

- A change in policy in relation to his personal laptop for work;
- No invitation to clients' race night on 3 October 2008;
- No invitation extended to Mr Christey's clients to the Cup day 60th anniversary of Searells;
- Having old clients deleted from the computer system on 5 October 2008;
- Having his remote access to his computer stopped without prior notice on 10 October 2008;
- The shutting down and taking away of his work flow by Mr Sissons.

[4] Mr Christey seeks six months' lost wages, less six weeks' notice paid to him, in the sum of \$31,538.46, compensation for hurt and humiliation in the sum of \$25,000, costs of medical, psychological and psychiatric consultations, and costs. There is no longer a claim by Mr Christey in terms of bonuses as that matter has been resolved.

[5] Searells accept, and have done from an early stage, that Mr Christey was dismissed in a procedurally unjustified manner. Searells say that the amounts claimed for wages and compensation are unreasonable and there are issues of mitigation and contribution that need to be taken into account.

[6] Searells say in terms of the substance for the dismissal that Ms Wedlock received complaints from staff about Mr Christey and that Mr Sissons and another staff member had threatened to leave if he stayed on. Searells decided that it was necessary to attempt to reach an agreement with Mr Christey to terminate his employment.

[7] Searells counterclaim against Mr Christey on the basis that he breached his employment agreement and caused them damage as a result of his billing methodology and standard of work for which they say he is liable under several heads. The office manager at Searells, Nicky Kent, gave evidence about the amounts that are claimed under each head:

- Clients leaving the practice as a result of standard of work and billing methodology of Mr Christey in the sum of \$16,285;
- Bad debts in the sum of \$32,001.36;
- Credit notes that were required to be issued in the sum of \$7,588.11;
- Write-offs in the sum of \$10,860.47.

[8] Searells further seek a penalty against Mr Christey under s.4A of the Employment Relations Act 2000 for what they say was a failure by Mr Christey to be active and constructive and communicative so that an orderly exit from the firm could be secured.

[9] In his reply to the counterclaim, Mr Christey denies that there was any defect in the standard of work or his billing methodology and denies he overcharged clients or charged for services not required. Mr Christey denies that he is responsible for the loss of clients. He does not accept that Searells is entitled to a penalty.

The issues

[10] The issues for determination in circumstances where Searells accept that Mr Christey was dismissed in a procedurally unfair way although do not accept that there were any unjustified actions on their part to cause him disadvantage are as follows:

- Were there unjustified actions on the part of Searells that disadvantaged Mr Christey?
- What was the reason or reasons for the termination of Mr Christey's employment and was it substantively justified?
- What amount is to be awarded to Mr Christey for lost wages under s.123(1)(b) of the Employment Relations Act 2000 for lost wages and are there issues of mitigation?
- What amount is to be awarded to Mr Christey for hurt and humiliation under s.123(1)(c)(i) of the Employment Relations Act 2000?

- Are there issues of contribution that should be taken into account in making orders as to remedies?
- Should Mr Christey be reimbursed for medical costs incurred in terms of consultations with his general practitioner, psychologist and psychiatrist?

[11] In terms of the counterclaim, the following issues arise:

- Did Mr Christey breach his employment agreement with Searells?
- If he did, did the breach or breaches cause loss to Searells?
- Was that loss reasonably foreseeable to the parties at the time they entered into the employment agreement as likely to result from the breach?

The background against which the issues are to be assessed

The interview process

[12] Mr Christey had an extended interview process before he was appointed to the position of practice manager at Searells and commenced his employment on 5 October 2007. Ms Wedlock wanted to be sure that Mr Christey understood the culture and systems at Searells and wanted to be comfortable that he could work in that culture. Ms Wedlock gave evidence that there was a difference between Searells and the firm of accountants that Mr Christey had been working for because Searells operate a flat management structure rather than a hierarchical structure. The flat management structure is possible because Searells have only ever employed senior accountants who are either chartered accountants or had acquired their knowledge through years of experience.

[13] Ms Wedlock said that she was not happy with Mr Christey having a title because she considered the responsibility for managing the practice rested with her but that she was so keen to get someone on board that she relented about this matter. The reason for this was that Ms Wedlock wanted to start a family and was looking for someone to come into the practice and take some pressure from her in terms of her role, particularly in generating additional fees for the practice.

[14] Mr Christey said in his evidence that he understood that he was expected to work with the team in the Searells environment and to generate fee income by attracting clients to Searells.

The employment agreement

[15] Schedule 2 of Mr Christey's employment agreement contains a position description. That position description makes it clear that Mr Christey was responsible to the director of Searells, Ms Wedlock and was required to have functional relationships with practice staff, the receptionist and accountants. The primary objective for Mr Christey as set out in schedule 2 was to facilitate the growth of the practice through bringing in new clients, assist in the management of the practice and to provide a responsive and efficient service for clients while being available to other team members.

Raising of any performance/compatibility issues before 14 October 2008

[16] Mr Christey was not the subject of any oral or written warnings during his employment. Mr Christey had had two performance appraisals from which he did not conclude that there were any concerns with his performance. The last performance appraisal was completed in May 2008 when he filled in a written performance appraisal questionnaire in which he rated his performance as steady, specifically noting that his ability to maintain client relationships through the period had been a significant achievement with the help of *your team*.

[17] Ms Wedlock met with Mr Christey to discuss the May performance appraisal questionnaire. In her written evidence, Ms Wedlock said that in hindsight she believed that the applicant seemed to filter out the negative comments and, as a result, assumed that everything was going well. Ms Wedlock said that her management style was to remain upbeat and encouraging and that Mr Christey may well have focused on that instead of any comments or feedback that were not as positive. Ms Wedlock was surprised that Mr Christey had set out a page and a half reporting his views on other members of the Searells team but there did not appear to have been any discussion as to why Mr Christey had prepared this report. Ms Wedlock thought some of the comments about other employees were strange, given the complaints that she had received from those employees about Mr Christey. Mr Christey, in his

evidence, described Ms Wedlock's feedback at the performance meeting as supportive and praiseworthy.

[18] Ms Wedlock referred in her evidence to concerns from early in the relationship about Mr Christey upsetting staff in terms of changing systems and his ways of working. The evidence from Ms Wedlock and Mr Christey support that any concerns about performance and staff issues prior to a meeting on 9 October 2008, to which I shall come, were expressed in a general way and were not specific in terms of any particular staff members. Mr Christey was unaware that his employment was at risk because of compatibility or performance issues until the meeting on 14 October 2008. I am satisfied that he was not aware of any specific complaints that staff raised with Ms Wedlock about him.

[19] Ms Wedlock went on maternity leave in June 2008 having discussed with Mr Sissons that he would look after the practice while she was on maternity leave. Ms Wedlock said that there was never any consideration to giving that responsibility to Mr Christey because she said at that stage it was clear that he did not have the respect of anyone else in the office and people would be unhappy if he was left in charge. I am not satisfied that Mr Christey was aware that that was one of the reasons he was not left in charge of the office. Ms Wedlock did say also that Mr Christey would not have had the necessary client or systems knowledge to be in charge of the office as that takes time to pick up and Mr Christey had not been employed for a long period at that time.

[20] After Ms Wedlock commenced her maternity leave, Mr Sissons said that he became concerned about Mr Christey's fee income and that his methodology in terms of recruiting clients was not effective and was time wasting.

[21] Mr Sissons said that when Mr Christey was employed there was a possibility of a partnership because the practice needed a new person but that he knew that Mr Christey was not going to be that person. He said in evidence that Mr Christey was not the *right fit* for Searells and that Mr Christey was not getting in with the team and the team was not interested in dealing with him and that Mr Christey's productivity had declined significantly. I am not satisfied that Mr Sissons raised those matters with Mr Christey as specific performance issues which required addressing although I accept that in a general way there were issues discussed about the type of clients that Mr Christey should bring into the firm in terms of fee generation. I find

that it is likely these conversations took place closer to the end of Mr Christey's employment.

[22] The Fourth Schedule of Mr Christey's employment agreement provided a clearly defined process to deal with breaches of discipline and poor work performance. In the case of poor work performance, the employer was required to give the employee two written warnings prior to termination for that reason.

[23] Mr Christey said that his work flow was slowed down somewhat by the removal of the personal assistant he shared with another accountant without consultation. Mr Sissons said that it was not necessary for Mr Christey to have a personal assistant in terms of his work generation and secretarial support was still available to him.

[24] Mr Sissons said that by October 2008 he was having extreme difficulty managing Mr Christey and was concerned that he was shortly to be absent overseas from the office for approximately 2-3 weeks and that in his absence Mr Christey could have become a problem within the office.

[25] On 3 October 2008, Mr Sissons attended a race night with clients and Ms Wedlock was present. Mr Christey was not present. Mr Sissons expressed concern to Ms Wedlock about Mr Christey and made it clear that he felt Mr Christey had to go from the firm. I accept Ms Wedlock's evidence that Mr Sissons told her that it was either Mr Sissons who would leave the firm or Mr Christey. Mr Sissons accepted, in evidence, that he put Ms Wedlock in a difficult position but had strong feelings about Mr Christey.

[26] Mr Christey said that from in or about early October 2008, he became aware of *Chinese whispers* going around the office about his performance as a practice manager and how long it took him to do fees. He gave evidence that he was berated on one occasion by Mr Sissons in front of the team which he felt was unfair. Mr Sissons denied ever berating Mr Christey. I accept Mr Christey's evidence that it is more likely than not that Mr Sissons raised issues with him in such a way that made him feel he was being berated although it is likely that Mr Sissons was unaware that he was doing this and/or that it caused Mr Christey discomfort.

[27] I do not consider, as stated by Mr Sissons' in his written evidence, that Mr Christey was being paranoid at this time about what was happening in the office in

terms of exchanges or whispers or just a general feeling that things were not right. I accept Mr Christey's evidence that there was some basis to his belief that this was occurring. The evidence is clear that Mr Sissons had reached a very firm negative view about Mr Christey and it is also very likely that the other accountants from the team complained to Mr Sissons about Mr Christey at this time.

[28] Mr Sissons denied having an exchange with another accountant in or about October in which he looked across to Mr Christey and said *I think I've got his attention now*. Whilst I accept Mr Sissons' evidence if indeed such a statement was made that he was not talking specifically about Mr Christey, I find it understandable, given the general atmosphere, that Mr Christey believed he was.

[29] Sensibly, Mr Christey asked for a meeting with Mr Sissons to discuss his concerns in early October. Mr Sissons could not recall the meeting but I accept Mr Christey's evidence that he did meet and traverse with Mr Sissons the concerns, including the comment made in the doorway. Mr Christey said that Mr Sissons responded along the lines that *we talk about anyone and everyone here but it doesn't mean we're talking about you*. Mr Christey gave evidence that he left Mr Sissons' office believing that there was nothing further wrong.

[30] On 9 October 2008, Mr Christey arranged a meeting with Ms Wedlock. There is a difference in the evidence about what was discussed during the meeting. Mr Christey said that he had arranged the meeting to discuss the administration team resourcing and that as a parting shot at the end of the meeting Ms Wedlock said to Mr Christey *I have had some complaints from the team and you were supposed to bring the team with you*.

[31] Ms Wedlock, on the other hand, said that her comments about Mr Christey and his relationship with others in the team dominated the discussion and formed the basis of virtually the whole meeting. Ms Wedlock said that unlike her earlier discussions with Mr Christey, this discussion and the concerns raised seemed to register because Mr Christey sent a firm-wide email apologising for his behaviour.

[32] The email which was sent to all the members of the team was headed up *Apology to team*. Mr Christey said amongst other matters in the email that he had been given a reality check on how he had been performing in his current position at Searells. He said that his active pursuit to try and bring in new business and promote

the name of Searells had come at a cost because it had clouded his decision-making performance in assisting and supporting the team. Mr Christey stated in the email that he had wrongly started to interfere with the great systems already in place at Searells and had undermined the team's trust and expertise and sincerely apologised for that. He finished off by saying he had some rebuilding of trust and friendship to undertake from this coming Monday onwards.

[33] I find that it is clear from the email that Ms Wedlock's concerns did register with Mr Christey and, having given the matter some consideration, he sent an open and transparent email to the team apologising. The fact that the email was sent to the whole team supports that the concerns raised with Mr Christey were general and not in relation to any particular staff member. The email was dated 11 October 2008 which was a Saturday.

[34] Ms Wedlock said that the email from Mr Christey was too little and too late and generally insufficient. She said she decided to meet with Mr Christey along with Mr Sissons on 14 October 2008.

14 October 2008 meeting

[35] There is no dispute that during this meeting Mr Christey was dismissed from his employment.

[36] Mr Christey was not advised to bring a representative to the meeting which was arranged by email. He was not aware of the nature of the issues to be discussed. The meeting took place in the board room at Searells and it is common ground that the meeting was opened by Ms Wedlock raising issues about Mr Christey's performance and staff relationships. Mr Christey said that no specifics were given in this regard and I accept his evidence on that matter, although Mr Christey, in defending his position, pointed out that the level of his fees and debt collection was similar to others.

[37] Mr Christey put forward that the three step performance process in his employment agreement should be followed by Ms Wedlock. This was not acceptable to Ms Wedlock and Mr Sissons. I accept Mr Christey's evidence because he has a clear recollection of this that Mr Sissons said words to the effect, *Phillip this is not going to happen.*

[38] There was some evidence from Ms Wedlock and Mr Sissons to the effect that Mr Christey did not appear surprised and mentioned that he had discussed with his wife what they would do if he lost his job. Mr Christey did not accept that he presented in that manner, or indeed that he was not surprised. He said that the discussion took place out of the blue and he did not expect the meeting to be about the termination of his employment. I accept his evidence about that.

[39] Mr Christey asked whether there was another role that he could undertake in the firm but that option was not acceptable to Mr Sissons or Ms Wedlock because either there were no other positions and/or the staff relationship difficulties would still have existed.

[40] Mr Christey said that he felt forced to offer his resignation. I find the evidence supports that it is likely that Ms Wedlock may have indicated at that meeting or at some stage that day that notice would be paid through to 24 December 2008. Ms Wedlock offered to do a reference for Mr Christey and I find that it is likely that there was some discussion about Mr Christey making a list of clients he wished to take with him.

[41] There was a dispute in the evidence about whether Mr Sissons and Mr Christey went straight from that meeting to make an announcement to staff that Mr Christey was leaving, or whether they had lunch first. Regardless, there is no dispute that an announcement was made to the team by Mr Sissons that Mr Christey was leaving. Mr Sisson advised staff he was not sure whether Mr Christey would work from home or join another firm. Mr Christey may well have contributed to the announcement, although the evidence from other employees from Searells supports that Mr Christey appeared somewhat upset and subdued at the time.

[42] Mr Christey and Mr Sissons did have lunch that day. Ms Wedlock approached Mr Christey when he was at his desk and advised that he would be paid out his performance bonuses and he was also given a client list by Mr Sissons and told to highlight the clients he wanted. Mr Sissons recommended that Mr Christey hand in his security card which he did and Mr Christey then left the offices.

16 October 2008

[43] Mr Christey returned to the office on 16 October 2008 at 7.30am as arranged with Mr Sissons. Mr Christey said that he was quite shocked by some of the

statements Mr Sissons made at that meeting and made handwritten notes in front of Mr Sissons which he provided as part of the bundle of documents. Mr Christey gave evidence that he later typed up the notes within about two days of the meeting to record in a fuller way what he recalled being said. I accept the rough notes and fuller typed notes taken at that time and close to the meeting are a fairly accurate reflection of what was discussed. The notes record there was a discussion about Mr Christey wanting something in writing from the 14 October meeting. I think it likely that Mr Sissons indicated that it was a termination and a parting of the ways. Mr Sissons wanted Mr Christey to provide details of the clients he wanted to take with him but Mr Christey said that he had not had time to do that and needed more time. There was also reference to Mr Sissons stating his personal view that Mr Christey had in fact never been the practice manager. Mr Sissons agreed that he would get a solicitor to prepare a draft document on the termination proposal. Mr Sissons and Mr Christey agreed that there would be another meeting held on Monday, 20 October 2008 at 10am so that the agreement could be prepared.

17 October 2008

[44] On 17 October 2008, Mr Christey sent an email to the team at Searells including Ms Wedlock. Mr Christey headed up the subject of the email *P L Christey Abandonment of Employment – clause 14.1 (urgent)*. The email provided:

Hi Team

Further to my meeting with Richard Sissons yesterday at 7-30am, it has now been advised that I can not attend client meetings without prior permission, however I am available to work with any team member to answer client queries which you are working on. Nicky Kent has my personal e-mail address written down for you to contact me and I am clearing all home phone messages on my cell phone on a regular basis. I will be in today to clear any messages at work and do normal duties if there is any work available.

[45] Mr Sissons said in his evidence that the effect of the email was to undermine all his attempts to make Mr Christey's departure seamless and orderly. He said that it caused difficulty for the team which was concerned that Mr Christey may be returning to work. Mr Sissons was in a client meeting when Mr Christey turned up on 17 October and had to leave the meeting in order to send Mr Christey back home.

[46] Mr Christey said that on returning home he retired to bed because he was distressed and upset. He said that around lunchtime he observed a lady knocking on his door and as he was getting out of bed to see what she required he saw her leave a letter in the mailbox as she went down the driveway.

[47] The letter was written by Ms Wedlock's husband, Kerry Williams, who is a solicitor and provided:

NOTICE OF TERMINATION

This letter records the meeting on 14th October 2008 where you were advised your employment with Searell & Co Limited will terminate as at that date.

As negotiated you are not required to attend the office during this 6 week notice period with the exception of on an as required basis as advised to you by Searells.

Your salary will continue to be paid to you during this notice period.

You are reminded of your restraint provisions in your employment contract.

Do not contact any of the Searells clients.

[48] Mr Christey returned to Searells offices on 20 October 2008 where an agreement was available in draft form. Mr Christey simply picked up the agreement and took it away with him and there was no further discussion.

[49] Mr Christey had by that stage obtained some legal advice and by letter dated 20 October 2008 Mr James raised a personal grievance that Mr Christey had been unjustifiably dismissed from 14 October 2008 and had been disadvantaged by unjustified actions of Searells. No agreement was entered into between Mr Christey and Searells.

Were there unjustified actions on the part of Searells that disadvantaged Mr Christey?

[50] Section 103(1)(b) of the Employment Relations Act 2000 provides that there can be a personal grievance claim where the employee's employment or one or more conditions of the employee's employment was affected to the employee's disadvantage by some unjustifiable action by the employer. An unjustified action is required on the part of the employer that affects an employee's employment or conditions thereof to that employee's disadvantage.

[51] The test in s.103A of the Employment Relations Act 2000 requires, in determining whether or not an action was justifiable, that it be determined on an objective basis considering whether the action was what a fair and reasonable employer would have done in all the circumstances at the time the action occurred.

Removal of laptop

[52] Another employee of Searells, Simone, was in charge of IT within the organisation. Simone gave evidence that Mr Christey was advised not to bring his personal laptop because it was a security risk. I am not satisfied that there was a change of policy on this issue, rather than an increasing awareness of the security issue and a need to make a change in this regard.

[53] I am not satisfied that the actions in advising Mr Christey he could no longer bring in his personal laptop but still providing him with access to another laptop could be seen to be unjustified or that Mr Christey given his access to another laptop was disadvantaged.

No invitation to race/cup nights

[54] Mr Christey saw this as a slight and was very unhappy that neither he nor his clients were invited. Searells' justification was that none of Mr Christey's clients were invited so therefore he was not invited and that there was a limit to the numbers who could attend. Mr Christey had been invited to a previous social event of this nature.

[55] I think it is likely that, given the proximity of the race night on 3 October 2008 to the termination date and the discussion between Mr Sissons and Ms Wedlock, that the decision not to invite him was a deliberate one based on reasons additional to the fact that his clients did not attend.

[56] I am not satisfied, however, that it was a condition of Mr Christey's employment that he always be invited to these events and the evidence was that other accountants also did not attend. I do accept that the numbers invited were limited and some regard had to be had in terms of who attended in that regard.

[57] There is no evidence made out of particular disadvantage and I do not find that this claim is made out.

Stopping remote access

[58] I am not satisfied that on the date Mr Christey refers to, 10 October 2008, there was a deliberate attempt to stop Mr Christey's remote access. The evidence from Simone was that there was the possibility of a server crash. The claim in this regard is not made out.

Deleting old clients from the computer system

[59] I am not satisfied that Mr Christey has established that the deletion was unjustified or done for purposes to make his life difficult or that it caused him disadvantage.

Shutting down his work flow

[60] I am not satisfied that Searells deliberately shut down Mr Christey's work flow as Mr James submits. The workload may have slowed for a variety of reasons but I am not satisfied the evidence is such to enable a conclusion that there were unjustified actions in this regard.

[61] I do not find that the actions Mr Christey complained of are unjustified and/or are such that he has made out a claim that he has suffered disadvantage. The claim for unjustified actions causing disadvantage are dismissed.

What was the reason or reasons for the termination of Mr Christey's employment

[62] I find that the reasons for Mr Christey's dismissal were primarily that Mr Christey was perceived as incompatible with the rest of the team, had upset them and that Mr Sissons had given Ms Wedlock an ultimatum that Mr Christey leave or that Mr Sissons would leave. There was also the possibility of another staff member leaving. To an extent, this overlaps given Mr Christey's position as practice manager with performance issues and there was also some general reference to other performance issues at the meeting on 14 October 2008.

Substance of the dismissal

[63] It was accepted that the dismissal was undertaken in a procedurally unfair way. This is a situation where it is difficult, given the justification put forward is incompatibility and poor performance, to separate the substance from the procedure.

[64] I accept Mr Smyth's submission that a dismissal can be justified on the grounds of incompatibility although such cases are rare. In this case, I am not satisfied that Mr Christey was warned of the incompatibility issues in a way that enabled him to address them. Any discussion about difficulties in that regard was of a very general nature and I accept that Mr Christey was unaware of the effect he was having on the team until at least 9 October 2008. Support for that conclusion is found in the May performance appraisal questionnaire which had an assessment of staff attached to it by Mr Christey but did not indicate any staff relationship difficulties and in the email which was sent after the 9 October meeting.

[65] The evidence from some of the staff that I heard who are still at Searells was to the effect they had made their complaints and concerns about Mr Christey well known to Ms Wedlock. I am not satisfied that Ms Wedlock in turn made those concerns, so far as they related to any particular staff member, clear to Mr Christey. A fair and reasonable employer would not have simply assumed that Mr Christey knew the effect he was having on staff at Searells. This is particularly in circumstances where Ms Wedlock had formed a view, because she continued to receive complaints from staff, that Mr Christey was not taking on board the issues she raised with him in a general way. A fair and reasonable employer would have realised that matters needed to be more clearly spelt out and would have done so in writing if necessary. A fair and reasonable employer would have considered whether there were other ways to deal with the staff concerns such as mediation.

[66] I have not found that any performance issues were raised with Mr Christey in accordance with the process set out in his employment agreement. A fair and reasonable employer would have raised the performance issues very clearly and warned Mr Christey under that process of the consequences of not improving his performance along the clear lines set out in the employment agreement.

[67] I find that the procedural defects which are conceded are linked to the substantive failures in terms of both the incompatibility and the performance reasons

for this dismissal. In terms of the incompatibility issue which, in my view, is the primary view for the termination of Mr Christey's employment, he was not warned of these issues at an early stage to enable, or at least see, if they could be addressed. Searells was only able to come to a justifiable view that the relationship between Mr Christey and the team was irreparable and that that was the fault of Mr Christey if there had previously been that fair process.

[68] I find that Mr Christey was unjustifiably dismissed from his employment on 14 October 2008 because a fair and reasonable employer would not have dismissed Mr Christey in all the circumstances (s.103A of the Employment Relations Act 2000).

[69] Mr Christey has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

Lost wages

[70] Mr Christey claims lost wages for a period of six months from the date of dismissal less paid notice of six weeks.

[71] Searells put forward a statement of evidence from a recruitment consultant, Nikki Taylor, who is a director of IGG Recruitment. Mr James agreed, as did the Authority, that given Ms Taylor was at the time of the investigation meeting resident in Australia, she could be connected to the investigation meeting by telephone.

[72] Part of the IGG practice is the recruitment of accountants for independent accountancy practices. Ms Taylor said in her statement, and reinforced that by telephone, that it was difficult from September 2008 to seek a New Zealand qualified accountant with 2-10 years' experience and she says that had Mr Christey met with the agency it would have had several offers of employment for him.

[73] In contrast to Ms Taylor's statement, Mr Christey provided a statement from an accountant who said that he was looking for roles from October to December 2008 in Christchurch and was listed with a number of recruitment agencies. He says only four roles were provided to him for consideration during this period.

[74] I am satisfied that Mr Christey did attempt to mitigate his loss after the termination of his employment by registering with a recruitment agency and applying

for roles direct from newspapers himself and attending interviews between October 2008 and when he made his decision to start his own business on 21 January 2009.

[75] I do not accept Mr Smyth's submission that the failure by Mr Christey to secure one role with a firm of accountants could be seen as Mr Christey's fault because of the way he presented at interview. This is because, for reasons I shall canvass later, Mr Christey was not as well as he could have been at that stage. There was no evidence that Mr Christey had been offered a job and had refused it.

[76] I do accept that Mr Christey could have enlisted the help of more than one recruitment agency, but positions are often placed with multiple agencies and I am not satisfied that that, on its own, is sufficient to say that Mr Christey's steps, in terms of mitigation, were inadequate.

[77] Mr Smyth also put forward in submissions that Mr Christey had contemplated setting up business earlier than 21 January and I accept that that is quite possible and indeed at Mr Sissons' meeting with staff in explaining what Mr Christey was going to do after he left Searells put that as an option. Before 21 January 2009, however, Mr Christey did attend interviews and applied for roles.

[78] I do not find, as submitted by Mr Smyth, that the failure to reach settlement can be a factor relied on in terms of a failure to mitigate. In that regard, I note that Searells, although initially prepared to provide a reference, were not prepared to provide one until after the settlement was finalised.

[79] The claim for lost wages extends beyond 21 January 2009 when Mr Christey made a decision to set up his own business. Mr James correctly submits that s.128(3) of the Employment Relations Act 2000 gives the Authority a discretion to order an employer pay an employee a sum greater than three months' ordinary time remuneration.

[80] Mr Smyth submits that the Authority should not, as a matter of law, award a sum beyond 21 January 2009 when Mr Christey chose to set up on his own and not continue to apply for accountancy roles. A decision by an employee to set up business on one's own account has not always been held to have broken the chain of causation in terms of mitigation of loss – *Betta Foods (NZ) Ltd v. Briggs* [1997] ERNZ 456.

[81] In exercising my discretion as to whether to order an amount greater than three months' ordinary time remuneration, I have considered the following factors. The evidence supports that Mr Christey had not fully recovered in terms of his health problems which I find occurred as a result of and following his dismissal until about mid-February. The psychiatric report, which I shall refer to in more detail under the claim for compensation, provided that Mr Christey, as at 31 January 2009, had *reconstituted considerably*. At that time, the report of Dr Brian Deavoll, consultant psychiatrist, set out that Mr Christey was sleeping soundly and able to concentrate considerably better and was beginning to take on some long term clients' work again with the intention of forming his own accountancy company.

[82] Notwithstanding that there were these difficulties, I am quite satisfied that Mr Christey adequately mitigated his loss in all the circumstances up until 21 January 2009 and the only issue for me is whether the decision on 21 January 2009 to set up in his own business broke the chain of causation in terms of mitigating his loss.

[83] In exercising my discretion, I am of the view that it is appropriate that I take Mr Christey's health into account and that, even though he had made the decision on 21 January 2009 to start up his own business, the evidence does not support that he would have been in a position to get the business up and running as quickly as somebody without his health impairment would have been.

[84] On the other hand, this is not a situation where I am satisfied that there were no other accountancy positions for which Mr Christey could have been employed had he continued his job search after 21 January 2009. In that way, starting up his own business was the preferred course of action for Mr Christey rather than, in reality, the only course of action available.

[85] In exercising my discretion, I have taken the health matters into consideration to find that the chain of causation was not broken as at 21 January 2009 to the extent that I should not make an award beyond that time but I am not satisfied that Searells should bear the entire consequence of the decision by Mr Christey to start up his own business and not continue to seek employment.

[86] I am of the view that a fair award in all the circumstances would be to award lost wages from 14 October 2008 to 14 February 2009 which is a period of four months (17 weeks). I am aware that that goes beyond the time that Mr Christey

decided to start his own business, but as I have explained, that is because regardless of making that decision or not, it is likely his health issues would have impacted on him at that stage and he would not have been fully fit until that date.

[87] I expect the parties to liaise with respect to a final figure. To assist in that process on the basis that Mr Christey was paid a base salary of \$82,000 gross that is, divided by 52, \$1,576.92 gross weekly pay. Four months' lost income is the sum of \$1,576.92 x 17 weeks which is \$26,807.70. From this sum, the six week payment already received is required to be deducted, leaving a balance of \$17,346.11 gross. From this balance, any income earned by Mr Christey needs to be deducted, including the 25 hours of work that Mr Christey performed before Christmas at \$25 per hour and he will need to provide a figure that he received for work done for a relative before Christmas.

[88] I will reserve leave for the parties to return to the Authority if they have any difficulty in calculating the lost wages due and owing.

What amount is to be awarded to Mr Christey for hurt and humiliation under s.123(1)(c)(i) of the Employment Relations Act 2000?

[89] Mr Christey claims the sum of \$25,000 compensation. I heard extensive evidence with respect to this claim. Mr Christey's wife, Anne MacLeod, gave evidence in support of Mr Christey and what she observed after his dismissal. There were statements provided by a clinical psychologist, Alan Prosser, who saw Mr Christey on 1 December 2008 and then for four follow up sessions through to 9 March 2009 for matters that he said arose consequent to his dismissal. There was a report provided by Dr Brian Deavoll, consultant psychiatrist, with whom Mr Christey had one consultation on 26 January 2009.

[90] There was also evidence from Mr Christey about how he felt at the time of the dismissal and following the dismissal and indeed for the period leading up to the dismissal. Mr Christey said that he was hurt and humiliated that he had not been given the opportunity to go through the process set out in the employment agreement and that his dismissal impacted on his professional standing and reputation. He said he felt he had done a good job and brought fees into the practice and that he saw himself carrying on in his role at Searells having left a firm he had worked for for many years to take up the position. Mr Christey said that the outcome on 14 October had been predetermined and he had no opportunity to change that.

[91] Ms MacLeod, who is a trained social worker, described her husband as a kind and generous person who was honest, trustworthy and trusting and willing to be held accountable for his actions. She said in her written evidence that on 14 October 2008 Mr Christey asked her to come home immediately and when she arrived he appeared stressful and tearful. He told her he was not entirely sure why he had been forced to resign from his employment.

[92] Ms MacLeod said that Mr Christey had had disrupted sleep up to December 2008 and had difficulty carrying out simple tasks without being prompted. Ms MacLeod said Mr Christey became distrustful of others which was not like him and that by 17 November 2008 she was very worried about him because he was showing signs of becoming delusional and believed that neighbours and others were conspiring against him. He made statements to her that he had received warnings from the Police and neighbours that he not proceed with his case. Ms MacLeod said she encouraged him to see his general practitioner on 20 November 2008 and he was prescribed at that consultation with Risperidone to treat and attempt to control his paranoid interpretations. Ms MacLeod said that Mr Christey had never previously demonstrated any mental health issues.

[93] On 31 January 2009, Mr Christey saw Dr Deavoll. By agreement, Dr Deavoll was connected to the investigation meeting by way of telephone conference so that he could answer any questions in terms of his report. Dr Deavoll said that the symptoms Mr Christey had would be diagnosed in DSM-IV criteria as an adjustment disorder with psychotic features. In his opinion, this was a psychological disturbance seen as a direct result of an identifiable stressor sufficient to significantly affect functioning but not reaching criteria for a depressive anxiety or full psychotic condition. The identifiable stressor was seen as the dismissal.

[94] Dr Deavoll did note in his report that, after two months on Risperidone and three months after his employment termination, Mr Christey had reconstituted considerably although the paranoid interpretation of events was still there to a minor degree. It was noted that he was able to concentrate considerably better and was beginning to take on some long term clients and work again and there was less rumination when reminded of events around the termination.

[95] Mr Prosser who was also connected to the investigation meeting by telephone observed that Mr Christey was significantly improved by 17 February 2009.

Although he did note that Mr Christey was somewhat obsessional, he did not consider that this impacted in terms of his work and could even be seen as positive. He said that Mr Christey had reported to him that he had not had his psychological and psychiatric issues prior to the dismissal event.

[96] Mr Smyth, in his submission, submits that the medical evidence in this case should be treated with caution because it is based on self-reporting. In that regard there is no reason not to accept that Mr Christey's doctor considered he was suffering in a way that justified a prescription of Risperidone and his condition after a period of taking Risperidone did appear to improve. The psychiatrist, in his report, agreed that that medication was of assistance and should not be discontinued. The evidence does not support any psychological difficulties prior to dismissal.

[97] I do not accept Mr Smyth's submission that Ms MacLeod's evidence should carry much weight. Ms MacLeod was in a position where she was able to observe first hand the effect on Mr Christey of his dismissal. Mr Smyth further submits that Ms Wedlock and Mr Sissons were open and transparent about the reasons for dismissal. I accept that that is what they intended but from Mr Christey's perspective I am satisfied that he was not clear about the reasons for his dismissal and I find that it is likely those reasons only became apparent after 14 October 2008.

[98] I do accept that Searells did acknowledge that the process was unfair and that certainly is a matter that I take into account as it occurred at an early stage. Although Mr Smyth submits that Searells offered time for Mr Christey to think about the terms of settlement, including the opportunity to take legal advice, there was no such opportunity given to Mr Christey prior to the crucial meeting on 14 October. Had legal advice been available then, the matter would in all probability have resolved at an early stage.

[99] I find that Mr Christey's reaction to his dismissal was more severe than it may have been for another employee. The dismissal was unexpected and without prior warning. His request to use his employment agreement provisions for performance was denied. Although to a degree it could be said that Mr Christey acquiesced to staff being told on 14 October 2008 of his departure, in reality he had little choice and employees gave evidence that he appeared upset and was quite subdued at the meeting. It seemed unnecessary to advise staff so quickly and certainly was not an action to Mr Christey's benefit.

[100] Mr Christey was not given the opportunity to deal with closing files or contacting clients in a dignified and unhurried manner and was effectively prevented from coming back into the firm to attend to those matters which a professional would normally be permitted.

[101] Mr Smyth presented his submissions on the basis that Mr Christey should only be awarded a minimum award for hurt and humiliation. There was some suggestion that this be around \$5000. I have had regard to the authorities that Mr James has directed me to, including the Court of Appeal judgment in *Commissioner of Police v. Robert Hawkins* [2009] NZCA 209. The Court of Appeal reviewed the Employment Court judgments in terms of assessing whether the award by the Employment Court of \$35,000 under s.123(1)(c)(i) was excessive given the Court of Appeal's judgment in *NCR (NZ) Corporation Ltd v Blowes* [2005] 1 ERNZ 932.

[102] Mr Hawkins suffered a considerable amount of stress and there was evidence that he was diagnosed with an adjustment disorder and became suicidal. The Court of Appeal in *Hawkins* held that Chief Judge Colgan had correctly stated the proper approach to *Blowes* in *Simpsons Farm Ltd v. Aberhart* [2006] ERNZ 825 including that the Court of Appeal in *Blowes* intended to signal that most awards would fall within a range up to \$27,000 but that exceptional cases may attract higher awards.

[103] The Authority is not, as Mr Smyth submitted, restricted in cases where the evidence would support a higher award under s.123(1)(c)(i) for hurt and humiliation to some sort of medium award. That would assume that all employees suffer exactly the same degree of hurt and humiliation and that is clearly not the case.

[104] Based on the medical evidence, I find that Mr Christey, following and as a result of his dismissal, suffered an adjustment disorder with psychotic features which fortunately did not reach criteria for a full psychotic condition. Mr Christey responded well to medication but there was an impact on Mr Christey who had previously been an organised and high performing individual. I have taken into account, in making an award, the actions of Searells and their early acknowledgment that the process was unfair and that they would be prepared to reach some form of settlement which could be negotiated.

[105] In all the circumstances and considering other similar cases, I am of the view that a suitable award for compensation would be \$18,000.

I order Searell & Co Limited to pay to Phillip Christey under section 123(1)(c)(i) of the Employment the sum of \$18000 without deduction being compensation for humiliation and loss of dignity.

Contribution

[106] I do not find that Mr Christey can be said to have contributed to his dismissal in a way that the awards previously made should be reduced. Mr Christey did not have an understanding that his team considered their relationship with him had broken down and there was no opportunity for him to understand that his employment was at risk unless he improved or changed his behaviour.

[107] For completeness, I do not consider the issues raised in the counterclaim have any bearing on remedies in this particular matter in terms of contribution as they had not been brought to his attention as performance issues.

Should Mr Christey be reimbursed for medical costs incurred in terms of consultations with general practitioners, psychologists and psychiatrist?

[108] Section 113 of the Employment Relations Act 2000 provides that the only way to challenge a dismissal is by way of a personal grievance in the Authority. The remedies for a personal grievance are those found in s.123 of the Employment Relations Act 2000.

[109] I am not satisfied that Mr Christey's expenses relating to medical, psychological and psychiatric costs fall within the remedies the Authority can provide.

[110] The Authority can and has taken the reports into account in terms of Mr Christey's claim for compensation. The invoices from Mr Prosser and Dr Deavoll for attendances by telephone conference at the investigation meeting can be considered by the Authority as witness expenses in terms of costs.

[111] The claim for reimbursement of medical expenses, however, is declined.

Counterclaim

[112] Mr Christey answered the numerous claims against him by Searells in his written evidence in terms of time written off, fees not corrected, credit notes and loss of clients.

[113] Mr James submitted in his final submissions that claims made in terms of the counterclaim cannot be so made in terms of Mr Christey's employment agreement or industry practice.

[114] Mr Smyth does not rely on an express term of the employment agreement but on an implied obligation that an employee will take reasonable care with work and that Mr Christey was competent to undertake the work required of him. I accept that there is an implied duty that an employee would take reasonable care in his or her work and is competent to perform the work, and that there may be occasion where duties can be breached and an award of damages may result. The evidence from the accountants at Searells under questioning was to the effect that they did not consider they would be responsible in terms of the matters now claimed against Mr Christey under their employment agreements. Ms Wedlock accepted under questioning from the Authority that Mr Christey would not have been aware he was liable at the time he entered into his employment agreement for clients leaving the firm, credit notes and write-offs and bad debts.

[115] Even if this was the type of claim that an employer could make, putting issues of foreseeability to one side at this point, I am not satisfied that Searells have established to the required standard that Mr Christey breached his contract with them, causing the loss they now claim from them.

[116] I am not satisfied, from the evidence, that Mr Christey was responsible for clients leaving the firm. I am not satisfied that Mr Christey, in terms of bad debts, breached his employment agreement. I am not satisfied that he undertook work knowing Searells would not be paid by a client.

[117] I am not satisfied that Mr Christey can be said to have breached his contract in terms of any credit notes. Mr Christey was not involved in the decisions in issuing such credit notes and I am not satisfied that breaches on his part caused such credit notes to issue.

[118] In terms of time recording and write-off, I note the time recording is a mechanism by which a firm can record productivity and generate fees. There will always be write-offs but I am not satisfied that Mr Christey can have been said to have breached his employment contract in terms of these write-offs or be deemed to be responsible for any loss in that regard.

[119] The counterclaim for reasons that I have set out does not succeed and is dismissed.

Penalties

[120] I do not find that Searells is entitled to a penalty for a breach of good faith by Mr Christey because he failed to be constructive and communicate and try to settle matters in terms of his dismissal from Searells. Mr Christey was entitled to raise a personal grievance and the parties did participate in mediation.

Costs

[121] I reserve the issue of costs. It may be that the parties are able to reach an agreement about this matter, failing which Mr James has until 13 November 2009 to lodge and serve submissions as to costs and Mr Smyth has until 11 December 2009 to lodge and serve submissions in reply.

Summary of findings and orders made:

- Mr Christey was unjustifiably dismissed from his employment with Searells.
- I have awarded Mr Christey four months lost wages from which is to be deducted six weeks that he received by way of notice and any income received during that period. Leave is reserved if the parties are unable to agree on the sum owed.
- I have awarded Mr Christey the sum of \$18,000 under s 123 (1)(c)(i) of the Employment Relations Act 2000.
- I have not awarded Mr Christey reimbursement of his medical expenses.
- I have dismissed the counterclaim.
- I have reserved the issue of costs and timetabled for an exchange of submissions in the event that agreement cannot be reached.