Employment Court of New Zealand

Gyenge v Clifford Lamar Limited [2011] NZEmpC 1 (10 January 2011)

Last Updated: 21 March 2011

IN THE EMPLOYMENT COURT

AUCKLAND

[2011] NZEMPC 1
ARC 65/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN EMMA GYENGE

Plaintiff

AND CLIFFORD LAMAR LIMITED

Defendant

Hearing: 10 November 2010

11 November 2010
22 November 2010

Appearances: Jan Gyenge, Agent for Plaintiff Clifford Harris, Agent for Defendant

Judgment: 10 January 2011

JUDGMENT OF JUDGE A D FORD

Background

[1] The plaintiff, Ms Emma Gyenge began working in the defendant's hair salon

in Tauranga in December 2006. It was her first job out from college. On 5 January 2009 she handed in her written resignation, finishing work on 31 January 2009. The following month Ms Gyenge received an invoice from the defendant dated 26 February 2009 in the sum of $5069.24 for reimbursement of monies allegedly expended by the defendant in connection with her hairdressing training. She refused to pay the invoice and initiated a personal grievance in the Employment Relations Authority (the Authority) alleging that she had been constructively dismissed. The defendant counterclaimed in respect of the $5069.24 invoice.

> [2] In a determination dated 17 May 2010[1] the Authority Member concluded that Ms Gyenge had not been "dismissed, constructively or in any other way, from her employment" and that she did not therefore have a personal grievance in that regard. He went on to uphold the defendant's counterclaim and made an order requiring Ms Gyenge to pay the full amount sought by the defendant of $5069.24. Ms Gyenge challenged the whole of the determination of the Authority and elected a hearing de novo.

The competition

> [3] In the middle of 2006 Ms Gyenge (Emma), was in year 12 at Otumoetai College in Tauranga. She was 16 years of age and was planning to return to college in 2007 to complete her year 13. She had, however, already set her mind on becoming a hairdresser when she left school. These plans were to take a rather dramatic change before the year was out. In September 2006, Mr Clifford Harris, a director and one of the

owners of Clifford Lamar Limited (Clifford Lamar), visited Otumoetai College and spoke to Emma's class about a high profile competition Clifford Lamar was promoting in which the winner would win a three-year training contract to become a hair stylist. The competition was based on the American television show, "The Apprentice" hosted by Donald Trump. Emma was one of between 30 and 50 young people who applied to enter the competition.
[4] Commencing in September 2006 the contestants had to complete a series of
tasks over a number of weeks involving everything from creativity tests with origami to physical tests such as running up Mauao (Mt Maunganui). Each week a certain number of contestants were eliminated from the competition. In the end, when there were only three contestants left, Emma came out on top in the final challenge and was declared the winner of the competition. Her prize included a trip to Melbourne, a $500 cash prize and a three-year training course with Clifford Lamar. The competition received significant local media attention. When asked how she felt upon being announced as the winner, Emma told the Court:

Pretty ecstatic. I was really wrapt — I was excited to go work there. I thought it was a fantastic salon and I wanted to be trained by Cliff.

I think the training I was going to get was the most important thing. Clifford's a really good hairdresser and I wanted to learn off him.

The first employment agreement

[5] The other two owners of Clifford Lamar were Mr Harris' wife, Anna and the Artistic Director, Amanda Cooper. On 4 December 2006, Amanda Cooper wrote to Emma outlining what she could expect from her first year of training. An individual employment agreement was then entered into between Emma and Clifford Lamar which was dated 11 December 2006, Amanda Cooper, as a director, signed the agreement on behalf of the company. Mr Harris told the Court that the agreement had been drafted by his solicitor but he had not informed his lawyer that Emma was only 17 years of age. She had turned 17 on 3 August 2006.
[6] There were two particular provisions in the employment agreement which were the subject of much evidence. First, clause 3.1 which provided:

3. Appointment

3.1 The Employer agrees to employ the Employee as a Senior Technician and the Employee agrees to accept employment in that capacity in accordance with the terms and conditions of this agreement."

[7] When questioned by Mrs Gyenge about the description "Senior Technician", Mr Harris told the Court that he thought the word "Senior" had been inserted in error by his lawyer. He said "It would be an absolute absurdity for a new apprentice to be given the position of "Senior Technician". Mrs Gyenge then drew the witness' attention to a document headed "Job Description" on Clifford Lamar letterhead which was attached to the employment agreement. The document commenced: "We have pin pointed your day to day jobs as a senior Technician, however this may change from time to time." Mr Harris agreed that he had typed up that job description.
[8] The second controversial provision in the employment agreement was clause 13.3 which provided:

In the event that the Employee terminates employment with the Employer within a period of six months of completing a training course, the Employee will be required to reimburse the Employer the full cost of such training course and of any certification obtained.

[9] The defendant's counterclaim is based on this particular provision. Emma told the Court that clause 13.3 was one of the provisions she had specifically queried with Mr Harris before she signed the contract. She said, "my understanding was that this clause referred to my training fees at the Bay of Plenty Polytechnic (the Polytechnic). My training fees for my first year were $598. I said to Cliff that I didn't agree with clause 13.3 being in the contract as I had won my training. He wouldn't take it out. $598 was a lot of money to me." In cross-examination she described the provision as "unreasonable".
[10] Emma said in evidence that there were other queries regarding her contract which she had also raised with Mr Harris. The normal working hours were stated to be "30 to 33 hrs per week in accordance with a roster to be provided by the Employer at least 1 week in advance." The "work days" were stated to be Monday to Saturday. Emma said she asked about her hours being increased to full-time and she also wanted her work days to be changed to "Tuesday to Saturday" which were going to be her actual working days. She said, "Nothing was changed. Clifford assured me he would look after me and it wouldn't be a problem. He told me not to worry about it. I said to him that it's important the contract is correct."
[11] In April 2007, Emma entered into a standard form 3 year apprenticeship training agreement which was duly registered with the NZ Hairdressing industry Organisation Inc (HITO). The agreement provided that the employer was responsible for providing the apprentice with training and instructions in accordance with the provisions of the "Training Requirements, the Training Manual and Training Record Book". In addition, Emma was required to attend off-job training at the Polytechnic once a week for about 20 weeks a year. The Training Agreement

produced to the Court showed the training fees payable to HITO as being $315 for the first year, $200 for the second year and $150 for the third year. In addition there were fees payable to the Polytechnic in respect of the three-year "off job training course". The Polytechnic fee for year two was $2000 of which $1500 was to be paid by HITO. The fee for year three was $1396.00 of which $1047.00 was to be paid by HITO.

[12] In July 2007, Amanda Cooper suddenly left the salon and told Emma that she would not be returning. Mr Harris discussed the ongoing viability of the salon with Emma and he told her that one of the options was for him and his wife, Mrs Harris (Anna), to return to England where he had previously owned and operated a hairdressing salon in Notting Hill, London under the name Clifford Mark. Mr Harris told Emma that if he and Anna moved back to England then there was a possibility that she could go with them and work for them. As it happened, Mr Harris and Anna decided to carry on in Tauranga and before the end of 2007 two new staff joined the salon. Ms Candice Haycock started in September followed by Mr Sam Dowdall. Candice was the same age as Emma and one year ahead of her in their apprenticeship training. Sam had yet to start his apprenticeship. Emma seemed happy with the progress she made in her first year as an apprentice in 2007, She was trained by Mr Harris and ended up being awarded first prize as student of the year out of her apprenticeship class at the Polytechnic. Because she had excelled in her first year, her tutors at the Polytechnic had suggested that she should consider condensing her second and third year apprenticeship training into the one year. **The second employment agreement**

[13] The employment relationship between Emma and the defendant appears to have begun to deteriorate towards the end of 2007. On a date which was not pinpointed in evidence but most likely around September 2007, Mr Harris presented Emma with a new employment agreement for signing. Emma said that she had been told by Mr Harris that as Amanda Cooper "wasn't in the business any more that the contract had to be redone". When cross-examined on this topic, Mr Harris said:

That wasn't the case. As far as I remember and I don't even know when she turned 18 it would be in the contract but I'm quite sure she was turning 18 from what I was aware when I worked in London and I actually I (sic) got this wrong but I thought that when people turned 18 they needed a new contract to be signed so they're classed as an adult and this was the reason I came out with a new contract.

[14] When it was put to Mr Harris that Emma's understanding was that the new contract was necessary because his former partner had left the firm, he accepted that proposition and said that he did not know whether he had explained the age issue to Emma,

[15] Emma was not happy with the new employment agreement. With one exception which I refer to in the next paragraph, it appears to have been identical to the first employment agreement but the matters Emma had queried in relation to the first agreement had still not been clarified. Emma again queried the clauses she had queried under the original agreement and she raised some additional issues. She made a handwritten note of her concerns which was headed "Contract Points" and gave the note to Mr Harris. The note was produced in evidence. It was undated but Mr Harris had inserted "Gyenge # 12 Dec 2006" at the top right corner. The year. "2006" was clearly incorrect because one of the points Emma had raised in her note was that her annual review should have been carried out at the start of December and that observation makes sense only if Emma had already completed her first year at the salon. Other issues Emma included in her note which she wanted to query with Mr Harris were, the dates, the shop number, her title, breaks, probationary period, training, annual leave, public holidays on a Monday, who she reported to, her hours, her work days, her pay and redundancy provisions.

[16] The only apparent change that had been made in the second employment agreement was that Emma's title in both the agreement itself and the job description had been altered to read "technician" in place of "senior technician". Emma told the Court, "[t]here was no reason why I was demoted". Emma also raised a query regarding the probationary period provided for in the second employment agreement. Her point was that she had already served her three-month probationary period under the original December 2006 employment agreement. In a letter dated

7 January 2008, Mr Harris confirmed that Emma's probation period was "at an end" but the provisions were not deleted from the second employment agreement. In relation to her other concerns, Emma told the Court:

> Cliff was totally inflexible and made no further changes that I have described. Cliff said to me that he wasn't getting his lawyer to prepare a

contract specifically for me. He dismissed the importance of the contract to . me,

[17] Emma continued to remain on the minimum wage rate without any increase in her hours. Her work days continued to be recorded in the agreement as "Monday to Saturday" even though her actual work days were Tuesday to Saturday.

[18] Emma told the Court that she was not prepared to sign the new employment agreement and only did so in the end under "undue influence" from Mr Harris. On 30 January 2008, Mr Harris wrote a letter to Emma dealing initially with certain housekeeping matters. Mr Harris then went on to refer to the second employment agreement:

One last thing, A quick break down on your contract, You are a senior tech when you start your second year at poly, the

hours each week fluctuate but we can only give at this time what we have set out in the contract, We cannot adjust your days when a public holiday comes around, And we cannot adjust the company policy on redundancy. I will need this matter sorted in the next two weeks now that this has been going on for a number of months, After this we will have to suspend your training, as we have no restraint of trade and no training clause,

> [19] Emma was concerned over the ultimatum to suspend her training which she saw as a threat to her entire apprenticeship programme. She told the Court that she had explained to Mr Harris that she wanted the issues she raised in her note about the employment agreement addressed because it was important to her "for the contract to be correct". She expected her concerns to be resolved fairly and she did not think that she was doing anything wrong in raising them but Mr Harris dismissed her concerns and would not make any further changes. Emma continued:

At the end of two weeks my choices were to sign the contract or leave because if I was not able to attend my training course at the Bay of Plenty Polytechnic and receive on-the-job training to continue in my apprenticeship I would have to find another job. The contract with HITO would no longer be valid. Cliff placed undue influence over me. I was powerless in negotiating the contract. I felt I was not being treated fairly. This was a major threat to me that my training would be suspended if I didn't sign the contract. Cliff knew how much I wanted to be trained by him. Cliff didn't like me raising my concerns about the contract, I was extremely stressed. Cliff placed undue influence over me to sign the contract.

[20] Emma said that after receiving the letter dated 30 January 2008 she talked to Mr Harris. He assured her that she was still going to be trained by himself and so for her it was either a matter of signing the contract or leaving Clifford Lamar. She reaffirmed that she rated Mr Harris' training highly and she wanted to be trained by him. Emma then signed the second employment agreement and Mr Harris signed on behalf of Clifford Lamar. The agreement remains undated although the evidence is that it was signed in early February 2008. Throughout his evidence, Mr Harris contended that he was entitled under the employment agreement to suspend Emma's training but, when invited by the Court to identify the provision in the agreement which he had been relying upon, Mr Harris was unable to do so.

The training programme

> [21] The essence of Emma's claim is that from about this point in time in the chronology of events, Mr Harris changed the way he treated her. On 7 March 2008 Emma received a letter signed by both Mr and Mrs Harris indicting concerns they had about her tutors' proposal to condense two years apprenticeship training into the one year and that proposal, which Emma was enthusiastic about, did not go ahead. Emma also claimed that as from 29 February 2008 she began having problems with her pay not being correct. She kept notes of the hours she worked each day which she carried around in her purse and she was able to collate her recorded hours against the hours shown on her pay slips. All the relevant documentation including Emma's notes and the pay slips were produced in evidence. According to Emma's records there were at least 20 pay periods between February 2008 and the date when she left the salon where she had been short paid. She told the Court that on each occasion she would complain to Anna Harris, who handled that side of the business, but Anna never corrected the mistake or explained why she had been short paid. Emma said:

It was not uncommon for Anna to laugh at me. I just wanted my pay to be right.

> [22] In her evidence, Anna said that she had been unaware that Emma had been keeping her own record of the hours she worked. In relation to the "laughing" allegation, Anna said:

Um I would not laugh at her and I always took it serious and I would go home and talk to Cliff about it.

> [23] Emma outlined in her evidence a number of other incidents that began to cause her concern. In about May 2008, Mr Harris told Emma that Candice Haycock was going to be training her and she had to report to Candice for artistic issues and to Anna for everything else. Emma pointed out that that direction was contrary to her employment agreement which provided that she was to report to Mr Harris and that provision could only be varied after consultation with herself. Clause 31.1 of the employment agreement provided:

The parties agree this agreement may be varied by agreement in writing between the Employee and the Employer, after the Employee has had the opportunity to obtain independent advice on any of the proposed changes.

> [24] In evidence Emma said:

Cliff wasn't worried that I didn't agree to my reporting to Candice and Anna. It was a way to unsettle me. I believe Cliff punished me because I asked him questions. He was not active in my training. As my employer by making Candice my trainer Cliff unjustifiably changed my employment conditions in a way that disadvantaged me significantly. Cliff's requirement that I was being trained by Candice, an apprentice in her 3rd year, not yet qualified, directly contributed to me not being given the opportunity to be on the floor cutting by the end of September [2008] as planned. This would have entitled me to a promotion, an increase in my hours and a pay increase. Cliff's actions disadvantaged me. When I asked

Candice or Anna something the usual reply was "I'll ask Cliff'. Anna & Candice could talk to Cliff but I couldn't. Information continually got lost in translation.

> [25] Emma described an incident on 7 May 2008 when Candice made a comment to Mr Harris in the salon and without any prior consultation Mr Harris turned to Emma and told her in front of Candice and clients at the salon that as from the following week he was swapping her Mondays off for Thursdays. Emma later complained to Mr Harris and told him that she thought he should have discussed changes to her work days in private before any decision was made. She told the Court that she had begun to feel extremely unhappy and stressed in the salon. She felt like she wasn't fitting in to the Clifford Lamar culture anymore. She claimed that Mr Harris liked to control the lives of his staff and he and Anna had a personal relationship with Candice and Sam outside the salon. What appeared to upset Emma more than anything else, however, was that Mr Harris had delegated her training tuition to Candice who was still an apprentice, only one year ahead of Emma, and

Emma very clearly had no confidence in her as a trainer. Referring to this development Emma said:

Candice was competing with me for the salon competition [a trip to the UK] and also the external regional competition [the 2008 Bay of Plenty Regional Competitions]. Cliff appointed Candice and Anna to help me prepare for the competitions. Cliff was helping Sam. There was a conflict of interest. None of [Candice's] goals were tied to me achieving my goals. Cliff didn't help me with preparing for the Bay of Plenty hairdressing competitions. He said to me that we can't have you getting too big for your boots.

> [26] Sam, under Mr Harris' training, ended up winning one of the categories in the Bay of Plenty Regional competitions that year, Candice came third and Emma fourth. When the allegation about Emma getting too big for her boots was put to Mr Harris, he denied having made such a remark but he did admit that he had made Candice her trainer. In explanation, he told the Court that his training was based on the Socratic method and in his opinion it was a great training tool to step back as a trainer because at some point the apprentice has to make decisions for themselves. In cross-examination, Mrs Gyenge challenged the logic of that statement by getting the witness to agree that in 2008 Emma was being trained in cutting and, as she had never been trained in cutting previously, there was no basis upon which she could make decisions for herself.
> [27] No evidence was called from HITO as to whether the national hairdressing training organisation would have approved Emma's training in 2008 being delegated to another apprentice but Mrs Gyenge produced a copy of the HITO Training Record Book which provides in s 4 that "Apprentices/Trainees" are to be "supervised or instructed by a qualified trainer or trained instructors while employed by the Employer". The definition of a "qualified trainer" includes a worker or employer who "is a holder of National Certificate OR NZ Trade Certificate OR accepted equivalent... and has completed an Apprenticeship/Traineeship, or who has had at least six years continuous experience in the industry prior to 1 November 1999 and is competent in the skills prescribed for the industry to the satisfaction of the HITO or HITO approval." As already noted, the evidence was that Candice was still an apprentice only one year ahead of Emma. She had only begun cutting on the floor at Clifford Lamar in September 2007, Mr Harris was asked by the Court whether HITO knew that Emma was being trained by Candice and he replied, "they were definitely aware of that." He was then asked, "and were they happy about that?" Mr Harris replied:

A. Urn well I spoke to Duel last week and I spoke to Pam this week and

I think it is really hard for them to make a comment. Candice passed at the top of her grades in her class. I think it's at my discretion. They allow that we can use anyone to train and they know that Candice was extremely talented.

Q. They knew that she was unqualified and they were happy about that?

A. Yeah we're allowed to.

> [28] The target that had been fixed by Mr Harris in writing was for Emma to be doing her own cutting on the floor of the salon by the end of September 2008. Emma told the Court that towards the end of September Mr Harris told her that she would not be going on the floor until March/April the following year, 2009, at the earliest. This was six months after the planned time. Emma was clear in her evidence that the reason why she was not advancing as anticipated was because the training she had been receiving from Candice was simply not adequate.

The warning letter

> [29] There were other incidents during 2008 which were covered in evidence. I propose to refer briefly to only two of them. The first related to a training session in October and the other to an application for leave over the 2008 Christmas period. On Wednesday, 15 October 2008 Emma had a training session at the end of her normal day's work. Her brother Simon was her model and her aims for the training session had been recorded in writing. Emma told the Court that she began cutting and during the cut she checked with Candice periodically that the balance and cut were correct. She continued:

She [Candice] offered me no advice and told me to carry on. She was standing 2 to 3 metres away from me. She didn't give me any feedback during the cut or say the cut was not right. At the end of two hours Candice checked the cut and told me it was not even. I made alterations. Cliff then checked, said it was all out and told me it was not even. I made alterations. Cliff then checked, said it was all out and had to be redone. I was frustrated.

Mr Harris told Emma that Candice should finish the cut but Emma objected saying that Simon was her brother. Emma recounted in precise detail the events that then took place. The end result was that Mr Harris told her to go home and get out of the salon and she ended up crying but she did settle down and carried on finishing Simon's cut. She then asked to speak to Mr Harris and Candice and apologised to them both over how she had reacted. Her evidence continued:

Cliff said — I am very angry with how you reacted tonight. It's not acceptable. You embarrassed me. Go home. Cliff was angry. He didn't accept my apology. I left the salon. Simon and I wrote down what had happened at the training session. I had got upset during the training session just described. It was out of absolute frustration in how I was being trained by Candice. This was how my training sessions with Candice had been going. I wasn't actually getting any help during the training and instructions at the start were minimal. I was asking Candice questions because I wanted to know the answers. I was asking for help. I wasn't getting any. It was more like a test.

> [31] Simon Gyenge, who is currently an Auckland University student, gave evidence confirming Emma's account of the incident. After describing the events in the salon, Simon told the Court:

After I left the salon I went to my car and texted my mother, Jan Gyenge. I texted saying that "It's horrible for Emma working there [Clifford Lamar]. They were terrible to her." I sat in my car for numerous minutes as initially I was not composed enough to drive. The way Emma was treated had shocked me and it wasn't till I was outside in my car that I reflected on the events and realised the pressure Emma had been under.

> [32] Emma told the Court that the following morning when she arrived at work Mr Harris called Candice and her into his office and he gave Emma a letter. He asked Emma to co-sign the letter. Relevantly, the letter stated:

It is with regret that we have issued your first verbal warning for poor performance.

As we have had this problem occur before and discussed, we feel there is now a need to address this stronger, for the sake of the company and your growth.

[33] Mr Harris also told Emma that he has withdrawn her name from the Apprentice Competition and she would not be able to have any models during the day. Emma told the Court that she did not know what Mr Harris was referring to when he said that the problem had occurred before. She said:

The verbal warning was unjustified. The manner in which it was given was tantamount to intimidation. Cliff didn't advise me that he was calling a meeting to discuss my shortcomings. No plan of action of how to improve was provided to me. I felt very nervous about the state of my employment. I was very distressed by what had happened. A client having a colour done was moved into my column when I was meant to be having my lunch break. It was a horrible day.

> [34] At this point in the narrative Emma contacted Ms Pam Fegan, her contact person at HITO, to seek assistance with her training issues and to discuss how she was being treated in the salon. Emma and her parents met with Ms Fegan on 17 October 2008 and Emma outlined all her work related problems. She said it was decided at that meeting that she should approach Mr Harris and talk to him again about her concerns. On 23 October 2008, Emma met with Mr Harris. She had made out a list of the issues she wished to discuss. Her parents also attended the meeting. Emma told the Court that she hoped after that meeting that her work environment at Clifford Lamar would change. She said that at the end of the meeting Mr Harris gave her a flower arrangement and her parents a card, both of which he already had. Emma said that Ms Fegan wanted to arrange a meeting with herself and Mr Harris but Mr Harris was not prepared to meet with them. A letter from Mr Harris dated 31 October 2008 was produced in which he confirmed that he would not be attending a meeting with Ms Fegan. In cross-examination he said that his refusal to meet with Ms Fegan was because he was "really, really, really busy". Mr Harris' refusal to meet with the HITO representative flew in the face of a dispute provision in the HITO Training Agreement which provided that any dispute between the employer and the apprentice relating to the training relationship or the competence of the apprentice was to be referred to HITO.
> [35] In reference to the 15 October incident Mr Harris told the Court:

I watched Candice check the cut after a while. I heard a commotion and saw Emma getting frustrated and grabbing her brother's head. This was something that we had trained her not to do. I went over to see what was happening. The cut was completely uneven. I instructed her to do it again. The haircut appeared to be, culmination (sic) of a series of issues with her cutting that I had attempted to instruct her on. For example, we were trying to teach her that hairdressing isn't about just learning a series of haircuts, but the need to process and assess the needs of the client and their hair. She needed to learn how to do this and on her own. I instructed her to start the cut again.

She was not happy. I do not remember how she demonstrated it, but that was enough for me to tell her that she needed to come into the office. It was embarrassing having it happen on the salon floor.

In the office I attempted to get her to calm down and I suggested Candice finish the cut. This wasn't out of spite, it was on the basis that she was in a state and would not learn anything more that evening.

Emma did finish the cut. She stopped crying and pulled it together. I was pretty impressed with her by that and I think I told her that the next day.

> [36] In reference to the warning letter, Mr Harris told the Court that he could not remember fully the first incident he referred to in the letter but he thought it was when he told Emma about her work days being adjusted to include Mondays and Emma did not like the proposal. He said, "I have no — I don't have too many memories but I'm quite sure that her voice was raised on the reception desk." In relation to the incident on 15 October 2008 which led to the warning letter, Mr Harris said that his intent was to teach Emma not to demonstrate emotional behaviour on the salon floor but only, "in closed doors".
> [37] Despite Emma's optimistic expectations that the situation regarding her training programme might improve following her 23 October meeting with Mr Harris, which her parents had also attended, it was clear from her evidence that this did not happen. Emma said that Candice "was observing me not training me. I was asking questions and trying to get her to engage. She didn't seem to know or didn't want to. This was how it had always been. It was an unjustifiable disadvantage Candice training me."

The application for annual leave

> [38] The second major incident happened on Christmas Eve 2008, although it had its origins back in July. On 14 July 2008, Emma had written to Mr Harris requesting annual leave for 27, 30 and 31 December 2008 to enable her to travel. In his written response Mr Harris said that December was their most profitable period and it was company policy not to allow leave to be taken at that time. His letter concluded: "However if those dates do arrive and the salon is able to function at an expectable level we will be able to grant those days as requested." On 26 November 2008, Emma again wrote repeating her request for leave on the three dates in December. Mrs Anna Harris responded on that occasion enclosing a copy of Mr Harris' earlier response. She went on to confirm the company policy and stated: "However if we get to this period of time and the shop is not busy we will be able to allow [your] holiday at the moment it is looking busy and doubt that we can guarantee this we will only know this when the time comes. Until then unfortunately we are unable to guarantee the holiday."
> [39] Not having heard anything further, Emma gave Mr Harris a further letter on the morning of 24 December 2008 asking about her leave request (she said that she had previously been told to put everything in writing). Emma said that when she handed the letter to Mr Harris he was "abrupt and aggressive and said he didn't want it and told me to talk to Anna." Emma rang Mrs Harris at home and told her there were minimal bookings for her on the three days in question. Mrs Harris then asked to speak to her husband again and Emma described in evidence what then happened:

Anna asked to speak to Cliff again and then Cliff came out into the salon and said to me "I'm putting an end to this. The answer is no". Cliff shouted at me and was angry. Cliff shouted at me in front of the clients and other staff and he was agitated. Cliff made it as unpleasant as he could and embarrassing in front of clients too. By his standards this was unprofessional and extremely distressing and humiliating for me. I asked to talk to Cliff and we went out into the office and I asked why. He said that it was company policy and it is the salon's busiest time of year. I knew from previous experience at that point it was no use discussing it further with Cliff. I made a handwritten note of bookings from the salon computer. On the 24th [of] December 2008 the bookings for the days I had requested leave were as follows: 27th December — 1 client, 30th of December — No clients, 31st December — 1 client... I thought they were extremely unfair. I was their longest serving employee and this was my third Christmas of working. No opportunity was given to negotiate for even a part of the requested time off or clarify the importance to me of the leave.

> [40] During the afternoon of 24 December 2008 another incident happened at the salon in relation to the leave application which assumed some significance as the case progressed. Emma's father, Mr George Gyenge, is a real estate agent in Tauranga. He told the Court that after work on 24 December 2008 he stopped off at the salon "to clarify issues that were causing Emma a high level of stress." He said that he asked Mr Harris if they could talk through some issues as Emma was very unhappy and he said he needed to clarify Emma's leave request. He said Mr Harris

responded, "he had had enough of it and that she couldn't have the leave." His evidence continued:

I said there is a problem between Emma, Candice and Anna in their given roles and Cliff you were not available to talk to. I said that Emma felt that Anna at times was laughing at her.

At that point Mr Harris totally lost it and started shouting at me to 'get out of my salon' — 'get out of the building'.

I tried to explain my comments and that I was only there to help as I could see he was very upset. He kept shouting which got louder and louder. He was very aggressive and irrational in his manner and I thought at that stage he was going to punch me.

I left.

> [41] Emma said that when her father arrived she was finishing up for the day. She said, "Cliff and Dad talked by the front desk initially and then went through to the office. After a while they came back out to the front desk and they were talking. I could see them and hear them. Cliff got agitated and started yelling at Dad to get out of the salon. He opened the side door and ushered Dad out. We left. Dad was shaken and I was crying."
> [42] In his evidence relating to the same incident, Mr Harris said, "Mr Gyenge wanted to talk to me about Emma's requested days off. He told me that I had to grant the holiday period. I explained to him the position — that I believe had always been made completely clear — that it was our busiest time of year. As such we needed her in the premises. In my opinion Mr Gyenge became quite angry. I asked him to leave the premises or I would call the police. He then left." I will need to return to this incident.

The resignation

> [43] On 27 December 2008, Mr Harris wrote to Mr Gyenge asking him to put in writing the accusations he had made on 24 December towards Anna and Candice and stating that until he got to the bottom of the matter Anna, Candice and Emma were not to be alone together. Mr Gyenge told the Court that he had made no accusations at their meeting he simply had raised points for discussion and areas that needed to be addressed. He was disappointed with the aggressive and threatening nature of Mr Harris' letter. He wrote a response dated the same day expressing disappointment at the way the meeting on 24 December had ended and he said that Emma would be writing a letter detailing all her concerns and he asked Mr Harris to treat the matter "with the seriousness that it deserves". On the same day Emma wrote a very detailed four-page letter to Mr and Mrs Harris setting out a number of the issues that were affecting her and remained unresolved. She also wrote a separate letter to Anna requesting details of the sick leave and annual leave she had taken and details of the annual leave she still had owing. The four-page letter ended as follows:

In summary:

The issue of my leave request has been very poorly handled and highlights the ongoing communication problems that are occurring and Cliff your inability to discuss issues with me in a business like fashion.

The issue of daily breaks needs to be rectified.

My hours and wages need to be administered correctly.

I feel you have let me down with my cutting training.

I am a loyal hard working employee and I deserve to be treated fairly and not intimidated.

It disappoints me the lack of interest you are taking in my career.

Product sales should not be included in targets if there is not product in stock to be sold.

Cliff, I had hoped after our meeting in October that my work environment at Clifford Lamar would have seen noticeable improvements by now.

I look forward to the issues being resolved.

Yours faithfully

Emma Gyenge

[44] Emma said that she gave her four-page letter to Mr Harris at 2,00 pm on 30 December 2008 and, "he was mad". She told how he wrote a response on the computer and then attempted to have her sign it:

He interrupted me while I was with a client that same afternoon just prior to 5.00 pm and asked me to sign a letter to me from him. He said "I'm taking over", referring to my client. I went around the front of the salon and he followed me and said **I** had to sign it (the letter). I said I wasn't going to and he said I had to and then snatched the letter out of my hands. By his standards this was unprofessional and for me a humiliating way to be spoken to and treated in the salon in front of clients and other staff and I was extremely distressed and intimidated. He was bullying me and being very controlling. I felt so intimidated by Cliff that I felt unable to make a decision as to whether I should sign it or not. I wanted to show someone before I signed it. Cliff wrote his letter in anger. I don't believe he consulted with Candice or Anna before writing his reply. All I wanted was my issues to be addressed.

[45] In his evidence, Mr Harris denied snatching the letter in question from Emma's hands and he denied bullying Emma and "being very controlling". In his letter he claimed that it was her own fault that she did not take her morning and afternoon tea breaks. He reiterated that she had not been granted the three day's leave because it was "our busiest *three weeks* of the year" (emphasis added). In relation to Emma's complaint about Candice as her cutting trainer, Mr Harris said:

If you feel we have let you down with cutting training I am sorry but we have given the best we can give. There is no lack of interest in your career we care for everyone in the salon and have to treat everyone equally no one gets put above the other. We hope you understand this.

Mr Harris concluded his letter by telling Emma to see Candice if she had an artistic problem and Anna with any other problems.

[46] The highlighted words were consistent with Emma's own evidence in so far as she claimed that it was the period in December up to Christmas Eve that was the busiest time of the year for the salon whereas in the final week of December they were reliant on "walk-in clients". The point Emma stressed to the Court was that the three day's annual leave she had been seeking were for three days during that final week in December and not three days during the busy three-week period leading up to Christmas.

[47] The issue relating to Emma's morning and afternoon breaks seems to have been a fairly constant problem throughout 2008. The employment agreement provided that work on any day would be continuous except for one unpaid meal break of one half hour for lunch and "two paid breaks of 15 minutes each day taken at or about the mid-point of the morning and the afternoon." The evidence was that Emma was not taking her paid breaks. Mr Harris claimed, in effect, that that was Emma's own fault because she chose to continue working when her breaks should be taken. Emma, on the other hand, claimed that management simply did not make it possible for her to take her authorised breaks. She told the Court that "Sam was in the habit of just walking out" but there was always necessary work to be done between clients and management did not have a system in place that encouraged or allowed her to take her rest periods.

[48] Emma told the Court that her pay was incorrect again on 30 December 2008 and she had no afternoon break that day. On 31 December 2008, Anna Harris wrote to Emma also addressing several of the matters raised in her four-page letter of 27 December. She invited Emma to write to her indicating how she (Emma) would have dealt with the situations she was unhappy about had she been in management. Emma claimed in her evidence that Anna's letter blamed her (Emma) for the situation she was in and it did not address all her points of concern. She noted that there were still a number of issues in her four-page letter that had not been addressed by either Mr or Mrs Harris. She described these as "pay problems, changing of hours, annual review, favouritism, control, communication problems, ignoring me, health and safety and verbal warning." Nor did Mrs Harris provide the information Emma had requested regarding her sick leave and annual leave entitlements. Emma said the situation had become untenable and the responses she had received demonstrated that they were ignoring her issues. She said, "No meeting was scheduled to discuss the issues. I felt my issues were simply dismissed. Management had created a culture of distrust for me in the salon. The atmosphere in the salon was horrible. I was worn out with trying to get my issues addressed."

[49] The reality, as confirmed by the evidence, was that any apology or explanation contained in the letters from Mr and Mrs Harris came too late. Emma was already suffering from considerable stress. She was off work on sick leave on both 31 December 2008 and 3 January 2009. Emma told the Court that her constructive dismissal occurred on 5 January 2009 when she resigned from Clifford Lamar. Her letter to Anna Harris simply said:

Dear Anna

I wish to tender my resignation from Clifford Lamar to be effective from the 31' January, 2009. Thank you.

Yours faithfully

[501 In the concluding section of her evidence, Emma said:

I didn't want to leave Clifford Lamar and was bitterly disappointed that I had to. The actions of Clifford Lamar forced me to resign. I should have been treated fairly and not intimidated. I didn't understand why I was being treated the way I was. I worked hard and was fiercely loyal to Clifford Lamar. I always worked in the best interest of Clifford Lamar and was totally committed to the salon. I was suffering distress, hurt, humiliation and disadvantage and saw no option but to resign. I was 19 years old. The actions of Clifford Lamar left me with no choice. I could not carry on working at Clifford Lamar.

[51] The evidence was that Mrs Harris simply said "okay" when Emma told her of her resignation and Mr Harris didn't say anything to Emma until he said goodbye to her on her final day, four weeks later. Neither Mr nor Mrs Harris provided or offered to provide Emma with a written reference. A medical certificate produced in evidence confirmed that Emma was unfit for work during the final week of her notice period because of stress. In his evidence, Emma's father described the nature of her stress symptoms:

I mean Emma is normally a bouncy young woman, her confidence was totally shot she was totally under stress. She was having physical problems with eczema because of the stress levels that she was under. She would be crying. It was very bad.

The stress levels that she was suffering at that time I couldn't — I would have left long before Emma would — the stress levels that she was suffering were awful.

The law

> [52] The legal principles relating to cases of constructive dismissal were enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW*[2] and have subsequently been applied in numerous decisions of this Court. Relevantly, the Court of Appeal stated:[3]

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

> [53] The Court of Appeal then turned to consider the potentially relevant duties of an employer in this field specifically adopting the implied term of trust and confidence recognised by Brown-Wilkinson J. in the following passage from the judgment of the Employment Appeal Tribunal in *Woods v W M Car Services (Peterborough) Ltd:*[4]

In our view it is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew.*[5] To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin*[6] and *Post Office v Roberts.*[7] The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts.*

> [54] In New Zealand the implied contractual term of trust and confidence is now incorporated in the even broader statutory duty of good faith imposed on all parties to an employment relationship by virtue of s 4 of the Employment Relations Act 2000 (the Act). The relevant good faith provisions stipulate:

4. Parties to employment relationship to deal with each other in

good faith

{1) The parties to an employment relationship specified in subsection (2)

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other. (1A) The duty of good faith in subsection (1) —
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;
> [55] Another relevant factor in the New Zealand legislation is s 103A of the Act which requires the Court, if it concludes that the resignation was in substance a dismissal, to then go on to consider whether the dismissal was justifiable by determining, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

Discussion

> [56] This case turns very much on its facts and as is usual in that situation the issue of credibility becomes particularly important. In his determination of 17 May 2010, the Authority Member described an incident that occurred during the course of his investigation which is relevant to credibility. It was also canvassed in evidence in this Court. The relevant passage in the determination reads:

[55] After Ms Gyenge had commenced the investigation in the Authority by lodging a statement of problem, Mr Harris responded on behalf of Clifford Lamar in the usual way by lodging a statement in reply, a copy which was sent to Ms Gyenge. In a reasonably detailed annexed statement signed by Mr Harris and addressed to the Authority, he accused Mr George Gyenge of calling him to his face on 24 December 2008 a "black#!*!, or a black cunt as was clearly suggested to have been the actual words of abuse.

[56] Mr Harris accused Mr Gyenge of making this "racist comment," as he called it, to him twice during a conversation at the hair salon on 24 December, and also accused him of abusing him generally about his refusal to allow Ms Gyenge the requested time off at the end of the year.
[57] In his evidence Mr Gyenge absolutely refuted the accusation when questioned by the Authority. Mr Harris then said he was no longer making an issue of the allegation, before finally confessing that it was untrue.
[58] Mr Harris had allowed his lies about Mr Gyenge to stay on the record over the weeks that followed the lodging of the statement in reply, and he maintained those lies as being the truth right up until Mr Gyenge was being questioned during the investigation meeting.
[59] Mr Harris implied that as a Jamaican from the United Kingdom he had been a victim of racism, but lying about others being the perpetrators of that simply encourage racial prejudice. Mr Harris claimed he had found it offensive to be called a black cunt. No doubt he would have been offended, had his statement been true. What was doubly offensive on the part of Mr Harris was his lying about Mr Gyenge and the lies themselves.
[57] Mr Gyenge told the Court that Mr Harris had only withdrawn the false allegations after he (Mr Gyenge) threatened to take a defamation case against him at the conclusion of the employment litigation. In a revealing passage taken from the notes of evidence in this Court, Mr Gyenge was cross-examined by Mr Harris about the incident:

George would you admit that that was quite a hard moment for me that day in the Employment Relations Authority meeting? Specifically talking about what I had written that was false?

A. I would think that that would have been a hard day for anyone with

writing such a lie and then dragging somebody's name through the mud as you did and then having to front it I would think that would be difficult for anyone.

Q. And do you recall that I walked outside and passed out afterwards?

A. Yes I do. I couldn't work out whether that was theatrical or whether

that was real but yes that happened.

Q. Did you recall the sweat on my brow when I walked back in the

room? Me having to take my jacket off?

A. I'd feel pretty hot if I'd made a statement like that to.

[58] None of this evidence assisted Mr Harris in terms of his credibility. He freely admitted to the Court that when he wrote the false statement and sent it off to the Employment Relations Authority, he knew it was false at the time but he did nothing to correct the situation until he was questioned by the Authority Member about the matter sometime after he had confirmed the truth of his statement either on oath or by affirmation (there was conflicting evidence as to whether he had affirmed or taken an oath).
[59] In stark contrast to this rather sordid evidence, I must say that Ms Gyenge was a most impressive witness in every sense of the word. One of the witnesses who gave evidence on her behalf was Ms Kim Whyte, her former form teacher at Otumoetai College. Ms Whyte described Emma as a "high achieving student throughout her time at secondary school." She told the Court that Emma excelled in mathematics, music and sport and "always enjoyed a convivial and respectful working relationship with her teachers, Deans and coaches." Ms White explained that she was a client of Emma's at the hairdressing salon where she currently works. She described Emma as being immaculately presented and noted that she takes care with even the smallest detail in herself and in her work. In the concluding paragraph of her written brief Ms Whyte stated:

Emma is mature and responsible in every way. Emma has the utmost integrity, and conducts her life in an open and honest manner. She maintains strong relationships with others because she is caring and sincere. Emma inherently cares for others and will go out of her way to help and support. She is a loyal and gracious person, and for this she is appreciated by many.

[60] None of this evidence was challenged in any way and I accept it as an accurate assessment. It conforms to my own perception of the plaintiff.
[61] For the record, I confirm that I also formed a favourable view of the credibility of the other two witnesses

called on behalf of the plaintiff. Although they were family (Emma's father and brother) I consider that they gave their evidence in a reasonably detached and objective manner. For these reasons, wherever there is a conflict between the evidence presented on behalf of the plaintiff and the defendant I have preferred the evidence given on oath by the plaintiff's witnesses.

[62] In addition to its statutory duty of good faith which I have summarised earlier and its other duties and obligations under the Act and the Apprenticeship Training Agreement, the defendant had the specific obligations and duties set out in the employment agreement, including those in clause 10 which provided:

10. Employer's duties

10.1 The Employer will:

a. Treat the Employee fairly and properly in all aspects of

employment.

b. Provide the Employee with good working conditions and reasonable facilities;

c. Provide all training and instruction reasonably necessary to equip the Employee for the safe, efficient and proper performance of their duties in employment.

[63] I am satisfied on the evidence that the plaintiff has established to the required standard of proof in civil cases a plethora of breaches of duty on the part of the defendant which led inexorably to Emma reluctantly tendering her resignation. Some of the breaches were more serious than others and involved breaches of contract. Other actions on the part of the defendant would no doubt have given rise to a personal grievance or a claim of unjustifiable disadvantage. Either way, I am satisfied that it was the accumulative impact of the defendant's conduct as a whole that led to Emma's resignation.

[64] Turning to the specific incidents, first there was the cumbersome and less than frank way in which Mr Harris showed his resolve not to be bound by the original employment agreement but instead, without any explanation as to the real reason for taking the action, produced the second employment agreement and issued his unjustified ultimatum that Emma was to sign the same or have her training suspended.

[65] Then there was the issue over Emma's status. In her first employment agreement, Emma's job description had been stated as "Senior Technician". In the second agreement the position was stated to be simply "Technician". The change had been made without any consultation with Emma (in breach of clause 6.1 of the employment agreement) and she told the Court that she could not work out why she had been demoted. Mr Harris claimed that the job description in the original agreement was the result of an error on the part of his lawyer but he was unable to explain why in the detailed job description which he himself had typed up on Clifford Lamar letterhead he had also shown her position as "senior Technician". The opening lines of Mr Harris' letter read:

Job Description:

Technician.

We have pin pointed your day to day jobs as a senior Technician, however this may change from time to time.

[66] I do not consider that there was a mistake by the lawyer in the original description. I think the position was deliberately overstated by Mr Harris to convey the impression to customers that he employed senior staff in the salon and not junior staff. The evidence was that Candice Haycock also received rapid promotion. Candice was the same age as Emma and started working for Clifford Lamar in September 2007. She was still only an apprentice when she was promoted in early 2008 to the position of "Artistic Director".

[67] Another serious breach of duty on the part of the defendant was the way in which Mr Harris, without any consultation with Emma and in breach of the apprenticeship agreement and the assurance which I find that he had given Emma in order to persuade her to sign the second employment agreement, proceeded in the early part of 2008 to delegate her cutting training to Candice. This was another clear disadvantage in employment. Candice was not a "qualified trainer" within the meaning of the HITO training agreement. She was still only an apprentice, one year ahead of Emma in the apprentice training programme. As Mrs Gyenge expressed it in her final submissions, Emma was being trained by a trainer who was herself still being trained. Moreover, Candice was in competition with Emma in the same internal salon competition that year, where the prize was a trip to the UK, and they were also competing in the Bay of Plenty Regional hairdressing competitions. Against that background, it was quite inappropriate for Candice to be designated as Emma's trainer. It was inevitable that friction would develop between the two young women. Mr Harris should have been alert to the obvious potential problems the appointment would have created and he should have been proactive in solving the problem and allaying Emma's deeply felt concerns. This was just one of the numerous concerns I find that Emma genuinely held which Mr Harris failed to deal with in breach of his statutory obligation of good faith and his specific contractual duty to treat Emma "fairly and properly" in all aspects of her employment.

[68] The decision to issue Emma with a written warning constituted a disadvantage in employment which could only be justified under s 103A of the Act if it had been what a fair and reasonable employer would have done in all the

circumstances at the time. It was clear from the evidence that Emma's frustrations had arisen out of Candice's failure or inability to provide her with proper training. Mr Harris never gave Emma the opportunity, however, to explain any of this before he escorted her into his office and handed her the warning letter. His decision had been predetermined. He was not interested in listening to any explanation Emma had to offer. Nor was he interested in ensuring that she had representation at the meeting. This is not how a fair and reasonable employer would have acted.

[69] Then there was the failure of Mr Harris to co-operate and meet with the HITO representative following Emma's approach to Ms Fegan of that organisation at the end of October 2008. His failure in that regard occurred at a crucial stage in the chronology of Emma's ongoing employment problems. Had Mr Harris been proactive and co-operated in having the dispute referred to HITO for mediation or other resolution then, with the active assistance of Emma's parents, all the problems could well have been resolved. As it was, Mr Harris did not co-operate and the matter was not resolved. Emma's very real and genuine concerns were simply left to fester.
[70] The situation in relation to Emma's application for three days' leave at the end of December 2008 was dealt with appallingly by Mr and Mrs Harris. The employment agreement provided:

14.3

d. The time for taking annual leave may be agreed between the

Employer and Employee and the Employer must not unreasonably withhold consent to the timing proposed by the employee.

[71] The evidence was that, although the exact number of days was not quantified, Emma had considerable annual leave owing to her. Emma had given five months' notice of her desire to take three days' leave at the end of December. The Harris' strung her along indicating that they may be able to accommodate her request but they never sat down and communicated with her about the matter in a good faith way. Then at the very last moment, on Christmas Eve 2008, Mr Harris rejected her

leave application in the terse manner Emma described in her evidence to the Court. That type of conduct cannot be described as treating the employee "fairly and properly".

[72] In addition to these matters, there were the other ongoing concerns which Emma detailed in her evidence. One of those was the failure of management to have a system in place that encouraged Emma to take her rest periods as allowed for in the employment agreement and under the Act. Then there were the numerous instances where Emma's pay was incorrect because she was not getting paid for the actual hours she worked. Emma said in evidence, which I accept, that on each occasion she would raise the matter with Mrs Harris but Mrs Harris did not correct the pay or tell Emma why she had changed the hours she was being paid for. It is fair to record that this particular issue could not be authoritatively resolved one way or the other on the evidence because the computerised generated data relied upon for calculating Emma's wages for the relevant pay periods is (contrary to the Act) no longer held by the defendant. I accept Emma's evidence, however, that she kept a reliable record of the hours she actually worked at the salon and I accept that she was genuinely aggrieved that she was not being paid for those hours. This was another crucial area in which, in terms of their contractual obligations, Mr and Mrs Harris should have been proactive and communicative. They should have left no stone unturned in trying to have the matter resolved to their employee's satisfaction.
[73] Under the remuneration provisions of her employment agreement, the employer was required to review Emma's personal performance annually as well as her remuneration. The evidence was that, although Emma raised these issues with Mr Harris, there was no review either of her performance or remuneration in 2008.
[74] In terms of the causation issue identified by the Court of Appeal in the *Auckland Electric Power Board* case, I have no hesitation in concluding that the plaintiff's untimely resignation came about as a result of a succession of breaches of the defendant's obligations and duties under the employment agreement over a sustained period of time.
[75] In terms of the second essential element, namely, whether the breaches were sufficiently serious to make a substantial risk of resignation reasonably foreseeable, again, I am more than satisfied that this ground has been established. In *Woods* (supra) Browne-Wilkinson J noted that the fact that the employer's conduct was likely to "damage seriously the relationship of confidence and trust between the employee and the employers seems to us to be shown by the actual breakdown in the normal relationship between employers and employee that in fact occurred." Likewise, in the present case there was a certain inevitably about the outcome of the defendant's intolerable behaviour.
[76] Turning to the s 103A test of justification, I am satisfied that the plaintiff's dismissal was unjustified. It is axiomatic that a fair and reasonable employer would not have breached an employment agreement in the serious and ongoing manner I have identified in the present case.

[77] In contrast to the comprehensive evidence presented to the Court on behalf of the plaintiff in relation to liability, the evidence presented in relation to compensation for economic loss was scant. What was presented was not challenged by the defendant but it was still up to the plaintiff to establish the quantum aspects of her claim.
[78] The plaintiff's claim for economic compensation can be categorised into three parts. First, there is a claim for two separate amounts totalling $2368.13 for compensation arising from the fact that Emma had not been appointed a stylist or given full-time hours of work in October 2008. Then there is a claim totalling $1032 relating to Emma's departure from Clifford Lamar and her start-up with Scots, another Tauranga hairdressing firm. The third element making up the claim for economic compensation is a claim of $5001.75 for loss of earnings.
[79] This challenge is concerned only with the one personal grievance, namely Emma's constructive or unjustified dismissal in January 2009. Section 123(1)(b) of the Act provides for reimbursement of wages or other money lost by the employee *as a result of the grievance* (emphasis added). The claim for economic loss resulting from Emma's failure to obtain the anticipated promotion in October 2008 does not arise out of the personal grievance before this Court and cannot, therefore, be compensated.

[80] The claim for $1032 is made up as follows:

- $100 transfer fee to new salon;
- $546 year 3 training costs;
- $125 in-salon assessment cost;
- $261 final assessment cost.

[81] I heard minimal evidence in relation to these particular items of claim. I am prepared to accept that the plaintiff is entitled to recover the sum of $546 because those training costs were an element of the prize she had won in the Clifford Lamar Apprenticeship Competition. The amount is recoverable as the loss of a benefit in terms of s 123(1)(c)(ii) of the Act. I have insufficient information regarding the other items to uphold the claim,
[82] The claim for reimbursement of wages lost appears to be based on the fact that for the first 26 weeks of her new employment with Scots, Emma worked part-time only. Her hours were 24 hours a week compared with her 33 hours per week at Clifford Lamar. Her rate of pay at Scots appears to have been $14.25 per hour compared with $12 per hour at Clifford Lamar. I find it quite impossible, however, to reconcile those figures with the amount claimed in Mrs Gyenge's final submissions under this head of $5,001.75, As noted, the claim was not challenged in any way by the defendant and it seems to be soundly based. I consider the justice of the case can best be met by my allowing the plaintiff the opportunity of filing within 14 days a memorandum clarifying precisely how her loss of earnings claim is made up. I will then issue further directions.
[83] The plaintiff has also claimed $10,000 compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(l)(c)(i) of the Act. This element of the claim is subject to the same observations I made earlier. In other words, compensation under this head can be awarded only in respect of humiliation, injury to feelings etc arising out of the personal grievance before the Court, namely, her unjustified dismissal in January 2009. Much of the humiliation, injury to feelings etc which Emma suffered arose out of the employer's breach of duties on earlier occasions. The defendant's actions on those earlier occasions no doubt could have been made the subject of separate personal grievances at the time but they were not and their only relevance in relation to the claim before the Court is that cumulatively they go to make up the conduct the plaintiff relied upon to establish her claim of constructive dismissal.
[84] Emma told the Court that her problems did not stop with her resignation. She said, "It was very hard going back into the salon [working out her notice period]. I was keeping a diary. This was helping me to cope with my stress." I accept that having to serve out her notice period in an unpleasant and uncomfortable environment would have been a particularly hurtful and humiliating experience for a young conscientious employee like Emma. Mr Harris and Mrs Harris effectively ignored her. There were other unpleasant incidents during this period which I need not go into. They were relatively minor but they all took their toll. In the end, as already noted, a medical certificate produced to the Court confirmed that Emma had to go on stress leave for the final week of her employment. As she told the Court, she was only 19 years of age. For compensation under s 123(1)(c)(i), I award the sum of $8000.
[85] Having concluded that the plaintiff has succeed in establishing her personal grievance, s 124 of the Act requires the Court to consider the extent to which the actions of the employee contributed towards the situation that gave rise to that grievance. No allegation of contribution was made by the defendant and, on the evidence, I am quite satisfied that Emma did not contribute to the situation giving rise to her personal grievance in any manner which would justify a reduction in the remedies awarded.
[86] The defendant's counterclaim, made pursuant to clause 13.3 of the employment agreement, in the sum of $5069.24 for reimbursement of training costs, is rejected. The clause provided that reimbursement applied only if the employee terminated the agreement and I have found that that was not the situation in the present case. Moreover, as Emma contended from the outset, she won all her training costs as part of her prize in winning the Clifford Lamar Apprenticeship Competition. Under s 162 of the Act, the Court has jurisdiction to make orders

under the Minors' Contracts Act 1969. Section 5 of Minors' Contracts Act allows the Court to cancel or decline to enforce unconscionable provisions imposing an obligation on a minor. I am satisfied that clause 13.3 of the initial contract was unconscionable and, had it been necessary, I would have declined to enforce the provision.

> [87] Finally, the plaintiff makes a claim for costs. Emma was represented by her mother and it is not the practice of this Court to award costs in those circumstances. I suspect, however, that Mrs Gyenge may have obtained legal assistance in the preparation of her comprehensive final submissions because legal authorities were referred to which were both relevant and helpful. If that is indeed the situation then the plaintiff would normally be entitled to obtain a contribution towards those legal costs. Mrs Gyenge is invited to clarify the situation in this regard and produce any invoice as part of the memorandum requested under paragraph [82]. The plaintiff should also identify in that same memorandum any disbursements incurred in connection with the case.

Summary

> [88] The plaintiff succeeds in her challenge and is entitled to awards of $8000 and $546 respectively under ss 123(1)(c)(i) and 123(1)(c)(ii) of the Act.
> [89] The plaintiff is entitled to reimbursement for loss of earnings pursuant to s 123(1)(b) of the Act in a sum to be determined upon consideration of the memorandum requested under paragraph [82] above.
> [90] The plaintiff is entitled to recover expenses and disbursements reasonably incurred in connection with the case and to a contribution towards any legal costs actually incurred. The position in this regard is to be clarified by memorandum.

A D Ford Judge
Judgment signed at 11,30 am on 10 January 2011

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[1] AA230/10
[2] [1994] NZCA 250; [1994] 1 ERNZ 168.
[3] At 172.
[4] [1981] ICR 666 at 670-671.
[5] [1979] IRLR 84.
[6] [1978] IRLR 322.
[7] [1980] IRLR 347.
