Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 112
5456175

	BETWEEN	JACINTA HIGHLEY Applicant
	A N D	AJ OPERATIONS LIMITED t/a COCOPELLI Respondent

Member of Authority:	David Appleton
Representatives:	Bradley McDonald, Counsel for the Applicant Philip Shamy, Counsel for the Respondent
Investigation Meeting:	1 and 2 July 2015 at Christchurch
Submissions Received:	15 and 31 July 2015 from the Applicant 29 July 2015 from the Respondent
Date of Determination:	5 August 2015

DETERMINATION OF THE AUTHORITY

A. Ms Highley was unjustifiably dismissed by the respondent and is awarded remedies as set out in this determination.

B. The staff tab system operated by the respondent during Ms Highley's employment operated in breach of the Holidays Act 2003 and the Wages Protection Act 1983.

C. I decline to impose penalties against the respondent.

D. Costs are reserved.

Prohibition from publication order

[1] During the course of the investigation meeting, evidence was adduced in relation to consultations that Ms Highley had with her GP. The details of that evidence are personal and, save to the extent disclosed in this determination, are not to be published and are to be kept confidential.

Employment relationship problem

[2] Ms Highley claims that, on Tuesday, 28 January 2014, she was unjustifiably dismissed from her employment as a full time duty manager/waitress by the respondent, which operates a restaurant and bar in Christchurch known as Cocopelli.

[3] Ms Highley also claims that she suffered an unjustified disadvantage in her employment by being dismissed in breach of the disciplinary terms of her individual employment agreement and by not being provided with 40 hours of work each week. She also claims breaches of the Wages Protection Act 1983 and the Holidays Act 2003 in relation to the way that the respondent operated its staff tab system and seeks penalties to be imposed in relation to these breaches.

[4] Ms Highley also seeks penalties to be imposed in relation to an alleged breach of good faith by the respondent, as well as the alleged breaches of her employment agreement.

[5] The respondent denies that Ms Highley was unjustifiably dismissed, although it concedes that her dismissal was undertaken in reliance upon a 90 day trial period contained in her employment agreement, but that the date of the dismissal fell outside of that 90 day period due to a miscalculation. It relies on a number of alleged actions of misconduct by Ms Highley to argue that any remedies awarded to her should be reduced pursuant to s.124 of the Employment Relations Act 2000 (the Act).

[6] The respondent also denies that it has breached Ms Highley's employment agreement and asserts that Ms Highley agreed to the methodology adopted in the staff tab system.

Brief account of events leading to the dismissal

[7] Ms Highley commenced her employment with the respondent on 30 October 2013, when she was aged 19. She was employed pursuant to an individual employment agreement which contained the following material terms[1]:

> *2.0 DEFINITIONS*
>
> *2.1* ***Full-Time employees***
> *Full-time employees are those employed for a minimum of forty (40) hours.*
>
> *4.0 EMPLOYEE REPRESENTATIONS*
>
> *Upon entering into this Agreement, the employee agrees that:*
>
> *4.1 All representations, whether oral or written, made by the employee as to qualifications and experience in applying for this position are true and complete.*
>
> *4.2 The employee has not deliberately failed to disclose any matter that may have materially influenced the employer's decision to employ the employee.*
>
> *…*
>
> *4.4 Clauses 4.1, 4.2 …. above are essential terms of this agreement and a breach of any of these Clauses may constitute misconduct that may result in termination of the employee's employment in accordance with Clause 13 of this Agreement.*
>
> *5.0 POSITION AND DUTIES*
>
> *5.1 The employee will be employed as a Duty Manager/ Waitress. The position is Full-time. Because of the nature of the business, the employee may also be engaged in providing customer service, hospitality and other work associated with the operation, administration and maintenance of the business.*
>
> *5.2 The Agreement shall commence on 30th October 2013 and continue until terminated in accordance with this Agreement.*
>
> *5.3 The job description (if applicable) is contained in Schedule C and may be varied from time to time.*
>
> *6.0 HOURS AND DAYS OF WORK*
>
> *6.1 The ordinary hours of work should not normally exceed forty (40) hours in any one week or 10 hours in any one day and may be worked on no more than*

[1] The Trial Period clause has been omitted given that the respondent accepts that it had expired at the date of the dismissal.

five days of the week, Monday to Sunday inclusive, except as provided in Clause 6.2. These hours will be paid at ordinary rates of pay, as set out in schedule A to this Agreement irrespective of the day of the week or time of the day on which the work is performed.

6.2 Notwithstanding Clause 6.1 above, where an employee and the employer agree, the ordinary hours of work may be spread over 6 or 7 days of the week and/or exceed 40 hours in any week, provided that no more than 50 hours is worked in any week without agreement between the parties. Any hours worked in excess of 40 hours per week will be paid at the employee's ordinary rate of pay as set out in schedule A.

6.3 The hours and/or days of work of part time employees may be increased or decreased by the employer in order to meet variations and fluctuations in trading patterns and labour requirements.

…

8.0 REMUNERATION

8.1 The employee will be paid the remuneration set out in Schedule A to this agreement by direct credit into a bank account nominated by the employee unless otherwise agreed.

8.2 ***Deductions from wages and/or holiday pay***

Deductions may be made from the employee's wages and/or holiday pay in the following circumstances:

(i) unapproved sick leave or other unpaid absences and for leave without pay which has been agreed between the parties;

(ii) by agreement between the employer and the employee;

(iii) as otherwise provided by this agreement;

(iv) from final pay for any unreturned protective clothing, equipment or any other property, or any debt believed by the employer to be owing to the employer, whatsoever it may be, including damage to the employer's property as a result of the employee's fault or carelessness.

8.2.1 Before making any deductions under this Clause you will be consulted as to the circumstances and amount of the deduction.

….

10.0 RESPONSIBILITIES OF THE EMPLOYEE

Under this Agreement, the employee shall:

10.1 At all times comply with all reasonable and lawful instructions issued by the employer and shall comply with all rules and procedures established for the conduct of the employee or employees in general.

10.2 At all times maintain an acceptable standard of dress and appearance. The employee will be advised of an specific uniform requirements, with which he/she must comply.

10.3 Carry out his/her duties faithfully, effectively, and to the best of the employee's ability and devote his/her whole time and attention during working hours exclusively to the employee's duties and not engage in any other activity inconsistent with the performance or services under this Agreement.

10.4 For the avoidance of doubt, breach of any of the terms of this agreement may result in disciplinary procedures being initiated in accordance with Clause 13 and may adversely affect continued employment.

……

12.0 [NO HEADING]

12.1 Where employment is terminated, in accordance with this Agreement, the employer or the employee must give the other either 2 weeks' notice of termination or resignation. Where either party terminates the employment without giving the required period of notice, one week's wages shall be paid or forfeited by the defaulting party.

12.2 Where notice of termination is given by the employer or employee under Clause 12.1, the employer may elect to pay wages in lieu of notice but this shall not constitute summary dismissal.

12.3 At the employer's discretion, the employer may reassign the employee to other duties during a notice period and this reassignment shall not constitute a unilateral variation to this agreement.

12.4 Nothing in this Agreement shall prevent the employer from dismissing the employee for serious misconduct without any period of notice or payment in lieu.

…..

13.0 DISCIPLINARY PROCEDURES

13.1 The procedure set out in this clause will be followed in circumstances where the matter(s) causing

concern is/are not of sufficient seriousness to warrant summary dismissal.

13.1.1 The employee will be required to attend a disciplinary meeting and will be advised:

(i) Of her/his right of assistance and/or representation at any stage, including at the disciplinary meeting;

(ii) Of the specific matter(s) causing concern that will be discussed at the disciplinary meeting and given an opportunity to state any reasons or an explanation in response to the matters of concern before any decisions are made;

(iii) Of the corrective action(s) required to remedy the situation.

13.1.2 Under normal circumstances the first two occurrences of minor misconduct would entail warnings, and the third instance of the misconduct could entail dismissal with or without notice.

13.1.3 The employee will always be given sufficient time to take the necessary corrective action(s).

13.1.4 Any action under this clause is to be recorded in writing and both parties are to receive a copy.

13.1.5 If, in the opinion of the employer, the situation warrants it, the employee may be suspended on pay pending the resolution of the matter(s) of concern.

17.0 EMPLOYMENT RELATED STATUTORY RESPONSIBILITIES

The employee acknowledges that:

17.1 The employee may be required to perform a number of duties under this Agreement that are subject to statutory governance including, but without limitation, the Sale of Liquor Act 1989, the Gambling Act 2003 and the Smoke-free Environments Amendment Act 2003 and related regulations.

17.2 Failure by the employee to meet the standards, satisfy the criteria or in the event of a breach of any requirement of any relevant statute or regulation,

either before commencing employment or during the employment may unduly affect on-going employment.

17.3 Failure by the employee to disclose criminal convictions, or to pass a credit history check may adversely affect on-going employment; and

17.4 Termination of the employee's employment by the employer for any reason as set out in Clauses 17.2 and 17.3 above shall not constitute unjustified dismissal.

21.0 VARIATION OF THIS AGREEMENT
The parties to this agreement acknowledge that circumstances may arise during the term of this agreement that warrant variation of this agreement. The parties agree that this agreement may be varied by agreement between the parties in writing and that no such variation shall be effective until signed by both parties.

SCHEDULE A
Summary of terms and conditions of employment

Names of the parties:
JACINTA HIGHLEY
Employee

AJ OPERATIONS LTD
Employer

Description of work:	*Duty Manager/Waitress – Front of House* *Specific position and/or "general hospitality duties"*
Place of work:	*P2 The Palms Arena, 18 Marshland Road, Shirley, Chch*
Wages:	*$17.00 per hour* *All amounts are stated as gross and will be subject to PAYE and other lawful deductions.*
Hours of work:	*Flexible hours as required by the employer.*

[8] There were also job descriptions for duty manager and for wait staff. The job description for duty manager contained the following:

Duty Managers are to work the bar/floor in a professional manner ensuring that all customers are welcomed, assisted in any way and enjoy their Cocopelli experience.
…
***Expectations**:*
…
Customers leave happy and want to return to Cocopelli Gourmet Pizza Bar.

[9] The job description for wait staff contained the same requirements.

[10] Ms Highley's evidence was that she felt that her first two months of employment went very well and that she would receive compliments from employees of the kitchen and the front of house. However, in the third month, the general manager and part owner of the respondent, Jeanette Francis, told her that she needed to smile more. Ms Highley believes that Ms Francis first raised this in late November 2013, around the time when Ms Highley had had her car broken into and damaged, which had caused her upset. It is common ground that Ms Francis came up with the idea of a code word, *miley*, which Ms Highley agreed to, and which Ms Francis and the other staff would say to Ms Highley to remind her to smile. Ms Highley's evidence is that this made her very upset and nervous as staff would say this to her even when she felt she was smiling.

[11] Ms Francis reports that she met with Ms Highley on 12 December 2013 to tell her that she felt that Ms Highley was still not smiling enough. Ms Francis' evidence was that being happy and engaging with customers and clients is essential in the hospitality business, which is why she took the issue so seriously. Her evidence is that they suggested changing the code word to *Rob*, the name of Ms Highley's partner, as Ms Highley seemed to smile when she spoke about him.

[12] On 23 January 2014, Ms Francis met with Ms Highley again and, according to Ms Highley, advised her that she needed to smile more or her employment could be in jeopardy. Ms Highley says that she was also advised by Ms Francis that some customers had complained about her, although she was unable to tell her who the customers were or when Ms Highley had served them.

[13] It is Ms Francis' evidence that there had been numerous complaints and comments by customers about Ms Highley, variously describing her as *unhappy, bland, lacking personality, looking miserable and seeming to hate her job*. She also said that comments had been made that Ms Highley was *disinterested* [sic], *that she made no conversation and she made no eye contact*. Ms Francis sums these issues up as customer service related.

[14] Ms Francis said in evidence that customers even asked if they could be served by someone else because Ms Highley was so *miserable looking* and did not make their evening enjoyable. Ms Francis says that she did not disclose these exact statements to Ms Highley as she thought they would be hurtful and that all

Ms Highley needed to know was that it was her lack of smiling and her being inhospitable that was not acceptable.

[15] Evidence was heard from a number of witnesses called on behalf of the respondent, two of whom could be called occasional customers of the restaurant, and four of whom were staff members or former staff members of the respondent. Most of these witnesses spoke of Ms Highley not having given good customer service. Two witnesses in particular, Sarah-Louise Kearney (a duty manager still employed by the respondent) and Alysha Gilmour, the respondent's former floor manager, gave credible evidence both of Ms Highley's customer service not being up to an acceptable standard and of the importance of good customer service.

[16] Ms Francis met with Ms Highley again on 26 January 2014 and advised her that, in Ms Highley's words, she was not doing well and she needed to improve or she would not make it past her trial period, (which was due to expire the next day). Ms Highley was told that Ms Francis had been told of another two complaints the night before about Ms Highley. Ms Highley's evidence was that she was very upset, and cried for a long time, as she was very disappointed in herself that she was not improving as she thought she was.

[17] Ms Highley knew her 90 day trial period was about to expire the next day and says that she was relieved when that day passed and she was not dismissed. However, the following day, 28 January 2014, Ms Francis told her that she was being dismissed and she was given a letter. Ms Highley says that when she asked why, Ms Francis told her that it was because she did not smile and she had not seen her improve within the time she had been given. Ms Highley says that Ms Francis did not raise any other issues. Ms Francis does not dispute that she did not mention any other issues other than her customer service.

[18] Ms Francis' evidence about the dismissal essentially confirms Ms Highley's. Ms Francis stated in her brief of evidence that she had had issues with Ms Highley's lack of smiling and customer service throughout her entire period of employment and that she had not improved. Ms Francis concedes that she dismissed Ms Highley on the 91st day, outside of the contractual and statutory maximum trial period.

[19] There is a dispute over whether or not Ms Highley was required to work out her shift on the day of her dismissal, although Ms Highley concedes that she was so

upset that she may have misunderstood what Ms Francis had said about that. Ms Highley was paid in lieu of two weeks' notice together with holiday pay and final hours owing.

[20] The letter of dismissal stated the following:

> *Dear Jacinta,*
>
> *On 23rd and 26th January 2014 you attended a meeting at which I was present, where we discussed some matters surrounding your employment at Cocopelli.*
>
> *We discussed your performance and the actions required to correct the areas of dissatisfaction. I also referred to the performance matters that we had raised with you previously.*
>
> *It was also discussed at this meeting that you were on a trial period and that your continued employment could be in jeopardy.*
>
> *We met again on 28th January 2014 and I explained that we had decided to terminate the employment relationship as we feel you are not suitable for permanent employment. Please refer to section 7.0 of your employment agreement which outlines a 90 day period to determine your suitability for permanent employment.*
>
> *This letter now constitutes formal notice of two weeks that you are dismissed from your employment with Cocopelli notice effective from 28th January 2014. Your final day will be 11th February 2014.*
>
> *Yours sincerely,*
> *Jeanette Francis*
> *Employer*

[21] A personal grievance was raised on behalf of Ms Highley by her counsel by way of a letter dated 28 February 2014. A response to this letter was sent on behalf of the respondent from Hospitality New Zealand on 17 March 2014. In this letter, a number of other issues were raised with respect to Ms Highley which were subsequently also relied on by the respondent in its Statement in Reply, and which Ms Francis said in evidence formed part of the overall experience of Ms Highley that led to the decision to dismiss her.

[22] These matters can be summarised as follows:

a. Not being honest in her application for employment about the fact that she had a restriction on her General Manager's Licence;

b. Supplying ID to someone aged 17;

c. Eating a cooked breakfast and not putting it on her staff tab; and

d. Drinking directly out of a blender in view of customers.

The issues

[23] The Authority must determine the following issues:

a. Whether Ms Highley was unjustifiably dismissed by the respondent;

b. If so,

i. what remedies should be awarded to Ms Highley, and

ii. what reduction should be applied to those remedies, if any, under s.124 of the Act?

c. Whether the respondent has breached the Wages Protection Act 1983 and the Holidays Act 2003 by the way that it operated the staff tab system;

d. Whether the respondent has breached Ms Highley's employment agreement by failing to provide her with 40 hours of work per week; and

e. Whether penalties should be imposed on the respondent for breaches of good faith and the employment agreement.

Was Ms Highley unjustifiably dismissed by the respondent?

[24] Section 103A of the Act provides as follows:

> ***Section 103A Test of justification***
> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
> *(3) In applying the test in subsection (2), the Authority or the court must consider—*
> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
> *(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
> *(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
> *(a) minor; and*
> *(b) did not result in the employee being treated unfairly.*

[25] First, I accept that the respondent had genuinely held concerns about Ms Highley's customer service skills. Second, I accept that having an acceptable level of customer service skills was an essential requirement of working in a customer facing role within the respondent company. Third, on the basis of the evidence from a number of witnesses, I accept that it is more likely than not that Ms Highley was not meeting those requirements.

[26] In addition, I accept that Ms Highley was advised by Ms Francis that her employment was in jeopardy if she did not improve her customer service. However, the conversation in which Ms Francis first told Ms Highley this was on 23 January 2014, four days from the end of her trial period. Furthermore, the warning was given in the context of the trial period; that is to say, Ms Highley was told that she risked being dismissed during or at the end of her trial period if she did not improve.

[27] Therefore, when Ms Highley's trial period came to an end without being dismissed, the respondent could no longer rely upon that warning without taking further steps that complied with the terms of Ms Highley's employment agreement and the provisions of the Act. Whilst I understand that Ms Francis miscalculated and believed that she was acting within the term of the trial period, her error cannot be permitted to disadvantage Ms Highley. Ms Highley gave evidence of her relief when she passed the 90th day of her employment without having been dismissed. From the 91st day of her employment she was entitled to expect that she would be treated in accordance with the terms of her employment agreement, in particular clause 13, and the provisions of the Act.

[28] In practice, this means that, prior to her dismissal, Ms Highley was entitled under her employment agreement to have been:

a. Asked to attend a disciplinary meeting;

b. advised of her right to *assistance and/or representation*;

c. advised of the specific matters causing concern;

d. given an opportunity to state any reasons or an explanation in response; and

e. advised of the corrective action required to remedy the situation.

[29] None of these things happened between the end of the expiry of the trial period and the dismissal. The respondent cannot reasonably ignore the fact that in allowing the trial period to expire without Ms Highley being dismissed it followed that Ms Highley reasonably believed that her performance was deemed to be acceptable. That meant in turn that, if the respondent still regarded her performance as being unacceptable, it needed to advise her of that and to have given her a chance to make representations in accordance with her contractual and statutory rights. Instead, Ms Highley was ambushed.

[30] This ambush is not the action that any fair and reasonable employer could have taken in all the circumstances. Although the ambush was not intended, because of the miscalculation in regard to the date of the trial period ending, the consequences of that error cannot be borne by Ms Highley and the respondent must be held accountable for it. These procedural flaws were not minor, and they did result in Ms Highley being treated unfairly.

[31] I therefore conclude that Ms Highley was unjustifiably dismissed.

What remedies should be awarded to Ms Highley?

[32] Section 123(1)(a) to (c) of the Act provides as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[33] Section 128 provides:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

Reimbursement of lost wages

[34] Ms Highley states that she was unemployed for a period of eight weeks, and then found employment on the same hourly rate as she was paid by the respondent. She therefore claims a loss of $5,440 before tax.

[35] The respondent suggests that Ms Highley should have found a job within a shorter period of time and that she found it hard to do so because she had a pre-booked holiday coming up which made it hard to start new employment. Ms Highley agrees that this fact made it hard to find a new job.

[36] However, I do not accept that this fact means that Ms Highley should not receive reimbursement of lost wages for the full eight weeks. Although she took a risk that she would be dismissed under her trial period when she booked her holiday, she was not dismissed during the trial period. If she had been, she would not be able

to claim unjustified dismissal in the Authority (assuming the provisions of s67A of the Act had been otherwise complied with). Ms Highley should not bear the consequences of the respondent's error in applying the trial period incorrectly. Furthermore, Ms Highley had been given permission by the respondent to take the holiday.

[37] I therefore decline to reduce the lost wages claimed on the basis that Ms Highley had a pre-booked holiday which made it hard for her to find new work more quickly than eight weeks. I am also satisfied on the evidence provided that Ms Highley made reasonable efforts to find new work, and thereby to mitigate her loss.

[38] It is necessary to also consider whether, had Ms Highley been subjected to a fair performance improvement procedure after her trial period had ended, she would have remained employed for a further eight weeks[2]. One can only speculate although, having heard the evidence, I believe that, even if a fair procedure had been followed that had been less rushed than that embarked upon during the trial period, it is more likely than not that Ms Highley could have been fairly dismissed for her performance shortfalls after a further four weeks, as I do not believe she would have been able to have reached a satisfactory standard. In reaching this conclusion, I take into account the reasonable efforts and strategies that had already been used, without success, by the respondent's managers to assist Ms Highley to perform up to an acceptable standard.

[39] I therefore conclude that Ms Highley is entitled to recover four weeks' loss of earnings, subject to any reduction under s.124 of the Act.

Compensation for humiliation, loss of dignity, and injury to the feelings

[40] Ms Highley gave evidence that she was very upset by being dismissed. She spoke of the stress she had been under prior to the end of the 90 day trial period, her relief when the 90th day had expired and then her shock when she was dismissed on the 91st day.

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[2] I refer to *Waitakere City Council v Ioane* [2006] 2 NZLR 310, [2005] ERNZ 1043 (CA) in which the Court of Appeal stated at [30] that "…*if a fair procedure would inevitably have resulted in a justified dismissal, procedural infelicities associated with the dismissal do not warrant an award of compensation. So the fixing of a maximum sum for compensation must reflect the likelihood, where it is relevant, that had a proper procedure been followed, the employee would have been dismissed*."

[41] Ms Highley spoke of going into a state of depression, and that she found it very hard to trust anyone again. This evidence was supported by her partner and her partner's mother. Indeed, Ms Highley became upset when recalling for the Authority the immediate effects upon her of the dismissal.

[42] Whilst I believe that an element of the upset suffered stemmed from Ms Highley's sense of failure, and disappointment at herself, I accept that a substantial element also relates to the shock of being dismissed without warning after her trial period had ended.

[43] The Employment Court has recently opined that compensation awards have not kept pace with inflation and that they should be set higher than they have been hitherto.[3] I believe that the effects suffered by Ms Highley were reasonably severe, and taking into account the position taken by the Employment Court believe that it is appropriate to award compensation to Ms Highley in the sum of $15,000, subject to any reduction under s.124 of the Act.

[44] Whilst Ms Highley also alleges that the respondent failing to abide by the terms of clause 13 of her employment agreement amounted to an unjustified disadvantage in her employment, which I accept is the case, I decline to award any separate compensation in relation to that unjustified disadvantage as the breach of clause 13 resulted in the unjustified dismissal for which she has been compensated.

Reduction for contribution

[45] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[46] It is the submission of the respondent that Ms Highley contributed substantially to her dismissal. It relies on Ms Highley's customer service difficulties and on the other issues that were referred to in the letter from Hospitality New Zealand dated 17 March 2014. I deal with these in turn.

[3] I refer to *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 and *Campbell v The Commissioner of Salford School* [2015] NZEmpC 122 as examples.

Customer service difficulties

[47] As I have already found, I accept that Ms Highley did have difficulties in meeting the reasonable requirements of the respondent in presenting the right image to customers. For the record, Ms Highley is a perfectly presentable, articulate, intelligent, polite and pleasant person who is apparently succeeding perfectly well in her current employment, which does not involve hospitality. Furthermore, none of the witnesses said anything negative about Ms Highley's interactions with her colleagues, and Ms Gilmour described Ms Highley as *a really lovely person*. However, I accept that, on balance, Ms Highley did not have the particular skill set required by the respondent in the particular environment in which she was required to work.

[48] In considering the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, I must be satisfied that Ms Highley's actions were both causative of the outcome and blameworthy[4].

[49] Ms Highley's customer service difficulties were clearly significantly causative of her dismissal. As to whether they were blameworthy, they did not constitute misconduct, as they were not as a result of a wilful failure. However, Ms Highley's performance did fall short of the reasonable requirements of the respondent's business, and so had as their origin a failing in Ms Highley's obligations to the respondent, albeit not deliberate.

[50] However, I have already found that, although a lawful performance improvement procedure had not been followed prior to dismissal, I am satisfied that, if it had been, Ms Highley would have been fairly dismissed after a further four weeks, and that her lost wages should be limited to that amount. Under these circumstances, I do not consider it just to further reduce Ms Highley's remedy for lost wages, as her performance shortfall has already been taken into account to reduce the recovery of lost wages.

[51] In respect of imposing a reduction to the award I have made for compensation under s.123(1)(c)(i) of the Act, the situation giving rise to the personal grievance was Ms Highley's difficulties in her customer service. That was the reason she was dismissed, from which her personal grievance arises. I therefore accept that it is appropriate to make a reduction in her award of compensation. However, a good part

[4] See, for example, *Harris v The Warehouse Limited* [2014] NZ EmpC 188

of the compensation I have awarded reflects the shock that I accept Ms Highley suffered, and the aftermath of that shock on her, at having been dismissed suddenly, after she had believed herself to be safe from dismissal, rather than the simple fact of being dismissed.

[52] In those circumstances, I believe it is appropriate to restrict the reduction to Ms Highley's compensation under s.123(1)(c)(i) to 25%.

[53] The respondent adduced a considerable amount of evidence about the other alleged failings in Ms Highley's performance and conduct which they say should go to a reduction in remedies under s.124 of the Act. I deal with these below.

The status of Ms Highley's Duty Manager's Licence

[54] The respondent complains that, when Ms Highley applied for the job with it, she did not disclose that her duty manager's licence was subject to an undertaking. In brief, there was essentially a restriction on Ms Highley's ability to work other than at Liquorland Beckenham for the first 12 months of her General Manager's Certificate being issued, unless she obtained prior approval of the District Licensing Agency Inspector.

[55] Once she had been offered the role of duty manager and wait staff at Cocopelli's Ms Highley got the agreement of the District Licensing Agency Inspector to work there, subject to her undertaking that she would not use her General Manager's Certificate on Thursday, Friday or Saturday nights while the premises were operating as a nightclub, which were considered high risk.

[56] This meant, according to Ms Francis, that she could not employ Ms Highley as she had originally intended to, and that she had to employ her as a duty manager on opening shifts only. Ms Francis asserts that she regards Ms Highley as having lied to her about having a duty manager's certificate, by implying it was a full one, because she did not mention the restriction. Ms Highley's evidence is that she had no idea that giving an undertaking was unusual and assumed that, for the first 12 months, this was a normal part of being granted a licence, and so did not mention it. She said she had no intention to mislead the respondent, and did not lie therefore.

[57] Ms Francis also says that, by this time (late October 2013), she had little choice but to employ Ms Highley despite her restricted licence because the busy

season was approaching and it would have taken too long to have found a replacement, given that there was a shortage of duty managers on the market at the time.

[58] However, I note that Ms Francis states the following in her brief of evidence:

> *When I called the Christchurch City Council to notify them of the change in management*[5] *they responded* [that] *Jacinta had an undertaking on her licence for Beckenham Liquorland*[6]*. I had never heard of an undertaking. I now know that this was a new policy from the Council as the Sale of Liquor Act 1989 was due to change to the Sale of Liquor Act 2012 from the 18th December 2013. One of the new changes was that from the 18th December 2013 all new Duty Managers would need to be 20 years or over to apply.*

[59] I note that Ms Highley's CV, which was in the possession of the respondent at the time of its interview with Ms Highley, states clearly Ms Highley's date of birth. This would have made clear to the respondent that, at that time, she was under 20 years of age. Given that the respondent owns and operates a bar and nightclub, and that Ms Francis had considerable experience as a duty manager herself, I find that it was primarily the responsibility of the respondent to know the policies of the Council and to fully understand the proposed new law.

[60] In other words, whereas Ms Highley was aged 19 and had only been granted a duty manager's licence for a short period, Ms Francis had been a duty manager for at least 16 years at that time. It would have been reasonable to have expected Ms Francis to have kept abreast of the Council's changed requirements in respect of duty managers aged under 20, and to have anticipated that, as Ms Highley was clearly under 20 at the time of her application for the job, she would have had restrictions on her ability to be a duty manager.

[61] Furthermore, I do not accept that the respondent was in any way forced to employ Ms Highley despite its discovery that she did not hold a full, unrestricted licence. There is no evidence that the respondent tried unsuccessfully to find someone else when Ms Francis found out about the undertaking. Instead, the respondent went ahead and employed her in full knowledge of her undertaking and the restriction applying to her licence.

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5 i.e. that Ms Highley had been recruited as a duty manager

6 Ms Highley's former employer

[62] I therefore reject the assertion by the respondent that Ms Highley somehow misled or lied to Ms Francis in making her application for employment. It follows that Ms Highley did not act in beach of clause 4 of her employment agreement.

[63] In addition, I find that, factually, this matter did not form part of the reason for Ms Highley's dismissal. It was not mentioned to Ms Highley at any time by any manager of the respondent as a matter which might give rise to or play a part in a subsequent decision to dismiss her. I find that the concerns about Ms Highley's customer service only were behind the decision to dismiss Ms Highley.

[64] Furthermore, whilst Ms Francis referred to having concerns about trusting Ms Highley because she did not reveal her restricted licence when she applied for the job, by deciding to employ Ms Highley nonetheless, and by not warning her that the issue may count against her continued employment when her trial period came to an end, the respondent waived any right to rely upon this issue later.

[65] I therefore do not accept that it is appropriate to treat this matter as an action by Ms Highley that contributed towards the situation that gave rise to the personal grievance of unjustified dismissal.

Giving her ID to an under-age person

[66] Ms Highley admits that she supplied to another employee, who was under 18 at the time, a driving licence that she had spare to enable the 17 year old to pass herself off as being aged 18. Ms Highley says that this was so the employee could attend a concert in Auckland which was rated 18 and above, but accepts that it was a serious error in judgement and could have had serious implications for her and her employer.

[67] Whilst this was indeed a serious error of judgment on the part of Ms Highley, it is clear from the evidence that the respondent was aware of this and spoke to Ms Highley about it prior to the expiry of the trial period, and that it could have been valid grounds to have terminated her employment summarily, within the 90 day trial period. However, the respondent chose not to discipline Ms Highley for it, other than to give her an informal admonishment. Again, having chosen not to take formal action in respect of the issue at the time it arose, the respondent cannot now justly seek to rely on the issue in defending itself from Ms Highley's personal grievance complaint.

[68] I also find that the issue was not part of the reason for dismissal. I therefore do not accept that it is appropriate to treat this as an action that contributed towards the situation that gave rise to the personal grievance of unjustified dismissal.

Drinking out of a blender

[69] It is a policy of the respondent that anyone making a cocktail or mocktail for a customer is to pour a small amount into a glass first and sample it, to ensure its quality. However, Ms Highley is accused of having once drunk the contents from the blender jug directly where customers could see. Mr Tony Francis, the company director and part owner of the respondent, told Ms Highley off for doing this in an angry manner and asked Ms Francis to deal with the matter. Ms Highley's evidence is that she did not drink directly from the blender but used a drinking straw as there was not enough to pour the contents into a glass.

[70] However, again, the respondent did not take any formal action against Ms Highley in respect of it at the time, during the trial period.

[71] Furthermore, I am satisfied that this incident was not part of the reason for Ms Highley's dismissal. Therefore, this action did not contribute towards the situation that gave rise to Ms Highley's personal grievance of unjustified dismissal. Therefore, it cannot be taken into consideration under s.124 of the Act.

Eating a breakfast that was not put onto Ms Highley's tab

[72] On one occasion Ms Highley was made a breakfast by the sous chef, which she says she believed he was going to ring onto her tab, but which he did not. Ms Highley's evidence is that she spoke to Ms Francis about this and apologised, and explained that it had been a mistake as she had believed that the sous chef would ring it up on their tabs. She says that Ms Francis had said that it was fine but that it should not happen again.

[73] In her evidence, Ms Francis complains that Ms Highley had been eating breakfast at 11am, when she should have been working, as well as not charging it to her tab. Ms Francis says in her evidence that this apparently happened regularly and she had told Ms Highley that this was theft. However, again, the respondent chose not to take any formal disciplinary action against Ms Highley as a result of it.

[74] Furthermore, again, this issue did not form part of the reason for Ms Highley's dismissal. I therefore do not accept that this should form part of any reason to reduce Ms Highley's remedies under s.124 of the Act.

Conclusion

[75] I reduce Ms Highley's compensatory award by 25%.

Did the respondent breach the Wages Protection Act 1983 and the Holidays Act 2003 by the way that it operated the staff tab system?

[76] It is Ms Highley's evidence that when staff members consumed the respondent's drinks or food, they were entitled to a 50% discount and that the staff had to ring this up on the till as part of their tab. Apparently, however, the respondent did let staff have free meals for working long shifts and all fizzy drinks were free.

[77] At the end of each week, Ms Francis would work out how much each staff member had consumed, would apply the 50% discount and then convert the remaining dollar amount into hours by reference to the relevant hourly rate paid to the staff member in question. The staff would then be paid by reference to those reduced hours. Indeed, it was the evidence of Ms Highley that the actual hours worked were not shown on payslips.

[78] Ms Highley argues that this approach is in breach of the Wages Protection Act 1983, and has an impact on the calculation of her holiday pay. She also argues that it prevented her from earning independent earners' tax credit as it took her pay below the applicable threshold. During the investigation meeting, however, Mr McDonald said that Ms Highley did not seek to recover any lost earnings or holiday pay in respect of the alleged unlawful operation of the staff tab, as Ms Highley accepts that she did consume the respondent's food and drink. She does, however, seek a declaration that the staff tab operated unlawfully.

[79] Mr Shamy in his submissions states that the respondent has now changed the way that it operates the staff tab system, and has accounted to the Inland Revenue Department for PAYE payments that would otherwise have been made had it not operated the staff tab system the way it did. The respondent does not, however, admit that there was any deliberate wrongdoing.

[80] Although the respondent no longer operates the staff tab system by deducting hours worked, as this methodology could be replicated elsewhere in the hospitality industry, I shall examine the legal position as requested by Mr McDonald.

[81] Section 23 of the Holidays Act 2003 provides:

> ***23 Calculation of annual holiday pay if employment ends within 12 months***
> *(1) Subsection (2) applies if—*
> *(a) the employment of an employee comes to an end; and*
> *(b) the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of section 16.*
> *(2) An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount—*
> *(a) paid to the employee for annual holidays taken in advance; or*
> *(b) paid in accordance with section 28.*

[82] Gross earnings are defined in s.14 of the Holidays Act as including salary and wages:

> ***14 Meaning of gross earnings***
> *In this Act, unless the context otherwise requires,* ***gross earnings****, in relation to an employee for the period during which the earnings are being assessed,—*
> *(a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—*
> *(i) salary or wages:*

[83] Sections 4, 5, 7, and 9 of the Wages Protection Act 1983 provide:

> ***4 No deductions from wages except in accordance with Act***
> *Subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*
>
> ***5 Deductions with worker's consent***
> *(1) An employer may, for any lawful purpose,—*
> *(a) with the written consent of a worker; or*
> *(b) on the written request of a worker—*
> *make deductions from wages payable to that worker.*
> *(2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall—*
> *(a) within 2 weeks of receiving that notice, if practicable; and*
> *(b) as soon as is practicable, in every other case,—*
> *cease making or vary, as the case requires, the deductions concerned.*
>
> ***7 Wages to be payable in money***

> *Subject to sections 8 to 10, an employer shall pay the wages of every worker in money only.*
>
> ***9 Agreement as to manner of payment of wages***
> *(1) An employer may,—*
> *(a) with the written consent of a worker; or*
> *(b) on the written request of a worker,—*
> *pay to that worker by postal order, money order, specified cheque, or lodgement at a financial institution to the credit of an account standing in the name of that worker or in the name of that worker and some other person or persons jointly, any wages that have become payable to that worker.*
> *(2) A worker may vary or withdraw a consent given or request made by that worker under subsection (1) by giving the employer written notice to that effect; and in that case, that employer shall—*
> *(a) within 2 weeks of receiving that notice, if practicable; and*
> *(b) as soon as is practicable, in every other case,—*
> *commence paying that worker in money, or in some other manner in accordance with subsection (1).*

[84] It is clear that the staff tab practice operated by the respondent meant that staff who participated in the tab system received less pay than they otherwise would have done by reference to the hours they worked in any given period, when a reduction in hours was applied. That in turn resulted in each staff member's gross earnings being less, which in turn impacted upon the holiday pay that staff would receive under s.23. It would also impact upon other entitlements under the Holidays Act.

[85] Section 4 provides that, subject to defined exceptions, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction. It is therefore first necessary to decide when the wages became payable to Ms Highley. If it was before the reduction in hours was applied under the tab system, then it will be necessary to go on to decide whether the deduction in wages that resulted falls under any of the exceptions of the Wages Protection Act. If the reduction in hours occurred before the wages became payable, then the Wages Protection Act will not have been breached by the tab system.

[86] In *Sealord Group Ltd v New Zealand Fishing Industry Guild Inc* [7] the full Court noted, inter alia, that the time *when any wages become payable* referred to in s.4 is a matter to be determined by reference to the employment agreement between the parties.

[87] Unfortunately, the employment agreement between the parties does not specify when wages would become payable. From wage slips provided by the parties,

[7] [2005] ERNZ 535

it appears that Ms Highley received her pay on a weekly basis, in arrears. I understand that the tab reduction in hours would be applied at the point when the wages were being processed. In other words, at the point of inputting the hours data into the payroll system, the value of food consumed would be worked out, halved, and converted into time by reference to the employee's hourly rate (so that, for example, an item worth $34 would be discounted to $17 and, in Ms Highley's case, converted to one hour's time worked). That hour would then be deducted from the employee's time entered into the system.

[88] Mr McDonald refers me to the unpublished Employment Court case of *Portia Developments Limited trading as Silverstone Intercredit New Zealand v Kirsten Taylor* 3 June 1997 AEC100/97, in which Judge Travis, at page 7, examined the question of whether wages had become payable to the employee, in the context of the 1983 Act, because her resignation had come part way through a pay week. Judge Travis held as follows:

> *As to the first point* [whether wages had become payable] *the evidence was not clear as to precisely when the respondent left her employment……..In the absence of any authorities cited by either side I conclude that as the respondent was being paid on an hourly rate she was entitled to her wages for the period she actually worked. The fact that she worked for part of a week would therefore not prevent her wages being "payable" in terms of s4 of the Wages Protection Act.*

[89] It is necessary to interpret s.4 of the Wages Protection Act purposively. Its clear purpose is to ensure that wages are properly paid to employees in their entirety, subject to limited exceptions. It would too easily defeat the purpose of the 1983 Act if a period of time could exist between when work was done by an employee and the time when the employer was obliged to render the wages into the employee's bank account, during which the employer could make deductions that fell outside of the 1983 Act with impunity. This cannot be the intended meaning of the concept behind the words *when any wages become payable to a worker*.

[90] Accordingly, I find that in Ms Highley's case, being paid on an hourly basis, in relation to each hour of work she carried out, her wages (namely, $17 gross) became payable at the completion of that hour of work. In turn, this means that the deductions to the calculation of her hours of work that were made by the respondent in relation to the staff tab, which directly impacted her earnings, occurred after the wages became payable and so could only permissibly occur if they fell within the

exceptions set out in s.5(1) of the 1983 Act. Section 6(2) does not apply as it relates to overpayments.

[91] Section 5(1) of the 1983 Act relates to deductions being made *(a) with the written consent of a worker; or (b) on the written request of a worker.* I am satisfied that there was no such written consent or request made by Ms Highley in respect of the deductions made in relation to the staff tab. The respondent did request that each staff member sign a memorandum dated 15 January 2014, but this made no mention of having the cost of food and drink consumed deducted from employees' hours of work. There is also nothing in the employment agreement about this methodology being used.

[92] In conclusion, I am satisfied that the staff tab system operated by the respondent during Ms Highley's employment was in breach of the 1983 Act.

[93] The corollary of this finding is that there was also a breach of the Holidays Act by the respondent when it calculated Ms Highley's gross earnings by reference to pay which had been incorrectly calculated, due to unlawful deductions having been made.

[94] In his submissions to the Authority, Mr Shamy asked that the Authority consider deducting from whatever is due to the applicant the true cost of the food and drink supplied to her. However, first, no counterclaim was made against Ms Highley in the statement in reply, and so she has had no chance to plead to that counterclaim or to put the respondent to proof as to the cost of the food and drink it now seeks to recover.

[95] Secondly, the respondent would now appear to be asking the Authority to punish Ms Highley for having challenged its methodology of operating the staff tab, a methodology I have found was unlawful. Ms Highley was entitled to a 50% discount during her employment on food and drink consumed, and it is not clear why the respondent now argues that she should have to pay any more.

[96] I decline to order Ms Highley to make any payment to the respondent in respect of food and drink consumed during her employment.

Did the respondent breach Ms Highley's employment agreement by failing to provide her with 40 hours of work per week?

[97] Ms Highley argues that she was not given the opportunity to work 40 hours each week, in breach of her employment agreement. Ms Highley says that she worked a total of 385 hours during her employment but should have been given 440 hours of work. Taking into account her unpaid breaks, this amounts to a deficit of 39.25 hours, which equates to the gross sum claimed of $667.25. With 8% holiday pay added, the total amount claimed is $720.63.

[98] The respondent says that Ms Highley did not work 40 hours per week because she did not have a full duty manager's licence and so could not work what were deemed to be the more risky shifts. Ms Highley says she could have been asked to work more wait staff shifts during the high risk times.

[99] When examining the terms of Ms Highley's employment agreement, there is an unequivocal statement at clause 2.1 that full-time employees are employed for a minimum of 40 hours. At clause 5.1 it states that Ms Highley was employed as a Duty Manager/Waitress, and that the position was full time. At clause 21 of the agreement it states that the agreement may be varied between the parties in writing, and that no such variation shall be effective until signed by both parties.

[100] The respondent has not produced any signed document to show that the terms of Ms Highley's hours were reduced by agreement to less than full time hours.

[101] I am therefore bound to find that the respondent acted in breach of the employment agreement between it and Ms Highley and that she is owed the gross sum of $667.25, together with the gross sum of $53.38 by way of holiday pay.

[102] Ms Highley has argued that the breach of her employment agreement amounted to an unjustified disadvantage in her employment. It does not take a great deal of analysis to find that this was the case. She was clearly disadvantaged by the breach and the breach was not what a fair and reasonable employer could have done in all the circumstances. Having found this, I do not consider it appropriate to award any separate remedies for this unjustified disadvantage. I have already awarded loss of income arising from the breach, and I heard no evidence to suggest that Ms Highley suffered any humiliation, loss of dignity and injury to her feelings as a result of the breach.

Penalties

[103] Mr McDonald seeks the imposition of penalties against the respondent as follows:

a. Under s.75(1)(b) of the Holidays Act and/or s.13(b) of the Wages Protection Act in relation to the operation of the staff tab;

b. Under s.134(1) of the Act in relation to the breach of Ms Highley's employment agreement; and

c. Under s.4A of the Act in relation to an alleged breach by the respondent of its duty of good faith.

[104] I decline to impose penalties against the respondent. Insofar as the staff tab system is concerned, I am satisfied that the respondent carried out its operation of it without any deliberate intention to breach the provisions of the Holidays Act or the Wages Protection Act.

[105] I am also satisfied that the respondent believed that it was acting lawfully within the terms of the 90 day trial period when it dismissed Ms Highley. Whilst its error does not exonerate it as far as its duties under s.103A of the Act are concerned, it would not be just to impose a penalty. Furthermore, I do not find that the requirements of s.4A of the Act have been satisfied to justify the imposition of a penalty under that provision.

Tax credit

[106] Ms Highley seeks an award of $520 under s.123(1)(c)(ii) of the Act in respect of Independent Earners Tax Credit which she says she did not receive. However, this is a credit normally due from the IRD by using an ME or ME SL tax code. I believe that the most appropriate way for Ms Highley to obtain this tax credit is to seek it from the IRD, making available to it a copy of this determination if necessary.

Orders

[107] I order the respondent to pay to Ms Highley the following sums:

a. Lost wages under s.123(1)(b) of the Act in the gross sum of $2,720;

b. Holiday pay on the above award in the gross sum of $217.60;

c. Compensation pursuant to s.123(1)(c)(i) of the Act in the sum of $11,250;

d. Wages by reference to the breach of contract in the gross sum of $667.25;

e. Holiday pay by reference to the breach of contract in the gross sum of $53.38;

f. Interest on the sums referred to in paragraphs 107(b) and 104(e) above pursuant to s.84 of the Holidays Act, to accrue at the rate of 5% per annum, calculated from the date of Ms Highley's dismissal until the date when the sums have been paid in full.

Costs

[108] I reserve costs. The parties are to seek to agree how costs are to be dealt with between them. If they are unable to agree by 4pm on Friday 2 October 2015[8], then Mr McDonald may seek any contribution to Ms Highley's costs by way of a memorandum of counsel served and lodged by no later than Friday 16 October 2015 and Mr Shamy may reply by way of a memorandum of counsel served and lodged by no later than Friday 30 October 2015.

David Appleton
Member of the Employment Relations Authority

[8] This date takes into account Mr McDonald's extended absence on leave, as advised by him on 14 July 2015.