant the gross sum of $348.30 pursuant to the Minimum Wage Act 1983.

E. Costs are reserved.

Non publication orders

[1] During the course of the proceedings a number of documents were lodged with the Authority, and a significant amount of evidence heard, concerning the alleged conduct of a consultant working for the respondent at the material time. He took no part in the proceedings and, accordingly, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) I order that any parts of the evidence given and the pleadings lodged which identify this consultant (save as are set out in this determination) shall not be published. He shall be referred to as Consultant X in this determination.

[2] I also order that that any parts of the evidence given and the pleadings lodged which identify the fees generated by and paid to any consultant of the respondent, including Consultant X, (save as are set out in this determination) shall not be published.

[3] In addition, several documents were lodged with the Authority and evidence heard which identified numerous clients of the respondent's legal services division known as EMA Legal. None of these clients took part in the proceedings and the respondent has a legal duty *to protect and hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.*[1] Accordingly, I order that any parts of the evidence given and the pleadings lodged which identify these clients (save as are set out in this determination) shall not be published.

[4] Finally, documents were lodged with the Authority and evidence heard which identified the remuneration of several of the staff employed in the EMA Legal division of the respondent, together with fees generated by them on behalf of the respondent. It is not necessary for this information, which is confidential to the individuals concerned, to be made public. Accordingly, I order that any parts of the evidence given and the pleadings lodged which identify this information (save as are set out in this determination) shall not be published. This order does not extend to the remuneration received and the fees generated by Ms Burke during her employment by the respondent, but does extend to details of her remuneration earned at her new employer.

[1] Rule 8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

Employment relationship problem

[5] Ms Burke claims in her statement of problem that she was unjustifiably constructively dismissed from her employment with the respondent and suffered unjustified disadvantage during her employment. Principally, Ms Burke's allegations relate to the way her concerns about Consultant X's conduct in respect of her clients and potential clients were handled by the respondent, the way the respondent dealt with her concerns about her remuneration, and the way her manager, Ms Joanne Douglas, behaved towards her. As will be seen below, Ms Burke claims that unjustified disadvantage arose in her employment from other alleged actions and omissions of the respondent as well.

[6] Ms Burke also claims that the respondent breached its duty of good faith towards her, and breached the employment agreement between them. She also claims that she received remuneration in breach of the Minimum Wage Act 1983, and that the respondent breached its duties owed to her under the Health & Safety in Employment Act 1992. In respect of this last allegation, Ms Burke acknowledges that the Authority does not have jurisdiction to consider this claim as drafted and so recast it at the start of the investigation meeting as a further unjustified disadvantage claim.

[7] The respondent denies any wrongdoing and states that Ms Burke resigned of her own volition to commence employment with another employer. It admits that there have been inadvertent breaches of the Minimum Wage Act amounting to a shortfall during the course of her employment of $348.21, as opposed to the $10,676.40 alleged by Ms Burke to be owed (not including a shortfall in holiday pay on that sum).

[8] The Authority had before it around 1,000 pages of evidence, together with voluminous pleadings, memoranda of counsel, eight briefs of evidence and 104 pages of submissions. I have read all of these documents, but necessarily cannot refer expressly in this determination to everything that I have considered.

Brief account of the events leading to the termination of employment

[9] The respondent is a well-known membership organisation providing professional services to businesses based in the North Island. A substantial element of those services consists of providing advice to members on employment relations

and employment law, and advocacy in the Employment Relations Authority and the Employment Court.

[10] Ms Burke is a lawyer specialising in employment law who was employed by the respondent between August 2010 and August 2013.

[11] When Ms Burke was first employed by the respondent, her remit was to consolidate and expand the legal presence of the respondent in the Waikato area. Up until that point, the area's members had been principally serviced by two consultants, Mr Fursden and Mr Quigan. Neither was a practising lawyer (although it is understood that one or both may have had legal training). A division of the respondent had been set up earlier by Mr David Lowe, Advisory Services Manager, called EMA Legal. Ms Burke joined EMA Legal in the Waikato area, being the first lawyer to do so.

[12] Ms Burke gave evidence to the Authority that, when she commenced employment, she was given a list of members, some of whom, she understood, she could target as a way of growing the legal business. The list had around 1,100 organisation names on it and Ms Burke had the ability to check using the respondent's IMIS system whether or not any particular member had already been invoiced by one of the consultants. If it had, she would not target it. If it had not been so invoiced, she could target it with a view to selling to it her legal services.

[13] Mr Lowe gave evidence to the Authority that, when he established a presence for EMA Legal in the Waikato area, he had reached an agreement with Mr Fursden that any member name on Mr Fursden's list of EMA members which Mr Fursden had billed in the preceding 24 months would remain his client and could not be targeted by anyone else. Mr Lowe said that those names would therefore be solely allocated to Mr Fursden. Anyone else on Mr Fursden's list could be targeted by someone else, but would remain allocated to Mr Fursden as well. Hence, they were effectively dually allocated. It was this second list, it appears, that was made available to Ms Burke when she joined EMA. Her evidence was that she did not know where the list had come from.

[14] Mr Lowe said that Mr Fursden also had a third list, which contained his private clients which he dealt with on a private basis through his own consultancy

business. Problems arose when Mr Fursden sold all three of his lists to Consultant X in or around December 2010.

[15] Consultant X's purchase of Mr Fursden's lists led to difficulties according to Ms Burke because of the way that Consultant X marketed himself to the members of the EMA, including members whom Ms Burke understood were allocated solely to her. It should be said at this stage that a copy of the list of clients originally given to Ms Burke in August 2010 (or a close approximation of it) was made available to the Authority as part of the disclosure exercise. Unfortunately, the respondent was unable to find a copy of the list of members bought by Consultant X from Mr Fursden. However, according to Mr Lowe's evidence, given that it seems that the list given to Ms Burke in August 2010 was entirely composed of members also allocated to Mr Fursden, that list would have then become the list of members allocated to Consultant X when he purchased it. In other words, the list given to Ms Burke in August 2010 would have been very largely composed of members also allocated to Consultant X upon his purchase of the list from Mr Fursden in December 2010.

[16] The only list of members allocated to Consultant X that was made available to the Authority was one produced in May 2012. By then, of course, membership had changed in that members had resigned and other members had joined. Comparing the list of members allocated to Consultant X in May 2012 with a similar list of members allocated to Ms Burke in May 2012 shows some but not a significant number of clients jointly shared.

[17] This issue of the joint sharing of members, and which ones Consultant X could legitimately target, was of importance to Ms Burke because of the way she was remunerated under her employment agreement. I set out below material parts of her individual employment agreement:

> *4.* ***SALARY AND COMMISSION***
>
> *The EMA operates a total remuneration approach.*
>
> *(a)* *Your total remuneration is an all inclusive covering all hours worked and all expenses that you incur in providing your own tools of trade and your own premises.*
>
> *(b)* *If you make contributions to KiwiSaver, you agree that all total gross wage and salary payments payable to you by the EMA will be inclusive of*

employer contributions (including ESCT) and the amount of the employer contributions will be diverted from your wages and salary into your KiwiSaver fund, less ESCT.

(c) *Your annual salary is $24,000. Your salary will be reviewed as at 1 July each year.*

(d) *Your salary shall be paid monthly, on the 16th day of each month (or first working day thereafter), by direct credit into a bank account in your name. Your monthly salary payment will cover the period from the first to the last day of the month.*

(e) *EMA may make a deduction, from your next monthly salary payment, or from any monies owing to you at the date of termination, should any overpayment have been made to you.*

(f) *EMA may make a rateable deduction from your salary for any time lost through your default, or through absence beyond your entitlement to leave.*

(g) *In addition to your salary you will be paid commission as set out in* ***Schedule 3****. The EMA has complete discretion to review the structure amount and operation of your total remuneration package at the point six months from Commencement Date and then on an annual basis with effect from 1 July after proper consultation with you with a view to the arrangements being satisfactory to both parties and that in any event any resulting variation to the arrangements shall be no less favourable than the initial total remuneration package (including base salary and commission structure).*

[18] Schedule 3 of the agreement set out the commission arrangements as follows:

PRINCIPLE OF THE ARRANGEMENT

Your remuneration is comprised of a base annual salary (initially $24,000 pa) together with a 60% commission in each financial year (1 July to 30 June).

Commission is calculated on "your billings" over and above the 180% of base salary threshold.

"Your billings" means EMA invoices issued for professional services entered in to EMA's e-relationship management system as a result of your services to EMA members but does not include unbilled WIP, GST, disbursements and the standard EMA administration fee on each invoice.

Commission will usually be calculated and paid in monthly instalments in arrears in accordance with the payment provision below, but subject to a withholding for client billing conflict

resolution process below and to an annual overall washup of unders and overs of commission at the end of each financial year.

If a client refuses to pay for your products or services and claims that the quality and/or professionalism of your services is a reason for their non-payment, the EMA reserves the right to deduct and withhold a provision from future commission earned equivalent to the commission that would already have been paid on the disputed amount unless or until such time as the matter is resolved with the client.

You will have access to full information about the amount of your billings and the calculation of your commission payment instalments and the annual commission washup.

PAYMENT OF COMMISSION ARRANGEMENTS

Your initial hourly charge out rate is $220.00 +GST. This will be reviewed by your manager (in consultation with you) on a periodic basis, normally annually.

Your "ordinary monthly billings target" is your annual salary divided by 12 and multiplied by 180%. So, your commencing "ordinary monthly billings target" is $3,600.00.

For all billings in excess of your ordinary minimum monthly billings target you will be eligible to be paid a commission of 60% on those excess billings. This commission will be paid monthly in arrears via the payroll on the following monthly pay date. For the period starting from your Commencement date until 28 February 2011 inclusive you will be paid commission on your monthly billings which exceed your ordinary monthly billings target. This commission will be paid on account of your annual commission entitlement and is subject to the annual commission wash up below.

From 1 March 2011 onwards if in any month, your billings do not reach your ordinary monthly billings target, then the amount of the deficit of monthly billings for that month shall be added to the following month's billings target. The new cumulative monthly target must be invoiced before any further commission is earned and payable.

This deficit accumulation process will continue month by month thereafter until the monthly billings catch up or until the end of the financial year when there will be an annual review of all billings and commission payments earned and paid for that financial year. Following that annual review, any underpayment of commission earned and payable to you in the financial year will be paid via the payroll in your August pay for the following financial year. Any overpayment of commission earned and payable to you for the financial year will be deducted from your August pay for the following financial year. Full details of the unders and/or overs calculations will be provided before any payments or deductions are made.

[19] Ms Burke's evidence is that she first became suspicious of Consultant X's conduct towards clients allocated to her on a sole basis in March 2011 when a client

advised Ms Burke that Consultant X had approached it to update their employment agreements. Shortly afterwards, she found out that another one of her clients had been approached by Consultant X and, as a consequence, Ms Burke began to wonder whether he was approaching all of her clients. As a result of this, she emailed Mr Lowe and Mr Brian Cooley, the Manager of the respondent's AdviceLine, one of whose responsibilities was the allocation of EMA members to consultants and solicitors. In her email, Ms Burke expressed concern about Consultant X contacting her clients and diverting work from her clients to him. Ms Burke's evidence to the Authority was that it was only when she discovered what Consultant X had done with respect to these two clients that she found out that there were dually allocated members.

[20] Presumably as a result of Ms Burke's email, Mr Lowe called a meeting to discuss the tensions that had arisen between Ms Burke, Consultant X and Mr Quigan; (evidence showed that Mr Quigan also had concerns about Consultant X's conduct towards his clients.) As a result of the discussions at that meeting in March 2011, some ground rules were established. These ground rules were summarised by Mr Cooley in his brief of evidence as follows:

> 1. *Members that were currently allocated to more than one consultant/solicitor would remain that way until one consultant/solicitor invoiced that member, at which time the member would become a sole allocation to the person who had invoiced them;*
>
> 2. *New members, and additional subsidiaries of existing members, would be allocated to each consultant/solicitor on a rotational basis as they were added to the EMA database;*
>
> 3. *AdviceLine referrals for dual allocations would be made as much as possible on a rotational basis, with consideration given to the member's preference, previous interaction with the consultant/solicitor, and sometimes the type of work involved. In many instances cost was a major factor for the member.*
>
> 4. *Any member that was a dual allocation prior to that meeting but had already been invoiced by a particular consultant/ solicitor would be changed to a sole allocation in favour of that invoicing consultant/solicitor.*
>
> 5. *Any member that was a dual allocation prior to that meeting that had already been invoiced by both a consultant and solicitor was to remain a dual allocation, unless they agreed otherwise between themselves.*

[21] Mr Cooley's evidence to the Authority was that he was asked by Mr Lowe to police these ground rules. Unfortunately, it is plain that, despite these ground rules being established in March 2011, there continued to be tensions and disagreements involving the targeting of allocated clients and how new members were allocated and existing members reallocated.

[22] On 22 December 2011, Ms Burke raised a concern in an email to her manager, Joanne Douglas, the Managing Solicitor for EMA Legal (Northern). In this email, Ms Burke asked for transparency over the way new members were allocated between herself, Mr Quigan and Consultant X. She also noted in her email that out of 144 members allocated to her with 20 or more employees, only 30 were sole allocations. This email was prompted because, for December 2011, she had billed a much lower amount than usual so that she did not make budget, and therefore earned no commission.

[23] Ms Burke's invoicing for January 2012 was also very low. Ms Burke says that, in February 2012, during a meeting, she found out by chance that the staff members manning the AdviceLine were recommending consultants over solicitors. This concerned her because a proportion of her work came from referrals through the AdviceLine service. Ms Burke wrote to Ms Douglas on 1 March 2012 complaining that new members were not being allocated to her in rotation, that dual allocations she shared with Mr Quigan and Consultant X had not been removed, that she had not had her profile on the EMA website between December 2011 and the end of February 2012 and that AdviceLine was not promoting her to members on a rotational basis.

[24] Ms Douglas passed these queries onto Mr Cooley, and they corresponded about the issues in a number of emails. One of Mr Cooley's emails stated that Ms Burke only had 66 companies that were not shared with an ER consultant. He also replied saying that, between August 2011 and 6 March 2012, Consultant X had had 14 allocations, Mr Quigan 11 and Ms Burke 7. He also stated that, if they removed the duplicate allocations, it would need to be Ms Burke's allocations that were reduced as they could not reduce Mr Quigan's any further. Duel allocations were not, however, ultimately eliminated.

[25] The Authority saw a copy of an email in reply from Ms Douglas to Mr Cooley dated 8 March 2012, copied to Mr Lowe, asking Mr Cooley to ensure that allocations were done on a rotational basis unless there was a specific reason, such as a member

being referred to a particular person. Ms Douglas also stated that AdviceLine teams should be offering a member both a consultant and a solicitor if the member had a dual allocation.

[26] Ms Burke states that she was told by Ms Douglas not to mention Consultant X's name again. Ms Douglas says that she actually told Ms Burke to stop bringing up historical complaints about Consultant X, not that she must never mention Consultant X's name again. A file note of the conversation between Ms Burke and Ms Douglas dated 14 March 2012, prepared by Ms Douglas, records that Ms Douglas told Ms Burke that she did not want to hear any further complaints about Consultant X; that it is acknowledged that when he was taking her work the previous year, that was inappropriate but that Mr Lowe had sorted that out. Ms Douglas did not accept that Consultant X was still taking Ms Burke's clients, and noted that he was quite an effective consultant, was doing a good job for the consultant services and was good for the EMA.

[27] Mr Quigan complained about Consultant X in mid-March 2012 and a meeting to discuss matters took place on 3 April 2012 between Mr Quigan, Consultant X, Ms Burke, Ms Douglas and Mr Lowe. In the email dated 22 March 2012, setting up the meeting, Mr Lowe wrote:

> *Over the last little while I have been watching with concern at the increasing feuding between you all. Collaboration and co-operation is the modus operandi of Advice. It has reached a point where I would like all three of you to meet with me as a group so I can re-set the ground, and if need be I will make some decisions to ensure we do operate collaboratively and co-operatively.*

[28] Mr Lowe's evidence is that, at the meeting, Ms Burke stated that Consultant X had been working for EMA members not allocated to him. He says that this perplexed him as he believed that the computer system did not allow Consultant X to bill a client not allocated to him. This belief was subsequently confirmed by Mr Cooley in his evidence to the Authority. Mr Lowe says that he investigated the matter and discussed the allegation with Consultant X, and found that Consultant X had billed an EMA member outside of the EMA system. He says that he took action against Consultant X that was less severe than contract termination because there had been extenuating circumstances. He says that he could not report the details to Ms Burke because of privacy issues.

[29] Mr Lowe says that Ms Burke also complained about Consultant X's marketing activities, such as marketing in a church newsletter, but that Mr Lowe did not believe that Consultant X was doing anything that needed action.

[30] In July 2012, Ms Burke forwarded to Ms Douglas evidence of an AdviceLine team member suggesting a consultant when the member had asked for a lawyer. Ms Douglas replied saying that she would have a chat with the team member, who was relatively new, *to make sure she understood that was ok to refer to a lawyer if that is the preference of the member wanted*. Ms Douglas also took issue with the tone of Ms Burke's original email, who had stated that consultants were being *foisted* on members. Ms Douglas also stated in this email:

> *I don't necessarily agree with the current system of work allocation, but it is what it is and is not changing in the foreseeable future.*

[31] On 18 September 2012, Ms Burke and Ms Douglas had a further conversation about allocations in which Ms Douglas stated that the EMA reserved the right to allocate members; that Ms Burke had been given a number of allocations that month; that there was no agreement about allocations; that Ms Douglas was there to make sure that Ms Burke had enough work; that she had an advantage as a lawyer over the consultants and that it was acceptable to ask Mr Cooley to make changes to the allocation if a member asked for a lawyer.

[32] In October 2012, an EMA office was opened in Waikato at which Ms Douglas expected Ms Burke to work. Ms Burke's evidence is that there were a number of IT problems which prevented her from doing so, whereas Ms Douglas says that Ms Burke was not willing to work there. Although a reasonable amount of space was given over to this issue in the briefs of evidence of both Ms Burke and Ms Douglas, I do not believe it is material to the issues under consideration by the Authority, although it appears that Ms Douglas was using the issue to demonstrate difficulties she was having with managing Ms Burke.

[33] The Authority saw evidence that Ms Burke sent her CV to a recruitment agent expressing interest in a senior employment lawyer position in Auckland, on 1 March 2013, and contacted other agents during March, April and May 2013 seeking alternative positions.

[34] Ms Burke says that she realised the extent of the reduction in her allocated members in April 2013 when she had a greater access to the database once she started working in the Waikato office.

[35] It was also in April 2013 that Ms Burke commenced negotiations with the respondent regarding changing the basis of her remuneration structure. Ms Burke had asked for a salary of $100,000 per annum, plus benefits. On 24 April 2013, Ms Douglas wrote to Ms Burke stating that a salary of $100,000 plus benefits was not commensurate with the fee revenue that Ms Burke had been able to produce over the time she had been at the EMA. Ms Douglas produced, in her letter, a summary of Ms Burke's gross billings compared with her total remuneration over three periods of 1 July 2010 to 30 June 2011, 1 July 2011 to 30 June 2012 and 1 July 2012 to 30 April 2013. This showed that, in the first period, Ms Burke's remuneration was 55% of her total billings, in the second period it was 67% and in the third 69%. The letter stated that EMA Legal team members were expected to invoice 1.8 times their salary. This equates to the remuneration being 55% or less of billings. Therefore, the table indicated that, in the second period, Ms Burke's billings were short of that target by 18% and in the third period by 19%.

[36] Ms Douglas' letter offered Ms Burke an annual salary of $60,000 together with a commission component from 1 July 2013 whereby, if she invoiced over $9,000 per month, she would be entitled to 0.6% of the invoiced amount over $9,000 as commission.

[37] On 7 May 2013 Ms Burke replied to Ms Douglas' letter by way of a six page letter (with three pages of attachments) which expressed her disappointment at EMA Legal refusing to treat her the same as the other EMA Legal solicitors, by refusing to pay her a salary. She also referred to what she called Ms Douglas' focus on Ms Burke's billings being consistently restricted to the seasonal lows and appearing to ignore the rest of the annual billings cycle. She produced a graph in her letter which tracked her billings month-on-month from October 2010 to March 2013. This graph showed peaks in billing in March 2011, July 2011, November 2011, May 2012, September 2012 and November 2012. The graph showed that Ms Burke's billings dropped below $5,000 per month in December 2011 and January 2012 and in March 2013. Ms Burke stated that the then current financial year showed a 30% increase in billings compared with the previous 12 months and that she anticipated this being

even higher by the end of the financial year on 30 June 2013. Ms Burke makes no mention in her letter of the alleged effect on her billing of Consultant X's conduct, but refers to *a natural, cyclical decrease in billing.*

[38] Ms Burke referred in her evidence to being told by Ms Douglas in April, and in a subsequent discussion by telephone that, had she been on a salary, she would now be facing either redundancy or being performance managed. Ms Burke took issue with Ms Douglas' characterisation of the market for legal services in the Waikato as *extremely variable* and with Ms Douglas saying that she was concerned that it also meant that the legal operation in Waikato *is marginal in its viability*.

[39] Ms Burke then drew comparisons between what she had been offered and the salaries of three other members of EMA Legal. Ms Burke raised a number of other arguments in her letter including that, achieving 73% of her target (which I understand is what Ms Burke had achieved for that financial year), did not mean that she was failing or that the organisation was losing money.

[40] During her evidence, Ms Douglas said that she was shocked by Ms Burke's letter, which seemed to be challenging the 1.8 target, and which stated incorrect information in relation to the salaries of the other solicitors. Ms Douglas replied to Ms Burke's letter on 23 May 2013 declining to pay her a salary of $100,000 per annum with benefits. In her letter she re-presented the previous offer set out in the letter of 24 April 2013 and also stated that, if the EMA was to accept her request to increase her salary to $100,000, that would jeopardise the viability of the Hamilton office.

[41] Mr Lowe wrote to Ms Burke on 20 May 2013 inviting her to a meeting so that she, he and Ms Douglas could have a conversation about the salary issue. Ms Burke replied saying that she could not afford to attend the meeting at such short notice as it would require her to forego chargeable work and cancel client appointments.

[42] The Authority saw evidence that Ms Burke sent her CV to a recruitment agency on 23 May 2013.

[43] On 28 May 2013, Ms Burke wrote to Mr Lowe saying that she was prepared to meet with him in Hamilton and that she did not wish Ms Douglas to attend. She said that she wished to discuss the following issues: *my remuneration; problems with my manager, Jo Douglas; and the ongoing issues with Consultant X.*. Ms Burke's email

followed an earlier email sent the same day to Mr Lowe in which she described the re-offering of the same remuneration package inappropriate and insulting. She also stated that, if she was forced to resign over the issue, *a PG for unjustified disadvantage and constructive dismissal will be inevitable*.

[44] The meeting took place between Mr Lowe and Ms Burke on 10 June 2013. Ms Burke sent an email to Mr Lowe later that day setting out her summary of the meeting. This was a lengthy email which detailed a number of complaints regarding Ms Douglas and Consultant X.

[45] Ms Burke also arranged to meet with the CEO of the respondent, Mr Campbell, and did so 28 June 2013. Mr Campbell subsequently sent a letter to Ms Burke dated 2 July 2013. As the contents of this letter are relied upon as part of Ms Burke's reason to resign, it is appropriate to set out the text of it in full.

> *Dear Erin,*
>
> *We have now considered your submission regarding your employment arrangements at our meeting on Friday, 28 June, in my office.*
>
> *I am sorry that you felt that at least thus far you have been disadvantaged, both in your remuneration and the organisation of your work.*
>
> *I note that you were principally concerned about three matters:*
>
> 1. *You recorded dissatisfaction with the allocation of work between you and our consultant,* [Consultant X]*, and outlined details of his activities which may have been prejudicial to you being able to earn sufficient income under your current remuneration arrangements.*
>
> 2. *You recorded your dissatisfaction with the low basis remuneration and that the quotas which were required each month were somewhat onerous and you struggled with the inconsistency of income which resulted from your falling behind in one month and having to make up the deficiency in subsequent months.*
>
> 3. *You recorded your concerns about your working relationship with Jo Douglas in particular and other requirements in general, mentioning such things as unpaid writing and other attendances.*
>
> *I see no point in re-litigating these details, but would prefer to come to a fair arrangement for the future which suits both you and EMA. Please note my suggestions to deal with the three items noted above:*

1. *We will undertake a review of the allocation of work between* [Consultant X] *and yourself and address the issues you have outlined concerning you. I thank you for bringing these items to my attention. In any event, the system for allocating clients and work applies to you in the same way as it does to the other members of our Legal Team. This should be to your advantage as in your territory you have a pool of 417 members allocated to you compared to Auckland where 502 members are shared between three lawyers.*

2. *To address the issue of your income, I propose (in the attached offer document) a new income arrangement for you which is aligned with the rest of the Legal Team.*

   Namely, a fixed salary supported by benefits which include KPI bonuses and a bonus component payable after a certain revenue target is earned each year. These bonuses are payable on an annual basis after the end of the financial year.

   Under these arrangements, whilst you have a more reliable permanent income, you will be required to meet a certain minimum billing, at the same level as the targets set for the other Legal team members. The salary offered will require you to quickly increase your level of billings to meet the required targets. If you cannot achieve these targets, then you may face performance management or the possible redundancy of your role.

   In addition, you will see outlined other procedural requirements such as office attendance and file keeping in conformity with the remainder of the EMA Legal team. This is particularly important now that we have established a permanent office for your use in Hamilton.

3. *I have discussed these matters with Jo Douglas who shares similar frustrations as you. These frustrations have arisen from professional imperatives rather than personal ones.*

   It is acknowledged you are a legal professional and are therefore largely to your own devices. However, you will appreciate the need for us to ensure uniformity across our communication, and to ensure professional standards are met. It is Jo's role to review and monitor the work of all members of the EMA Legal team to make sure that the required standards are met. This protects you and the EMA and ensures that we can deliver the best possible service.

   It is important, on a professional level, that we find consensus across tone when it comes to communication and presentation. In this regard I would ask you to put personal preferences aside in the interests of such uniformity. I would ask both you and Jo to seek mutual agreement rather than conflict, although you must appreciate that at times, you will be required to take direction from Jo. If you have difficulty with this, we could talk some more.

> *I have tried very hard to be objective and as far as our short meeting had allowed, I hope you find these new arrangements to your satisfaction.*
>
> *I would like you to signal your agreement to these arrangements before the close of business on 31 July. If we do not hear from you, we will assume you have decided to stay on the existing arrangements.*
>
> *Yours sincerely,*
> *Kim Campbell*
> *Chief Executive*

[46] Accompanying the letter from Mr Campbell was a letter from Ms Douglas which offered to vary Ms Burke's individual employment agreement so that she would receive a base salary of $84,000 per annum, together with a potential year-end bonus of $1,680 and a potential KPI year-end bonus of $2,520. Ms Douglas' letter stated that, in return, Ms Burke would be employed between the hours of 8.30am and 5pm, based in the Hamilton office, and would be expected to work additional hours as and when required. Ms Burke would be required to carry out file reviews at regular period with her manager and to work collaboratively with her colleagues and EMA consultants. Ms Burke was also to *demonstrate a professional and positive attitude at all times, and show respect and courtesy in all* [her] *communications, including with* [her] *colleagues and EMA consultants*.

[47] The letter also stated the following:

> *4. You will be required to meet the minimum billing requirements (and other KPI targets) set by your Manager, currently set at 1.8 of your base salary.*

[48] On 10 July 2013 Mr Lowe wrote to Ms Burke, and another employee, saying that they had complained about Consultant X and that he would accordingly commence an investigation into their allegations.

[49] Around 16 July, Mr Ross Anderson, a consultant engaged by the EMA to investigate the complaints against Consultant X, made contact with Ms Burke, setting out his proposed approach. Ms Burke replied suggesting persons that Mr Anderson should interview and suggesting that there had been inaction by management in addressing her concerns about Consultant X. Mr Anderson replied saying they should discuss her suggestions when they were due to meet, on 29 July.

[50] On 24 July 2013 Ms Burke signed an employment agreement with the law firm Norris Ward McKinnon accepting the position of Senior Solicitor.

[51] On 31 July 2013, Ms Burke sent a letter to Mr Campbell tendering her resignation. The letter stated as follows:

> *Dear Kim,*
>
> ***Notice of Resignation***
>
> 1. *I refer to the proposed variation put forward in your letter dated 2 July 2013 and the letter from Jo Douglas which accompanied it and bears the same date.*
>
> 2. *Whilst I appreciate you have taken the time to meet with me and consider my situation, and that the offer you had put forward is considerably closer to that of the other solicitors than the previous proposal, I feel I am left with no other option than to refuse your offer and tender my resignation.*
>
> 3. *The offer contained in both letters dated 2 July 2013 referred to the 1.8 billing requirement as the "minimum billing requirements" and states that failure to meet this will likely result in performance management or redundancy. As no proposal has been put forward as to how the required 30% increase in monthly billings is to be achieved and as the problems in the Waikato that I have been raising for close to three years show no prospect of near resolution, I feel acceptance of your offer is effectively giving the EMA my agreement that my employment be terminated in the near future. As I have stated previously, the 1.8 billing KPI which appears to be a target for other solicitors is put forward as a minimum requirement for me which is inequitable and unjust.*
>
> 4. *As I have already suffered significant financial detriment as a result of the unresolved issues previously raised, my financial position is now too precarious to take such a risk with my and my family's financial future. Neither can I continue to afford to work under the remuneration proposal to date.*
>
> 5. *In accordance with the four week notice requirement in my employment agreement, I hereby give notice that my final day of work for the EMA will be 30 August 2013.*
>
> 6. *Apart from the problems which remain unresolved, I have loved my position with the EMA and feel greatly saddened that I am left with no other option but to resign.*

[52] Mr Anderson completed his investigation report in August 2013, sending a draft copy to Mr Lowe. As this was not seen by Ms Burke until after her resignation had been tendered, and she had left the EMA's employment, it played no part in her decision to resign, and so it is not necessary to set out here the details of Mr Anderson's findings. However, Ms Burke was heavily critical of the findings, and

suggested that Mr Lowe had improperly influenced them, on the grounds that Mr Anderson was very experienced and reliable and yet had reached illogical conclusions. Ms Burke also suggests that Mr Anderson was not independent because he had worked with Mr Lowe in making submissions to the Parliamentary Select Committee on the Employment Relations Amendment Bill.

[53] As Ms Burke tendered her resignation before she knew the contents of the Anderson report, the allegation regarding Mr Lowe influencing the report can only assist Ms Burke in an indirect way, by providing what one might call proclivity evidence to support her contention that he deliberately failed to support her complaints about Consultant X during her employment and that he was acting in bad faith. For this reason I shall address here my conclusions on that particular part of Ms Burke's allegation regarding Mr Anderson's report.

[54] Whilst I accept that, on their face, some of Mr Anderson's findings are not logical when viewed against the question of whether Consultant X had improperly approached certain named clients allocated on a sole basis to Ms Burke, I believe that the apparent illogicalities derive from Mr Anderson concentrating on the question of whether Consultant X had been acting in breach of his consultancy agreement with the EMA rather than also addressing other aspects of Ms Burke's complaints. Facts suggesting that Consultant X had approached some of Ms Burke's clients did not support such a breach of his consultancy agreement and, for this reason, many allegations about specific clients were rejected by Mr Anderson, whereas some might have been established if Mr Anderson had been mindful of his wider remit. However, that potential slip on Mr Anderson's part does not reflect upon the respondent which, I am satisfied, left Mr Anderson to conduct his investigation without interference.

[55] Whilst it is unfortunate that Mr Anderson appears to have confused matters in this way, it played no part in Ms Burke's resignation. I record my findings on this issue in order to state that I saw no evidence whatsoever to suggest in the slightest that Mr Lowe had behaved improperly in respect of the preparation of the Anderson report.

[56] I also do not accept that there was a deliberate attempt by Mr Lowe to influence the report on the grounds that he appointed someone who was not independent. Whilst Mr Anderson had clearly worked with Mr Lowe and the EMA before, Mr Anderson was also clearly extremely experienced and had conducted a

number of investigations prior to conducting this one. He has been a JP for 30 years. Under such circumstances, it was reasonable for the respondent to expect Mr Anderson to work independently of the relationship he had with Mr Lowe and the EMA. I accept his evidence that he was not influenced by that relationship. Additionally, Ms Burke raised no objections to Mr Anderson prior to her seeing the report.

Issues

[57] It is necessary for the Authority to determine the following issues:

(a) Whether Ms Burke was unjustifiably constructively dismissed from the employment of the respondent;

(b) Whether Ms Burke was unjustifiably disadvantaged in her employment;

(c) Whether the respondent breached its duty of good faith towards Ms Burke;

(d) Whether the respondent breached the terms of the individual employment agreement between the parties;

(e) Whether the respondent failed to pay Ms Burke her entitlements under the Minimum Wage Act; and

(f) Whether Ms Burke suffered unjustified disadvantage in her employment arising out of breaches of the Health and Safety at Work Act 1992.

(g) Whether a penalty should be imposed upon the respondent.

The relevant sections of the Act

[58] The following are key sections of the Act which are relevant to the issues identified above.

> ***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.

4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

(a) the failure was deliberate, serious, and sustained; or

(b) the failure was intended to undermine—

(i) bargaining for an individual employment agreement or a collective agreement; or

(ii) an individual employment agreement or a collective agreement; or

(iii) an employment relationship; or

(c) the failure was a breach of section 59B or section 59C

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.

Was Ms Burke unjustifiably constructively dismissed from the employment of the respondent?

[59] The law in relation to constructive dismissals in New Zealand is well settled and the principles have been explored in a number of cases. These principles (as material to this matter) may be summarised as follows:

a. *A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.*
...
There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.

Wellington, Taranaki and Marlborough Clerical IUOW v *Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ SEL Cas 95 (AC) at [104].

b. In the first Court of Appeal decision considering constructive dismissal, the Court enunciated three (non-exhaustive) situations in which a constructive dismissal may occur:

   i. where the employee is given a choice of resignation or dismissal;

   ii. where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

   iii. where a breach of duty by the employer leads a worker to resign.

   Auckland Shop Employees Union v Woolworths (NZ) Limited [1985] 2 NZLR 372.

c. The essential questions to be addressed in constructive dismissal cases are:

   i. What were the terms of the contract?

ii. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

Greenwich supra.

d. The very nature of a claim for constructive dismissal is dependant on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer (*Commissioner of Police v Hawkins* [2009] NZCA 209).

e. A typical constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship or trust in confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407).

f. A resignation need not take effect immediately, and an employee may still succeed in a claim of constructive dismissal by giving notice (*Para Franchising Limited v Whyte* [2002] 2 ERNZ 120). However, an employee cannot wait a significant length of time without good reason. (See for example *Barry v Anoop Investments Limited*, ERA Auckland, AA11/07).

g. It is well established that the repudiatory contract by the employer may involve a series of events over a period of time such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect may be. (*Lewis v, Motor World Garages Limited* [1986] ICR 157 (CA)).

h. To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable. (*Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

What were the expressed causes of Ms Burke's resignation?

[60] It is understood from Ms Miles's submissions that Ms Burke is relying primarily on the third category of constructive dismissal referred to in *Woolworths*. However, the case as pleaded also supports an argument that she is pursuing a claim under the second category as well, so I shall also address that possibility.

[61] In her oral evidence, Ms Burke explained that the catalyst for her resignation was a combination of the 1.8 times salary minimum billing requirement referred to in Mr Campbell's letter dated 2 July 2013, together with the requirement that she *quickly increase* [her] *level of billings to meet the required targets* or she *may face performance management or possible redundancy of* [her] *role.* Ms Burke objected to this because, she said, what was a target for the other lawyers within the respondent was a minimum billing requirement for her.

[62] Ms Burke's resignation letter makes reference to the billing requirement and the possible consequences of failing to meet them. She then refers to no proposal being put forward as to how the 30% increase in monthly billings is to be achieved and then states *and as the problems in the Waikato that I have been raising for close to three years show no prospect of near resolution, I feel acceptance of your offer is effectively giving the EMA my agreement that my employment be terminated in the near future*.

[63] Examining the contents of this letter, it seems clear that, as well the minimum billing requirement issue, and the fear of performance management or redundancy, Ms Burke's expressed reason for resigning also encompassed what she saw as a failure to resolve the concerns she had regarding Consultant X and the effect his perceived activities were having on her billing. I do not find, either from the letter or from Ms Burke's evidence, that her concerns regarding bullying by Ms Douglas and Mr Lowe formed any part of her expressed reasons for resigning.

Did the respondent breach the terms of its employment agreement with Ms Burke?

[64] The next question to examine is, whether the respondent breached its contractual duties to Ms Burke in respect of these issues, so as to give rise to an unjustified constructive dismissal. These duties were imposed upon the respondent expressly, by way of the terms of the individual employment agreement between them; and impliedly, by way of the Act and the common law.

[65] Whilst the alleged breaches by the respondent relied upon by Ms Burke are intertwined, it is convenient to first examine them individually.

Imposing a minimum billing requirement on Ms Burke

[66] The evidence of Ms Douglas was that every lawyer in the employment of the respondent was subject to a billing target of 1.8 times their remuneration. Evidence produced by the respondent confirmed this, and I do not believe that Ms Burke disputes it. The question is, were the other lawyers' billing targets also minimum billing requirements? If not, then that would be evidence that there was disparity of treatment between Ms Burke and the other lawyers.

[67] Under cross examination, Ms Douglas' evidence was a little confusing, in that she first accepted that there was a difference between a target and a minimum billing performance expectation, but then later said that the difference was a matter *of semantics*, which I take to mean a matter of mere terminology, with no real distinction. Ms Douglas states in her brief of evidence that another lawyer who was recruited to work for EMA Legal in Tauranga was told that, *if her billing was not tracking in the right direction within a reasonable timeframe, she might be made redundant*. This lawyer did not give evidence but there is no reason to believe that Ms Douglas' evidence is not correct.

[68] Evidence was, however, heard from Ms Ronni Cabraal, who had worked for the respondent as a senior associate in 2012 and 2013. She stated that she had known that she had to be *self-funding*, and that if she did not make her budget (by which I understand she meant her fee target) her role might not be necessary. She said that she had worked out what she had been billing and realised that she was not achieving near to what she needed in order to justify her position, and eventually resigned because of this realisation. Ms Cabraal said Ms Douglas had been very clear with her about the budget she needed to achieve.

[69] The Authority also saw copies of Key Performance Indicators for several of the legal staff employed by the respondent. These all included the following words *Achieve billing amounting to 180% of base salary for the* [X] *year.* Some went on to say words such as:

> *This will be achieved through:*
> - *Management of 15 to 20 matters per month.*

- *Billing of 3 to 4 hours per day.*
- *Billing of 80 hours per month.*

[70] When I consider all this evidence, on balance I am satisfied that the other lawyers' billing targets were also minimum billing requirements and that there was no disparity of treatment. Whilst no lawyer has been subject to a performance review, or redundancy, according to Ms Douglas, that does not mean that they were not at risk of such action if there had been a consistent failure to achieve their targets. Therefore, whilst the letter from Mr Campbell to Ms Burke spelled out the risk, I do not believe that this was treating Ms Burke differently from other lawyers.

[71] I also take into account the context in which the letter had been written. That is, at the time, Ms Burke was on an agreed remuneration package which created little risk for the respondent but which the respondent was willing to change, despite having concerns that Ms Burke's billing trend seemed to indicate that she would struggle to achieve the 1.8 billing requirement in respect of the salary that Ms Burke was asking for. In that context, I believe that it was appropriate for the respondent to make clear that the proposed change to her remuneration (which Ms Burke was perfectly at liberty to reject) was dependent upon achieving the 1.8 requirement.

[72] I do not, therefore, accept that the statement in Mr Campbell's letter that Ms Burke objected to constituted a breach of the respondent's duty towards her. Indeed, it might be argued that a failure to explain the billing requirement would itself have been a breach of duty.

Being told that she faced performance management or possible redundancy of [her] *role if she failed to achieve the minimum billing requirements*

[73] This runs hand in hand with the imposition of the minimum billing requirement. For all the reasons examined above, I do not believe that the respondent committed any breach of duty by spelling out the possible consequences of failing to achieve the minimum billing requirements. I also do not accept that the other lawyers were not also subject to the same nature and level of risk if they did not achieve their targets.

[74] Perhaps the only issue that differentiates Ms Burke's situation with that of the other lawyers is the use of the word *quickly* in the letter to Ms Burke when he talks about her having to *quickly increase* [her] *level of billings to meet the required*

targets. This phrase gives no indication of how *quickly* she was to achieve the billing target however. It is noteworthy, though, that Ms Burke made no attempt to question what Mr Campbell meant by the phrase. Indeed, save for an email exchange about Mr Anderson's investigation, there appears to have been no correspondence between Ms Burke and the EMA regarding Mr Campbell's letter and Ms Douglas' offer of variation to Ms Burke's remuneration until Ms Burke wrote her letter of resignation.

[75] In my view, given the mutual duty of good faith owed by each party to the other and, in particular, the duty to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative[2], coupled with the fact that Ms Burke is an experienced and confident specialist employment lawyer who was familiar with the concept of fee targets and their rationale, it was incumbent upon her to make enquiries of Mr Campbell and Ms Douglas as to exactly what was meant by the phrase *quickly increase* [her] *level of billings to meet the required targets* if she harboured concerns or uncertainty about that requirement.

[76] The letters from Mr Campbell and Ms Douglas did not amount to a unilateral variation to Ms Burk's terms and conditions of employment; they contained a proposed variation, made directly as a result of repeated requests by Ms Burke and as a culmination of on-going negotiations between Ms Burke and her employer. I do not accept that stating that Ms Burke had to *quickly increase* [her] *level of billings to meet the required targets*, without Ms Burke making enquiry as to what that entailed, entitled Ms Burke to treat that statement as a repudiation of her employment agreement, and to resign.

Was there a failure to resolve the concerns Ms Burke had regarding Consultant X?

[77] In my view, the respondent made a number of genuine efforts over the period of Ms Burke's employment to investigate her concerns about Consultant X, and to deal with them. These efforts included:

a. A meeting in March 2011 in which ground rules were established to ensure that allocations of members between consultants and lawyers were fairly dealt with;

[2] S.4(1A)(b) of the Act.

b. Mr Lowe writing to Consultant X and Ms Burke on 28 April 2011 inviting their comments on how to deal with the billing of duel allocated clients;[3]

c. Ms Douglas making enquiries of Mr Cooley in March 2012 and asking him to ensure that allocations were done on a rotational basis, and that AdviceLine team members offered both a lawyer and a consultant to callers where appropriate;

d. A meeting in April 2012 with Mr Lowe and affected individuals which resulted in Mr Lowe taking action short of termination of contract against Consultant X;

e. Ms Douglas promising to talk to a new AdviceLine team member in July 2012 when Ms Burke had identified that the team member had suggested a consultant instead of a lawyer to a member;

f. A conversation in October 2012 between Ms Burke and Ms Douglas in which, amongst other things, Ms Douglas told Ms Burke that she could ask Mr Cooley to make changes to allocations. I accept that Ms Burke saw this conversation as largely unhelpful;

g. Mr Lowe meeting with Ms Burke on 10 June 2013 to discuss a number of issues, including Consultant X. I accept that Ms Burke saw this meeting as unhelpful;

h. Mr Campbell meeting with Ms Burke on 28 June 2013, as a result of which he asked Mr Lowe to instigate an investigation into Consultant X;

i. Mr Anderson being engaged to carry out that investigation, which he did in July and August 2013.

[78] In addition to these steps, I accept the evidence of Mr Cooley that he made sure that the systems that he had in place to police the allocation ground rules were robust. He said that, as time went on, and in particular in 2013, because of the degree

[3] Ms Burke alleged, via her counsel, that this letter *has been created recently in an attempt to defend the EMA's position and is not authentic.* However, for the record, I am satisfied that this serious allegation is groundless.

of tension over allocations between Ms Burke and Consultant X, rather than operating the rotational allocation system by simply remembering who had been last allocated a new member, he started to keep track of allocations on a spreadsheet.

[79] He also said that he would initially take at face value representations made to him by Consultant X when Consultant X would ask for an existing member to be reallocated to him (because, for example, the member ostensibly wanted that), but he was later asked by Mr Lowe to ensure that he had received a request from the member itself before effecting the reallocation. This change took place a fair while before the Anderson report had been issued he said. Eventually, Mr Cooley could not make any changes to allocations without Mr Lowe's permission, although it seems that this change took effect after Ms Burke had left, as a result of the Anderson report.

[80] Ms Burke relies on a number of examples of Ms Douglas and Mr Lowe not taking her concerns seriously, such as Mr Lowe not addressing Consultant X's marketing tactics, and Ms Douglas refusing to discuss historical grievances about him. Whilst these issues were no doubt frustrating for Ms Burke, I bear in mind that the respondent was attempting to balance its duties towards Ms Burke with its duties to Consultant X and other consultants, who also had to make their relationship with the respondent profitable.

[81] Furthermore, my analysis below of the actual likely adverse effect on Ms Burke of Consultant X's activities, and of the array of probable causes for the drop in her allocations and revenue, show on balance that she is mistaken in attributing her need to resign to Consultant X and to the respondent's alleged failures to curb his conduct.

[82] In summary, I do not believe that the respondent failed to take seriously Ms Burke's concerns about Consultant X's conduct, nor that it failed to take adequate steps to address the concerns. It is certainly the case that, in retrospect, more could have been done to create a more transparent system, so that there could have been less guess work and suspicion created between some of the lawyers and consultants. For example, everyone's allocations could have been made visible to everyone else. I understand that this was not done so as to preserve confidentiality and avoid creating more tensions. However, even though this decision not to share information may have added to the tensions, it was not the root cause of them, and was not aimed specifically at Ms Burke. Ms Cabraal, for example, said in evidence that she found

the lack of transparency in some aspects of the respondent's practice difficult, and a contrast to what she had been used to in a commercial law firm.

What was the likely cause of the drop in allocations and fee revenue for Ms Burke?

[83] At this point it is necessary to step back and examine what the probable root causes were for the drop in allocations to Ms Burke, and in her fee income, which she perceived were caused by Consultant X's conduct and the respondent's failures to address it. In my view, having heard all the evidence, the causes can be summarised as follows:

a. First, Ms Burke is mistaken when she says that her allocations dropped from 1,100 to 400 over the course of her employment. This is because her initial list, which showed around 1,100 members, were all duel allocations, initially shared with Mr Fursden, and later mostly shared with Consultant X when he purchased the list from Mr Fursden;

b. Second, a big clear up exercise occurred as a result of the March 2011 meeting, which would have removed from Ms Burke's list any member already billed by someone else (not only Consultant X, but Mr Quigan as well). This exercise applied to everyone's lists I understand;

c. On-going removals from her list as duel allocated members were billed by someone else. An analysis of dually allocated members billed by Consultant X showed that he billed 33 members during Ms Burke's employment, totalling $108,527. Mr Quigan would also have billed members dually allocated with her, of course. Such billing, and consequential removals of members from her list, were completely legitimate, as was acknowledged by Ms Burke;

d. A general downturn in member numbers. Between July 2010 and July 2013, there had been a 14% reduction in the number of members across the entire organisation. It is not known how much this attrition impacted on consultants' and lawyers' fees, but it is to be expected that there would have been at least a commensurate decrease in fees. Mr Lowe's evidence was that Consultant X had also complained to him about a decrease in fee earning work from members, and Mr Cooley

said that Consultant X had complained to him about a decrease in allocations to him. There is no reason to disbelieve this evidence;

e. The fact that consultants' charge out rates were lower than lawyers' charge out rates. For example, Ms Burke's hourly charge out rate was $220 when she joined, increasing to $250, whereas Consultant X's hourly charge out rate was around $185. This would very likely have frequently led members electing to use Consultant X and other consultants over Ms Burke when cost was a concern for them;

f. As the global financial crisis bit, there is likely to have been not only a decrease in the number of fee earning instructions from members, but also a increasing preference for the cheaper option of a consultant over a lawyer;

g. Consultant X's aggressive marketing tactics. Ms Burke had complained about some of the tactics adopted by Consultant X, such as advertising his office as EMA Waikato and advertising in a Christian newsletter, and Mr Lowe had considered the complaints and decided that Consultant X was not doing anything objectionable. Of course, Ms Burke was able to carry out her own marketing initiatives, and did so, although perhaps not to the same extent, or with the same rigour as Consultant X. I do not find that the respondent breached any duty towards Ms Burke in respect of what it allowed Consultant X to do in marketing himself. Such activities had an impact on Mr Quigan as well of course.

[84] It cannot be ignored that Consultant X did work and invoiced some of the members which were allocated to Ms Burke on a sole basis. It appears that there were four clients which were billed by both Ms Burke and Consultant X. Ms Burke had billed them a total of $5,990, whereas Consultant X had billed them a total of $4,350. It seems that three of these members had been billed by Ms Burke first. However, having considered the circumstances, whilst Consultant X may have acted dishonestly in persuading Mr Cooley to allow him to bill them, (and I cannot make a definitive finding that that was the case) I do not accept that the respondent acted in bad faith in allowing such billing as it was entitled to take the word of one of its consultants at face value.

[85] In addition, the data provided by the respondent indicated that another 14 members had been billed by Consultant X, but were not on his list of allocated members as at May 2012, nor had they been billed by Ms Burke. Consultant X had billed them a total of $28,207 between December 2010 and July 2013. However, as I do not have access to Consultant X's allocations prior to or after May 2012, it is conceivable that they were allocated to him at the time when he billed them. Indeed, under the IMIS system, he could not have billed them unless they were on his allocated list. Ten of the 14 members had been billed by Consultant X prior to May 2012. One cannot draw any definitive conclusions in respect of these billings therefore.

[86] One can conclude from these data that Consultant X improperly billed, as a maximum, $32,162 and, as a minimum, $3,955, depending on how many of the 14 members he billed which were not on his list in May 2012 were improperly billed by him. Even taking the highest figure, this amounts to 10% of the total fees billed by Ms Burke. The lowest figure equates to 1.25% of her total billings.

[87] Over the period of three years' employment, even the possible 10% effect is not significant. It would probably have had some impact upon Ms Burke's income, but I am unable to reach the conclusion that any losses attributable to Consultant X's conduct should be made the liability of the respondent, as I am unable to conclude that the respondent breached its contractual duties owed to Ms Burke during her employment in respect of Consultant X's conduct.

Summary

[88] In summary, I am unable to reach the conclusion that Ms Burke was unjustifiably constructively dismissed by the actions of the respondent. I do not believe that the respondent either followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or committed breaches of duty leading Ms Burke to resign.

[89] Rather, I believe that Ms Burke's principal reason for resigning was that she had been offered, and then accepted, a job with a remuneration package that suited her better, in that it was less erratic than the one she had been employed under. She was perfectly entitled to do so, but the fact that, by mid-2013, she believed that the remuneration basis she had agreed to in 2010 was no longer suitable did not flow from

any breach of duty by the respondent. She had entered into employment with the respondent being fully aware of the basis of the remuneration, and the risks it entailed. The respondent was under no contractual obligation to increase or otherwise vary Ms Burke's remuneration at any point during her employment.

[90] In addition, because Ms Burke resigned before her concerns had been investigated by Mr Anderson, without her raising any objections about the contents of Mr Campbell's letter save in the resignation letter itself, I do not accept that her resignation had been foreseeable by the respondent. I do not accept that Ms Burke's mentions of the possibility of her resigning in her email to Mr Lowe dated 28 May 2013, and in her email to Mr Campbell dated 17 June 2013, mean that her resignation was foreseeable given that they preceded Mr Campbell's letter of 2 July 2013, which effectively created a clean slate by proposing a resolution to her concerns and which she did not object to. As far as the respondent was concerned, it would reasonably have expected Ms Burke to have raised any concerns about the contents of Mr Campbell's letter, his proposed resolutions, and the new remuneration offer before it could be said to have reasonably foreseen that Ms Burke was contemplating resigning.

[91] I also reject Ms Miles' submission that paragraph 32 of *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164 is authority for arguing that the respondent had a duty of good faith to make enquiries of Ms Burke after she had tendered her letter of resignation. Ms Miles fails to cite the whole of paragraph 32 of that case in her submissions, which went to state that:

> *Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee's actual intentions rather than on what might be inferred from equivocal words and conduct.* [Emphasis added].

[92] In this case, there was no doubt. Ms Burke had unequivocally resigned in writing, several days after receiving Mr Campbell's letter, and certainly not in the heat of the moment. The respondent had no duty to check what she meant or intended under those circumstances.

Was Ms Burke unjustifiably disadvantaged in her employment?

[93] Ms Miles wrote a letter to Mr Campbell dated 2 September 2013, in which she raised personal grievances on behalf of Ms Burke. In this letter, she set out the alleged actions of the respondent which Ms Burke states amounted to unjustified disadvantage in her employment. These can be summarised as follows:

a. Being bullied and threatened by Ms Douglas and Mr Lowe;

b. Failing to investigate Ms Burke's complaints about Ms Douglas's conduct;

c. Being treated differently compared to the other lawyers in terms of targets and remuneration;

d. Refusing to give Ms Burke information relating to the remuneration and billing of other lawyers;

e. Being threatened with performance management and redundancy if Ms Burke's billings did not quickly increase;

f. The EMA failing to address the issues relating to Consultant X;

g. The only members not shared with a consultant were already Ms Burke's clients, and so her ability to obtain new work through AdviceLine was not possible;

h. Not being given a copy of the Ross Anderson report when requested;

i. Mr Lowe being in charge of the Anderson investigation when Ms Burke's complaints included his refusal to act on the evidence against Consultant X;

j. Mr Lowe demanding Ms Burke drive to Auckland for a meeting; and

k. Mr Lowe refusing to give Ms Burke a copy of his notes of the meeting on 10 June 2013;

Being bullied and threatened by Ms Douglas

[94] In the letter from Ms Miles to Mr Campbell dated 2 September 2013 in which Ms Miles raised personal grievances on behalf of Ms Burke, Ms Miles wrote the following:

> *From April 2013 until her resignation on 31 July 2013, my client was increasingly subjected to bullying and threatening behaviour from her managing solicitor Jo Douglas and the manager of Advice, David Lowe. Jo exhibited increasing animosity and anger over the salary negotiations and there had also been issues where my client felt that Jo was angry over my client's fortnightly newspaper column and the*

> *fact that my client had higher credentials than her managing solicitor. In December 2012, this behaviour resulted in my client ceasing the fortnightly column she had been writing since April 2012 as the criticism and stress that resulted were simply untenable, particularly given my client was doing this promotional work unremunerated. The correspondence evidencing these issues has been well-documented by both sides.*

[95] Regarding the article writing, I saw no objective evidence that suggested that Ms Douglas was angry about Ms Burke's article writing. In fact, I saw an email from Ms Douglas to Ms Burke dated 2 November 2011 in which she stated that Ms Burke writing a monthly article for the Waikato Times *sound*[ed] *like a good idea, as long as it is not too intensive on your time…Certainly it is a good idea for your profile in the area.* Whilst this predates the period Ms Miles refers to, it is unlikely that Ms Douglas would have changed from encouraging Ms Burke to write articles, to being unhappy and angry about it.

[96] I also did not see any objective evidence that Ms Douglas was angry about Ms Burke having *higher credentials.* Whilst Ms Douglas initially resisted Ms Burke listing her academic qualifications on her profile and business cards (as she did not want any lawyer doing so) she relented. The period of time when Ms Burke's profile was missing from the website was because work was being done on the website and Ms Burke was not the only lawyer whose profile was missing. I also did not see any evidence of any professional jealousy on the part of Ms Douglas towards Ms Burke, as alleged. In fact, Ms Douglas promoted Ms Burke to senior solicitor in August 2011 and increased her hourly charge out rate. Mr Campbell's evidence to the Authority was that, contrary to what is asserted by Ms Miles in her submissions, he believed that it was Ms Burke who felt professional jealousy towards Ms Douglas rather than the other way round. I draw no conclusions on this.

[97] Furthermore, I saw evidence that Ms Douglas tried to assist Ms Burke on several occasions, referring work to her, and advising her regarding a list of the top 65 members in the Waikato, for example. I also accept Ms Douglas' evidence that, when she told Ms Burke she did not want to hear any further mention of Consultant X, she meant any repeat of historical allegations already made.

[98] Regarding the threat that Ms Douglas is alleged to have made, this relates to her having told Ms Burke that she had to achieve her billing targets or face performance management or redundancy if she wanted to be remunerated by way of a

fixed salary. I do not believe this was intended to be a threat, but rather a reminder to Ms Burke that she had billing targets to achieve to justify the salary she sought.

[99] To summarise, I saw no evidence at all that persuades me that Ms Douglas in anyway bullied or threatened Ms Burke. Whilst I accept that Ms Burke became frustrated that she could not persuade Ms Douglas that she should be paid $100,000 a year, and that matters became tense between Ms Burke and Ms Douglas for other reasons, that was not, I believe, due to any improper actions by Ms Douglas.

Being bullied and threatened by Mr Lowe

[100] It is not clear exactly what alleged actions by Mr Lowe against Ms Burke constituted bullying and threatening behaviour. In her statement of problem Ms Burke complained that Mr Lowe had altered the allocations on the IMIS database in the favour of Consultant X, and that he did so because it financially benefited him in some way. However, there is no evidence to support this contention, which appears to be pure supposition on Ms Burke's part. I accept the evidence of Mr Cooley that Mr Lowe lacked the IT skills to make such changes. It is much more likely that changes to allocations which were made without any explanatory annotations were done by Mr Cooley before he changed his practice in the light of the tensions that were continuing in respect of allocations.

[101] Ms Burke makes wider allegations against Mr Lowe that he colluded to assist Consultant X in his attempts to poach clients from Ms Burke. This allegation appears to be supposition based on Mr Lowe's defending of Consultant X against Ms Burke's allegations from time to time. However, some of Ms Burke's objections to Consultant X's marketing tactics do not appear to have been entirely reasonable, which I suspect explains Mr Lowe's defence of Consultant X, especially during the meeting on 3 April 2012.

[102] When I review the emails that Mr Lowe sent to Ms Burke, and to Ms Douglas about Ms Burke, I do not see anything that supports the contention that Mr Lowe was bullying or threatening, or intimidating towards Ms Burke. The emails show that Mr Lowe wanted to be satisfied that a revised remuneration package for Ms Burke was sustainable. He was also keen to meet with Ms Burke to discuss her concerns, rather than to attempt to resolve them by exchanges of emails and letters.

[103] In her brief of evidence Ms Burke states that Mr Lowe continually told her how worthless she was. However, I saw no evidence of that allegation whatsoever.

[104] In summary, I do not accept that there is any cogent evidence that Mr Lowe bullied, threatened or intimidated Ms Burke.

Failing to investigate Ms Burke's complaints about Ms Douglas's conduct

[105] In her email addressed to Mr Campbell dated 17 June 2013, Ms Burke stated that she wished to discuss a number of issues with him, but then said that the two main issues were her remuneration and problems with Consultant X. She included with the email to Mr Campbell copies of an email she had sent to Mr Lowe following her meeting with him on 10 June 2013, together with two letters from Ms Douglas and a letter from her to Ms Douglas.

[106] The copy of the email to Mr Lowe included a section entitled *issues with Jo*, which referred, inter alia, to the way Ms Douglas spoke to Ms Burke, Ms Douglas being negative, being *quite aggressive* about the choice of a topic for an article, her being reluctant to participate in activities that could raise EMA's legal profile, making threats of performance management, and her not having experience in business or management.

[107] Mr Lowe replied to this email by way of a letter dated 13 June 2013, which devoted some six paragraphs to Ms Burke's criticisms of Ms Douglas. The final paragraph stated:

> *I asked you what you would like me to do regarding the relationship between you and Jo. You suggested that Jo be asked to attend a supervisory course and that she needs up-skilling for her position.*

[108] In her emailed reply to Mr Lowe on 13 June, Ms Burke stated:

> *…In particular you have painted our discussions around Jo Douglas in a far more negative light than is warranted.*

[109] Ms Burke did not say in that email that she wanted anything else to be done in respect of her concerns about Ms Douglas.

[110] In the meeting with Mr Campbell on 28 June 2013, Mr Lowe took eight pages of notes. Mr Campbell believed the notes were accurate, and given that Mr Lowe did

not participate actively in the meeting, this is likely to be the case, as he would have been able to concentrate on recording what was being said.

[111] These notes show that Mr Campbell asked Ms Burke how she characterised her relationship with Ms Douglas in July 2012, to which the notes record that she replied: *OK. Was no issue. She spoke a bit sharply*. Later the notes appear to relate that Ms Burke stated that she had been forbidden by Ms Douglas from raising what other staff members are paid. Mr Campbell replied that he was not going to comment on what other people are paid.

[112] The notes then record the following exchange:

> *KC: Anything else.*
> *Do you have a gripe with Jo?*
> *BE Don't really have one. I don't want to have one.*

[113] Towards the end of the meeting, the following exchange occurred:

> *KC: Is there anything else?*
> *BE when asked for salary, Jo said she* [sic] *would otherwise be performance managed or made redundant.*
> *Waikato Times article – Jo wanted to be closely involved & it's a small issue & its too close.*
> *Jo has a thing about my writing. I've been a writer & it's really disrespectful. So have just stopped as it is stressful to be criticized.*
> *Qualifications on business card. Jo said no quals. I think she's jealous.*
> *Lots of little battles to maintain professional profile.*
> *Did say prof jealousy, but maybe I'm a threat to her.*
> *KC: anything else?*
> *BE: no.*

[114] In his reply to Ms Burke, which she says led to her resignation, Mr Campbell indicates that he had spoken to Ms Douglas and had concluded that Ms Burke and Ms Douglas needed to find mutual agreement rather than conflict, but that Ms Burke needed to appreciate that, at times, she would be required to take direction from Ms Douglas.

[115] When I take into account that Ms Burke had asked Mr Lowe that Ms Douglas should go on a management course, (which Ms Douglas subsequently did) but did not ask for any further intervention, and further, when I take into account that Ms Burke stated to Mr Campbell that she did not *have a gripe* with Ms Douglas, but then gave some examples of her concerns, none of which she characterised as bullying, openly or impliedly, I consider that Mr Campbell's actions in speaking to Ms Douglas were sufficient investigation at that stage.

[116] Ms Burke had not stated at any time that she wanted a formal investigation to take place, nor that she was raising a formal personal grievance against Ms Douglas. In the absence of that information, it is my view that Mr Campbell's action in speaking to Ms Douglas was what a fair and reasonable employer could have done in all the circumstances. Ms Burke did not take issue with the approach Mr Campbell had taken in respect of Ms Douglas, either prior to her resignation, nor in the resignation letter itself.

[117] I conclude that, in all the circumstances, Mr Campbell carried out such investigation into Ms Burke's complaints about Ms Douglas as was reasonable, and that his proposed resolution to the issues between Ms Burke and Ms Douglas was reasonable.

Being treated differently compared to the other lawyers in terms of targets and remuneration

[118] I have already considered this allegation above, and reject that there was any unjustified different treatment of Ms Burke as compared to her colleagues. She was not treated differently in terms of targets, and whilst she was treated differently in terms of remuneration this was because she was on a completely different remuneration package, which she had accepted when she signed her employment agreement in 2010. The respondent attempted to agree with Ms Burke how to address her concerns, within the financial constraints it faced in the Waikato area.

Refusing to give her information relating to the remuneration and billing of other lawyers

[119] Ms Burke had no legal right to be informed of what other staff members were getting paid, and what they were billing and, indeed, the respondent owed a duty to its other employees to maintain their private information on a confidential basis. I do not need to examine this question any further.

Being threatened with performance management and redundancy if her billings did not quickly increase

[120] I have already examined this allegation in detail and reject it for the reasons set out above.

The EMA failing to address the issues relating to Consultant X

[121] As I have already examined above, I believe that the respondent took a number of steps to address Ms Burke's concerns, which were reasonable and sufficient in the circumstances. I therefore reject this allegation.

The only members not shared with a consultant were already her clients, and so her ability to obtain new work through AdviceLine was not possible

[122] It is not clear what Ms Burke's grievance is in this respect. I accept that work from AdviceLine was more likely to have been directed to a consultant than to Ms Burke, but believe that this was because of the significant difference in charge out rates, which the respondent had no duty to change. I have seen sufficient evidence to persuade me that the respondent took pains to ensure a fair allocation of new members to Ms Burke and, where appropriate, work arising out of calls to the AdviceLine.

Not being given a copy of the Ross Anderson report when requested

[123] Mr Anderson had initially stated that he would send a copy to Ms Burke and to the other complainant at the same time as he sent a copy to Mr Lowe. However, he did not do so, and Mr Lowe then advised Ms Burke on 28 August that it would not be ready prior to her leaving the employment of the respondent on 30 August 2013, because Mr Anderson was waiting for further information from third parties.

[124] The promise to provide Ms Burke with a copy of the draft report was made by Mr Anderson, who was not an employee of the respondent and, working in an independent capacity, was not acting as its agent either. It cannot, therefore, be said that Mr Anderson's promise to provide the draft report was binding upon the respondent. Mr Lowe's decision not to send the draft report to Ms Burke was, therefore, not a breach of any promise or agreement previously made by the respondent.

[125] In any event, it is not clear what disadvantage was caused to Ms Burke by not being sent the draft report, given that she had already tendered her resignation by the time the first draft of the report was ready, and given that she was very scathing about the findings when she did see them, suggesting that, if she had seen them before her notice had expired, it would not have changed her position in any event.

[126] In all these circumstances, I do not find that this change in position by Mr Anderson regarding the provision of the draft report caused Ms Burke a disadvantage in her employment.

Mr Lowe being in charge of the Anderson investigation when Ms Burke's complaints included his refusal to act on the evidence against Consultant X

[127] Having considered the evidence of Mr Anderson, I do not accept that Mr Lowe influenced or sought to influence the outcome of the inquiry in any way.

Mr Lowe demanding Ms Burke drive to Auckland for a meeting

[128] I simply saw no evidence to support this allegation.

Lowe refusing to give Ms Burke a copy of his notes of the meeting on 10 June 2013

[129] I do not believe that it was unreasonable for Mr Lowe to have refused to immediately hand over copies of handwritten notes that he had taken whilst conducting a meeting. It was entirely reasonable for him to have wanted to check them for accuracy and legibility first. If this issue created a disadvantage for Ms Burke, which is not clear in any event, I do not accept that it was unjustified.

Did the respondent breach its duty of good faith towards Ms Burke?

[130] In her submissions, Ms Miles asserts that the respondent breached its duty of good faith towards Ms Burke in two ways; by failing to provide information and by deceptive and misleading conduct.

Failing to provide information

[131] What Ms Burke principally complains of under this heading, apart from not being given access to the pay and billing information of other staff members, which I have already addressed, is the failure to make known to all fee earners (solicitors and consultants) the list of new members each month, and whom they were allocated to. The respondent's reason for not doing so was, effectively, that the information would have increased tensions between the fee earners. I agree with Ms Burke that this seems not to be a sufficient reason, and that transparency would have been a better route to have taken.

[132] However, I am not convinced that this failure amounted to a breach of good faith. If the reason had been to hide wrong doing by the respondent, such as a deliberate manipulation of allocations so that Ms Burke was disadvantaged, then that would have amounted to a breach of the duty of good faith. Whilst Ms Burke alleges that that was exactly what was happening, I must disagree. I simply do not find that either Mr Cooley or Mr Lowe deliberately (or even recklessly) manipulated the allocation system to disadvantage Ms Burke. Indeed, I find that, as it became more and more clear that Ms Burke's concerns were continuing, Mr Cooley took greater and greater pains to ensure that allocations were carried out fairly, and in accordance with a protocol.

[133] The refusal to show Ms Burke and her colleagues a monthly list of allocations was ill judged, but was not a breach of the duty of good faith in my view as the information was not relevant to a decision of the respondent which was likely to have an adverse effect on the continuation of Ms Burke's employment. I do not believe that having provided such lists would have had a material difference to Ms Burke's fee earning capability, and income.

[134] Ms Burke also states that Mr Lowe's refusal to provide a copy of the draft Anderson report to her constituted a breach of the duty of good faith. I have already found that this refusal did not constitute a disadvantage in Ms Burke's employment. I also do not accept that Mr Lowe refusing to let Ms Burke see a copy before the report had been finalised was a breach of good faith, as there was no obligation upon the respondent to do so, the promise having been made by Mr Anderson, who had no authority to bind the respondent in the matter.

Deceptive and misleading conduct

[135] Ms Miles states in her submissions that evidence of deceptive and misleading behaviour is *rife* throughout Ms Burke's employment, but states that the most stark and unacceptable example comes from Mr Campbell when he stated in an email to Mr Lowe and Ms Douglas, attached to which was his draft letter to Ms Burke dated 2 July 2013:

> *You will note in my letter to Erin Burke (attached) I have avoided discussing the viability or otherwise of the Hamilton business and side-stepped a few other issues which she raised, but which I think were obviously germane to this discussion.*
>
> *Let me know what you think.*

[136] Ms Miles states that, it was entirely clear to Ms Burke that these issues had been avoided and side stepped when she received the final version of the letter from Mr Campbell and had it confirmed to her that the matters she had raised would never be dealt with in good faith. Ms Miles states that she clearly had no further options.

[137] Mr Campbell's evidence was that he had not referred to the viability of the Hamilton business because he had not regarded it as germane to the discussion he had had with Ms Burke. I believe Mr Campbell was effectively saying that, despite his reservations about the viability of the Hamilton office, he was willing to authorise a new remuneration package for Ms Burke. Given that, to refer to his views about the viability of the Hamilton office would have lent little more to the letter. Mr Campbell did refer to the need for Ms Burke to quickly increase her level of billings to meet the required targets, which recognised that there had to be a sound financial and business basis to the offer. It is not clear what other issues Mr Campbell had *side stepped.*

[138] What is clear, is that Ms Burke knew what had been discussed with Mr Campbell and so, would have seen from the letter what he had dealt with and what he had not. Ms Burke did not, however, raise any questions or concerns in response to the letter. The fact that Mr Campbell chose not to address certain issues in his letter cannot amount to deceptive or misleading conduct because Ms Burke would have known what he was addressing and not addressing. I do not find that Mr Campbell held back any material information which should have been disclosed to Ms Burke.

[139] In summary, I do not accept that there has been any breach of good faith by the respondent.

Did the respondent breach the terms of the individual employment agreement between the parties?

[140] Ms Burke contends that the first offer made to her on 24 April 2013 (an annual salary of $60,000 plus a commission element of 0.6 of all invoiced fees over $9,000 per month) breached clause 4(g) of her individual employment agreement.

[141] This clause is cited above at paragraph 17. It clearly contemplates that any variation to Ms Burke's remuneration was to be no less favourable, not any offer during a negotiation about pay. I therefore do not find that the offer made in Ms

Douglas' letter dated 24 April amounted to a breach of Ms Burke's employment agreement, as it was not a *resulting variation* of her employment agreement.

Did the respondent fail to pay Ms Burke her entitlements under the Minimum Wage Act 1983?

[142] It appears that Ms Burke's argument that she was systematically paid in breach of the Minimum Wage Act is based upon an hourly wage rate of $11.53 that was referred to in one or more of her pay slips. However, Ms Burke takes no account of the commission payments she received throughout her employment.

[143] In her submissions, Ms Miles argues that commission should be ignored on the analogy that a restaurant owner could pay his or her staff $5 and rely on tips to ensure the staff received the minimum wage, and that this could not have been parliament's intention.

[144] However, I concur with the submissions of Mr Upton on this point. First, tips from customers would not constitute payment from the employees' employer, as is required by s.6 of the Minimum Wage Act. Second, the recent Employment Court case of *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 examined what can constitute wages for the purposes of the Minimum Wage Act. His Honour Chief Judge Colgan held, at [69] and [70], the following:

> *[69] Turning to dictionary assistance, Black's Law Dictionary defines "salary" as: "an agreed compensation for services – esp. professional or semi-professional services – usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis".*[4] *Black's defines "wages" as "[p]ayment for labor or services, usu. based on time worked or quantity produced; specif., compensation of an employee based on time worked or output of production" and as including "every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer."*[5]
>
> *[70] Taking account of all of the foregoing interpretive assistance, I find for the plaintiffs and against the defendants and the Secretary of Education on this issue. The words "wages" and "salary" are different descriptions of essentially the same thing, that is remuneration paid to employees for work performed. That a "salary" can also describe the remuneration of others who are not employees (for example office holders) does not mean that an employee's remuneration must be categorised exclusively as wages alone, or specifically as either wages or salary.*

[4] Bryan A. Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009) at 1454.
[5] At 1716.

[145] I agree with Mr Upton that this judgement enables the Authority to conclude that, in considering whether Ms Burke received the statutory minimum wage during her employment, it must take into account commissions which she earned. To decide otherwise would mean that many thousands of employees throughout New Zealand who receive significant commission payments as part of their employment arrangements would be entitled, in addition, to base salary payments equivalent to the prevailing minimum wage rate even when the commission payments bring their hourly remuneration well above the prevailing minimum rate. That cannot have been parliament's intention.

[146] The respondent does concede that there were three occasions during Ms Burke's employment when she was remunerated at a rate lower than the prevailing minimum rate. These were in August 2010, September 2010 and February 2012. Having checked the payroll records for Ms Burke, I accept that these are the only occasions, and I accept (with a very small adjustment) the respondent's calculations of the underpayments. Accordingly, Ms Burke is owed the total gross sum of $348.30.

Did Ms Burke suffer an unjustified disadvantage in her employment arising out of breaches of the Health and Safety at Work Act 1992?

[147] I have found that the respondent did not unjustifiably disadvantage Ms Burke and did not breach its duty of good faith towards her. In addition, there was no corroborated or objective evidence that Ms Burke suffered ill health or other injury as a result of any acts or omissions of the respondent. I must therefore answer this question in the negative.

Penalties

[148] I do not find that the respondent has breached its statutory duty of good faith towards Ms Burke, nor that it has breached any term (express or implied) of the individual employment agreement between her and the respondent. Therefore, the issue of the imposition of a penalty does not arise.

Order

[149] I order the respondent to pay to Ms Burke the gross sum of $348.30.

Costs

[150] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. If they are unable to reach agreement within 14 days of the date of this determination, the respondent may serve and lodge a memorandum of counsel within a further 14 days. This memorandum should provide a sufficient breakdown of the costs incurred by the respondent to enable the Authority to consider, inter alia, that any contribution sought from Ms Burke is reasonable. Ms Burke shall have a further 14 days within which to serve and lodge a memorandum of counsel in reply.

David Appleton
Member of the Employment Relations Authority