

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 55  
3237179

BETWEEN           MADELINE DOWNER  
Applicant

AND                 LM ARCHITECTURAL  
BUILDERS LIMITED  
Respondent

Member of Authority:    Lucia Vincent

Representatives:        Lynda and Max Mathieson, co-advocates for the  
Applicant  
Miles Davis, counsel for the Respondent

Investigation Meeting:   13 August 2024 in Christchurch

Submissions:            5 September and 2 October 2024 from the Applicant  
17 September 2024 from the Respondent  
Further information received up to 1 November 2024

Determination:          3 February 2025

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**DETERMINATION OF THE AUTHORITY**

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**What is the Employment Relationship Problem?**

[1] Ms Downer says LM Architectural Builders Limited (LMAB) unjustifiably dismissed and disadvantaged her in her employment. Aspects of her disadvantage grievances were based on bullying alleged to have occurred during Ms Downer's employment and a suspension. She seeks remedies that include compensation and costs.<sup>1</sup>

[2] LMAB says it justifiably dismissed Ms Downer for serious misconduct following a fair process. It says the grounds for Ms Downer's dismissal arose when she

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<sup>1</sup> Any claim for lost wages was withdrawn at the investigation meeting.

left her work cell phone face down on a desk in the open plan working environment recording when she left work for the day - an attempt to record private and confidential conversations of others including LMAB's director, Mr Leo Meredith.

[3] Both LMAB and Ms Downer have asked the Authority to award penalties against each other for breaching their respective duties of good faith.

[4] LMAB also asks for an order requiring Ms Downer to repay annual holidays taken in advance. Ms Downer has agreed to this repayment but asks LMAB to outline how the amount was calculated.

[5] The Authority is tasked with resolving the employment relationship problem.

### **How did the Authority investigate?**

[6] Ms Downer lodged her original statement of problem on 7 July 2023. LMAB lodged its original statement in reply on 1 August 2023.

[7] The Authority made a direction to mediation on 9 August 2023. The parties were unable to resolve the matter.

[8] A case management conference occurred on 7 December 2023. Another Authority Member dealt with an admissibility issue on 8 April 2024.<sup>2</sup>

[9] Due to the orders made by the Authority regarding admissibility, Ms Downer lodged an amended statement of problem on 14 May 2024. LMAB lodged an amended statement in reply lodged on 22 May 2024. LMAB lodged another amended statement in reply on 13 August 2024 clarifying a claim for a penalty.

[10] An investigation meeting for the substantive matter occurred on 13 August 2024. Evidence was given by witnesses under oath or affirmation.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

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<sup>2</sup> *Downer v LM Architectural Builders Ltd* [2024] NZERA 204.

## **What were the issues?**

- [12] The Authority investigated the following issues:
- (a) Did LMAB unjustifiably dismiss Ms Downer?
  - (b) Did LMAB unjustifiably disadvantage Ms Downer?
  - (c) What (if any) remedies should the Authority award?
  - (d) Does Ms Downer owe LMAB money for advanced annual holidays and should the Authority order repayment?
  - (e) Should I award any penalties against LMAB or Ms Downer for any breaches of good faith?

## **What happened?**

### *Employment started well*

- [13] The parties agree they worked amicably together at the start.
- [14] After Ms Downer met with Mr Meredith and his partner Lisette Zonnebeld (who also worked in the business), LMAB offered her a full-time role as an “Administration and accounts superstar.”<sup>3</sup> Mr Meredith later gave Ms Downer an individual employment agreement (Agreement). She started work on 31 October 2022.

- [15] Material clauses in the Agreement included that:
- (a) Ms Downer agreed LMAB could make deductions from her remuneration, subject to consultation, in instances of overpayment or where she owed LMAB money.<sup>4</sup>
  - (b) LMAB intended to operate a close down over the Christmas period for which it would give Ms Downer 14 days notice and expect her to take annual holidays as necessary during that period, with her annual holiday entitlement date then becoming the date of the closedown.<sup>5</sup>

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<sup>3</sup> Letter from LMAB to Ms Downer dated 28 September 2022.

<sup>4</sup> Clause 1.2, page 4.

<sup>5</sup> Clause 7.3, page 6.

- (c) Ms Downer agreed to use LMAB's internet and email solely for the purpose of carrying out its business – misuse could amount to serious misconduct.<sup>6</sup>
- (d) Ms Downer could resign by giving four weeks notice.<sup>7</sup>
- (e) LMAB could terminate the agreement immediately without notice for serious misconduct.<sup>8</sup>
- (f) LMAB could suspend Ms Downer from her duties until it had decided what (if any) action to take in the event it decided to start an investigation into whether it should take disciplinary action.<sup>9</sup>
- (g) Upon termination, LMAB could deduct any amount Ms Downer owed it from her final pay, including holiday pay.<sup>10</sup>

[16] Mr Meredith says LMAB highlighted that the role was an autonomous one. He recognised that despite Ms Downer's great skills and attributes, there were some areas she needed trained in. Ms Zonnebeld trained Ms Downer for her first few months - Ms Downer enjoyed this time. Ms Zonnebeld took parental leave in the new year, resulting in Ms Downer working without her supervision.

[17] LMAB closed down over Christmas. Ms Downer took annual holidays in advance. LMAB paid her for that time.

### *Unhappiness surfaced*

[18] Upon Ms Downer's return to work in the new year, some unhappiness began to surface. Regrettably, upon Mr Meredith's return to work after his baby was born, Ms Downer says the relationship worsened. For example, she recalls Mr Meredith was impatient and reluctant to answer her questions. She struggled with some tasks she was not yet independently proficient in, but felt discouraged from asking for help because of how Mr Meredith responded. Mr Meredith denies his manner changed and says he remained available and helpful to Ms Downer.

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<sup>6</sup> Clause 12.

<sup>7</sup> Clause 14.1 and Schedule 1, page 17.

<sup>8</sup> Clause 14.6, page 10.

<sup>9</sup> Clause 14.7, page 10.

<sup>10</sup> Clause 16.1, page 11.

[19] During a meeting on 14 February 2023, Mr Meredith provided feedback about Ms Downer's performance. Mr Meredith emailed Ms Downer later that day summarising what they discussed. The email began by reiterating the purpose of helping them both work better together as a team. It listed nine issues for improvement then finished with positive feedback about Ms Downer doing a great job in keeping the office tidy and ready for meetings as well as the wage reports.

[20] I have read the email. It had a constructive tone. Although it might have been upsetting to Ms Downer to receive so much feedback all at once, the points did not appear to be unreasonable, even if Ms Downer did not agree with everything.

[21] Ms Downer found the meeting difficult. Later that day she says she ended up in tears when Mr Meredith responded aggressively to a question she asked. Coupled with what she says was Mr Meredith's change in behaviour to snap at and be impatient with her, she felt embarrassed and humiliated. Mr Meredith denies any change in behaviour and reiterated he remained available and helpful and was empathetic towards Ms Downer when she became upset.

[22] After reflecting during the evening of 14 February 2023, Ms Downer decided to look for another role, planning to tell Mr Meredith at work. She emailed her CV to herself to update during her breaks, which she did over the next few days along with updating a flatmate wanted post on Facebook with photographs of her flat (this assumed some significance down the track).

*Ms Downer indicates she wishes to resign*

[23] Ms Downer says she spoke with Mr Meredith on Friday 17 February 2023 expressing concern about not getting the guidance or support she needed from him. In tears, she explained she was struggling and lonely and thought it best to look for another job. Ms Downer says she wished to be fair and transparent with Mr Meredith who responded positively, saying he was happy for her to attend interviews or have the option of leaving straight away if she was unhappy in her role. Ms Downer declined the offer to leave straight away for financial reasons - she needed to find another job before leaving.

[24] Mr Meredith recalls this discussion differently in some aspects. He says he observed Ms Downer appearing upset. When he asked her if everything was alright - she said she felt out of her depth and did not have the skills to do the job unsupervised.

She said she planned to begin looking for another job, which he supported. Mr Meredith says Ms Downer did not raise issues about the level of support she had received nor any concerns about his behaviour. Mr Meredith says he suggested Ms Downer have a couple of days (over the weekend) to think about things.

[25] Ms Downer accepted it was reasonable for Mr Meredith to offer to pay her out two weeks at that time (the timeframe Mr Meredith mistakenly understood her notice period to be).

*Concerns about Ms Downer's conduct arose*

[26] During the weekend after the Friday on which Ms Downer had indicated she wished to resign once she secured another position, Mr Meredith became concerned about what appeared to be a mass deletion of files by Ms Downer and use of her computer for personal matters such as updating her CV and storing personal photographs (relating to her flat). Mr Meredith later instructed an IT expert who provided a report that LMAB said supported the allegations. Ultimately LMAB did not dismiss Ms Downer because of these concerns, however.

[27] On Monday 20 February 2023 Mr Meredith spoke to Ms Downer about his concerns twice. Ms Downer made recordings on her cell phone of these discussions although Mr Meredith was unaware of it at the time. The recordings do not capture the full context of the conversation. However, the following key points can be taken from the first recording:

- (a) Upon Ms Downer arriving at work, Mr Meredith asked her if she had thought about what she wanted to do? Ms Downer said she would be leaving but could not leave until she had found another job to go to.
- (b) Mr Meredith expressed concern about things that had come to his attention about what Ms Downer had been doing in work time – like working on her CV while he was paying her – which were serious misconduct. He did not trust her and did not know how he could have Ms Downer in the role open endedly and trust her to do her work.
- (c) Ms Downer apologised for working on her CV.

- (d) To resolve the situation, Mr Meredith offered to pay her out two weeks if she wanted to finish up, otherwise he would deal with it in a different way – taking disciplinary action.

[28] The second recording was from later that day - another conversation with Mr Meredith before Ms Downer left for the day. Key points were:

- (a) Ms Downer asked Mr Meredith to email her with the proposal that they discussed that morning.
- (b) Ms Downer accepted what she had done was wrong and was sorry (regarding working on her CV at work). She asked what else Mr Meredith thought she had done wrong? Mr Meredith gave the example of clearing her internet browser history.
- (c) Ms Downer asked for it in writing – Mr Meredith agreed. Ms Downer intended to get advice.
- (d) Mr Meredith made several comments about no longer trusting Ms Downer, and questioning how he could trust her to do her job while she was looking for another job given what he had found.
- (e) Mr Meredith reiterated a number of times that he had made an offer to avoid going down the disciplinary road and would be taking disciplinary action, but would not get into the mechanics of it at that stage.

[29] At the investigation meeting, Mr Meredith explained that when he discussed taking disciplinary action, it meant to him that he would be going through a disciplinary process with Ms Downer, which he later did.

[30] After this conversation and after Ms Downer had left work for the day, Mr Meredith discovered her work cell phone on a desk charging just outside his office. When he turned the phone over, he could see it was recording audio.

*LMAB suspended Ms Downer*

[31] The following morning on Tuesday, 21 February 2023, Mr Meredith attempted to talk to Ms Downer. Although Mr Meredith says he wished to discuss a proposal to suspend Ms Downer, this is not what occurred. This conversation was also recorded. Key points from the conversation are:

- (a) Ms Downer did not want to talk and wanted it all in writing.
- (b) Ms Downer wanted to have a support person with her if Mr Meredith wanted to talk with her. Mr Meredith agreed but told her to call them then. When Ms Downer asked why, he told her, “(Y)ou’re not working today.”
- (c) Mr Meredith also said:

(Y)ou’ve now obliterated all the trust I could possibly have. The fact that the stuff you’ve done on my computer and during work time and then you’ve also done, what you’ve done on the work phone. So with that being said, you’ve given me absolutely no choice but to put you on garden leave while we investigate it and take disciplinary action.
- (d) Mr Meredith gave Ms Downer a letter formalising what was discussed.

[32] The suspension letter said:

As discussed, I have evidence that suggests you have seemingly spent significant amounts of my time on your personal matters; that you have seemingly deleted documents and emails off my computer equipment and that you have seemingly sought to record me talking on possibly confidential matters, without my consent.

Any of these are potentially serious misconduct and I feel unable to trust that you will not potentially do more, that may harm my business. Therefore, in terms of clause 14.7 of your employment agreement and after considering your comments, I have decided to suspend you on full pay for up to 1 week or until we have been able to investigate this matter fully and enable you to respond to any resulting disciplinary charges, whichever is shorter. Your access to our systems has likewise been blocked for this period.

We will shortly provide you with copies of the evidence and arrange a time for an investigation meeting. In the meantime, you are instructed to keep away from all Company premises and work sites and refrain from contacting all employees.

[33] Ms Downer went home.

[34] That afternoon, Ms Downer emailed Mr Meredith expressing concern about what had happened. She said she felt she had been sacked because he had told her that her actions were serious misconduct and the prior day had told her to resign with two weeks pay or he would take disciplinary action. She also expressed concern about the lack of evidence given to her about what she was alleged to have done, and that if there was no evidence, questioned why he would be so brutal and harsh to make her leave.

[35] Mr Meredith responded that evening telling Ms Downer she had not been sacked, but suspended on pay for the investigation. He said he had done this because he could not be sure he could trust her not to delete more emails, browser history and

documents until he had fully investigated. He said he was collating the evidence and would give that to her as soon as he could. He referred to a phone left recording, “seemingly trying to trap me.” He then said:

However you understood it, my offer to pay you out for your notice was genuine – once someone has told their boss they are seeking alternative employment it is very difficult for trust to remain that you will do your very best for the business. If you accepted this offer, there would obviously be no point in me starting the disciplinary process I was heading towards. I was merely indicating the options for you.

#### *LMAB held a disciplinary meeting*

[36] LMAB set out in detail the allegations of serious misconduct in a letter dated 23 February 2023. Mr Meredith asked to meet with Ms Downer to hear her response, with a representative present, to specific concerns:

- You appear to have deleted large volumes of files and data (some 5000 in total at least), including many company documents that could have been critical to our operations;
- You appear to have attempted to delete files from the Company’s one drive recycle bin, but could not because it was password protected;
- You appear to have attempted to record me unknowingly, by leaving your phone on to charge in the office, while recording.
- You appear to have spent significant hours working on your own matters during company time. Evidence includes working on non-work photographs and your CV, plus personal use of our internet.

I have engaged the services of a confidential forensic IT organisation to identify what has happened and to recover files. Their report is attached in summary, together with relevant screenshots. If there is no reasonable explanation for any of these allegations, these behaviours could be serious misconduct. When it comes to unauthorised deletion of company data and files and attempting to record me unknowingly and not even in your presence, the behaviour really does seem to go to the very heart of the essential relationship of trust in employment.

[37] The parties met on 1 March 2023 with their representatives. The parties have different views about how the meeting went. Ms Downer’s explanations were summarised by LMAB in the letter sent to Ms Downer the next day, dismissing her.

#### *LMAB dismissed Ms Downer relying on the recording allegation*

[38] In its letter dated 2 March 2023 to Ms Downer dismissing her, LMAB did not rely on the allegations about deleting documents and data and working on personal matters during work time. It accepted they were, at best, misconduct (not serious

misconduct). LMAB relied on its third allegation that Ms Downer had attempted to record Mr Meredith unknowingly, by leaving her phone on to charge in the office, while recording. The letter summarised Ms Downer's explanation to this allegation as "... something to the effect that you felt vulnerable and believed there was an ulterior motive to terminate your employment." At the investigation meeting Ms Downer accepted that was her explanation.

[39] The letter described the basis for Ms Downer's dismissal as follows:

Allegation 3

You have admitted to attempting to secretly record me in the workplace, without my knowledge or consent.

**Decision**

Having considered the evidence and your responses, we have determined that, on balance, your conduct in attempting to secretly record your employer (Third Allegation) constitutes serious misconduct and you are hereby dismissed without notice, effective immediately. Today will be your last day with the company.

Your conduct in attempting to secretly record me, without my knowledge or consent, constitutes a breach of your duty of good faith under Section 4 of the Employment Relations Act 2000 and has completely undermined and destroyed the relationship of trust and confidence that is essential to an employment relationship continuing.

Given you were attempting to record parties without their consent and you, yourself, were not a party to the conversation you were attempting to record, it is my view that your attempts may constitute a criminal act under Section 216B of the Crimes Act 1961. I have today made a police complaint about that conduct.

[40] The letter also referred to a comment by Ms Downer's representative during the disciplinary meeting that it was clear the relationship had broken down beyond repair and neither party was interested in fixing it. Finally, LMAB asked for Ms Downer's consent to deducting advanced annual holiday pay from her final pay (which was not given).

**Did LMAB unjustifiably dismiss Ms Downer?**

*Test of Justification*

[41] The Authority must determine the question of whether LMAB can justify its dismissal of Ms Downer on an objective basis, applying the test of justification: whether

LMAB's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Ms Downer.<sup>11</sup>

[42] In applying the test of justification, the Authority must consider the following four factors:

- (a) Whether (having regard to resources), LMAB sufficiently investigated the allegations against Ms Downer before dismissing her;
- (b) Whether LMAB raised its concerns with Ms Downer before dismissing her;
- (c) Whether LMAB gave Ms Downer a reasonable opportunity to respond to its concerns before dismissing her; and
- (d) Whether LMAB genuinely considered Ms Downer's explanation (if any) to the allegations before dismissing her.

[43] The Authority may consider other factors as appropriate.

[44] The Authority must not determine Ms Downer's dismissal was unjustified solely because of minor procedural defects by LMAB that did not result in her being treated unfairly.

#### *Good faith*

[45] The duty of good faith requires parties to deal with each other in good faith - it includes not indirectly doing anything likely to mislead or deceive the other.<sup>12</sup> The duty expressly requires an employer proposing to make a decision that may adversely impact an employee's ongoing employment, to provide access to information relevant to that decision, and an opportunity to comment on that information before deciding what to do.<sup>13</sup>

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<sup>11</sup> Act, s 103A.

<sup>12</sup> Act, s 4(1).

<sup>13</sup> Act, s 4(1A)(c).

## *Serious Misconduct*

[46] The Court of Appeal has described the kind of conduct that will justify summary dismissal in broad terms:<sup>14</sup>

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a personal grievance ... questions of procedure and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.

[47] The Authority has previously recognised the seriousness of an employee secretly recording colleagues' conversations when they are not present. In a case involving a security service technician who covertly recorded such conversations, the Authority observed that the behaviour was capable of irrevocably destroying an employer's trust and substantively justifying summary dismissal.<sup>15</sup> Although the Authority found the dismissal unjustified for procedural reasons, it considered contribution for the covert recordings justified a 30% reduction in remedies. In another case the Authority also reduced remedies to reflect that a secret recording by the employee contributed to the circumstances of the grievance and was arguably unlawful.<sup>16</sup>

[48] Although decided in an admissibility context in relation to recordings of conversations the recorder is involved in, the Court of Appeal has suggested that in some circumstances surreptitiously recording could undermine the trust and confidence in an employment relationship.<sup>17</sup>

[49] I find it is reasonable in a good faith workplace environment for an employer to conclude that covertly recording (or attempting to covertly record) conversations of others you are not involved in, is serious misconduct, depending on the circumstances. Relevant circumstances may include whether those recorded had a reasonable expectation of privacy or confidentiality, the nature of the workplace, the purpose of the recording and what (if any) objection those being recorded may have. In circumstances where someone is unaware of being recorded and reasonably expected

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<sup>14</sup> *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 at [487]. Section 103A has modified the "would" aspect of this to "could."

<sup>15</sup> *Curnow v Advanced Security Group (Sth Is) Ltd* [2022] NZERA 359 at [75].

<sup>16</sup> *Firman v Insyn Limited t/a Synergy Hair Riccarton* [2016] NZERA Christchurch 227 at [111].

<sup>17</sup> *Talbot v Air New Zealand Ltd* [1996] 2 ERNZ 356 (CA) at [369].

privacy, such a recording is likely to be inconsistent with the duty of good faith. I also consider that without good explanation or mitigating circumstances, a fair and reasonable employer could potentially within the range of acceptable actions, summarily dismiss an employee for making or attempting to make such a recording.

*Justified Dismissal?*

[50] I now consider whether LMAB's conclusion Ms Downer's attempted recording was serious misconduct in all the circumstances was fair and reasonable, and if so, whether her subsequent dismissal fell within the range of responses reasonably open to it.

[51] Although Ms Downer did not succeed in recording the conversations of Mr Meredith or others after she left work, that is likely because Mr Meredith noticed her phone recording and stopped it after around six minutes. Ms Downer admitted to attempting to record Mr Meredith without his knowledge and consent after she left work. She says she did so to protect herself from what she believed Mr Meredith would do (and say) to set her up for dismissal. I understood this was because she believed he had an ulterior motive to dismiss her and may interfere with her computer such as planting something or asking someone else to (which a recording would capture).

[52] Recording conversations you are involved in is one thing, however Ms Downer tried to record Mr Meredith after she had left work for the day. On his own in the office, Mr Meredith could reasonably expect he could have conversations in private, without any concerns about being recorded, and without any risk that the confidentiality of what he may discuss could be compromised by a member of his own staff. Ms Downer and Mr Meredith worked together in a small team. Ms Downer's role supported Mr Meredith's and the business. LMAB could reasonably expect that an employee would respect the privacy of others and ensure the confidentiality of matters being discussed could include potentially commercially sensitive information. It was open to LMAB not to accept Ms Downer's explanations and to conclude they did not mitigate what had occurred. In the circumstances it was reasonable to find Ms Downer had breached her duty of good faith and what she had done was serious misconduct. I also find that given these factors, dismissal was within the range of responses a reasonable and fair employer could take.

[53] I must also consider whether LMAB followed a fair process in dismissing Ms Downer. The process was not perfect. However, I consider any procedural deficiencies did not relate to the decision to dismiss or were minor and did not result in Ms Downer being treated unfairly.

[54] Ms Downer made much of Mr Meredith's offer to pay her out two weeks if she resigned rather than go through a disciplinary process. I do not accept it is inappropriate for an employer to offer to pay out an employee's notice period as a sign of good will once an employee indicates an intention to resign in circumstances where they feel unhappy (even if Mr Meredith was mistaken about the length of Ms Downer's notice period which was four weeks). Ms Downer accepted Mr Meredith's proposal was appropriate on Friday 17 February 2023. Mr Meredith had given Ms Downer a few days to think about it so followed up on the Monday. When he did, Ms Downer asked for his proposal to be put in writing so she could consider it and seek advice. Given what Mr Meredith discovered over the weekend, it was reasonable for him to highlight his concerns to Ms Downer (including about her completing her CV in work time). Telling her a disciplinary process would follow if it was not accepted created unnecessary pressure on Ms Downer to decide. However, it was not then unreasonable for Mr Meredith to address his concerns with Ms Downer in a formal capacity.

[55] Ms Downer also highlights statements by Mr Meredith (as recorded on 20 and 21 February 2023) that what she had done was serious misconduct, he did not trust her and would be taking disciplinary action. She says these statements give rise to concerns Mr Meredith had predetermined the outcome of dismissal.

[56] Starting with the recordings on 20 February 2023, these statements must be taken in context. At that stage, Ms Downer had not attempted to record Mr Meredith when she was not present. LMAB's concern were about deleting documents and personal computer use. LMAB went through a disciplinary process to hear from Ms Downer. It appropriately did not conclude her actions were as serious as first thought and were at best, as misconduct, and were not relied on when deciding to dismiss. Mr Meredith's comments about trust were directed at Mr Meredith's belief he could not trust Ms Downer to work solely on LMAB's matters (and not personal matters) while at work. In light of Ms Downer's admission she had worked on her CV, that was not unreasonable at the time, although it had implications for how open-minded Mr

Meredith could be when he decided to suspend Ms Downer the next day (discussed below).

[57] In the third recording on 21 February 2023, Mr Meredith made a further comment about all trust being “obliterated,” after he became aware of the secret recording (the allegation for which LMAB dismissed Ms Downer). In context, I have considered this comment was directed at the lack of trust Mr Meredith had in Ms Downer staying at work while he investigated the matter, resulting in her suspension (which I address below). The letter suspending Ms Downer tends to support that when it refers to Mr Meredith feeling unable to trust Ms Downer would not potentially do more that may harm the business, therefore suspending her on pay while carrying out the investigation.

[58] I have also considered criticisms about Mr Meredith’s repeated statements to Ms Downer that he would be taking disciplinary action when discussing the offer of paying out two weeks. Although poorly expressed, I accept that Mr Meredith loosely used the term to refer to the process (rather than outcome).

[59] Turning to the four factors set out in s 103A, I find LMAB met minimum requirements:

- (a) LMAB sufficiently investigated its concerns about Ms Downer. It carried out its own enquiries of Ms Downer about what had happened. LMAB engaged an IT expert to provide a report. After hearing from Ms Downer about the deleting data and personal use allegations, these were downgraded to misconduct and ultimately not relied on in dismissing Ms Downer. After putting the allegation to Ms Downer about the secret recording, she admitted to it. In the context of a small business conducting its own investigation, LMAB adequately investigated the allegations.
- (b) LMAB put its concerns to Ms Downer for her responses and feedback with representation present. Correspondence clearly set out the specifics of the allegations and attached relevant information including the report relied on from the IT expert. Ms Downer was on notice about what her employer’s concerns were and that her employment was at risk if she

could not adequately explain what had happened. LMAB raised its concerns appropriately with Ms Downer

- (c) Ms Downer had a reasonable opportunity to provide her explanations to the allegations in a meeting convened for that purpose. Ms Downer accepted the letter dismissing her accurately recorded the explanation she provided to the allegation for which she was dismissed.
- (d) LMAB genuinely considered Ms Downer's explanations, even if it did not accept them. In this respect, Ms Downer alleges Mr Meredith had an ulterior motive to dismiss her if she did not accept the offer of paying her two weeks and he was predetermined in his outcome of dismissal if she did not. In context I do not consider that allegation is made out as described above.

[60] I now turn to consider whether LMAB unjustifiably disadvantaged Ms Downer.

#### **Did LMAB unjustifiably disadvantage Ms Downer?**

[61] Many of the alleged disadvantages relate to aspects of the disciplinary process which are not in substance standalone grievances separate to the process and decision. There are two disadvantage grievances that require closer examination - alleged bullying and unjustified suspension.

[62] Ms Downer acknowledged any concerns of bullying occurred within a limited timeframe upon her return to work and focussed on comments made after she intended to resign, Mr Meredith offered to pay her two weeks, and concerns had arisen about her conduct at work. Whilst Ms Downer and Mr Meredith were involved in what were undoubtedly uncomfortable conversations, I do not accept any bullying occurred because of them.

[63] The suspension is another matter.

[64] Mr Meredith says he tried to meet to discuss his proposal to suspend Ms Downer and that she refused and asked for matters to be put in writing, effectively preventing any consultation. I do not accept Mr Meredith could not have consulted. Mr Meredith did discuss the suspension with Ms Downer and could have discussed this in the context of a proposal to suspend rather than a decision to suspend. When he did meet with her, Mr Meredith told Ms Downer she would not be working and handed her a letter suspending her. Although the letter refers to taking Ms Downer's comments

into account, that did not happen. Any discussion would have also been coloured by Mr Meredith's view at that stage that he could not trust Ms Downer to remain at work focussing solely on LMAB matters while he investigated.

[65] I find LMAB has not justified its action in suspending Ms Downer under s 103A. Mr Meredith went into the discussion with Ms Downer having already decided LMAB would suspend her while it investigated the allegations. The suspension caused Ms Downer to leave suddenly with little understanding about why. In her words it felt "brutal" and "harsh" and like she had been sacked. This was caused by LMAB's suspension without any meaningful consultation in circumstances where it could have. LMAB's unjustified action caused Ms Downer to be unjustifiably disadvantaged. I do not however consider that this materially affected LMAB's process for and justification of Ms Downer's dismissal.

#### **What if any remedies should be awarded?**

[66] Having succeeded in her personal grievance for unjustified disadvantage regarding her suspension, Ms Downer is entitled to a consideration of remedies.

#### *Compensation*

[67] Ms Downer sought \$40,000 compensation for her personal grievances, however she has not succeeded in her unjustified dismissal grievance for which that figure was also claimed. Ms Downer referred to the initial accusations causing her the most stress, fear and anxiety (the accusations for which she was not ultimately dismissed). At the time of her suspension, she referred to it as brutal, harsh and like she had been sacked. After considering the evidence, what has been awarded in other cases and trends generally,<sup>18</sup> I award Ms Downer \$7,000 under section 123(1)(c)(i) of the Act.

[68] I do not consider Ms Downer contributed to the circumstances giving rise to her unjustified disadvantage.

#### *Penalties for alleged good faith breaches*

[69] I decline to award any penalties.

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<sup>18</sup> For example, *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [161] to [162] and *Munro v NS Security Ltd formerly known as Hibiscus Coast Security Ltd* [2012] NZEmpC 38.

[70] LMAB sought penalties against Ms Downer for breaching her duty of good faith including for the ground on which it dismissed her. Ms Downer has already suffered the consequences of losing her job. I do not consider it appropriate to award a penalty.

[71] I decline to award a penalty against LMAB for not consulting with Ms Downer prior to suspending her. The circumstances of the unjustified disadvantage personal grievance are already compensated for.

#### *Holiday pay*

[72] LMAB asked for damages for Ms Downer's breach of the Agreement for failing to repay her advanced annual holiday pay, plus a penalty for Ms Downer's failure to do so and consent to a deduction to her final pay.

[73] I decline to award a penalty. Ms Downer could give or withdraw any consent to deduct money she owed LMAB from her final pay. The clause in the Agreement was a general deductions clause that required prior consultation for any specific deductions.<sup>19</sup> Ms Downer could refuse to give her consent or withdraw her consent without breaching her obligations under the Agreement - her right to do so is protected by legislation. No penalty could be warranted in such circumstances.

[74] I also decline to make an order for repayment of holiday pay in the circumstances. Ms Downer acknowledged early on that she was willing to repay an amount reflecting the advanced annual holidays, when she was in a financial position to do so. I do not have enough information to accurately calculate what that amount would be and the parties appear to dispute the accuracy of the calculations. The Authority encourages the parties to try to resolve the holiday pay matter between themselves. If they are unable to do so, then leave is granted to return to the Authority.

#### **Costs**

[75] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[76] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Downer may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that

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<sup>19</sup> Wages Protection Act 1983, s 5.

memorandum LMAB will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[77] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>20</sup>

Lucia Vincent  
Member of the Employment Relations Authority

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<sup>20</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)