

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 193
5529241

BETWEEN JANINA ANN EWING
Applicant

A N D WAIMEA WEEKLY LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Steven Zindel and Jessica Gully, Counsel for Applicant
Kay Chapman, Advocate for Respondent

Investigation Meeting: 2 and 3 August 2016 at Nelson

Submissions Received: 15 August and 3 September 2016, from the Applicant
19 August 2016, from the Respondent

Date of Determination: 28 October 2016

DETERMINATION OF THE AUTHORITY

**A Janina Ewing was unjustifiably disadvantaged in her employment
and unjustifiably dismissed from her employment.**

B Waimea Weekly Limited is ordered to pay to Janina Ewing:

**(a) Reimbursement of lost wages in the sum of \$18,000 gross
under s 123(1)(b) of the Employment Relations Act 2000. I will as
a precautionary measure give Ms Chapman five days from the
date of this determination to return to the Authority if she takes
issue with the assessment of the three months lost wages.**

**(b) Payment of compensation in the sum of \$12,000 without
deduction under s 123(1)(c)(i) of the Employment Relations Act
2000.**

(c) Reimbursement of medical expenses in the sum of \$102.50 with leave reserved for Mr Zindel to return if required about one consultation.

C Mr Zindel agrees that the overpayment of holiday pay to Ms Ewing can be deducted from the amount owing. He should discuss with Ms Chapman how best to deal with that matter.

C The two counterclaims are dismissed.

D Costs are reserved and a timetable set for an exchange.

Prohibition from publication

[1] Mr Zindel and Ms Chapman did not oppose each other's request for prohibition from publication of various matters contained in some of the 14 statements of evidence/affidavits provided for this matter.

[2] The concerns about publication can best be dealt with by prohibiting the content of all the statements of evidence received in this matter from publication except to the extent that the evidence is referred to in this determination. I also prohibit from publication any medical evidence the Authority heard except to the extent that it is referred to in this determination.

Employment relationship problem

[3] Janina Ewing commenced employment with Waimea Weekly Limited (Waimea Weekly) on 14 January 2013 as a Sales Account Manager. Ms Ewing was party to an individual employment agreement with Waimea Weekly dated 20 February 2013.

[4] Waimea Weekly is a duly incorporated company having its registered office in Christchurch and carrying on business as a community newspaper. Steven Page is the Managing Director of Waimea Weekly. He has 33 years' experience in the industry. Mr Page is also a joint shareholder with the sister publication Nelson Weekly Limited.

[5] Ms Ewing says that the way she was treated by Mr Page meant that the workplace was not a safe one for her, she was subject to bullying behaviour and that there were breaches of the duty of good faith and implied terms as to trust and fair dealing.

[6] Ms Ewing says that she was unjustifiably disadvantaged in the workplace because of the treatment she was subjected to by Mr Page. Mr Zindel accepted in final submissions that actions referred to in evidence that were more than 90 days before a personal grievance was raised on 26 September 2014 may be background only. There was agreement that 90 days prior to 26 September 2014 is 28 June 2014.

[7] Ms Ewing was on sick leave from 15 September 2014 when she advised her doctor she suffered anxiety symptoms as a result of events on that day. A medical certificate providing that Ms Ewing was medically unfit due to work stress was provided to Waimea Weekly. Whilst on sick leave and after further medical certificates and correspondence, Ms Ewing was given four weeks' notice of termination of her employment by letter dated 18 November 2014. Ms Ewing says that her dismissal for reasons of incapacity was unjustified.

[8] Ms Ewing seeks by way of remedy reimbursement of lost wages for a period of at least three months, compensation in the sum of \$10,000 for each of the two grievances, reimbursement of medical expenses incurred due to stress and anxiety related to her employment, interest and costs.

[9] Ms Ewing claims that she was owed holiday pay but Mr Zindel has now confirmed, after discussions with Ms Chapman and consideration of her final submissions, that there has been an overpayment of holiday pay to Ms Ewing of \$5,453.20. Mr Zindel agrees that if the Authority gets to the point of awarding remedies in this matter then this amount can be deducted.

[10] Waimea Weekly does not accept that Ms Ewing was unjustifiably disadvantaged. It does not accept that there was a breach of good faith obligations, bullying or that it breached its duty and failed to provide a safe working environment for Ms Ewing. It says that it appropriately raised and dealt with performance concerns. It does not accept that Ms Ewing was unjustifiably dismissed from her employment and says that she was justifiably dismissed for reason of medical incapacity.

[11] Waimea Weekly counterclaims for breach of good faith requirements in that it says Ms Ewing deliberately removed historical client data and emails from her work computer and seeks a penalty for that. Further it says that there was a breach of the good faith obligation to be communicative and responsive during her period of absence and it seeks a penalty for that.

The issues

[12] The Authority needs to determine the following issues:

(a) *Unjustified disadvantage claim:*

The unjustified action alleged is that the treatment of Ms Ewing by Mr Page resulted in an unsafe workplace for her. Whether the actions of Waimea Weekly towards Ms Ewing were justified and whether one or more of the terms and conditions of her employment were affected to her disadvantage will involve an assessment of the following:

- (i) Was it known or ought it to have been known that Ms Ewing was suffering from work-related stress because of how Mr Page treated her;
- (ii) If it was known that Ms Ewing was suffering from work-related stress, then were reasonable steps taken to provide a healthy and safe workplace;
- (iii) Was there a breach of the obligation to provide Ms Ewing with a safe workplace?

(b) *Unjustified dismissal claim:*

- (i) Was the termination of Ms Ewing for reason of incapacity justified;
- (ii) If there were unjustified actions causing disadvantage and/or an unjustified dismissal then what remedies should be awarded and are there issues of mitigation or contribution?
- (iii) Should medical costs be reimbursed?
- (iv) Should interest be awarded?

(c) *Counterclaim:*

- (i) Did Ms Ewing breach her employment obligations by deliberately removing client data and emails from her computer and if so, should a penalty be awarded;

- (ii) Did Ms Ewing breach the duty of good faith to be responsive and communicative while she was on sick leave and should there be an award of a penalty?

Was it known by Mr Page that Ms Ewing was suffering from work-related stress?

Relevant provisions in the employment agreement

[13] The relevant provisions for this matter in Ms Ewing's employment agreement with Waimea Weekly include obligations of the employer in clause 4.1 to act as a good employer and deal with the employee in good faith in all aspects of the employment and take all practicable steps to provide the employee with a safe and healthy workplace. Ms Ewing had similar obligations in clause 4.2. There were general health and safety obligations in clause 17 of the employment agreement. The ability to deduct from remuneration was contained in clause 8 of the employment agreement and was limited to matters therein or as agreed.

[14] The termination provision in the employment agreement does not specifically refer to termination for illness or incapacity but is general in nature. Clause 23 of the agreement was relied on by Waimea Weekly to ask Ms Ewing's medical practitioner for information about her condition.

Knowledge

[15] Waimea Weekly was required to take reasonable steps to protect Ms Ewing's health and welfare which were proportionate to the known and avoidable risks - *Attorney-General v Gilbert*¹. In assessing reasonable steps the Authority should have regard to the severity of harm, the state of knowledge about its likelihood, knowledge of the means to counter the risk and the costs and availability of those means - *Gilbert*². An employee should also take all practicable steps to ensure their own safety and an employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee-*Gilbert*³.

[16] The Employment Court in *Davis v Commissioner of Police*⁴ stated that relevant evidence to be considered in an unjustified action grievance is not necessarily

¹ [2002] 1 ERNZ 31; [2002] 2 NZLR 342; (2002) 6 NZELC 96,602

² Ibid at para 83

³ Ibid at para 83

⁴ [2013] NZEmpC 226 at paragraph [47]

confined to events in the 90 days preceding the raising of the grievance. That is because disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct which need to be understood to determine whether the employee has suffered an unjustified disadvantage within the 90 day period. Remedies can however only relate to the events occurring within the 90 day period but it was stated in *Davis* that the nature and scope of such remedies may need to be informed by a broader background to the events that should be compensated for.

Before May 2014

[17] Ms Ewing said that she began to lose confidence and become anxious about the thought of further interactions with Mr Page from March 2014. She was fearful that what she was doing could be wrong and felt almost continually on edge. I accept that Mr Page was probably unaware at that time how his behaviour was affecting Ms Ewing.

[18] I record the period of employment between January 2013 and March 2014 was in the main a happy one for Ms Ewing. Ms Ewing did have some concerns about how Mr Page behaved towards other staff but she was not the focus of the behaviour and just got on with her role in which she considered she was doing well, in particular with her sales. Waimea Weekly gave evidence about a number of ways during that period in which it had assisted and been kind to Ms Ewing. For her part Ms Ewing considered that her sales figures were very good and that she was a high performing employee. Her base salary was \$35,000 per annum but she was on a bonus scheme of 10% until March 2014 when it was increased to 12.5% for good work. From March to September 2014 Ms Ewing's monthly bonus averaged \$3000 gross and her salary at termination was \$72,000 including the bonuses. Ms Ewing said that her sales figures were about eight times her salary.

[19] Ms Ewing's previous experience had been in radio sales. She sat approximately 2 metres away from Mr Page in an open plan area. Mr Page had an office but Ms Ewing describes the wall between the office and the area in which she was sitting as a thin one. Ms Ewing said that she would dread Mr Page listening to her selling and was on edge when doing so because Mr Page had made a comment in or about August 2013 that she sounded too false like she was selling radio time and

talking about opportunities to the client. He indicated that he wanted print advertising sold in another way.

[20] In September 2013, Susanne (Sue) Davies, who had previously been an employee of Waimea Weekly since 2009 and who resigned for personal reasons in 2013, came back as a shareholder in the business. Ms Davies managed Ms Ewing from in or about that time in sales. Ms Ewing referred to an interaction with Mr Page that took place on 6 November 2013 after a period of leave. Ms Ewing recalls Mr Page telling her she was the “*worst person for giving wrong instructions to the graphic designer*”. She also understood Mr Page to say to her that he did not want her to form professional relationships with clients. Mr Page accepted that he had raised concerns with Ms Ewing about her instructions to the graphic designer, Neil, but did not accept that he made any comment about professional relationships.

[21] Ms Ewing recalled in December 2013 Mr Page apologising for his manner although denying making any comments about professional relationships. Ms Ewing understood that Ms Davies had had a word with him about that. That discussion and subsequent resolution seemed to have cleared the air somewhat although Ms Ewing described herself as still wary about Mr Page’s behaviour.

May 2014

[22] On Monday, 19 May 2014 Ms Ewing was asked by Mr Page to come to a meeting in his office. Mr Page wanted to address some elements of Ms Ewing’s performance. Ms Ewing said that Mr Page “*lambasted her*” about a feature and would not allow her to respond calling her defensive and confrontational which she said in her written evidence was common for Mr Page. Ms Ewing said on this occasion it left her feeling powerless and upset because she was not feeling emotionally strong. Mr Page did not accept that he spoke to Ms Ewing in the manner she described and said that he raised his concerns in a calm manner and allowed Ms Ewing to respond. His recollection at that time was that Ms Ewing blamed others for the issues about the feature.

[23] Mr Page also told Ms Ewing it was unnecessary for her to come in over the weekend which she had done to send emails for advertisers for the quarterly Grey Power feature. He said in his evidence both written and oral that by that stage he did not trust Ms Ewing coming in over the weekend because of the mistakes and further that he was pretty sure she was setting him up to raise a personal grievance. He was

also worried about the security of the offices. The concern about coming in on the weekends was confusing for Ms Ewing because it was something she had always done with the quarterly Grey Power sales in order to get ahead as the sales work was in addition to her weekly sales work. Sometimes Mr Page would be at the offices during the weekend when Ms Ewing was there. I find in all likelihood Ms Ewing had also told Ms Davies of her intention to come in over the weekend that Mr Page was concerned about.

[24] A concern was also raised about Ms Ewing communicating to clients by emails which Mr Page said was ineffective in the market Waimea Weekly was operating in.

[25] At that same meeting, Mr Page asked Ms Ewing to sell advertising in a way that she felt was improper although that was not the view of Mr Page. I have reached no conclusion and placed no weight on that save as to set out the different views. Ms Ewing expressed her concerns to Mr Page but he told her to undertake the advertising in that way. Ms Davies also told her to do what she had been told. Ms Ewing said that following the meeting she tried the approach but the uptake was poor and she was told off by clients.

[26] On 21 May 2014 Ms Davies asked Ms Ewing to call clients and offer cheaper advertisements and Ms Ewing felt unhappy about a perceived loss of her integrity in doing so having attempted to persuade clients to go for the more expensive advertisements. Ms Davies also raised with Ms Ewing that an email she had sent about Grey Power to another staff member was inappropriate.

[27] Ms Ewing said that the meeting with Mr Page on the Monday, the calls with clients and her discussion with Ms Davies on the Wednesday caused her stress. She described herself as hyperventilating and felt quite emotional, leaving work to attend her doctor who provided her with a medical certificate that stated Ms Ewing was on stress leave from 21 to 23 May 2014. The consultation notes at the time Ms Ewing attended her doctor refer to stress in the work place and attribute that to Mr Page. The notes record symptoms of stress including poor sleep and tremor.

[28] When Ms Ewing returned to work on Monday 26 May 2014, she received an email from Mr Page. The email stated that there were a number of issues Mr Page wanted to discuss and there would be a meeting involving Mr Page, Ms Davies and Ms Ewing who could bring a support person if she wished. Mr Page explained in his

email that it was not a “*full on disciplinary meeting*” but that there needed to be a few changes to the way things were currently being done. Mr Page expressed the matters to be discussed at the meeting as:

... expectations on budgets, behaviour in and around the office, our role in working with your personal life and in particular your serious health issues, and how we can better manage the way you work and sell for us.

[29] The goal Mr Page set out in his email was to quickly reach an understanding of all the issues and help Ms Ewing with the sales role. He also set out that taking some leave would be beneficial and Ms Ewing was to get back with a start date for leave. Ms Ewing responded to that email and advised that a support person would attend the meeting as well.

28 May 2014 meeting

[30] Initially it was suggested that the meeting take place on 27 May 2014, however that was publishing day and a change was suggested to Wednesday, 28 May 2014 when I am satisfied the meeting took place.

[31] Ms Ewing attended the meeting with her support person Michele and Mr Page attended with Ms Davies. Michele took handwritten notes which were provided for the first time at the Authority investigation meeting. Ms Chapman raised an issue as to whether Michele’s evidence was reliable in submissions. I found Michelle to be a straightforward witness and I have placed some weight on her evidence notwithstanding in her written statement of evidence she incorrectly recalled Mr Page standing at times during the meeting. There has been a considerable passage of time since the meeting and that has an impact on the reliability of memory. Michele’s notes were not verbatim but she confirmed they were written during the meeting.

[32] Mr Page explained that during the meeting he referred to a document on his computer which was similar, but not identical, to the written summary of the meeting dated 27 May 2014 he gave to Ms Ewing on or about 17 June 2014. I shall call this written document the meeting summary from this point. When considered against Mr Page’s written record of the discussion, Michele’s notes reflect many of the comments in it. That strengthens my view of the reliability of her notes as far as they go.

[33] Mr Page can be forthright. The evidence supported that Mr Page spoke at least 50% of the time during the meeting and I find it more likely than not that Ms

Ewing listened more than contributed. Ms Ewing had, I accept, become somewhat anxious in her interactions with Mr Page that they would be unpleasant and negative and had lost confidence. At the time of the meeting she had a belief that she may be dismissed although it was clarified by Mr Page at the outset that the meeting was not a disciplinary meeting. Her evidence was that she felt nothing she said was of value and I do note that none of her responses were recorded in the document subsequently provided to her or in Michele's notes.

[34] Michele who had had some experience in these types of meetings said she felt intimidated during the meeting and observed Ms Ewing seemed quite shocked. She felt that the meeting was one sided and that every time Ms Ewing said something she was "*shot down*".

[35] Mr Page, I find, in advance of the meeting had formed a fairly clear view about what the stress could be related to and told Ms Ewing that any stress was related to personal issues consistent with his view that these were the material stressors in Ms Ewing's life and not work issues. The meeting summary provides in the first paragraph:

With the presentation of a medical certificate to us requesting sick time off because of stress, it is timely to address a number of issues. Although it has not been stated, the insinuation is that whatever stress issues you are having are work related. We would refute this, if it is the case, and here is why.

[36] The meeting summary refers to the stress being attributable to family issues and Ms Ewing's chronic disease and I find this was raised by Mr Page at the 28 May meeting but probably not to the same level of detail as is in the written meeting summary. By way of clarification Ms Ewing suffers from a chronic disease which impacts on her breathing and has required periods of hospitalisation including one period in 2013 whilst employed by Waimea Weekly.

[37] Mr Page said in his evidence that notwithstanding the view he had reached of what had caused Ms Ewing's stress as recorded in the medical certificate of 21 May there was an opportunity for Ms Ewing during the meeting to put her own view forward. I could not be satisfied from the evidence that Ms Ewing was in fact asked what her stressors were leading to the period of sick leave. A fair and reasonable employer could have been expected to have asked that. There was nothing in Mr

Page's meeting summary about Ms Ewing's view of why she was stressed or in Michele's handwritten notes.

[38] There was also reference in Michele's handwritten notes to Ms Ewing having been hospitalised the previous winter and an expectation (from Mr Page) that she would get sick again that winter and she would need holiday pay for that leave. Mr Page, when I asked him, did not recall saying that as bluntly as is recorded in Michele's notes.

[39] There was agreement that some performance concerns were also raised at that meeting but Ms Ewing said that there were no specifics raised about these and I find that is more likely. Ms Ewing was encouraged at the end of the meeting to take one or two weeks' annual leave. Ms Ewing took four days of annual leave from 3 to 6 June 2014 but did not take further leave because although she felt she needed to, there was so much work coming up and she wanted to save annual leave for family events. She accepted that she was pleased not to have been dismissed at the end of the meeting and felt that the relationship could possibly survive because there was the odd kind remark made by Mr Page.

Ms Ewing's own written stress report

[40] Ms Ewing was very clear in her evidence that the family related factors that Mr Page was raising were not causing her concern at that time and why that was so. One matter for example involving her son concerned issues some nine years earlier. There had been some family stress in early May 2014 but Ms Ewing had taken four hours off work to deal with the matter and said that it had not caused ongoing stress after that time.

[41] Ms Ewing said that she left a document headed stress on Mr Page's desk and gave a copy to Ms Davies dated 27 May 2014 at the end of the meeting. I shall call it the stress report. The stress report states amongst other matters that it is untrue that Ms Ewing's stress was not work related because of her personal life. Ms Ewing set out in the stress report the reasons for her work related stress. Mr Page said that he never saw the stress document and Ms Davies said that it was later, she thought in August although could not be clear, that she saw the document on Mr Page's desk. She said that she returned it to Ms Ewing saying that it would be better to hand that to him personally rather than leaving it on his desk. Ms Davies said that she had a quick skim read of the document before handing it back.

[42] As earlier stated the meeting summary was provided to Ms Ewing on or about 17 June 2014. Ms Ewing said in evidence that she wrote a response to the meeting summary to Mr Page dated 22 June 2014 which she provided in the bundle of documents. She said that she was too scared to provide it to Mr Page but it was therapeutic to write her thoughts down. Ms Ewing wrote she saw no point responding to Mr Page “*as he will only make my working environment more miserable than it is now.*”

[43] I accept that Ms Ewing did prepare a draft response on or about 22 June and I have relied on it to the extent that it enables me to reach conclusions about the stress report. The draft response states amongst other matters that Ms Davies told Ms Ewing on 16 June that she had taken her stress report off Mr Page’s desk as he did not need to see it as it would upset him.

[44] It must be, I find, that the stress report was put on Mr Page’s desk on or before 16 June for it to be handed back on that date by Ms Davies. Ms Ewing said in her written evidence that a reference to an August date as the date the stress report was removed in Mr Zindel’s letter dated 26 September 2014 raising the personal grievance was incorrect and it should have been May. The removal of the stress report by Ms Davies from Mr Page’s desk was unfortunate and an unusual step for a manager to take. It was a further barrier and impediment to Ms Ewing being able to advise why she was stressed and she did not subsequently present it in person to Mr Page. Ms Davies did skim read the document which further confirmed Ms Ewing’s view as to the cause of her stress at that time and therefore she had knowledge of the work issues that caused Ms Ewing stress.

[45] The stress document Ms Ewing left on Mr Page’s desk on or before 16 June which Ms Davies then removed says of her interaction with Mr Page which preceded her sick leave that “*his bullying verbal attack*” left her feeling stressed and humiliating. There is reference to Ms Ewing feeling “*wrung out and anxious*” after her interaction with Mr Page and feeling “*her heart and head start pounding*” and she knew she could not remain in the office. I find that Waimea Weekly knew or ought to have known of the risks to Ms Ewing health and well-being before 16 June 2014 from work related stress.

[46] Waimea Weekly was entitled to raise performance concerns but it could have been expected to have taken reasonable steps in doing so to protect Ms Ewing’s

health and well-being in light of knowledge about the impact of Mr Page's behaviour on her. A fair and reasonable employer could be expected to have a clear, transparent and supportive performance process in the circumstances.

In light of knowledge that Ms Ewing was suffering from work-related stress, were reasonable steps taken to provide a safe workplace?

[47] Ms Chapman in her submissions states that Ms Ewing was provided with a safe workplace and further that the behaviour of Mr Page before and after 28 May 2014 was not bullying and that he raised genuine performance concerns with Ms Ewing as he was entitled and obliged to do. She refers to the Work Safe guidelines that define bullying as "*repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety*".⁵ She submits that the behaviour by Mr Page does not satisfy that definition.

[48] I heard evidence from three previous employees of Waimea Weekly about Mr Page's behaviour. Two of them, Lynda and Jo, said they had been treated by Mr Page in a manner they regarded as unfair. Ms Chapman submits I should give that evidence no weight. A cautious approach is certainly necessary and should properly reflect that Waimea Weekly does have long serving and loyal employees. I conclude one element of the evidence is relevant in determining this matter. Lynda and Jo said they felt anxious, stressed and to a degree powerless in their dealings with Mr Page when he raised issues he was unhappy about with them or their work. That is very similar to how Ms Ewing described her interactions with Mr Page.

[49] Ms Davies confirmed in her written statement of evidence that Ms Ewing's sales performance was not in question but it was her work performance in following through with instructions and creating advertisements and relationships with other staff performing these tasks for her that was. Ms Ewing could not recall before May 2014 the raising of performance issues with her at least in a significant way.

⁵ See Workplace NZ "What is workplace bullying" <http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/bullying-guidelines/01>

June 2014

[50] Ms Ewing said that when she returned to work after her leave in early June 2014 Mr Page's behaviour towards her did not improve and he would make a number of comments such as she was too old to find another job and that her colleagues did not like working with her. She said that she felt depressed and worthless and her confidence was affected. Ms Ewing said that when she asked Mr Page why he was treating her in this manner she was either ordered out of his office or he would tell her that he was trying to help her. Mr Page agreed that he might have told Ms Ewing as she recalled it to stop behaving like a victim although did not accept that he ordered her out of his office and could not recall her asking why he was treating her as he was. Having heard the evidence I accept as likely Ms Ewing did question with Mr Page her treatment and that was not satisfactorily responded to.

[51] Mr Page did not accept any blunt reference to age in an inappropriate manner but accepted in his written evidence that he did point out that Ms Ewing was at the twilight of her career and "*she was still in huge trouble*" and that at Ms Ewing's age, opportunities do not come around so often. Mr Page says that this was against a background where he was aware that Ms Ewing was struggling in her performance and had significant personal issues to which he was not unsympathetic. Mr Page said in his written evidence that with health, family and money issues he concluded in or about June about Ms Ewing that he was "*pretty much watching a train crash happening*". He said that he was trying to lay it out to Ms Ewing in an honest and frank manner to see how serious the situation was but she went into denial about it.

[52] Mr Ewing said that on 13 June 2014 Mr Page said that he could "*sack me or work with me*". Mr Page could not recall saying this and Ms Chapman said that even if this was said it was not unreasonable. I find it less likely that Ms Ewing would have recalled this incorrectly.

[53] On 16 June 2014, Mr Page expressed in an email to Ms Ewing some disappointment about her not following his instructions from that morning. The email stated that, to help Ms Ewing, all other departments, pre-press, and editorial, were to maintain all contact with the customer after being notified about what is required by Ms Ewing and Ms Ewing was not to be involved in those processes. He stated that:

We need to let them get on with the job and you get on with what you're good at, selling. If the client asks for your involvement, as I

said today, please redirect them to Andrew or if you deem it applicable to me. This is to be implemented immediately.

[54] Mr Page then sent an email out to staff on that same day advising that Ms Ewing was not to be involved after her first contact. It was expressed that this was to free her up to trust our systems and let her focus on her primary role as a sales consultant.

[55] Ms Ewing said that she felt isolated and that she was being managed out at the point that she was advised she could not have that interaction with other staff. When Mr Page notified other staff that she was not to deal with them Ms Ewing said she felt inadequate to undertake her role and was fearful of being viewed as incompetent. Even if such a step was necessary as Mr Page said it was to help her, it seemed Ms Ewing was not clear why there was this reasonably significant change to how she carried out her role. With the knowledge that I find Waimea Weekly had or ought to have had about Ms Ewing's vulnerability, a clear approach to dealing with performance concerns was required to reduce stress.

[56] Ms Davies and Mr Page in their evidence said that Ms Ewing was placed directly under the management of Mr Page as Ms Ewing's constant need for reassurance and guidance was taking up too much of Ms Davies' time and energy, stopping her doing her own work. Ms Davies said that Ms Ewing would still go to her instead when issues arose and that was the cause of confusion and that she was fully aware she should be approaching Mr Page.

[57] I could not be satisfied that Ms Ewing understood there had been a change as to who managed her day to day. Ms Ewing said that Ms Davies would get upset with her for not doing things she used to do and she had to explain that was because Mr Page had told her not to do the work and therefore felt caught in the middle. Ms Davies did accept that initially she was not aware of the changes to Ms Ewing's responsibilities but that was only for a short period.

[58] Ms Davies said that Ms Ewing was the cause of the confusion because Ms Ewing fed her and Mr Page incorrect information. There was reference to extensive coaching in Mr Page's statement of evidence but that was not Ms Ewing's recollection. She did not accept that she received extensive coaching and said that she was an experienced sales person but not in other areas.

[59] On 17 June 2014 the meeting summary was provided by Mr Page. I accept Mr Zindel's submission that the earlier interactions about performance tie in with that being provided at that time. From the response that Ms Ewing drafted dated 22 June 2014 but did not feel she could give to Mr Page she felt that his description of her behaviour around the office in the document was "*cruel, insulting and unjustified*". She specifically refers to his statements contained in the record of the meeting about burning clients, sending destructive emails to staff and selling with a desperate air. There was a positive comment in the final paragraph of the summary of the 28 May meeting that Mr Page loved the way Ms Ewing tried, that she was always in the office and the way she worked with customers. For Ms Ewing those positive comments did not reduce the impact of the earlier description of her conduct which she said "*does not exist*". It was clear from the evidence that the wide sweeping statements by Mr Page caused Ms Ewing distress but she did not feel confident that she could do anything about it.

After 28 June 2014

[60] On Tuesday, 29 July 2014, Ms Ewing said she was exhausted and overwhelmed by what was happening. Mr Page was out of the office at this time for a medical procedure and she approached Ms Davies after work in the office to talk. Ms Ewing said that she told Ms Davies she could not cope with the pressure, that she was too old for the job and that she needed to look for something else. She explained how she was made to feel by Mr Page and that she talked about his behaviour that she said she described as bullying.

[61] Ms Davies said that she recalled Ms Ewing was quite upset and that she did advise that she felt too old and under pressure in relation to the job. She recalled that she was crying. Ms Davies accepted in her oral evidence that "*comments could have been said about Mr Page*" although in her written evidence said that she did not recall Ms Ewing specifically referring to any bullying from Mr Page. She said that Ms Ewing did advise her that being sick did not help and I accept that was likely. Ms Ewing was very clear that she referred to Mr Page's conduct as bullying and I find it more likely that Ms Ewing did refer to her concerns about Mr Page's comments and behaviour. It would in my view have been most unlikely that she did not.

[62] Ms Davies confirmed that she discussed the conversation she had with Ms Ewing with Mr Page. It is evident from an email at page 192 of the bundle that Mr

Page was sent a copy of an email subsequently provided to Ms Ewing on 30 July 2014. Ms Davies said in evidence she did not specifically mention any concerns to Mr Page as raised by Ms Ewing regarding his treatment and bullying and pressure. Given Ms Ewing did not feel comfortable raising issues of concern with Mr Page about his behaviour Ms Davies was the only person in a managerial position that Ms Ewing could raise her concerns with. Ms Davies agreed when questioned by the Authority that she knew Ms Ewing found Mr Page challenging to talk to and further she was aware that Ms Ewing had tried to talk to Mr Page about how she felt and it had not worked.

[63] Ms Ewing sent a text message to Ms Davies on 30 July 2014 advising that she was unwell and her breathing was challenging and she was then on sick leave between 30 July and 1 August 2014.

[64] On that same day, Ms Davies sent Ms Ewing an email thanking her for her frank and honest discussion when she said she would not be staying on with Waimea Weekly and that she was looking for other employment which did not involve media sales. Ms Davies advised that help could be requested with regard to time off for job interviews.

[65] Ms Ewing read that email when she returned from sick leave taken from 30 July to 1 August 2014. She said she was disappointed that was all that was taken from the conversation and that she had hoped, when she returned, Ms Davies would give her support or would have talked to Mr Page about his treatment of her.

[66] What was said on 29 July was more than simply a heads up that Ms Ewing was looking elsewhere for another role. I find that a fair and reasonable employer could have been expected to have had a discussion with Ms Ewing on her return from sick leave to ensure that her concerns with the system of work and the working environment were addressed. Nothing further, however, was said although Ms Davies said that after Ms Ewing returned to work in early August she was not bubbly and outgoing and Ms Davies thought she was not happy to be there.

[67] I find that more could be expected of a fair and reasonable employer in providing a safe workplace when concerns were raised that could indicate behaviour was impacting on Ms Ewing's health. There were no steps to investigate her concerns or put anything in place to prevent the behaviour occurring again although Ms Ewing

accepted that between 29 July and 12 September 2014 there were no significant issues.

[68] By email dated 15 August 2014 Ms Ewing applied for nine days' annual leave in late September and early November 2014 to attend family occasions. This was declined by Mr Page by email the same day. In that email he noted that if leave was to go ahead, Waimea Weekly had not had Ms Ewing on board for a full month for some time and also that it was the busiest time of the year. It was further noted that Ms Ewing recently had significant time off for sick leave which had now been "*maxed out*" and that Mr Page had had to decline other members' leave before Christmas.

[69] On 26 August 2014, Mr Page sent an email to Ms Ewing advising that her figures were great and her attitude had been the best for some time. He wrote that if Ms Ewing could give him an assurance to maintain this level and to have a two page feature minimum ready to go the week she was away, he would reconsider her leave application and sign it off. I accept Mr Zindel's submission that the grounds for reconsideration of the leave application could be seen as somewhat controlling. Ms Ewing did though understand that Mr Page considered she was working professionally. Her sales figures for July and August were good.

12- 15 September 2014

[70] On 12 September 2014, Ms Ewing became aware that an advertisement for a political party had run in the 3 September 2014 issue. It had been placed earlier and was due to run on two later dates in September but by mistake was also included in the 3 September 2014 edition. Ms Ewing asked the client whether it should have gone out in that edition but that had not been confirmed. Ms Ewing had made a mistake by not removing the advertisement from the booking book and as a result, \$475 plus GST was not charged to the client.

[71] Ms Ewing's evidence is that Mr Page was furious with her and spoke to her in an intimidating way in front of three other staff members, Ms Davies, Simon and Neil, about the mistake and advised her that her systems were "*shit*". Although there was a dispute about exactly what was said regarding the cost of the advertising Ms Ewing felt that Mr Page implied she may have to pay for it. Subsequently \$400 was deducted from Ms Ewing's pay. That was repaid in 2016 and I find the deduction was in all likelihood related to this matter.

[72] Mr Page did not accept he raised his voice, was intimidating or furious at the political party advertisement although he did accept he was cross. He did not accept that he said Ms Ewing's systems were "*shit*", but did say or question who would pay for it and felt that Ms Ewing was trying to minimise what he saw as being a serious issue because it involved advertising for a political party and could have implications beyond a normal advertisement placed by mistake.

[73] Ms Davies was present when Mr Page spoke about the political party advertisement. She did not accept that he was intimidating but did recall in her evidence that he was cross and said it would not surprise her if Mr Page had said something along the lines of Ms Ewing's systems being "*shit*". I find it likely that he did say something along those lines.

[74] It was unhelpful and unnecessary for the mistake to be raised in front of others on 12 September 2014 and for Mr Page to imply that Ms Ewing may have to pay for it. Ms Davies' approach that same day was more appropriate. She sent an email into which Mr Page was copied advising that Ms Ewing had made a serious error in running the advertisement on 3 September 2014 and that she would need a detailed account of how it happened, including copies of all emails from the client regarding ad placements and bookings. Ms Ewing was asked to have these provided by 5pm that day.

[75] At 4.10pm on 12 September 2014, Ms Ewing responded to Ms Davies sending a timeline regarding the mistake and advising that her systems had let her down and she was sincerely sorry. Ms Ewing recorded that she had emailed the client apologising and had given Mr Page's work number if he wished to discuss it further. I find that the interaction with Mr Page increased unnecessarily the stress Ms Ewing felt about making a mistake without adding anything of value.

[76] Over the weekend of 13 and 14 September 2014 there were some further events. Mr Page went into the office to catch up on some work. He said that he was concerned about the situation with respect to what had happened with the political party advertising and he wanted to have a look at the work computer that Ms Ewing used and chase relevant emails about the political party advertising at that time. Ms Davies had also mentioned to Mr Page that weekend that there were Facebook posts of Ms Ewing socialising with staff from Waimea Weekly's competition and this caused him concern.

[77] Mr Page was unable to access relevant files on Ms Ewing's computer and called out some IT specialists. I heard from Neil Albury of PC Systems by telephone. Mr Albury said that he was asked to look at the internet and email by Mr Page. He recalled being asked to consider some key words. He found that there were some emails but he did find that the browser seemed to have been cleared. Mr Page immediately became quite suspicious and said he took it to another specialist to recover the hard drive.

[78] On the same weekend, Ms Ewing also went to the office on Sunday 14 September 2014. She wrote an email to Mr Page about the political party advertisement error. It was never responded to. Mr Page could not recall if he received it but I accept that it was sent. Ms Ewing confirmed in her email that she had apologised both to the client and to Mr Page and that she had made a genuine mistake. She wrote that talking down to her in front of Simon, Neil and Ms Davies on the Friday and "*slating my systems*" was demeaning and unprofessional. She referred to the implication that she may have to pay for the \$475 mistake and said that she did not accept that. She advised that any meeting about the issue or further disciplinary meeting would be taped and that her lawyer had a copy of the email.

[79] Ms Davies in her evidence disputed that Ms Ewing was too upset or humiliated about what Mr Page said because she took some fresh salmon from Mr Page as she left that day. Clearly though Ms Ewing was upset notwithstanding she took some salmon because she wrote an email about it.

[80] On Monday, 15 September 2014 Ms Ewing attended work as she usually did to find that Ms Davies was there earlier than she normally would be. Ms Ewing became anxious. Ms Davies was looking at holiday photos with another sales representative. Ms Ewing expressed some surprise to see Ms Davies and then Ms Ewing saw that her computer was missing. Ms Davies said that she told Ms Ewing she could use another computer. Ms Ewing recalls being told by Ms Davies that her computer had been confiscated although that description was not accepted by Ms Davies or Mr Page. She was further advised that Mr Page was on his way to talk to her. At that point, Ms Ewing said she began to hyperventilate and had an anxiety attack. She left work and went to see her doctor who gave her a medical certificate until 29 September 2014.

Absence from work

[81] The medical certificate from Dr Swanson provided to Waimea Weekly that day stated that Ms Ewing was medically unfit due to work stress from 15 September 2014 and may be fit to resume work on 29 September 2014.

[82] The consultation notes at that time were provided for the purposes of the Authority's investigation meeting. Mr Page was concerned about the notes which he did not see until the bundle was compiled. He said there was an untrue statement in them. Whilst I accept Mr Page's evidence that the incident never happened as described it may simply have been a misinterpretation of the situation as seen by Ms Ewing. The balance of the consultation notes provide that Ms Ewing had reported she was under workplace stress with her boss who she described as a bully. It is recorded in the notes that she was made to feel useless and old and had come in that morning to find her computer confiscated and people were there who were not normally there. She was told that "*Steve will be in soon*". Ms Ewing is recorded as saying that her heart was racing and she had breathing issues and she needed two weeks off on stress leave. The notes record her stating she had now realised she was scared of her boss and, amongst other things, was finding it too hard to be strong and stand up to him. Mr Page said in his written evidence that the notes and self-reporting were untruthful to gain a medical certificate and make out a claim of stress.

[83] On 19 September 2014, Mr Page emailed Ms Ewing and advised that time needed to be set aside to discuss "*in an honest and open manner recent events*". Mr Page recorded that it would be preferable to do this as soon as possible before the target date for resumption of work because there were a number of serious issues to discuss and depending on Ms Ewing's responses, her employment may be in jeopardy and she could bring a support person. Ms Ewing responded to this email on 19 September 2014 and advised she was not in a fit state to have a meeting with Mr Page.

[84] Ms Davies became aware that Ms Ewing had worked on Election Day in the polling booth on Saturday, 20 September 2014 and regarded that as inconsistent with being on sick leave. She alerted Mr Page to this on the Monday by email and the times she had observed Ms Ewing working. Ms Ewing said in her evidence that she had undertaken to perform this role before her sick leave and was able to do undemanding tasks.

[85] On 24 September 2014, an employment advocate in Nelson, Shane Boyce, was instructed by Waimea Weekly and wrote to Ms Ewing. She advised Ms Ewing of a proposal to meet with her on 30 September 2014. The issues that Waimea Weekly wanted to be investigated were listed. There was Ms Ewing's fitness for work, abandonment of her employment on 15 September 2014, personal use of Waimea Weekly computer, potentially damaging the employer's reputation by the running of the unauthorised advertisement for the political party and dishonesty and misrepresentation because Ms Ewing had been observed during sick leave at the election polling site the day after Ms Ewing advised she was not in a fit state to have a meeting with Mr Page. Ms Ewing was advised in the letter that the allegations were serious and may jeopardise her employment and she was advised to bring a support person or representative to the meeting. Ms Ewing said that receiving this letter caused such an anxiety attack that she forwarded it to Mr Zindel unread and asked him to deal with it. Ms Ewing did email Ms Boyce on that same day and advised that Mr Zindel would respond and she was currently on work related stress leave and that she was in no fit state to deal with any communication from Waimea Weekly at that time.

[86] On 26 September 2014, Mr Zindel responded on behalf of Ms Ewing to Ms Boyce and raised a personal grievance of unjustified action causing disadvantage that the workplace was an unsafe place for Ms Ewing to return to unless there were assurances that past patterns of conduct were not to be repeated and that Ms Ewing was off work until at least 29 September 2014 and was assessing whether this needed to be continued. There was an invitation to attend mediation to discuss the personal grievance and talk on a without prejudice basis. Mr Zindel stated in his letter that the particular personality of Mr Page may be such that a return to work may not even be possible. Ms Ewing agreed that she had reservations about the possibility of that having raised a personal grievance.

[87] On 26 September 2014, there was a telephone consultation between Ms Ewing and her doctor. Notes at that time record Ms Ewing described she was still suffering from stress that she described as unbearable and that she was sometimes unable to open emails due to her symptoms and was hyperventilating on the phone. A further medical certificate was provided from 29 September 2014 resulting from a consultation with a doctor in person with Ms Ewing potentially being fit to resume work on 20 October 2014.

[88] On 30 September 2014, Ms Ewing was taken to hospital with the exacerbation of the chronic breathing condition from which she suffered. She was discharged on 10 October 2014. The Authority did not hear any medical evidence to support or otherwise that this condition was exacerbated because of the stress and pressure. The Authority was provided with the discharge summary which did refer to Ms Ewing being rundown and stressed and having poor sleep leading up to her condition requiring hospitalisation.

[89] On 1 October Mr Page said he was provided with a facebook post. Ms Ewing had been invited to an event and responded by saying:

You're a sweetheart Linda. I would love to come but am in hospital at present ... Please don't tell anyone at WW or NW. Would love to keep in touch because always liked you!! Filed PG against Steve so no one will be allowed to have contact with me!!! He has almost destroyed me but Steve Zindel will annihilate him xx

[90] On 15 October 2014, a further medical certificate was provided that Ms Ewing remained medically unfit due to work stress and may be fit to resume work on 10 November 2014.

[91] Mr Page then sought further medical information from Ms Ewing's medical practitioner under clause 23 of her employment agreement. By letter dated 21 October 2014 he noted in doing so that Ms Ewing had provided three consecutive medical certificates for nine weeks' absence stating work stress as the reason for the absence. There were a number of questions asked about the diagnosis, the medical treatment Ms Ewing was receiving, whether her symptoms related to a pre-existing condition and any steps that Waimea Weekly could take to minimise the workplace stress and prevent it from reoccurring.

[92] Before a response was received to the request for medical information a further medical certificate was provided on 7 November 2014 by email from Ms Ewing to Ms Boyce. It provided that Ms Ewing had been examined and may be fit to resume work on 8 December 2014. Ms Ewing in her email to Ms Boyce providing the medical certificate stated that she would be reviewed by her doctor on 6 December 2014. Ms Ewing asked that the medical certificate be forwarded to Waimea Weekly and advised that she continued to be in no fit state to have any contact with Mr Page.

[93] Five days later on 12 November 2014 Ms Ewing's doctor, Dr Swanson, responded to Ms Boyce and her request for information. The diagnosis was expressed

as anxiety symptoms due to claimed aggression from Mr Page. Dr Swanson noted that Ms Ewing attributed the workplace stress to Mr Page and said that this had caused her marked distress that would have significantly impaired her ability to perform her usual job. She noted there were no ongoing physical health issues. Under the DSM-IV criteria diagnosis was stated as Adjustment disorder with anxiety - 309.24. The symptoms were recorded as not related to any pre-existing condition and Ms Ewing has apparently not suffered from any anxiety in the past nor has she been on medication for this. Support was expressed as through her general practitioner and a referral to a clinical psychologist who specialises in workplace issues for further support. Dr Swanson recorded that Ms Ewing did not feel any duties caused her workplace stress but it is claimed "*it was her boss*" who caused the stress and that she enjoys her job and the line of work she is in. She stated that the only way to have no workplace stress would be reformed management as the working relationship has become tense and that Ms Ewing is happy to work through her normal duties except for the situation with Mr Page. Dr Swanson noted that Ms Ewing was happy to return to work but could not at that time and that the symptoms would resolve when management of her improved.

[94] On 18 November 2014, Ms Ewing received a letter from Mr Page which has already been referred to that gave her notice of termination of her employment.

Was there a breach of the obligation to provide Ms Ewing with a safe workplace?

[95] I find that Waimea Weekly breached its duty to take all reasonable and practicable steps to provide a safe workplace for Ms Ewing which avoided reasonably foreseeable harm to her health. I have found this in circumstances where it knew or ought to have known of the risks to her.

[96] It closed its mind to and refused to accept that Ms Ewing's stress was due to the work environment and treatment by Mr Page. It knew or ought to have known of the risk to Ms Ewing's health if that treatment continued. Ms Ewing left a stress report on Mr Page's desk. That was appropriate in circumstances where she was fearful of his reaction and had known difficulty communicating with him however it was removed by Ms Davies and Ms Ewing was advised to give it to him in person which she could not. She asked Mr Page why he was treating her as he was and was told to stop being a victim. On 29 July 2014 visibly upset she told Ms Davies that she could not cope any longer and spoke at that time of concerns about Mr Page's

treatment of her. Finally she sent Mr Page an email on 14 September apologising for a mistake and telling Mr Page his behaviour was inappropriate. This was not acknowledged probably because matters escalated.

[97] It was, I find, reasonably foreseeable that Ms Ewing would become anxious and unwell if the treatment of her by Mr Page continued. There was a period between 30 July and 12 September 2014 of six weeks and two days without significant incident but when there was a mistake on Ms Ewing's part which Mr Page was unhappy about he behaved unreasonably again and without giving any thought to the effect on Ms Ewing. There was an element of unpredictability with his behaviour that increased stress for Ms Ewing. Her email apologising for the mistake and expressing her unhappiness about criticism of her in front of others in an email on Sunday 14 was not responded to. It seems the afternoon of Sunday 14 September after Ms Ewing had prepared and sent the email and undertaken some other work Mr Page removed her computer. He had been told by Ms Davies at that stage that Ms Ewing was in photos on Facebook socialising with staff from a competitor.

[98] Mr Page does as Mr Zindel submits have strengths and good points and the evidence supported he can be generous. He has built his business up through hard work and determination. Unfortunately his treatment of Ms Ewing was unreasonable with elements of bullying and little regard to the duty of good faith to be active and constructive in establishing and maintaining a productive employment relationship. There is merit in Mr Zindel's submission that rather than listening to Ms Ewing and responding to what she was saying and her concerns, Mr Page took a defensive and somewhat aggressive approach which ultimately became too much for Ms Ewing to cope with. The support she hoped for from Ms Davies was not there and Mr Page did not consider what effect his actions may have on Ms Ewing and downplayed any suggestion that they would have caused any harm.

[99] These actions included wide sweeping and generalised negative statements about how she carried out her role and her interactions with others that made her feel incompetent, disempowered and with no ability to address the concerns. To approach performance concerns in that way is the antithesis of a fair and reasonable performance process. A fair performance process should be measured and clear with the objective for the employee to meet the employer's expectations which should be clearly set out. The performance process that followed caused confusion and I could

not be satisfied that Ms Ewing knew Ms Davies had or wanted to relinquish management of her or indeed why.

[100] There were also personal comments about Ms Ewing's family and the view that they were responsible for her stress without firstly assessing directly with her whether this was the case. There was the comment in front of others about her inadequate systems, the unexpected removing of her computer with an unplanned meeting to follow the email. Mr Page is correct in his evidence that the computer belonged to Waimea Weekly but with knowledge that he had or ought to have had about Ms Ewing's health it was not a reasonable step to take without discussion first. There was then the letter very shortly after Ms Ewing went on sick leave in September about serious issues and then more formally misconduct issues that may jeopardise her employment. This included an allegation of abandonment of employment when it was known she was sick.

[101] I accept Mr Zindel's submission that a fair and reasonable employer could and should have investigated Ms Ewing's concerns about her treatment and the pressure she was under and looked at ways she could be provided with a healthy and safe workplace. Mr Zindel made the concerns very clear in the grievance letter and Dr Swanson provided her report. An investigation was required in exactly the same way it would have been if Ms Ewing had said that the workplace stress was being caused by another employee.

[102] I agree with Ms Chapman's submission that Ms Ewing's medical reports are based on self-reporting and caution is required in concluding the stress was caused by the work place. Ms Chapman submits that other matters may have been responsible for the stress including medication for and the chronic disease itself. I find on the balance of probabilities that the main cause of Ms Ewing's workplace stress was her treatment by Mr Page.

[103] I find that by failing to provide Ms Ewing with a safe workplace this unjustifiably affected her conditions of employment to her disadvantage and she has a personal grievance that she was unjustifiably disadvantaged. What Waimea Weekly did and how it did it was not what a fair and reasonable employer could have done in all the circumstances at the time under the test of justification in s 103A of the Employment Relations Act 2000 (the Act). Ms Ewing is entitled to an assessment of

remedies which I will turn to after I have considered the claim that Ms Ewing was unjustifiably dismissed.

Unjustified dismissal

[104] Ms Chapman in her submissions confirmed that in terminating Ms Ewing's employment Waimea Weekly did not rely on frustration of contract but rather medical incapacity. She submits that Ms Ewing had been absent for a period in excess of nine weeks when the decision was made on 18 November to terminate her employment and was going to be absent until 8 December 2014 with the only path to a return to work, according to the doctor, being reformed management. Further, she submits that Ms Ewing occupied a key position and was notified that her employment was at risk although that was, I find, in relation to serious issues and allegations of misconduct.

[105] Ms Chapman submits if I find as I have that Waimea Weekly is responsible for Ms Ewing's absence it is not a determinative consideration and should not be in this case. Mr Zindel and Ms Chapman agree that there are circumstances where extended period of illness may justify a dismissal on notice but Mr Zindel submits that point had not been reached in this case.

[106] A termination for medical incapacity must be justified substantively and procedurally applying the test of justification in the Act.

[107] The justification test in s 103A of the Act requires the Authority to consider on an objective basis whether the actions of Waimea Weekly and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. The Authority must consider the procedural fairness factors set out at s 103A(3) of the Act and may take into account other factors as it thinks appropriate and must not determine an action or dismissal to be unjustified solely because of defects in the process if they were minor and did not result in unfair treatment. A fair and reasonable employer could be expected to comply with good faith obligations set out in s 4 of the Act.

[108] The letter advising of termination of employment on notice was dated 18 November 2014. Ms Ewing had been absent from work from 15 September 2014 but the letter refers to Ms Ewing having been off work for some three months as one of the grounds for the decision to give notice of termination but in fact it was a period of nine weeks and one day.

[109] There is a suggestion in the letter that Ms Ewing has been reluctant to inform about her medical condition and what steps can be taken to minimise the stress. At that time it was known that Ms Ewing's doctor considered the stress was caused to Ms Ewing by the treatment of Mr Page and reformed management was the step required. There had also been Mr Zindel's letter.

[110] If the medical report setting out the cause of the stress and anxiety and what must change in the work place for a safe return to work was not accepted, alternatives may have included, with agreement, Ms Ewing being seen by an independent medical practitioner or psychologist to deal with any concerns about self-reporting.

[111] A fair and reasonable employer could and should have considered whether there were some alternative solutions to termination. Early in 2014 there had been some discussion about moving Ms Ewing for example to the other Nelson based publication to minimise contact with Mr Page. Ms Chapman submits that Ms Ewing refused to engage about a return to work plan but Waimea Weekly did not accept the reasons for workplace stress in order to propose a reasonable and safe work plan even after the medical report made it clear.

[112] I accept Ms Chapman's submission that Ms Ewing was advised that her employment was at risk but considered in the round that was in relation to potential matters of misconduct and not medical incapacity. Ms Ewing was not properly advised that her employment may be terminated for the reason of medical incapacity and did not therefore have a reasonable opportunity to respond to that matter or have her response properly considered. The process did not meet the requirements of procedural fairness in s 103A(3) of the Act and not simply in a minor or technical way.

[113] It may have been that the employment relationship could not have been successfully re-established. Ms Ewing felt that may well have been the case from the point she raised a personal grievance on 26 September 2014. Waimea Weekly did not however, take appropriate steps after receiving the medical report from Dr Swanson before moving to dismiss Ms Ewing on notice for medical incapacity.

[114] The dismissal was not what a fair and reasonable employer could have done in all the circumstances for all the reasons set out above and is unjustified both substantively and procedurally. It was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[115] Ms Ewing has a personal grievance that she was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Lost Wages

[116] Ms Ewing seeks lost wages for at least a period of three months from 15 December 2014 which was the end of the four week notice period in the termination letter although the final pay was made on 26 November 2014. Ms Ewing found part-time work in mid-June 2015 and full time work from November 2015. Ms Ewing said that she continuously applied for jobs from February but was not in a good frame of mind or state of health to be a worthwhile employee. She started in early March building her health and self-esteem with Aqua Exercises. I accept Ms Chapman's submission that there was somewhat limited evidence about mitigation and no medical evidence to support continued incapacity after the date of termination.

[117] The Authority may under s 123 of the Act provide for reimbursement to the employee of a sum equal to the whole or any part of the wages lost as a result of the grievance. I have found grievances made out for unjustified action causing disadvantage and unjustified dismissal. Ms Ewing had exhausted her sick leave when she was absent from work from 15 September 2014. I have found that the most significant reason for the anxiety that she suffered at that time which prevented her working was her treatment by Mr Page. No lost wages are claimed from 15 September 2014 until termination. The exhaustion of sick leave at that time was at least in part as a result of the chronic disease for which Ms Ewing required a period of hospitalisation in 2013. That is fairly taken into account by limiting the remedies claimed before termination to compensation. It appropriately takes into account that whilst the onset of the chronic disease in 2014 may have been exacerbated by Ms Ewing being stressed and rundown there was no medical evidence before the Authority on that.

[118] I find that Ms Ewing should, subject to any issue of contribution, be entitled to reimbursement of three months wages from the date of termination. It is appropriate to limit any lost wages to three months because of the limited evidence of mitigation and some unlikelihood of the relationship being able to be properly re-established. I do weigh that if there had been some acceptance of the reason for the stress and some consideration about how to deal with that to provide a safe and

healthy workplace it is not inconceivable that the relationship may have been able to be successfully restored. A longer period would also have been required before termination for medical incapacity for a fair and proper process and investigation.

[119] Ms Ewing in her evidence said that her salary at the time of termination including bonuses was \$72,000. Three months reimbursement of lost wages subject to contribution is the sum of \$17,999.99 gross which I shall round up to \$18,000. Ms Ewing received a sickness benefit over the three month period but that is a matter between her and the agency that paid the benefit about the repayment of it.

Compensation

[120] The evidence supports that the impact on Ms Ewing's emotional well-being was significant both during her employment from 28 June 2014 and after she left Waimea Weekly. During her employment she became unhappy, withdrawn and was depressed and cried easily. She said that she had become exhausted. She described herself for some months after she left Waimea Weekly as nervy, depressed with no confidence and needing to have for the first time in her life sleeping pills. Ms Ewing did not accept that she had provided insufficient information about her medical condition and did not consider she had been away for a period that would justify dismissal. There were also financial consequences because Ms Ewing had to leave her home as she could no longer afford to live there and went boarding. I do weigh the considerable overlap of the two grievances.

[121] I find that there should be a global award under this head to reflect the significant effects to Ms Ewing because of her treatment and that subject to any issues of contribution the sum of \$12,000 is a fair award.

Contribution

[122] The Authority is required under s 124 of the Act where it determines there is a personal grievance to consider the extent to which the actions of Ms Ewing contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded. Ms Chapman submits that contribution should be assessed at 100%.

[123] There was some suggestion that Ms Ewing tried to hide her hospital admission. There may be situations where the failure to disclose a hospital admission

is causative of the grievance and in turn blameworthy conduct. I have found on the balance of probabilities that the main reason Ms Ewing was too unwell to return to work was her treatment by Mr Page rather than her pre-existing chronic condition and the hospital admission fell within a period covered by a medical certificate. I do not find that the comments made in the Facebook post, whilst unfortunate, about Mr Zindel annihilating Mr Page was causative of the situation that gave rise to grievances of unjustified action causing disadvantage or dismissal. To the extent that it may be seen to show a lack of intention to return to work that has already been reflected in the limiting to three months the recovery of wages.

[124] I do not find that there was contribution by Ms Ewing when she left the workplace on 15 September without discussion beforehand because she went straight to her doctor and provided a medical certificate without delay. I am not satisfied that the evidence is sufficient for me to conclude on the balance of probabilities that Ms Ewing sanitised her computer. She denied that except to the extent that she deleted emails after a month or so old having been instructed to do so by Mr Page. The evidence supports some emails were still present. I am not satisfied on the balance of probabilities the additional political party advertisement was other than a mistake. The polling booth work was not undertaken on what would have been a work day. The allegation was that this work was undertaken when Ms Ewing was too unwell to meet with Mr Page. Ms Ewing explained that the work was not physically demanding and was pre-arranged although she was not well when it was undertaken. Medical reports clarified that the cause of the stress was Mr Page's treatment of Ms Ewing. I do not find that was contributory conduct because of her working at the polling booth in all the circumstances.

[125] I am not satisfied that there was blameworthy conduct on the part of Ms Ewing for which the remedies to be awarded to her should be reduced.

Orders

[126] I order Waimea Weekly Limited to pay to Janina Ewing the sum of \$18,000 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000. I will as a precautionary measure give Ms Chapman five days from the date of this determination to return to the Authority if she takes issue with the assessment of the three months lost wages.

[127] I order Waimea Weekly Limited to pay to Janina Ewing the sum of \$12,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Medical expenses

[128] Ms Ewing has claimed for the cost of medical consultations to November 2014.

[129] I have found that the material cause of the work stress was treatment by Mr Page and I find that Ms Ewing is entitled in those circumstances to be reimbursed for consultations for medical certificates for the period from 15 September 2014 to the final medical certificate before termination only.

[130] There was a consultation on 15 September and a medical certificate was provided that Ms Ewing was unfit to 29 September 2014. The cost of that consultation was \$41. There was a telephone consultation on 26 September and a medical certificate that Ms Ewing was unfit to 20 October 2014. The cost of that consultation was \$20.50. There was a further consultation on 15 October 2014 and a medical certificate that Ms Ewing was unfit until 10 November 2014. The cost of that consultation was \$41. There was a further consultation on 7 November and a medical certificate that Ms Ewing was unfit until 7 December 2014. The cost of that consultation is shown as no cost.

[131] I order Waimea Weekly Limited to reimburse to Ms Ewing the cost of the consultation as set out above in the sum of \$102.50. I reserve leave for Mr Zindel to return to the Authority if there was a charge for the final consultation that I have overlooked.

Interest

[132] I am not minded to exercise my discretion and order interest payable on the above awards for lost wages and reimbursement of medical certificates. There was some delay in finalising the date for an investigation meeting but it was not exceptional delay as the application was lodged in July 2015.

Counterclaims

[133] I do not find that there is sufficient evidence for me to conclude that Ms Ewing sanitised her computer or deliberately deleted emails other than to comply with what she considered was company policy to the standard required for a penalty to be awarded. The claim is dismissed.

[134] I do not find that Ms Ewing breached her obligations to be communicative and responsive when the communication after 15 September 2014 is considered as a whole. Mr Zindel in his letter of 26 September which raised the personal grievance suggested mediation and/or without prejudice discussion. He also in the first paragraph requested that any meeting about the misconduct allegations be deferred as he was out of the office until 8 October. Ms Ewing explained to Mr Page that she was not well enough to meet with him when such were proposed. The claim for breach in this respect is not made out and is dismissed.

Costs

[135] I reserve the issue of costs. Mr Zindel has until 23 November 2016 to lodge and serve submissions as to costs and Ms Chapman has until 13 December 2016 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority