



# New Zealand Employment Relations Authority Decisions

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## Horton Media Limited v Tither (Auckland) [2013] NZERA 930; [2013] NZERA Auckland 178 (9 May 2013)

Last Updated: 7 May 2017

NOTE: An order prohibiting the Publication of certain information is contained at [80] & [81] of this determination

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2013] NZERA Auckland 178  
5378592

BETWEEN HORTON MEDIA LIMITED Applicant

AND NORAH LAURENCE TITHER Respondent

Member of Authority: R A Monaghan

Representatives: S Langton and N Edlin, counsel for applicant

NL Tither in person

Investigation meeting:

Further information provided:

14 and 15 March 2013

18 April 2013

Determination: 9 May 2013

### DETERMINATION OF THE AUTHORITY

**A. Norah Laurence Tither is ordered to pay Horton Media Limited damages in the sum of :**

**(i) \$212,757.54 in respect of unauthorised lieu day payments; (ii) \$436,242.14 in respect of unauthorised payments taken**

**from Waiuku Publishing Limited; (iii) \$71,037 as special damages; and**

**(iv) \$1,957.66 in respect of Kiwisaver contributions calculated with reference to the unauthorised lieu day payments.**

**B. Interest calculated at 5% pa from the date of this determination to the date of payment is to be paid on the above amounts.**

**C. Mrs Tither is not entitled to any remedy in respect of her suspension on 22 March 2012.**

**D. Mrs Tither is not entitled to payment in lieu of notice of the termination of her employment.**

**E. There will be no order for the payment of a penalty against either party.**

### Employment relationship problem

[1] Horton Media Limited (HML) employed Norah Laurence (known as Laura) Tither as its office manager from September 1998 to April 2000, and as its general manager from 10 April 2000 to 25 March 2012. In that capacity she was responsible for

the general management and administration of HML's affairs, including its banking, debtors, creditors and financial information. Mrs Tither's duties also included the management and administration of the banking, debtors, creditors and financial procedures of Waiuku Publishing Limited (WPL). HML holds 51% of the shares in WPL.

[2] On or about 13 March 2012 the chief executive of HML, Matthew Horton, became aware Mrs Tither had allegedly claimed and received payments to which she was not entitled. Mr Horton is based in Brisbane, and asked his father Michael Horton to obtain and forward HML's payroll records. When he received the records on 22 March 2012, he found Mrs Tither had received \$60,000 in 'lieu day' payments in the preceding two years. In the extensive investigation which followed HML found that since 2004 Mrs Tither had paid herself \$210,264.00 in respect of 'lieu days' without authority, and since January 2000 had misappropriated a further \$436,242.14 from WPL.

[3] Mrs Tither flew to Brisbane on 22 March 2012 to attend a conference. Mr Horton met her at the airport. He informed her of the information available to date, and advised her there was to be an investigation. He also advised her she was being suspended while the investigation was conducted. Mrs Tither has raised a personal grievance in respect of the suspension.

[4] Mrs Tither returned to Auckland, and resigned by letter dated 25 March 2012. HML treated her employment as terminated on that date. No personal grievance has been raised in respect of the termination.

[5] This employment relationship problem comprises:

(i) HML's claim for damages for breach of the employment agreement in the sum of \$212,757.54, being the amount of unauthorised payments to Mrs Tither for 'lieu days' (the lieu day payments);

(ii) HML's claim for damages for breach of the employment agreement in the sum of \$436,242.14, being the amount of unauthorised payments to Mrs Tither from WPL's bank account (the WPL payments);

(iii) HML's claim for special damages in the form of legal, accounting and executive costs incurred as a result of Mrs Tither's breaches of her obligations as an employee;

(iv) Mrs Tither's personal grievance on the ground that her suspension was unjustified;

(v) Mrs Tither's claim for payment in lieu of notice in respect of the

termination of her employment; and

(vi) both parties' claims for penalties in respect of alleged breaches of their

employment agreements, and breaches of good faith.

[6] Since lodging the statement of problem HML has calculated that Mrs Tither received: an additional \$50,816 in statutory entitlements as a result of including the unauthorised lieu day payments in those entitlements; and an additional \$2,965.76 was contributed to her Kiwisaver account for the same reason. It seeks the recovery of those amounts.

### **Terms of the employment agreement**

[7] The parties' employment agreement read in part:

#### *6. Remuneration and expenses*

*(a) The Company shall pay the General Manager an annual salary of [...] payable by equal fortnightly payments each of [...].*

...

#### *8. Hours*

*The General Manager shall work between the hours of 8.30 am and 5.00 pm Monday to Friday and/or at such other times as may be directed by the Chief Executive.*

[8] The agreement also stated that Mrs Tither was to report directly to the Chief

Executive, while the job description which formed part of the agreement obliged her:

*3. To report to the Chief Executive and Board of Horton Media Limited monthly in*

*respect of the financial affairs of Horton Media Limited ...*

*4. To perform duties as directed by the Chief Executive including,*

*(a) Credit control of all Horton Media Limited subsidiaries and associated*

companies ...

(b) Preparation of management and financial information, including regular

accounts as determined with the Chief Executive.

(c) Management of human resources, asset control, banking, debtors and creditors and financial procedures.

(d) Liaison with subsidiaries and associate companies of Horton Media Limited in order to produce financial accounting information as required by the company.

5. To submit a recommendation to the Chief Executive and the Board of Horton Media Limited in relation to any capital expenditure requirement, abnormal expenditure or employment agreement relevant to the company's affairs.

### **The lieu day payments**

[9] Mrs Tither accepts she paid herself amounts totalling \$212,757.54 as lieu day payments, but denies the payments were unauthorised. A 'lieu day' in this context is a day off in lieu of overtime<sup>1</sup>. Mrs Tither was salaried and says that during the relevant period she regularly worked large numbers of hours in addition to her normal working hours. She did not take the time off in lieu to which she considered herself entitled as a result. She paid herself for that time instead.

[10] Mrs Tither considers the lieu day payments were authorised because:

(i) nothing in cl 6 of the employment agreement provides expressly that the payment of salary includes payment for all hours worked;

(ii) Mr Horton authorised the payments during a conversation soon after the introduction of the [Holidays Act 2003](#), and confirmed the entitlement in other conversations; and

(iii) it was company practice to make the payments.

<sup>1</sup> Correspondingly, references to 'lieu time' are references to time off in lieu of overtime

#### **1. The employment agreement**

[11] Mrs Tither's written employment agreement provides at cl 6 for the payment to her of a salary. A salary is an annualised payment of money in return for work done. The agreement goes on to specify at cl 8 the hours during which the work is to be done. These include what can be described as the 'ordinary' hours worked from Monday to Friday, but extend to an obligation to work at other times as directed. The clause does not distinguish between ordinary hours and other hours for the purpose of payment.

[12] While the agreement does not state expressly that payment of salary includes payment for all hours worked that is the commonly understood meaning of 'salary' and the absence of such a statement is not fatal. There is no provision in the agreement to suggest the parties reached their own agreement to any different effect, and I construe cl 8 to find that all of the hours within the scope of the clause are incorporated in the payment of salary. That includes hours worked outside the 'ordinary' hours.

[13] Further, the agreement does not provide that Mrs Tither is entitled to any additional payment or other benefit for hours worked outside the ordinary hours. Some employment agreements do contain such provisions, but there are none here.

[14] For these reasons the contents of her employment agreement do not support

Mrs Tither's position. The agreement is at best silent on the entitlement to payment.

#### **2. Authorisation from Mr Horton**

[15] In material respects the [Holidays Act 2003](#) came into force on 1 April 2004. It provided that employees receive alternative holidays for work done on a public holiday when the holiday was otherwise a working day for that employee. Mr Horton's and Mrs Tither's discussion about the Act led to a written and signed amendment to Mrs Tither's employment agreement, dated 24 June 2004. The amendment was detailed. It reflected the provisions of the Act and dealt expressly with the application of those provisions in the employment relationship. It permitted Mrs Tither to take a paid alternative holiday for work done on a public holiday that

would otherwise have been a working day or, with the company's consent, to

exchange the alternative holiday for payment.

[16] The amendment was expressly concerned with entitlements to 'alternative holidays' (or days off in lieu) in the context of work done on a public holiday, and was limited to that context. There were no grounds for extending the relevant provisions to cover work done at any other time outside ordinary hours. Moreover, even if there were grounds for claiming an extended entitlement to days off in lieu, and an ability to exchange lieu days for payment, there were no grounds for proceeding to make the exchange without consent.

[17] Mrs Tither also relied on general conversations with Mr Horton about her workload. From time to time Mr Horton would comment that she was working long hours, and express the hope that she was claiming lieu time.

[18] Mr Horton accepted conversations of that kind occurred except that, as he put it, he told Mrs Tither she should take time off in lieu if she was working hard. Neither party suggested he went any further and told Mrs Tither expressly that she could claim payment in exchange for the lieu time, let alone that she could do so without his consent and without limit. Instead Mrs Tither's evidence was that she made no mention of payment to Mr Horton because, when at least one of the conversations occurred, she was taking lieu time and she indicated as much to Mr Horton.

### 3. Company practice

[19] Mrs Tither said she was under the impression that all time worked outside ordinary hours was claimable. However that position does not acknowledge the distinct statutory treatment of time off in lieu of time worked on a public holiday, and does not distinguish between the differing treatment of overtime for salaried and waged employees.

[20] All employees were entitled to the alternative holiday provided for under the [Holidays Act](#), in respect of work done on public holidays that would otherwise be working days. Added to that statutory entitlement was a modification of the employment agreements to permit the exchange of alternative holidays for payment. To that extent, records of employees' accumulated lieu days were available (except that Mrs Tither said she kept a personal record of her own lieu days, which was not available) and lieu day payments were made to employees.

[21] Entitlements to time in lieu other than in respect of work done on public holidays are outside the scope of the [Holidays Act](#), and are determined by the terms of the applicable employment agreement.

[22] In general, HML's waged employees were paid for time worked outside ordinary hours because their employment agreements provided for such payment. Mrs Tither's did not. Her salary itself was set to recognise the prospect of work being done outside ordinary hours.

[23] Mrs Tither also said she understood it was company practice to exchange payment for time in lieu. That may have been so in respect of time off in lieu of time worked on a public holiday, but if so it was because of the [Holidays Act](#) and related supplementary provisions in employment agreements. There was nothing to suggest any general practice of wider application.

[24] The remaining question is whether there was any practice of wider application in respect of salaried employees.

[25] During the relevant period HML employed only two or three salaried employees, of which Mrs Tither was one. One other was promoted to a salaried management position in 2003. An agreement specific to him was entered into at the time. Its purpose was to recognise work done outside ordinary hours in covering operational duties for which he was qualified because of his previous position and his trade training. Under the agreement he would receive either payment for the time worked or time off in lieu, although it appears Mrs Tither permitted him to accumulate time off in lieu and to exchange the accumulated lieu time for a payment.

[26] A similar arrangement was in place for a third employee who also provided coverage for operational duties.

[27] Mrs Tither's knowledge of these individual-specific arrangements did not entitle her to put in place a similar arrangement for herself. No such arrangement was discussed with Mr Horton, Mrs Tither did not cover operational duties in the way the two other employees did, and there were no grounds for her to conclude that the individual-specific arrangements under discussion also extended to her.

[28] Moreover, Mr Horton's evidence was that he told Mrs Tither not only that the arrangements were limited to those two people, but that they should be invoked rarely and only with Mrs Tither's approval. Again, even if there was some reason for Mrs Tither to apply the arrangements to herself, there was no reason for her to do so both without authority and without limit.

[29] As the general manager, whose responsibilities included a responsibility for human resources, Mrs Tither could be expected to understand all of the above differences.

[30] Finally, HML produced extensive documentation tracking the passage through the company's record keeping and accounting systems of the payments Mrs Tither made to herself. I do not detail the method she used but I have no hesitation

in finding the payments were not reasonably identifiable from the records and reports she provided to Mr Horton and the board when they should have been, and there was nothing to draw any attention to or raise a question about their existence. There was no reason why HML could or should have been aware of them, and there could be no suggestion that HML was aware of and condoned them.

[31] The conduct indicated by those records casts significant doubt on the genuineness of Mrs Tither's protestations that she believed she was entitled to the payments. I find it more likely that she believed she should be entitled to them and took them accordingly.

#### 4. Conclusion

[32] The jurisdiction of the Employment Relations Authority to address the claims for damages is set out in [s 162](#) of the [Employment Relations Act 2000](#), in particular:

*"... the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, ..."*

[33] Mr Langton relied further on a decision of the Employment Court in *Mason Engineers (NZ) Limited v Hodgson (No 4)*<sup>2</sup> He cited the following passage in particular:

*[19] It is incontrovertible that an employee who steals and otherwise fraudulently obtains money, to which she is not entitled, from her employer, is in fundamental breach of her employment agreement and the employer is entitled to recover damages for the breach. It is nevertheless necessary to identify the express or implied terms of the contract that were breached. In this case there do not appear to be express terms, at least in writing, but that does not detract from the strong case for implied and statutory terms. They include, as an office manager with sole and complete responsibility for the company's bank accounts and for payments made and received, an obligation to deal with the company's monies faithfully; to act generally in good faith towards the company (that is, not to mislead or deceive it); and, in particular, not to appropriate to her own use the company's property (including its money or rights to money) without the consent of the company that she did not have.*

[34] Mrs Tither's circumstances are very similar. She had no entitlement to the payments she took. She breached her statutory and implied obligations to deal with the company's money faithfully, to act generally in good faith, and to not appropriate to her own use the company's property without consent. As well as breaching these terms, she breached the express terms of her agreement concerning her reporting obligations.

[35] In breaching her obligations Mrs Tither caused HML to suffer a loss in the sum of \$212,757.54. She is therefore ordered to pay that sum to HML.

#### **Payments incorporating unauthorised lieu day payments**

##### 1. Statutory entitlements

[36] The amount claimed in respect of overpaid statutory entitlements was identified by:

- calculating the difference between Mrs Tither's accumulated salary

from 1 April 2003, and the payments actually made in the period;

##### 2 [\[2011\] NZEmpC 147](#)

- subtracting \$210,264, being the unauthorised lieu day payments; and

- subtracting the total amount of bonuses recorded as paid during the period.

[37] The amount remaining is \$50,816.

[38] The difference is unexplained. HML believes it must be the effect of the inclusion of unauthorised payments in Mrs Tither's remuneration for the purposes of calculating holiday pay entitlements. However some quick arithmetic in order to test that hypothesis - based on the [Holidays Act](#) and the spread sheet HML produced in evidence - yields significantly lower figures which do not account for the difference.

[39] I am not satisfied that breaches of Mrs Tither's caused the loss claimed. There will be no order in respect of it.

##### 2. Kiwisaver

[40] The amount claimed in respect of overpaid employer contributions to

Kiwisaver was calculated by:

- identifying the amount the employer actually contributed in the period from 1 April 2008; and
- identifying the contribution payable on Mrs Tither's salary.

[41] In both cases the employer's contribution is calculated at the rate of 1%, then

2% of the relevant amount.

[42] The difference is \$2,966.

[43] It is significantly, but not entirely, accounted for by including the unauthorised lieu day payments in the payments on which the contributions were based. From the spread sheet HML produced I find it likely that 2/3 of the difference is affected by the unauthorised payments.

[44] Mrs Tither is therefore ordered to pay to HML the sum of  $2/3 \times \$2,966 =$

\$1,957.66

### **The WPL payments**

[45] Mrs Tither accepts she took the amounts totalling \$436,242.14 from WPL's bank account, and without authorisation. On the evidence, she did so principally through the creation of false supplier accounts.

[46] HML seeks an order for payment to it on the grounds identified in the *Mason Engineers* decision, in the Authority's investigation meeting, and in an affidavit of Matthew Horton. It says in particular that:

- the amounts were taken in the course of Mrs Tither's duties as an employee of

HML;

- the amounts were taken in breach of her obligations to HML; and
- HML has suffered or will suffer a loss as a result of the breach, in that it has agreed to compensate WPL for the full amount of \$436,242.14.

[47] I accept those propositions. Mrs Tither is ordered to repay to HML the sum of

\$436,242.14.

### **Special damages**

[48] HML's claim for special damages is based on the accounting, legal and executive costs incurred in investigating the lieu day payments and the wider investigation which identified the WPL payments. The claim is quantified as:

- \$29,660.00, being a fee charged by a firm of chartered accountants to investigate the allegations regarding lieu day payments, and other specific areas of concern;
- \$18,032.00, being the fee charged by a contract accountant who compiled material as the investigation progressed, particularly when the WPL payments came to light;
- \$8,892, being the fee charged by a second contract accountant in support;
- \$2,669 for photocopying;
- \$300 for professional services from a consultant in accounting software who assisted with payroll journal reports;
- \$1,084 being the fee charged by HML's solicitors for advice prior to the filing of proceedings;
- \$23,240 in respect of fees charged by Matthew Horton's company Tyromedia

Limited for his management services; and

- \$10,400 for one month's full time work done by Michael Horton in identifying and classifying Mrs Tither's misappropriations, before the engagement of professional accountancy services.

[49] The total is \$94,277. The invoices produced in support show HML was charged these fees. I proceed on the basis that it paid them and has not been reimbursed for them by any other entity.

[50] In support, Mr Langton relied on the following comments of the Court of Appeal in *Binnie v Pacific Health Limited*<sup>3</sup> and referred to their subsequent application by the Authority:<sup>4</sup>

*[17] Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than party and party costs. The latter generally have as their focus the issue of proceedings ...*

*[18] ... In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. ... use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms.*

...

[51] In *Attorney-General v Gilbert*<sup>5</sup> the Court of Appeal said:

*[96] The plaintiff seeking damages for breach of contract must show on the balance of probabilities that his loss was caused by the breach. It is not enough if the breach was simply the occasion of opportunity for loss; neither is it necessary that the breach be the sole cause of the loss, if it is a material factor ... The loss must be sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances*

<sup>3</sup> [\[2003\] NZCA 69](#); [\[2002\] 1 ERNZ 438](#)

<sup>4</sup> *Auckland Regional Council v Tilialo* AA 368/09, 15 October 2009

<sup>5</sup> [\[2002\] NZCA 55](#); [\[2002\] 1 ERNZ 31](#)

*... Loss of the type suffered will usually be sufficiently linked to the breach if within the contemplation of the parties as a not unlikely consequence of the breach. That is how the question of remoteness of damage in contract was addressed in the context of the employment contract in ...*

*If it was reasonably foreseeable that a particular type of loss of this character ... was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable.*

[52] The above losses are sufficiently linked to Mrs Tither's breaches to warrant recovery.

[53] I make one exception for a claim which did not appear to have been fully prepared as at the date of the investigation meeting. The claim concerned Tyromedia's fees.

[54] I understood the associated claim to be based on a waste of Matthew Horton's executive time. If that is the case, then the claim is one for general damages. While I accept a likelihood that considerable amounts of Mr Horton's time were required to address Mrs Tither's activities, I am not satisfied the amount sought has been adequately supported by the evidence in that context. Elsewhere there was mention of reimbursing expenses, particularly for Mr Horton's airfares. If that was the intention then the claim may be classified correctly as one for special damages. Again I accept a likelihood in general that such costs were incurred, but only limited material was provided in evidence and again was not sufficient to support the claim as quantified.

[55] For these reasons I make no order in respect of the Tyromedia fees and deduct the amount of the fees from the total sought.

[56] The remainder is \$71,037. Mrs Tither is order to pay HML that amount.

### **Mrs Tither's suspension**

[57] On 22 March 2012 Mr Horton and another executive met Mrs Tither on her arrival at Brisbane airport. Mr Horton raised his concern that Mrs Tither had made unauthorised lieu day payments to herself, in the sum of what he then believed to be \$60,000. Mrs Tither replied that she was entitled to the payments, but Mr Horton advised her she was suspended pending an investigation. He provided her with an

airline ticket and instructed her to return to Auckland immediately. She protested, and says Mr Horton swore at her.

[58] When she raised her personal grievance on 29 March 2012 Mrs Tither said: she was concerned about the way the

suspension had been imposed; the allegations against her were motivated by a wish to hasten her retirement or otherwise facilitate the termination of her employment; the allegations against her were unfounded; and she had suffered stress and damage to her reputation as a result. In the light of the evidence uncovered and the admissions made since, some of these concerns have been abandoned.

[59] As identified in the Authority, the grievance is that the suspension was unjustified because:

- (i) there was no contractual right to suspend;
- (ii) the suspension was imposed in a public place; and
- (iii) Mrs Tither had no opportunity to comment before the suspension was implemented.

[60] The test of the justification for Mrs Tither's suspension is set out in [s 103A](#) of the [Employment Relations Act 2000](#). It concerns whether suspension was the action a fair and reasonable employer could take in the circumstances at the time.<sup>6</sup>

[61] It also requires a consideration of whether the employer: sufficiently investigated the relevant allegations before imposing the suspension; raised its concerns with the employee before taking that action; gave the employee a reasonable opportunity to respond before suspending her; and whether the explanation was genuinely considered before the suspension was imposed.<sup>7</sup> The Authority may take

other factors into account,<sup>8</sup> but must not determine the suspension to be unjustified if

any defects in the process were minor and did not result in the employee being treated unfairly.<sup>9</sup>

<sup>6</sup> [s 103A\(2\)](#)

<sup>7</sup> [s 103A\(3\)](#)

<sup>8</sup> [s 103A\(4\)](#)

<sup>9</sup> [s 103A\(5\)](#)

[62] The contractual effect of a suspension is that the employer refuses to make available to an employee work to which the employee is entitled under the employment agreement. Employment agreements commonly provide for suspension in certain circumstances<sup>10</sup>, but where they do not make such provision the employer's refusal to make work available is a breach of the agreement. There may be cases where allegations against the employee are so serious, and the risk from the employee's continued presence in the workplace is so great, that a suspension in the absence of an enabling provision in the employment agreement may still be an action a fair and reasonable employer could take. If so, the action must also be based on the information available to the employer at the time.

[63] Mrs Tither's employment agreement did not include provision for suspension. When her suspension was imposed HML had available to it a generalised allegation that she was hiding payments, and information suggesting she had taken \$60,000 in lieu day payments. At the time, it was not aware of the WPL payments. While I accept there was reason for concern, I do not accept the circumstances were so pressing as to justify Mrs Tither's immediate suspension. She was out of New Zealand and her access to the company's records and financial information was limited. Her internet access to bank accounts and company records could have been cut off or restricted pending a fuller appraisal of her possible misconduct, and how best to address it.

## 2. Suspension imposed in a public place

[64] I also accept it was not appropriate to impose the suspension at Brisbane airport as Mr Horton did. He wanted to act immediately to prevent any further misappropriation, and said that, in the circumstances travelling together from the airport to the company's offices would have been tense and difficult.

[65] I do not accept this was sufficient reason to act as he did.

<sup>10</sup> Although such suspensions remain subject to scrutiny under the personal grievance procedure, for example.

[66] I do not accept Mrs Tither had no opportunity to comment on the allegations against her or the prospect of suspension, but I find in any event that the suspension was predetermined.

## 4. Conclusion

[67] Findings of the above kind would usually support a finding that the suspension was unjustified. However the concerns Mr Horton had when the suspension was imposed were more than borne out by the subsequent investigation. A question arises of whether the subsequent findings can be taken into account in determining justification (given that the [s 103A](#) test is concerned with the employer's knowledge at the time of the suspension), or whether the findings are relevant to the

employee's remedy if the suspension is unjustified.

[68] The Court of Appeal flagged this question in *Salt v Fell*.<sup>11</sup> It went on to say:

*[96] Whichever approach is adopted, the result should be that the employee does not benefit from his or her wrong. At all times, the subsequently discovered conduct may be so egregious that no remedy at all should be given, notwithstanding the dismissal being technically unjustifiable.*

[69] On either approach, I find Mrs Tither is not entitled to a remedy.

### **Mrs Tither's claim for payment in lieu of notice**

[70] Mrs Tither's letter of resignation dated 25 March 2012 detailed her concern that HML was attempting to pressure her to retire from her employment, the stress she felt as a result of having worked long hours, and health difficulties she was facing. She said she could not 'cope any more' and wished to tender her resignation 'with immediate effect'. She went on to suggest that she attend the company's offices the next day to return company property, including the company vehicle.

[71] HML read the letter as an expression of Mrs Tither's wish to terminate her

employment immediately, and not as a notice that employment would terminate at a later date. It accepted the resignation on that basis, and did not make any payment in

11 [\[2008\] NZCA 128](#); [\[2008\] 3 NZLR 193](#), [\[2008\] ERNZ 155](#).

lieu of notice. Mrs Tither sought to withdraw her resignation on 26 March 2012. Mr

Horton declined to accept the withdrawal.

[72] Mrs Tither now seeks payment of one month's salary in lieu of notice, with

one month being the notice period provided for in the employment agreement.

[73] I find the tone and content of the 25 March letter overall indicate an intention that the employment relationship end immediately. Moreover the words 'effective immediately' have a plain meaning. It is straining that meaning to suggest the words refer to the commencement of the notice period, rather than to the termination of employment. If Mrs Tither had intended to resign on notice she could have said so – for example by nominating the intended termination date or simply indicating that she was giving one month's notice of her intention to resign.

[74] For these reasons I find Mrs Tither is not entitled to payment in lieu of notice.

### **The claims for penalties**

#### **1. HML's claims against Mrs Tither**

[75] Although Mrs Tither breached her employment agreement, and her statutory duty of good faith, the above orders mean nothing will be gained by any further her order for the payment of a penalty.

[76] There will be no order for the payment of a penalty against Mrs Tither.

#### **2. Mrs Tither's claims against HML**

[77] Mrs Tither seeks a penalty for a breach of good faith. As I understand the statement of problem, the claim relates to her suspension. I do not accept that the circumstances of her suspension amounted to a breach of good faith.

[78] There will be no order for the payment of a penalty against HML.

### **Interest**

[79] Interest is to be paid on all monetary amounts, calculated at the rate of 5% pa from the date of this determination to the date of payment.

### **Order prohibiting publication**

[80] HML sought orders that the Authority file be sealed in order to protect the personal information contained in the documents provided to it, and that it be advised of any application to inspect the file.

[81] I order accordingly.

### **Costs**

[82] Costs are reserved.

[83] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

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