

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 227
5588637

BETWEEN HARA YASMIN FIRMAN
 Applicant

A N D INSYN LIMITED trading as
 SYNERGY HAIR RICCARTON
 Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein and Linda Ryder, Counsel for Applicant
 Kelvyn Glading, Advocate for Respondent

Investigation Meeting: 13, 14 and 15 September 2016 at Christchurch

Submissions Received: On the day of investigation meeting and 30 September
 2016, from the Applicant
 22 September 2016, from the Respondent

Further Information
Supplied: 16 and 21 September and 3 October 2016

Date of Determination: 21 December 2016

DETERMINATION OF THE AUTHORITY

A Hara Yasmin Firman was unjustifiably suspended from her employment. Insyn Limited trading as Synergy Hair Riccarton is ordered to pay to her the sum of \$1000 without deduction under s 123 (1)(c)(i) of the Employment Relations Act 2000.

B Hara Yasmin Firman was justifiably warned for removal of product.

C Hara Yasmin Firman was unjustifiably constructively dismissed.

D Taking contribution into account Insyn Limited trading as Synergy Hair Riccarton is ordered to pay:

(i) \$2147.86 gross being lost wages and other money under s 123(1)(b) of the Act.

(ii) Reimbursement of the sum of \$200.20 gross under s 123(1)(c)(ii) of the Act being lost benefits for employer Kiwisaver contributions and holiday pay calculated on part of the lost wages as claimed.

(iii) Compensation in the sum of \$2800 without deduction under s 123 (1)(c)(i) of the Act.

(iv) There is no award for interest on the lost wages and lost benefits.

E There is no penalty imposed for breaches of good faith or for breaches of Ms Firman's employment agreement.

F A penalty of \$3000 has been imposed for a breach of the requirement to provide wage and time records under s 130 (2) of the Employment Relations Act 2000 with half of the penalty payable to Ms Firman and half to the Authority for payment into the Crown bank account.

G Insyn Limited trading as Synergy Hair Riccarton is to pay to Hara Yasmin Firman the sum of \$1056.00 gross for six alternative holidays and \$1882.69 holiday pay.

H The Authority has in its discretion awarded interest payable on the above amounts from 17 December 2015 to the date of payment at the rate prescribed under s 87 (3) of the Judicature Act 1908 of 5%.

I There is no penalty awarded for a failure to pay the above amounts as that is only available on the application of a Labour Inspector.

J The Authority does not have jurisdiction to deal with the claim for the value of the product removed from Insyn Limited trading as Synergy Hair Riccarton. The other counterclaims are dismissed.

K Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.

Employment relationship problem

[1] Ms Hara Yasmin Firman commenced her employment with Insyn Limited trading as Synergy Hair Riccarton (Synergy) in or about November 2012 as a junior stylist. Her place of work was at the Westfield Riccarton shopping centre in Christchurch and she was party to a written individual employment agreement (the employment agreement) with Synergy dated 30 November 2012.

[2] Mr Kelvyn Glading is the sole director of Insyn Limited. Insyn Limited is a duly incorporated company having its registered office at Christchurch and it owns and operates Synergy at Westfield Riccarton and four other Synergy Hair businesses throughout New Zealand.

[3] Ms Firman has a number of employment relationship problems arising from her employment with Synergy at a time when she had become a senior stylist. Issues arose in the employment relationship after removal by Ms Firman of some product from the Synergy store in early September 2015. Ms Firman resigned from her employment with Synergy on 16 December 2015 in circumstances she says were in the nature of a constructive dismissal.

[4] As well as alleging an unjustified constructive dismissal Ms Firman says that she was unjustifiably disadvantaged in her employment when she was suspended on 26 September 2015 and when she was issued with a written warning on 7 October 2015.

[5] Ms Firman says that there were breaches of express and implied terms of her employment agreement by the failure of Synergy to provide her with a safe workplace in accordance with clause 21 of her individual employment agreement and a failure to consult before deciding to suspend her. Further, she says that there was a failure by Synergy to meet good faith obligations in s 4 (1A)(b) and (c) of the Employment Relations Act 2000 (the Act), a failure to provide access to wage and time records and a failure to make payments of holiday pay and payment for alternative days. She seeks penalties for these breaches.

[6] Ms Firman seeks reimbursement of money owing for unpaid holiday and alternative days in the sums of \$1,882.69 gross and \$1,056 gross respectively. She

seeks reimbursement of lost wages including a lost bonus that she has averaged at \$60 per week and Kiwisaver contributions and other contractual benefits including holiday pay from 17 December 2015 to 25 January 2016 when she was without employment. Ms Firman then obtained a new hairdressing role on 25 January 2016 at the same hourly rate she was receiving at Synergy but worked for 35 hours per week and not for the 40 hours per week that she says she worked at Synergy. Ms Firman claims full reimbursement of lost wages for the difference of five hours per week and bonus from 26 January 2015 until the date of the investigation meeting on 13 September 2015.

[7] Ms Firman wants an order that the statement of problem and/or determination is provided to a Labour Inspector.

[8] Synergy does not accept its actions were unjustified or that Ms Firman was unjustifiably constructively dismissed. It says there should be no remedies awarded to her for personal grievances. It does not accept that there are any breaches on its part for which penalties should be awarded and disputes the quantum of money it owes to Ms Firman for alternative days and holiday pay, saying she was overpaid her sick pay which should be taken into account together with other sums owing.

[9] There was no dispute that the determination should be provided to a Labour Inspector and either party should feel free to do so.

[10] Synergy counterclaims and seeks reimbursement of the full value of product Ms Firman removed from the store on 2 September 2015 in the sum of \$75.68. It claims it is also entitled to reimbursement of wages for the failure of Ms Firman to work out her 14 day resignation period and damages for loss of sales for a two week period in the sum of \$7,035.30.

The issues

[11] The issues for the Authority to determine are as follows:

- (a) Was the suspension of Ms Firman from the workplace on 26 September 2015 unjustified?
- (b) Was the written warning issued to Ms Firman on 7 October 2015 unjustified?
- (c) Why did Ms Firman resign from her employment?

- (d) Did Synergy follow a course of conduct with the deliberate and dominant purpose of coercing Ms Firman to resign starting from the meeting on 9 September 2015?
- (e) Alternatively, or additionally, were there breaches of duty by Synergy that were of a serious nature?
- (f) Was Ms Firman constructively dismissed from her employment?
- (g) If Ms Firman was constructively dismissed from her employment, was that dismissal unjustified?
- (h) If the grievances for unjustified actions and/or unjustified constructive dismissal are made out, then what remedies should be awarded and are there issues of contribution and mitigation?
- (i) Was there a failure on the part of Synergy to meet good faith obligations for which a penalty should be awarded?
- (j) Was there a failure to provide Ms Firman with a safe workplace in accordance with the employment agreement for which a penalty should be awarded?
- (k) Was there a failure to provide access to wage and time records for which a penalty should be awarded?
- (l) Was there a failure to make payments of holiday pay and alternative days and if so in what amount and can a penalty be awarded?
- (m) Should there be an award to Synergy for the value of product removed from the store by Ms Firman?
- (n) Should there be damages awarded or wages forfeited for the failure to work out the two weeks' notice. Is there other money that should be payable to Synergy by Ms Firman, and if so, in what amount?

Relevant provisions in the employment agreement and house rules

[12] Clause 16.5 in the employment agreement provides about removal of items from the salon:

The removal from the salon of any equipment, product, documents, salon recordings, and fellow employee's belongings without approval is not permitted. Immediate dismissal will occur. If necessary the only person permitted to authorise removal of said items is the shop manager or owner. This will formally be recorded. The right is reserved to search employee's personal bags/effects at any time conducted with the said employee.

[13] The In Salon Hairdressing/Retail Guidelines/rules (house rules) are referred to in, and attached to, the employment agreement. These were signed by Ms Firman on the same date as the employment agreement. They provide in clause 12 under Staff Privileges (In Salon Hairdressing/Retail):

All staff may have their hair styled and all products will be supplied by the salon at a nominal charge. (ie\$10.00) and nominated day/time (eg Tuesday Night) This privilege is not to be abused in any way and will be carried out on designated evening/after normal salon hours. Any product/mixation used is to be recorded on your personal Staff Client Card (A/C#) and advised to the Manager. Staff hairdressing services shall not conflict with the normal running of the salon or hinder the services supplied to salon/retail customers. ...

All staff colour applications are to be recorded directly onto the employee's client care within the computer system. Eg. Date/product used quantity. And authorized by management.

[14] Clause 19 of the employment agreement refers to disciplinary process and provides amongst other matters for suspension:

Where a employee's conduct may require investigation for misconduct or serious irregularities the employee may be suspended from work without pay, maximum 2 days, while the employer conducts a full & procedural fair investigation.

[15] There is also reference to disciplinary action being implemented in accordance with the Shop/Salon Operations & Procedures manual & standard Employment Act provisions although there was nothing specifically about disciplinary procedures in the house rules.

Test of justification in section 103A of the Act

[16] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action and a dismissal. That is not done by considering

what the Authority may have done in the circumstances. The Authority is required under s 103A of the Act to consider on an objective basis whether the actions of Synergy and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the action or dismissal.

[17] The Authority must consider the four procedural fairness factors set out in s 103A (3) of the Act. These are whether the allegations were sufficiently investigated, whether concerns were raised with Ms Firman, whether she had a reasonable opportunity to respond to them and whether such explanation was considered genuinely by Synergy before action was taken. The Authority may take into account other factors as it thinks fit 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 the employee being treated unfairly.

[18] A fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act,

Was the suspension of Ms Firman from the workplace on 26 September 2015 unjustified?

[19] Ms Firman faced an allegation that she had taken product from the salon without paying for it and had been invited to a disciplinary meeting on 23 September 2015 by letter dated 22 September 2015 to be heard on that allegation. The main reason for suspension was that the date the disciplinary meeting could be held was to be delayed possibly until 13 or 14 October 2015. Although the parties said the other was responsible for the delay the only material matter for the Authority is that there was going to be one.

[20] The employment agreement expressly provided for suspension without pay if the employee conduct required investigation for misconduct or serious irregularities. Mr Glading had at the time of suspension considered security camera footage, witness statements and Ms Firman had admitted taking the product (outside of a formal disciplinary process) and returned back to work.

[21] Synergy's solicitor Angeline Boniface, in a letter dated 29 September 2015 responding to Mr Goldstein's raising of a personal grievance about the suspension, stated that Mr Glading felt it would be uncomfortable for Ms Firman to have the disciplinary matter which involved a very serious allegation unresolved. She wrote

that Ms Firman was working alongside two staff members who had provided information to Mr Glading about the removal of product.

[22] The suspension in all likelihood was motivated by genuine reasons but the employment agreement does not contemplate suspension in the circumstances relied on and confined the circumstances for suspension to those where there was conduct that required investigation. Consultation and agreement may have been the preferred approach to time away from the workplace for Ms Firman. Agreement may in fact have been reached with that approach. When in light of the concerns raised about the suspension Ms Boniface asked whether Ms Firman wished to return to work immediately on 29 September 2015, Mr Goldstein advised on 30 September 2015, his client would stay on paid suspension. From that date Ms Firman was therefore off work by agreement.

[23] A fair suspension process will include an opportunity for an employee to comment on the suspension. Ms Firman was asked if she had any questions about the suspension by Mr Glading when he attended at her place of work but given an element of surprise I am not satisfied it could be said to have been a proper opportunity to comment.

[24] I find suspension for the above reasons was not what a fair and reasonable employer could have done in all the circumstances. It was unjustified both substantively and procedurally. I will consider remedies after I have considered the other grievances.

Was the warning unjustified?

[25] A date was agreed to for the disciplinary meeting on 6 October 2015. Mr Glading attended with Ms Firman's manager, Operations Manager Ms Debbie Dean. Ms Firman attended with Mr Goldstein. The meeting was recorded by consent and a transcript was provided.

[26] It was not disputed that Ms Firman removed product from the salon on 2 September 2015 being some colour in a tint bowl. She did not pay for it and did not ask permission to remove it. She had admitted that before the disciplinary meeting in two letters and offered to pay for it and she had also asked in those letters to keep her job and was hopeful that she could get a written warning.

[27] The nature of the allegation Ms Firman was facing was clear. At the disciplinary meeting the letters from two staff witnesses were read out and the security camera footage was viewed. Mr Glading also read from his notes about the timing of what was happening as seen on the security camera footage from the time shortly before the colour was mixed in a tint bowl to the removal of the bowl with the colour in it from the store at home time.

[28] Mr Glading I find fairly gave Ms Firman an opportunity for comment on the allegation and information presented.

[29] Mr Goldstein advised Mr Glading that Ms Firman was not going to talk during the disciplinary process and he would do the talking because Mr Glading had previously ambushed her and threatened to go to the Police if she did not resign. The main explanation given was that staff had colour nights at the salon where they get their hair done and if time was running short product was taken home. Mr Goldstein explained that Ms Firman understood she was entitled to take product home and that she may or may not be later asked to pay for it. There was also an explanation that another staff member had not been dismissed for stealing coffee and that Ms Firman had offered to pay for the product on 9 September.

[30] The one question that Ms Firman did answer was from Mr Glading about what had happened to the colour. Ms Firman said that she used it to colour her hair because she had missed out on the colour night that was at the Northlands salon. It was clarified that the colour night was on 1 September and the product was removed by Ms Firman the following day on 2 September 2015.

[31] On 7 October 2015 Ms Firman received a written warning in respect to the removal of product from the salon without payment. The warning was to apply for a one year period and that Ms Firman was to apologise to the team for her actions. Insyn was to conduct a full review with regard to the operational procedures of staff having their personal hair colour and cut done within the business. Ms Firman was to be part of that review group and could return to work on 9 October 2015 and Mr Glading would discuss matters with his management team.

[32] The apology suggested was not inconsistent with what Ms Firman had said she was prepared to do in both her handwritten and typed letter given to Mr Glading before the disciplinary process.

[33] On 8 October 2015 Mr Goldstein raised a personal grievance on behalf of Ms Firman for unjustified disadvantage in relation to the written warning. He wrote in his letter of 8 October 2015 that a fair and reasonable employer could not have issued a written warning in all the circumstances and as stated at the disciplinary meeting “all staff understand that they can take product home for their personal use.” Mr Goldstein also set out that there had been pre-determination of the disciplinary investigation and on 9 September Ms Firman had been told that Mr Glading would go to the Police if she did not resign. He further set out that Ms Firman maintained her actions were not in breach of any company rules or policies and would not therefore be apologising to the team as she did not do anything wrong. He also set out that Ms Firman expected to be treated fairly in the workplace when she returned and any ill treatment of her may result in her resigning and bringing a constructive dismissal personal grievance.

[34] Mr Glading responded to Mr Goldstein by letter dated 9 October 2015 and advised that Ms Firman was to return on 13 October 2015 at 10am in the Riccarton salon rather than at 12pm on 9 October 2015. Mr Glading noted that if Ms Firman was uncomfortable recommencing at the salon she was welcome to transfer to the other company owned salon in Christchurch at Northlands shopping centre. Ms Firman did not want to do that for a number of reasons including that she had built up and enjoyed working with her clients.

Conclusion on justification of the warning

[35] I find that the process adopted on 6 October 2015 to investigate the allegation of removal of product was fair and met the requirements set out in s 103A (3) of the Act. The concerns were properly raised with Ms Firman and she was given a reasonable opportunity to respond to the concerns. I am not satisfied that this was a matter where pre-determination tainted the outcome. Mr Glading had of course viewed the security camera footage and received two letters from Ms Firman admitting taking product but there is nothing to suggest that he did not listen to and consider the explanation as given at the disciplinary meeting in reaching a disciplinary outcome.

[36] Mr Glading reached conclusions about the security camera footage that objectively assessed were open to a fair and reasonable employer. The evidence I heard from two previous employees of Synergy in support of Ms Firman about

whether removal of product was acceptable did not confirm that was common place outside of established colour nights when time fell short. The product was mixed and removed from the store by Ms Firman on other than a colour night without authorisation. Further investigation in my view would not have changed the conclusions and outcome.

[37] A fair and reasonable employer could conclude that Ms Firman's actions in removing the product without payment or authorisation amounted to serious misconduct, that it was clear from the employment agreement and policies that was not acceptable and the disciplinary outcome of a written warning was within the range of reasonable responses to such conduct. It was what a fair and reasonable employer could have done in all the circumstances that existed at the time.

[38] The written warning for removal of product was justified.

Unjustified Constructive Dismissal claim

Why did Ms Firman resign?

[39] On 15 December 2015 Ms Firman sent a text to Mr Glading requesting a meeting the following morning. The parties had attended mediation on 14 December 2015.

[40] Mr Glading attended a meeting on 16 December 2015 with Ms Firman and her support person, Rex Upton. Mr Glading commenced by asking if the meeting was being recorded and when it was confirmed there was no recording Ms Firman said she talked to Mr Glading about the salon environment.

[41] Ms Firman asked Mr Glading to confirm whether or not he had laid a complaint with the Police about the removal of product from the store. Mr Glading confirmed that he had done so and Ms Firman advised that she had not been provided with a professional and safe working environment and the news about the Police complaint made it impossible for her to continue to work for the company. She advised that she was *quitting*. Mr Glading asked that the resignation be put in writing, which Ms Firman duly did.

[42] In her resignation letter dated 17 December 2015 Ms Firman advised that she could no longer work for Mr Glading. She said in her written letter that the last four

months of working for Synergy Hair had been unbearable and that she had asked him to treat her like everyone else and let her work in a safe and professional workplace and that when Mr Glading confirmed that he had laid a complaint with the Police she had no option but to quit because that had completely broken the trust in the relationship and she no longer felt comfortable. Ms Firman asked for her final pay and holiday entitlements to be paid.

[43] I find that the evidence supports Ms Firman resigned because of the work environment and because Mr Glading had made a complaint to the Police that she had removed product.

Did Synergy follow a course of conduct with the deliberate and dominant purpose of coercing Ms Firman to resign starting from the meeting on 9 September 2015

[44] Mr Goldstein submits that Mr Glading followed a course of conduct with the deliberate and dominant purpose of coercing Ms Firman to resign from 9 September 2015. That date was when the issue of removal of product was first raised with Ms Firman. Mr Goldstein submits that Ms Firman was given an ultimatum at that meeting to make a decision to resign or a complaint would be laid with the Police. He submits that such a choice was then confirmed at a meeting on 11 September 2015 when additionally Mr Glading said that the salon would not be a nice place to work.

[45] Ms Firman gave Mr Glading two letters admitting taking the product without permission or payment on 11 September 2015. Ms Firman says that she did this because she felt forced into it. I heard a lot of evidence about these two meetings. I do find that it was more likely than not Ms Firman was asked to make a decision about her future with Synergy and that there could have been mention of a complaint being laid with the Police. Ms Firman wrote in her second letter that she recognised the implications for not only her career but life outside of work if she was to be charged with theft. That supports that the possibility of laying a complaint with the Police was mentioned. Ms Firman wrote that she hoped she could keep her position and the matter could be put behind them and it would never happen again.

[46] I find that what was said at these meetings which were not part of a fair process was then overtaken by subsequent events. The removal of product issue proceeded to a formal disciplinary process and the disciplinary outcome fell short of

dismissal. I do not find as Mr Goldstein submits that outcome can simply be seen as an attempt to avoid a personal grievance for unjustified dismissal. Mr Glading said that he made that decision taking into account the limited value of the product and that Ms Firman was a good hairdresser.

[47] Most significantly in my view Mr Glading, before Ms Firman returned to work after receiving the warning, suggested an alternative salon for her to work in to avoid a possibility of banter or gossip about the removal issue. Ms Firman did not want to do that but that offer on its face is inconsistent with a desire to put Ms Firman back into an environment that she would find so unpleasant she would leave.

[48] Mr Goldstein submits that Mr Glading kept the issue of the removal of product alive by asking staff a question in a document whether taking home product from the salon without paying for it was ok shortly before Ms Firman returned to work after the warning. I find that the timing of that question was more likely a reaction to the explanation provided by Ms Firman that staff were entitled to take product from the salon rather than an attempt to keep the issue with Ms Firman alive. Another employer may have dealt with the matter differently by simply circulating a reminder that such action was unacceptable but I do not conclude Mr Glading undertaking such a step with the purpose of making life difficult for Ms Firman.

[49] Mr Goldstein submits that Mr Glading allowed Ms Firman to be isolated, ignored and gossiped about and he had as his aim to force Ms Firman to resign. Ms Firman was concerned about whether a safe workplace was provided. I find that whether her concerns were properly dealt with falls more appropriately to be considered as to whether there were breaches of duty by Synergy. The evidence in my view does not support a course of conduct by Synergy with the deliberate and dominant purpose of coercing Ms Firman to resign from 9 September 2015.

Were there breaches of duty by Synergy that were of a serious nature

[50] One of the reasons Ms Firman says she resigned was that Mr Glading did not provide her with a safe workplace. Although Ms Firman in her resignation letter referred generally to her four months at Synergy having been unbearable there were two main issues raised with Mr Glading, and there were some further matters referred to in a letter dated 7 December 2015.

[51] The first incident raised was the L matter. On 16 September 2015 Ms Firman returned to work. This was after the meetings and knowledge about the product being removed but before the suspension and disciplinary meeting. Ms Firman said that she felt humiliated and the staff ignored her and she heard them gossiping about her in the salon although that was not the focus of the complaint sent to Mr Glading by email on 18 September.

[52] The email sent to Mr Glading refers to L who is the retail receptionist and an interaction on 17 September. Ms Firman described in her email that she was running late with her first hair-cut and her 6.30pm client had to be turned away for 15 minutes as there was nowhere for him to sit. Ms Firman said she was not told about this and when the client returned at 6.45pm and L advised Ms Firman she said that she could not look after him. She says that she was then “abused emotionally” by L who says she should look after the client and Ms Firman said she had an out of work appointment. Ms Firman wrote that this was humiliating as there were clients about and L carried on saying that Ms Firman should stay. Ms Firman then wrote that she told L that she was not to talk to her like that. On Friday 18 September 2015 Ms Firman reported L’s behaviour to her assistant manager, Sharna.

[53] Sharna spoke with Mr Glading and Ms Firman said she reported back that Mr Glading had advised her that she couldn’t do anything in regard to what had happened. She said that it had to be either Mr Glading or Ms Dean and that Ms Dean would be back from holiday on the Tuesday. Ms Firman said that the bullying and harassment by the staff members continued on this day and made her feel unsafe.

[54] Ms Firman sent an email setting out the behaviour of L that she complained of to Mr Glading the afternoon of Friday 18 September and said that in doing so another staff member started to read the email and challenged her about preparing it on a work computer.

[55] On Saturday 19 September 2015 Ms Firman advised Sharna by text that she was not going to be attending at work due to anxiety from the previous day. She said that as she was feeling unwell she went to see a doctor at the after-hours medical centre and was given a prescription for anxiety pills.

[56] Mr Glading sent an email to Ms Firman on Saturday 19 September 2015 acknowledging her email of 18 September 2015 and stated that he had been out of the

office on the Friday. He said that he would investigate the matter and that he would be in the salon if Ms Firman would like to discuss the matter that day. Ms Firman however was on sick leave. Mr Glading also received an email from L setting out her view of the matter although the evidence supported that was not shown to Ms Firman.

[57] An email dated 23 September 2015 from Ms Dean to Mr Glading was provided in the respondent's bundle of documents and supports that Ms Firman met with Ms Dean on that day and discussed the interaction with L. Ms Dean wrote in her email that communication between the stylist and the desk could have stopped the incident from happening. Ms Firman I find advised Ms Dean that she knew the girls knew something and they were making her feel uncomfortable at work and she was on medication. Ms Dean recorded in her email to Mr Glading that Ms Firman felt bullied and wanted a safe environment. Ms Dean wrote in the email that she would get back to Ms Firman Tuesday after talking to the individuals involved.

[58] Ms Firman said that she was unaware of any further investigation having been undertaken. Ms Glading said that the matter was of an everyday salon type issue and that he expected Ms Dean to investigate and conclude the matter. It does not appear though that she did. Shortly after that time and seemingly before the timeframe Ms Dean had said she would return to Ms Firman, Ms Firman was suspended and was away from the workplace from 27 September to 13 October 2015.

[59] Both Ms Firman and L had different views as to who was right and wrong. The provision of a safe workplace does not mean there will not be workplace issues of this kind that arise from time to time when people become busy. Ideally Ms Firman would have been advised of an outcome to the investigation as Ms Dean had proposed she would do. It was not therefore a perfect process but there were then intervening events of suspension and a disciplinary meeting.

[60] Ms Firman returned to work on 13 October 2015. She noted that the staff thought she would not be returning to work and her trolley had had her name tag removed and several clients told her that they had been told she was no longer going to be working there.

[61] The second main incident occurred on 16 October 2015. Ms Firman had an altercation with another hairdresser J. Ms Firman said that J swore at her and harassed her. Ms Firman spoke to Kelly O'Shea, who is the National Training

Manager at Synergy and was the most senior person working at the time in the salon. and told her what had happened. Ms O'Shea calmed Ms Firman down and advised she would talk to Ms Dean and they would sort it out. She agreed with Ms Firman that no-one should be sworn at or treated in that way.

[62] On 17 October 2015 Ms Firman sent a text message to Mr Glading advising that she was being bullied by other staff. Mr Glading responded that morning saying he had spoken with Ms O'Shea and Ms Dean about the incident and asked for her version of events. Ms Firman asked Mr Glading to come to the salon because other staff members were harassing her in front of her clients. Mr Glading responded to say that he had spoken with Sharna and that she could communicate directly with her if required. Ms Firman responded saying that she felt isolated at work with no support and that she would go straight to Sharna if there was more harassment. Mr Glading responded saying that was great and to keep looking after the clients. I am not satisfied that leaving matters in the hands of the onsite assistant manager for that day was unfair and unreasonable.

[63] Ms Firman had Sunday and Monday off as her usual days. On 19 October, a Monday, an apology text message was sent to Ms Firman from J.

Secret recording of staff conversations on 20 October 2015

[64] On 20 October 2015 which was Ms Firman's first day back at the salon after receiving the apology from J, she recorded staff in the back room of the salon on her cell phone. After Ms Firman had retrieved her cell phone and listened to what had been recorded she sent a text message to Mr Glading at 2.21pm that day and said that J's apology was far from sincere as she had carried on saying awful things to other staff members regarding her attacking her on Friday. She asked Mr Glading to ensure it would not happen again otherwise Ms Firman wrote that she had no choice but to resign and hand her notice in at the end of the day if he could not "for the final time address it." Mr Glading responded to Ms Firman by text and said that the matter was resolved that morning [by the apology] and wanted full details about what she was referring to. Ms Firman responded at about 3pm and said that she thought so as well but it is not. She said that she had found out J and A were gossiping out in the back room. She set out briefly some of what she had recorded and noted Ms Dean was not there but at the other hair salon. At 3.43pm Mr Glading advised that Ms Dean was on her way over to the salon.

[65] Ms Dean sent an email to Mr Glading about her meeting with Ms Firman on the afternoon of 20 October 2015. Ms Dean stated that she had asked Ms Firman if she had overheard the conversation and Ms Firman said that she had not. Ms Dean explained that in order to deal with it and go to those involved she needed to have some proof of the accusation. Ms Firman then advised, it was stated in Ms Dean's email, that it was on her cell phone that she had left recording from about 10.30am to 1.15pm in the back room. She confirmed that she had not heard the conversation with her own ears. Ms Dean said that she would get back to Ms Firman.

[66] On 21 October 2015 Ms Firman sent a text message to Mr Glading asking for a meeting. On 22 October 2015 Mr Glading talked to Ms Firman and told her she was not to be recording on her phone and Ms Firman said that she felt it was the only way to resolve the bullying because Ms Dean was not going to take any action until she witnessed it. It is more likely I find that Ms Dean wanted to establish that Ms Firman had heard the gossip not that she needed some sort of recording of the gossip. Ms Firman said that she was advised by Mr Glading that staff were going to be furious and that she would be hearing from his lawyer.

[67] The secret recording made by Ms Firman of a conversation between other staff members at Synergy to which she was not a party on 20 October 2015 has been considered by the Authority and was ruled to be admissible.

[68] The admission of such a secret recording depends and turns on the particular facts of each case. It does not mean that in another matter before the Authority even of a similar nature such a recording will be admitted. In this matter a second recording of a private conversation on the same day made by Ms Firman was ruled to be inadmissible.

[69] The first recording and what followed was a significant part of the factual matrix. The Authority has an investigative role and determines matters in accordance with their substantive merits. In undertaking its investigative role it has a discretionary power to take account of evidence that is not strictly legal evidence. It was necessary for the Authority to be satisfied that there was a recording and the general nature of what was recorded in order to be able to fairly and sensibly consider the reasonableness and fairness of what occurred at the time and after the recording.

[70] On 22 October 2015 Ms Boniface, sent a letter to Mr Goldstein in relation to a proposed mediation indicating Synergy was prepared to attend mediation. Ms Boniface noted that there was an issue that had arisen in relation to the recording of staff members without consent and knowledge. Ms Boniface proposed holding a meeting with all staff at the salon and/or emailing them with something to the effect that:

We understand there may be some chat behind the scenes now and again about various matters relating to staff members. We would like to point out that in order to work together, we all need to put personalities and management issues to one side. If you have a particular point you wish to raise, you should do that with your Manager rather than with each other.

[71] Ms Boniface asked whether Ms Firman was comfortable with the message to be presented to staff members in this way and stated that to do so would have the effect of discouraging all staff from gossip. There is no evidence that her proposal was responded to.

[72] The part of the recording relied on is only a very small part of what was recorded over the period of time the cell phone remained in the back room. Transcribed it amounts to one double spaced page and one additional line on another page. It was difficult to hear from the recording exactly what was said but I find what was said could be categorised as gossip.

[73] Secret recordings in these circumstances present difficulties. On one hand there is the distasteful and potentially unlawful aspect of the recording of other staff without their knowledge and consent and the impact that can have on staff relationships. On the other hand issues within the employment relationship between staff members cannot be ignored. The proposal by Ms Boniface was a fair and reasonable way of dealing with such a difficult situation where there had been covert recording of third parties. No alternative proposal or any response about the proposal was received from or on behalf of Ms Firman for the Authority to consider. Although the adequacy of the investigation into J's conduct and the L incident was later raised nothing was said at this point about that.

[74] There was then a period of time between 22 October and 7 December 2015 when no issues were escalated to Mr Glading by Ms Firman. Ms Firman said that she raised some issues with Ms Dean and I will come to that.

[75] Ms Firman was I find unaware of the following matters. The first was that Ms Dean and/or Mr Glading spoke to staff in late October advising them that Ms Firman had been recording in the back room. Several letters were provided from staff to Mr Glading. Staff were very upset about the possibility that they had been recorded whilst discussing personal matters. They wanted some sort of action to be taken. There were also some other letters raising other complaints and concerns about Ms Firman. Ms Firman was unaware of these matters until the legal proceedings were lodged. Mr Glading said that he asked staff to maintain their professionalism and continue in their role.

[76] The second was that on 2 November 2015 a formal complaint was made by Mr Glading to the Police regarding an allegation of theft by Ms Firman. He provided the police with copies of the witness statements and the security footage and his notes about that and Ms Firman's letters.

[77] On 7 December 2015 Ms Firman sent a further letter to Mr Glading. Ms Firman referred in the letter to the incident involving J where she had been called names and yelled at for no reason. She recorded that Mr Glading when he met with her acknowledged that she had an expectation that she would be able to work in a safe and professional work environment and that if this could not be provided Ms Firman said that she advised him she would have no choice but to resign. Ms Firman then wrote that about an hour after the meeting about J workplace bullying resumed and Mr Glading asked Ms Dean to sort the matter out but that had not happened. Ms Firman also wrote that she felt that Mr Glading had given certain staff a free pass to do and say what they like to her with no repercussions.

[78] Ms Firman set out some more concerns that she had raised with Ms Dean but said she was fobbed off and left to deal with them herself. I find that those concerns are set out in the letter. There was an issue about a mannequin that Ms Firman owned but her name in permanent marker on the back had been removed. Another person had performed a haircut on the mannequin and Ms Firman wrote that she was told by Ms Dean to deal with the matter herself. The second issue was that L had acted unprofessionally and harassed Ms Firman several weeks ago and that Ms Dean had done nothing about it. The third issue was that some staff were not booking clients in Ms Firman's column and that during her suspension she had lost a number of regular clients due to staff advising them they were unsure when or if she was returning.

Ms Firman said that this had impacted on her ability to reach weekly targets but that when she raised this with Ms Dean, Ms Dean had responded saying “staff don’t make bookings on personality”. The final issue Ms Firman said she raised with Ms Dean was that some staff were going out of their way not to include her in staff events and she was feeling very isolated in the salon. She referred specifically to a work dinner and gifts to other staff of wine and chocolates when she was suspended. Ms Firman concluded the letter by advising that she wanted a professional and safe working environment and if this was not to be provided she would have to consider resigning.

[79] On 8 December 2015 Mr Glading responded and advised that he would investigate the matters and get back to her by Friday.

[80] On 13 December 2015 Mr Glading responded to the various matters in the letter. He questioned whether the issue with J was the one she had apologised for or something new. He said that he would have to talk to Ms Dean and another employee about the mannequin. He wrote that he thought the issue with L was resolved. He did not accept the concern about the client appointments but said he was happy to sit with Ms Firman and go through the sales totals. He said he did not know what staff events Ms Firman had not been included in. He wrote that if Ms Firman had missed out on an item he would obtain to for her. Finally he did not accept in his letter that the work environment was not professional or safe and wrote that serious claims will be investigated as a matter of course. He wrote that Ms Firman had raised “one very formal unprofessional matter” but there was no response from her lawyer regarding the matter.

[81] On 14 December 2015 there was mediation between the parties. This was followed by the meeting on 16 December at which it was confirmed that Mr Glading had made a complaint to the Police and Ms Firman said that she concluded that Mr Glading could or would not provide a safe workplace. Mr Glading did not accept there was any discussion about not providing a safe workplace and said that the focus for Ms Firman at that time was simply about the Police complaint.

Conclusion on whether there was a breach of duty

[82] In respect of the safe workplace I have found that the issue about L was not the subject of an ideal or perfect process. If that could be said to be a breach of the employment agreement then I do not find that it was sufficiently serious so as to be a

repudiatory breach. It was an omission that whilst it may have caused some unhappiness had not crossed the borderline to repudiatory conduct sufficient to justify termination.¹

[83] The issue about J was somewhat overtaken by the recording to establish the lack of sincerity of the apology. Mr Glading through his solicitor did propose a step that I have found was fair and reasonable to address and discourage further gossip and banter. There was no response to that by or on behalf of Ms Firman. It was not raised at that time for example that the issue with J had not been properly concluded by the apology. It was only in December that Ms Firman raised that the issue with J was not properly investigated and concluded by way of the apology.

[84] At first glance Mr Glading's letter of 13 December 2015 does not seem to sit with the conclusion reached by Ms Firman that he would not deal with the salon environment and provide her with a professional and safe workplace. I am not however satisfied that is the end of the matter.

[85] Mr Glading knew from late October 2015 of significant staff concerns but took no steps to address them. From the depth of feeling expressed in letters to Mr Glading by staff about the secret recording it could in all likelihood have been an underlying reason for Ms Firman feeling isolated in the workplace as she reported in her letter dated 7 December 2015.

[86] Ms Firman did not know about the written staff complaints but there is between parties to an employment relationship an implied obligation to deal with each other with trust and confidence and there are statutory requirements and obligations in s 4 of the Act to act in good faith that supplement that. These obligations are mutual. It has been held that a breach of the statutory duty and requirement to act in good faith in s 4 of the Act may be established to reach the threshold of repudiatory conduct.²

[87] Section 4 (1A) (b) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining that relationship. I find there was a breach of the obligation to provide a safe workplace and to act in accordance with good faith obligations particularly after 7 December 2015 when Mr Glading knew how Ms Firman felt. His response to Ms Firman's

¹ Wellington etc Clerical Workers IUW v Greenwich [1983] ACJ 965

² Ramsay v Commissioner of Police [2009] ERNZ 81 at [10]

concerns on that date whilst appropriate on the surface failed to deal with the matters which were within his knowledge that could have impacted on the work environment.

[88] The second matter is that Ms Firman could fairly and reasonably conclude the issue with the removal of product had been dealt with when she received a written warning. Mr Glading said in his evidence that he made a complaint to the Police as some sort of reassurance about his conclusion on this matter. I accept there is a right for a person to make to a complaint to the Police. Mr Glading did not make the complaint on 2 November 2015 in accordance with good faith obligations in an employment relationship. He must have known given the concerns already raised by Ms Firman that it was an action that when discovered would not be constructive in maintaining the employment relationship. Mr Glading chose to make a complaint to the Police and not to be communicative about having made such a complaint. I could not rule out given the timing of the complaint that it was a reaction to the secret recording and/or the staff distress about that.

Were the breaches serious?

[89] I find these breaches particularly viewed together were serious and repudiatory conduct. Mr Glading had knowledge about why Ms Firman could feel isolated in the workplace but took no steps to address that matter and it was not clear if he ever would. That I find is both a failure to provide a safe workplace and a breach of good faith to be constructive in maintaining a productive employment relationship. Having given Ms Firman a warning for removal of product Mr Glading then somewhat inexplicably laid a complaint with the Police about the same action. It was foreseeable that Ms Firman would not be prepared to continue to work in the conditions once that Police complaint came to light.

Justification for the dismissal

[90] Mr Glading said in his submission that the situation would not have arisen if Ms Firman had not removed product. Although that can be assessed if the Authority gets to the point of remedies the disciplinary outcome for the removal of product was a warning.

[91] I do not find that the dismissal is able to be justified in accordance with the test in s 103A of the Act.

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

Remedies for the grievances with respect to the suspension and the unjustified constructive dismissal

Lost Wages

[93] Ms Firman obtained new employment on 26 January 2016 on the same hourly rate of \$22 but for fewer hours and she did not receive a bonus which she says she received at Synergy of an average of \$60 per week. She says that she was without work from 17 December 2015 to 25 January 2016 (both dates inclusive), a period of five weeks and four days.

[94] Mr Glading says that there was inadequate mitigation on the part of Ms Firman and she was intending to take some leave from Synergy during the period she was without work. Ms Firman resigned very close to Christmas. The leave applied for by Ms Firman whilst at Synergy was for five separate days over the Christmas period. If Mr Glading is suggesting that Ms Firman was unavailable for work then the leave record in fact supports that she was still largely available. Looking at the matter in the round I cannot be satisfied that there was a failure to mitigate.

[95] Mr Glading submitted that in fact Ms Firman did not work 40 hours on average at Synergy. I have assessed normal hours for a period of 13 weeks from the week ending 13 December 2015 excluding weeks where leave of any kind was taken. In doing that I arrive at an average of 39 hours per week worked and I find it fair to assess lost wages on that basis for hours worked.

[96] Another issue is whether Ms Firman should have assessed as part of her loss the bonus payments and if so in what amount. Clause 7 of Ms Firman's employment agreement provides for eligibility for a bonus/incentive measured weekly and based on salon client sales with hairdressing services and in salon retail sales. I find that the bonus can be considered as other money lost as a result of the grievance under s 123(1)(b) of the Act. Mr Glading does not accept the average claimed of \$60. I have considered all the wage records for a period from 1 January 2015 to week ending 13 December 2015. That is a period of 49 weeks and three days. Over that period Ms Firman received incentive or bonus payments of \$1890. If that figure is divided

by 49 weeks that would be \$38.57 per week. I will use that for the loss of the bonus calculation.

[97] Ms Ryder advances different methodologies for the Authority to consider reimbursement of lost wages. Firstly she submits that on the basis Ms Firman would have remained employed but for the dismissal for some years at Synergy consideration should be given to an award for 18-19 months future earnings. Alternatively Ms Ryder submits that Ms Firman should receive three months actual lost wages. The statement of problem claims lost wages to the date of the investigation meeting. She accepted the Authority would have to be satisfied that the relationship would have lasted.

[98] I have assessed Ms Firman's weekly income at Synergy for 39 hours per week at \$22 per hour with a lost bonus extrapolated out from the last year of employment to a weekly bonus of \$38.57 per week. That is a total weekly income of \$896.57. Five weeks without any income at \$896.57 is \$4482.85. The calculation for the additional four days is arrived at by ascertaining a daily rate from the weekly wage and bonus which is \$179.31 and multiplying it by four to arrive at a figure for that short week of \$717.26. The lost wages and bonus/incentive payment for the period of unemployment from 17 December 2015 to 25 January 2016 is a figure of \$5200.11 gross.

[99] Thereafter Ms Firman suffered a loss each week being the difference in hours (four) and the fact she did not receive a bonus payment. That is a shortfall in wages of \$88 per week and a bonus of \$38.57 which added together is a loss of \$126.57 gross.

[100] Reimbursement for three months ordinary time remuneration is the sum of \$11,655.41. If the figure of \$5200.11 is taken from the sum of \$11,655.41 the balance remaining is \$6455.30. The Authority would need to be satisfied that Ms Firman would have remained employed for a further 51 weeks from 26 January 2016 which extends beyond the date of the investigation meeting. I simply cannot be satisfied of that. Issues had developed within the relationship that impacted on the necessary and fundamental trust and confidence both parties needed to have in each other. The relationship had been tested significantly. The other issue that I have weighed is that whilst initially no criticism can be levelled at Ms Firman for the decision to remain in a job that offers fewer hours per week there does come a point where it becomes

unfair for Synergy to bear the consequences of that decision. Weighing both the unlikelihood that the relationship could survive for any extended period of time and the issue about hours I assess the lost wages to 17 March 2016 which is a period of 13 weeks from the date of termination.

[101] Subject to issues about contribution Ms Firman is entitled to reimbursement of lost wages for an initial period of unemployment from 17 December 2015 to 25 January 2016, five weeks and four days, in the sum of \$5200.11 gross. Thereafter from 26 January to 17 March 2016, seven weeks and two days, based on shortfall there is an entitlement to reimbursement of the sum of \$126.57 per week which is \$886 plus \$50.62 which is the sum of \$936.63 gross. Both sums added together are \$6136.73 gross.

[102] The statement of problem refers to the lost benefit of Kiwisaver contributions and holiday pay in respect of the wages for the period of unemployment which is the sum of \$5200.11. I find it is fair to make an award for those amounts. The employer contribution for Kiwisaver was 3% so that is a lost benefit of \$156 and the holiday pay for that period based on \$5200.11 multiplied by 8% is \$416.

Compensation for suspension

[103] The suspension was on full pay so there are no issues with lost wages. Ms Firman said that she was humiliated by her suspension in the salon. Mr Glading met with Ms Firman toward the end of her shift but I am satisfied she was suspended before her work day had officially ended. Ms Firman said that it was embarrassing for the suspension to take place in front of other staff. Mr Glading said that the conversation was in the back room of the salon and private. Ms Firman covertly recorded the exchange about the suspension and I have been able to listen to it. Mr Glading seemed to lower his voice during the discussion and I accept as more likely than not the meeting took place in or close to the back room of the salon where it is more private.

[104] Ms Firman was confident to ask on several occasions for notes that Mr Goldstein had requested earlier for the disciplinary meeting. Mr Glading was not prepared to talk about the notes and told Ms Firman to limit her questions to suspension.

[105] I accept that a modest award of compensation is called for, because there was some distress caused to Ms Firman, in the sum of \$1000. I do not find that Ms Firman contributed to her suspension.

[106] I order that Insyn Limited trading as Synergy Hair Riccarton pay to Hara Yasmin Firman the sum of \$1000 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.

Compensation for unjustified constructive dismissal

[107] I heard from Ms Firman, her mother Leanne Firman and her partner Damien Upton about this claim. I accept that Ms Firman became less happy in the workplace. I have found the warning for removal of product was justified. Therefore although the accusations about that were hurtful to Ms Firman I do not take that into account under this head. Ms Firman said that she was humiliated and distressed when Mr Glading advised he had laid a complaint with the Police against a background where she said she had not been provided with a safe workplace. There was no discussion with Ms Firman about this. After Ms Firman resigned she was given a formal warning for theft of hair products and her offending was noted in the computer system of the Police. Ms Firman said that she suffered financially after the dismissal, was not paid her proper entitlements over Christmas and had lost self-confidence and friendships. She said that she had to battle to stand up to Mr Glading but hoped that he will treat his staff fairly in the future and appreciate that it is not fair for them to be in an environment where they are bullied.

[108] I accept that Ms Firman was shocked and dismayed with the complaint to the Police and had concerns about the workplace. I have found that there were some underlying issues that could have resulted in a less than satisfactory work environment that needed to be addressed or investigated.

[109] Subject to compensation I find that a fair and reasonable award for compensation is the sum of \$8000.

Contribution

[110] Where the Authority has determined that an employee has a personal grievance it must under s 124 of the Act in deciding the nature and extent of the remedies to be provided consider the extent to which the actions of the employee

contributed towards the situation that gave rise to the personal grievance and if required reduce the remedies that would have been awarded accordingly.

[111] I need to consider the extent if any to which Ms Firman contributed towards the situation that gave rise to the personal grievance. Firstly I find on the balance of probabilities that Ms Firman removed product from the salon without payment or authorization. There is a causal connection between that action and the complaint to the Police. The action in removing product was blameworthy and must in my view result in a reduction of remedies. The second aspect I find that contributed toward the situation that gave rise to the personal grievance is the secret recording. That is arguably unlawful and I find would have caused those Ms Firman worked with to question the degree of trust they could have in her and in turn probably led to her feeling somewhat isolated in the salon. The third way in which Ms Firman I find contributed to the situation that gave rise to the grievance is when Ms Boniface suggested a way to deal with the recording issue and the possibility of repeated gossip she did not respond to that and did not suggest that issues for her were wider. In that way she was not constructive in dealing with issues within the salon at an early stage so as to resolve them.

[112] I find the level of contribution in this matter to be very high. I assess contribution at 65% and the remedies above are to be reduced by that amount.

Orders made for remedies for unjustified constructive dismissal

[113] Taking contribution into account I order Insyn Limited trading as Synergy Hair Riccarton to pay to Hara Yasmin Firman:

- (i) Reimbursement of the sum of \$2147.86 gross under s 123 (1)(b) of the Act being lost wages and other money.
- (ii) Reimbursement of the sum of \$200.20 gross under s 123 (1)(c)(ii) of the Act being lost benefits for employer Kiwisaver and holiday pay
- (iii) Compensation in the sum of \$2800 without deduction under s 123 (1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings.
- (iv) I do not in the exercise of my discretion make an award for interest on the lost wages and lost benefit awards.

Breach of good faith obligations

[114] Section 4 of the Act provides that there can be the imposition of a penalty if an employer fails to comply with the duty of good faith if the failure was deliberate, serious and sustained or it was intended to undermine the individual employment agreement.

[115] I have found that some of Mr Glading's actions were not in accordance with good faith. There was a sense of deliberateness about the Police complaint although it was a one off action. I could not be satisfied to the necessary degree that Mr Glading intended to undermine the relationship as opposed to doing something he considered he had a right to do. The bullying allegations were not made out to the extent alleged. When a way forward was proposed at one point there was no response to it by Ms Firman. I could not be satisfied that the failure to deal with staff concerns so as to ensure a safe workplace was deliberate or intentional with a view to undermining the employment relationship although I accept it was serious and sustained. In terms of provision of information Mr Glading did not disclose to Ms Firman at an early stage the security camera footage but this was remedied later. The existence or otherwise of Ms Dean's notes and therefore the provision of them was an issue but I could not be satisfied of their existence to the required level.

[116] Looking at the matter in the round I decline to award a penalty for a breach of good faith under s 4 of the Act.

Failing to provide the applicant with a safe workplace under clause 21 of her employment agreement and failing to consult before suspending

[117] These matters were the subject of consideration for the unjustified constructive dismissal claim. I have found some breaches with respect to providing a safe workplace and a failure to consult before suspending but I am not minded to impose a penalty as it would amount to a duplication of remedies.

Failing to provide wage and time records

[118] Mr Goldstein asked for time and wage records for the whole of Ms Firman's employment in a letter dated 19 January 2016 and again in his statement of problem dated 17 February 2016. Following a direction made by the Authority in May 2016

most of the records were provided in June with the balance save the final pay slip some short time later. A penalty is sought.

[119] Under s 130 (2) of the Act an employer must upon request by an employee or person authorised by the employee provide that employee immediately with access to or a copy from a part or all of the wages and time record relating to the employment relationship.

[120] I find that there is a breach of the obligation to provide access to time and wage records as required in s 130 (2) of the Act.

[121] The maximum penalty the Authority can impose under s 135 (2)(b) of the Act is \$20,000. That is the starting point for the Authority to commence its consideration for the breach.

[122] I find in assessing the severity of the breach and the aggravating factors that the failure to provide the records at an early stage did cause some disadvantage. It prevented some earlier assessment of what was owed to Ms Firman.

[123] One of the mitigating factors was that the records were available and were eventually provided in full save as to the final pay slip. This enabled an assessment to be made about what was owed and this was provided to the Authority.

[124] I consider when I weigh the elements of the severity of the breach that the starting point is 25% of the maximum penalty available or \$5000.

[125] Although there was a suggestion that such conduct was not uncommon for Insyn Limited I cannot find evidence of the company having engaged in similar conduct in the Authority or the Employment Court so I treat this as a first offence.

[126] I find that a reduction is reasonable from the provisional penalty of \$5000 to \$3000 and then I must consider the financial circumstances of Synergy and the proportionality of the outcome of a penalty.

[127] I did not hear evidence about the financial situation of Synergy and I do not reduce the penalty further on that basis.

[128] A penalty should be set at a level to have a deterrent effect for Insyn Limited and other employers but not set unrealistically high.

[129] I make no further reduction to the penalty of \$3000 in the circumstances.

[130] The Authority may under s 136 (2) of the Act order that the whole or part of the penalty recovered be paid to any person. Ms Firman wishes the penalty to be paid to her. I find that it is fair that half of the penalty is paid to Ms Firman and the balance is paid to the Authority to then be paid into the Crown bank account.

[131] I order Insyn Limited trading as Synergy Hair Riccarton to pay a penalty of \$3000 for failing to provide access to wage and time records under s 130 (2) of the Act. Half of the penalty is to be paid under s 136 (2) of the Act to Hara Yasmin Firman and the balance is to be paid to the Authority to be paid into the Crown Bank Account.

Unpaid holiday and alternative days

[132] I heard evidence from Ms Firman's partner Mr Upton about his assessment of what Ms Firman was owed. Mr Glading says that from any amount owing there must be deducted payment for sick days when the sick leave entitlement was exhausted. I have considered that matter and I do not conclude that such a deduction should be made. A decision was made by Synergy to pay Ms Firman for those days as sick leave with several of them falling within the period during which the employment relationship problems arose.

[133] I accept Mr Upton's evidence that Ms Firman is owed six days alternative holidays in the sum of \$1056 gross and a balance for holiday pay of \$1882.69 gross. Mr Glading seeks that from any amount owed there be a sum deducted for non-attendance at a Christmas function. Ms Firman did not accept she said she would attend the function and I cannot be satisfied of that. He also seeks deduction of the amount of the removed product. I have considered that matter. Initially Ms Firman agreed to pay for the product but that was not subsequently revisited following the written warning. One of the difficulties with that claim is that the Court of Appeal in *JP Morgan Chase Bank NA v Robert Lewis*³ considered the jurisdiction of the Authority in a case which involved theft of money and a claim for its recovery. It concluded that the essence of the claim for recovery of money was not employment related because the employment relationship was not a necessary component of many of the causes of action. It therefore was not within the Authority's jurisdiction. I do

³ [2015] NZCA 255 at [94] to [97]

not find on that basis the Authority has jurisdiction to consider the recovery of money for the removed product.

[134] Finally I note that there is a claim for a penalty for the failure to pay the holiday pay and payment for alternative holiday. Under s 76 of the Holidays Act 2003 a Labour Inspector is the only person who may bring an action in the Authority against an employer to recover a penalty under s 75 of the Holidays Act 2003 which I find this claim for a penalty falls under and therefore I decline to order a penalty.

[135] I order Insyn Limited trading as Synergy Hair Riccarton to pay Hara Yasmin Firman payment for six alternative holidays in the sum of \$1056 gross and for holiday pay in the sum of \$1882.69 gross.

[136] I order interest is payable on the above combined amounts of \$2938.69 from 17 December 2015 to the date of payment in accordance with clause 11 of the second schedule to the Employment Relations Act 2000 at the rate of 5% per annum under s 87 (3) of the Judicature Act 1908.

Counterclaims

[137] Mr Glading counterclaims for the failure by Ms Firman to give notice and for damages because she left abruptly. I have found that Ms Firman was unjustifiably constructively dismissed and on that basis do not find the counterclaims made out.

Costs

[138] I reserve the issue of costs. Mr Goldstein has until 27 January 2017 to lodge and serve submission as to costs and Mr Glading has until 10 February 2017 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority