

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 345  
3125294

BETWEEN	SHARRON MATTHEWS Applicant
AND	NEWBERRY'S FUNERAL HOME LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	David Flaws, advocate for the Applicant Freda Taylor, in person for the Respondent
Investigation Meeting:	25 and 26 November 2021 and 11 January 2022
Submissions received:	17 February 2022 from Applicant 14 March 2022 from Respondent
Determination:	26 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Sharron Matthews was employed at Newberrys Funeral Home Limited (NFHL) as a trainee embalmer and funeral director from October 2018 to November 2019, when she resigned. She claims she was unjustifiably disadvantaged, that she was constructively dismissed and was subject to unlawful discrimination. Compensation, wage arrears and lost wages are sought.

[2] Freda Taylor is the sole director and shareholder of NFHL. Ms Taylor, on behalf of NFHL, does not accept that Ms Matthews was disadvantaged or discriminated against by the actions of the employer and denies that Ms Matthews' resignation amounts to a constructive dismissal. To the extent that Ms Taylor says she knew about

the matters Ms Matthews has raised, she took appropriate steps on each occasion. She was unaware until the investigation meeting that she had incorrectly selected the “training wage” for Ms Matthews, because she did not realise there had to be formal or mandated training for that wage to apply.<sup>1</sup>

### **The Authority’s investigation**

[3] The Authority heard evidence from Ms Matthews, Nicola Manderson who is Ms Matthews’ mother, Becky Keen, Ms Matthews’ ex-partner, and Ms Taylor on behalf of NFHL. An investigation meeting was held on 25 and 26 November 2021 but was adjourned part heard, due to a health issue affecting a witness. A further investigation meeting took place on 11 January 2022.

[4] The witnesses gave evidence under oath or affirmation and answered questions from me and the representatives at the investigation meeting. The representatives also provided written and oral submissions on the issues for determination.

[5] Having regard to s 174E of the Employment Relations Act 2000 (“the Act”), it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[6] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

### **The issues**

[7] The issues requiring determination were:

- (a) Should the resignation of Ms Matthews, given on 21 October 2019, be treated as a constructive dismissal caused by the employer breaching its duty of fair treatment to her; and
- (b) If not constructively dismissed, was Ms Matthews nevertheless unjustifiably disadvantaged by how she was treated during her employment in the 90-day period preceding the personal grievance she raised on 21 October 2019?

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<sup>1</sup> <https://www.employment.govt.nz/hours-and-wages/pay/minimum-wage/different-types-of-minimum-wage-rates/>.

- (c) Within that period was Ms Matthews discriminated against in her employment on the grounds of age, sexual orientation or family status?

## **Background**

[8] Ms Matthews was employed as a trainee embalmer and funeral director at NFHL. Prior to commencing her employment, the issue of the role requiring a full drivers licence was negotiated. Ms Matthews held a learners licence and the parties agreed at the employment interview that Ms Matthews had three months to obtain a suitable licence.

[9] The driver licence issue became a source of contention between Ms Matthews and NFHL for the duration of the employment relationship. It was agreed, at the interview Ms Manderson or her husband would accompany Ms Matthews when she was required to do afterhours “on call” work until her licence permitted her to drive on her own. Ms Matthews understood this to be so that she could comply with the terms of her licence until she obtained her restricted licence and she had three months to obtain that. She was later given an extension.

[10] Ms Manderson was at the employment interview with her daughter and was involved in these discussions and said this was all explained to Ms Taylor and they thought Ms Taylor understood it would take more than three months to obtain a full licence but for the time being, at least while Ms Matthews was on a learners licence, they would accompany her until she obtained her restricted licence. Then she could drive on her own, just not after 10.00pm or before 5.00am (unless she had a supervisor in the front passenger seat).

[11] NFHL provided a work car for the “on call” work but it was a manual which became an additional issue. Ms Matthews was happy to continue to drive her own car to avoid having to drive the manual work car but Ms Taylor wanted her to drive the work car.

[12] Ms Taylor gave evidence that she did not understand the current three tier driver licensing regimen and assumed that Ms Matthews would have her full licence in 3 months and was disappointed when she did not. Ms Matthews did not obtain her restricted licence until 11 May 2019, which was approximately six months after

commencing her employment. It was not a full licence and did not permit her to drive a manual car.

*Training wage*

[13] In the first schedule to the employment agreement there was a clause titled remuneration as follows:

A salary of \$36,000 p.a. (Thirty-six thousand dollars per annum) for a period of twelve months with review with the employer and the employee. If satisfactory progress has been achieved after three months trial, and a full drivers licence gained, the salary will increase to \$38,000 p.a. (thirty-eight thousand dollars per annum) with a further review twelve months later following the second increase of salary.

[14] Ms Matthews received no salary increases and remained on the training wage for the duration of her employment with NFHL despite repeatedly raising issues about her wages with Ms Taylor.

[15] It was confirmed at the investigation meeting that Ms Taylor had been mistaken about it being a “trainee role” because training was simply on the job as opposed to formal training, meaning there was an obligation on NFHL to pay Ms Matthews at least the minimum wage. At the investigation meeting Ms Taylor agreed to pay Ms Matthews wage arrears that resulted from that mistake.

[16] Ms Matthews raised concerns with Ms Taylor about wages from early on in the employment relationship. Ms Taylor responded in various ways ranging from linking pay to the three-month review, seniority or maturity in comparison to other employees, gaining her restricted licence, and then once she had her restricted licence, it was to be reviewed when she could drive the manual work car.

[17] On 14 August 2021, Ms Matthews wrote to Ms Taylor formally asking for her pay to be reviewed and suggested \$2100.00 per fortnight (\$27.40 per hour) would be appropriate. They met to discuss and Ms Taylor declined to increase her wages.

[18] In her letter of 21 October 2019, Ms Matthews set out her calculation showing her wages to be \$16.29 per hour. She recorded in that letter that Ms Taylor’s response on 14 August was that there was a deduction for one hour a day for unpaid breaks,

which Ms Matthews said made no sense because she only had one 30-minute unpaid break each day. The wage issue remained in dispute and was never resolved between the parties.

#### *Training on the job*

[19] When Ms Matthews started, Ms Taylor allocated another employee to mentor and train her. Ms Matthews was on call one week in three, initially with another staff member. She received remuneration for being on call and then an additional payment depending on what type of task she was required to do outside of normal working hours.

[20] Ms Taylor gave evidence that she and her husband, Mr Squire, had high hopes for Ms Matthews as she showed a lot of talent. Mr Squire was a resource concerning embalming for all employees but suffered from a significant health issue and as a consequence spent very little time at work and he did not give evidence.

[21] The other aspect to Ms Matthew's role was the funeral directing side of the business. After three months Ms Taylor's view was that Ms Matthews needed more development in this part of the role. Ms Matthews accepted she preferred other aspects of the job (to funeral directing) but noted she had not had any proper training so had found it frustrating when issues were raised with her. Ms Taylor accepted that Ms Matthews had not been provided with all the information she should have received when she started.

[22] Ms Matthews said she loved the work and she studied textbooks at home to help her understand the work. She had difficulties with the employee who was training and mentoring her, and in the end, Ms Taylor accepted that he had been treating Ms Matthews unfairly, for example, having her carry out menial tasks. Ms Matthews found him to be exploitative of her. As time went on she formed a view that she did not receive sufficient training from the employee responsible. Then shortly after she returned to work after cutting her finger, an incident occurred at work that involved this employee who became aggressive and threatening towards Ms Matthews.

[23] Ms Taylor accepted that Ms Matthews raised issues with her about this employee and although she took some steps in July, she did not realise how serious it was until the aggressive and threatening incident occurred. She had taken some earlier steps, but Ms Matthews was unaware of those. Ms Taylor said she took legal advice

but was told she could not tell Ms Matthews about it. Ms Taylor took decisive steps following the aggressive outburst at work, but Ms Matthews did not see the results of that until several weeks later.

### *3 month “review”*

[24] The employment agreement purported to include a three-month trial period but the way it was drafted was unlikely to comply with the legislative requirements. It was not referred to during the investigation, other than in relation to Ms Matthews pay rate and Ms Taylor’s letter to Ms Matthews on 10 January 2019

[25] In that letter Ms Taylor noted there were several areas for development in relation to Ms Matthews’ office work and funeral directing but also accepted that Ms Matthews had not been provided with key information such as a “list of duties” for funeral directing. Sick leave was also raised as an issue which I will return to later. The letter made it clear Ms Matthews had more time to obtain her licence.

### *Mentoring*

[26] During the second week in her employment, the person mentoring her had Ms Matthews accompany him to Auckland and she was required to drive an NFHL hearse back on her own, while he drove back separately. Ms Matthews only held a learners licence at the time and should not have been driving unaccompanied or late at night.

[27] Ms Matthews evidence was that this person began to “exploit” her after that. It started with little things such as the driving incident, having her purchase food and cigarettes for him, claiming the on-call allowance for tasks Ms Matthews had done, and if she rang him for advice when on-call, he claimed the money by convincing Ms Taylor not to listen to Ms Matthews. He also came to Ms Matthews house late at night on one occasion in an intoxicated state to require Ms Matthews to undertake some on call work when she was not on call. Ms Manderson gave evidence about what she saw and said during that incident, and I accept that evidence.

[28] By July 2019, Ms Matthews says she was very unhappy and felt that she was treated differently from the other staff, and Ms Taylor refused to listen to her when she tried to discuss issues. Ms Matthews also said she felt she was accused of stealing the fuel card and of dealing drugs in the car park. While Ms Taylor acknowledges she

genuinely had to look into these matters, she did not accuse or believe Ms Matthews was involved. She gave evidence that she became aware of the drug dealing allegation from an anonymous phone call and although told Ms Matthews mother about it, she did not believe she had enough information to know whether it was true or not. The documentary evidence shows the employee mentoring Ms Matthews communicated separately with Ms Taylor about both those things and made those accusations against Ms Matthews to Ms Taylor.

### *Warnings*

[29] On 15 July 2019, Ms Matthews received a letter that was titled “written warning” covering swearing at work, accessing Facebook on the company cell phone and bad language in a text from Ms Matthews to another staff member, again on the company cell phone. Ms Taylor also recorded a reminder to keep breaks for smoking to the two 15-minute breaks morning and afternoon.

[30] On 22 July 2019, Ms Matthews received a second warning related to sick leave but specifically about how and when sick leave was to be notified. The warning letter advised that if Ms Taylor was not contacted by telephone before 7.30am of any illness or absence, given she had no sick leave left, it would mean instant dismissal.

[31] Both these warnings occurred outside the 90-day statutory time frame for raising grievances, however, they form part of the factual matrix, and provide context to the third warning Ms Matthews received in August 2019.

### *Finger injury*

[32] On 30 July 2019, Ms Matthews cut her index finger on a scalpel during an embalming procedure. Even though it would not stop bleeding, she says she was told initially to put a plaster on it and eventually the mentor employee tied string on it as a tourniquet in an effort to stem the bleeding. A photo of the finger with the string tourniquet was provided to the Authority. Ms Matthews says she was upset and crying and wanted to get medical attention but felt that she was not allowed to. She sent a text message with a photo of her finger and called her partner at the time who advised her to get medical attention. Ms Matthews left work and attended White Cross and her finger was stitched and splinted, and she was given a medical certificate to excuse her from working in the mortuary until it had healed.

[33] Ms Matthews said the next day, Ms Taylor did not accept the medical certificate and threw it in the rubbish telling her it was only a finger. Ms Matthews says she told Ms Taylor she was medically excused from working in the mortuary until her finger had healed and she had also reminded Ms Taylor she had no hepatitis B vaccination. Ms Matthews says she was sent to wash cars and the dressing got wet and the finger opened up again, at which time she had to have it restitched and another medical certificate was provided to Ms Taylor. Ms Taylor denied that she did not accept the first medical certificate but could not explain why the only medical certificate on her records was the second one.

[34] At the hearing and in her statement, Ms Taylor said it was unfortunate she was not in the building when it happened because the seriousness of the cut was not realised and occurred due to proper procedures regarding sharps not being complied with. Ms Taylor said the appropriate equipment was provided and that the use of these would have prevented the accident. Ms Matthews said she was doing it how she had been shown and there were no scalpel handles provided and she had been told this by the employee who had trained her.

#### *Aggressive outburst*

[35] On 1 August 2019, both Ms Matthews and the other employee were with Ms Taylor in her office. This was after Ms Matthews returned to work after cutting her finger and they were discussing what had happened. Ms Taylor was very unhappy with Ms Matthews leaving the day before to seek medical attention for her finger and gave Ms Matthews a third warning for leaving without handing over her work.

[36] Ms Matthews did not accept that she left work without the other employee knowing she was leaving and was angry and swore at the other employee when he denied she had handed over to him when she left. The meeting ended with him standing over Ms Mathews and asking her to go outside. Ms Taylor gave evidence that she was alarmed by the behaviour and sought further legal advice and took appropriate steps.

[37] Ms Taylor describes it as follows:

This team member and Ms Matthews had a loud verbal disagreement and the other team member appeared about to threaten Ms Matthews with physical violence and I

stood between them to prevent Ms Matthews being hurt. My heart was racing and both Ms Matthews and myself was [sic] shaken up. Ms Matthews left for the day naturally.

[38] Ms Matthews evidence was different from Ms Taylor's in that she says Ms Taylor did not stand between them and instead stayed sitting on her desk. After a few minutes that employee stormed out of the office and Ms Taylor left in her car. Ms Matthews was too scared to go outside because she did not know where the other employee had gone so went into the mortuary and phoned her family. Her mother came and picked her up. She was shaking and crying.

[39] Ms Taylor accepted at the investigation meeting, that she did not have a direct conversation with Ms Matthews after the incident. Ms Taylor said she thought Ms Matthews had gone home.

[40] After Ms Matthews cut her finger, Ms Manderson spoke to Ms Taylor about her concerns that the health and safety practices at NFHL were inadequate. In Ms Manderson's evidence she said Ms Taylor was not interested in a productive discussion and instead told her Ms Matthews was selling Class A drugs and kept referring to it being a problem with clumsiness despite being told there were no scalpel holders, or any proper system for dealing with sharps, a lack of training, and no written procedures.

[41] Ms Manderson did not recall the date but there was an earlier occasion when she had spoken to Ms Taylor because of the level of concern she had about how Ms Matthews was being treated at work. On that occasion it was about the employee mentoring Ms Matthews and how he was treating her unfairly. She recalled that Ms Taylor told her that Ms Matthews just needed to grow a backbone.

### *Resignation*

[42] Leading up to her resignation, several incidents occurred. On 14 August 2019, Ms Matthews says she wrote to Ms Taylor asking for payslips so she could sort out her holidays and sick leave. She told Ms Taylor she still thought she was underpaid because she had as many skills and abilities as the others and was doing more work. She complained that she often had extra jobs outside her usual work and when she was on-call in the weekend, she had been made to stay and do extra tasks for no extra pay.

[43] Then on 29 August 2019, a conversation occurred with John Squires, and it is alleged that he said to Ms Matthews that she was “offside with God” and “morally wrong” or words to that effect. Ms Matthews says that this was in relation to her personal intimate relationships.

[44] On 2 September 2019, Ms Taylor insisted Ms Matthews drive the manual work car and this further distressed Ms Matthews. On 24 September 2019, Ms Matthews says she was directed to go outside to pick up cigarette butts. There was also an issue about theft of fuel card, and an assertion that Ms Matthews was dealing drugs but the evidence on that was conflicting and although Ms Matthews was of the view that she was unfairly implicated in both those things, Ms Taylor’s explanations were that she did not act in any way to implicate Ms Matthews. Although I note that Ms Taylor accepts she told Ms Manderson about the drug allegation after Ms Matthews finger injury and continued to make this assertion in her final written submissions to the Authority, which suggests that she did believe allegation to have some foundation.

[45] By mid-October Ms Matthews says she was anxious and having minor panic attacks and had been to her doctor about work related stress. On 18 October 2019 her doctor gave her a medical certificate for two weeks sick leave. Given her health, and because Ms Taylor would not address her concerns, Ms Matthews says she felt she had no option but to resign which is why on 21 October she emailed Ms Taylor two letters. In one she outlined the grievance about pay and conditions and said if Ms Taylor was not prepared to address them, she would have to resign. But she wanted to keep working at NFHL if these matters could be addressed. If they were not addressed, the second letter was a resignation letter.

[46] Ms Taylor replied on 24 October accepting Ms Matthews resignation but stating that she found her complaints to be exaggerated and untrue but offered to look into the wages issue while at the same time asking if Ms Matthews had taken into consideration the Kiwisaver contributions. She did say she would set a date and time to discuss; however, events overtook the situation after Ms Matthews returned to work from sick leave but felt unwelcome and became distressed again, so she returned to her doctor, who issued a further medical certificate for the remainder of her notice period.

## **Constructive dismissal**

[47] The claim for constructive dismissal and disadvantage stem from the same events. The doctrine of constructive dismissal concerns situations where an employer's conduct compels a worker to resign. Such a resignation may be held, in employment law, to be as much a dismissal as where an employer has actually dismissed the worker.

[48] One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches.

[49] Ms Matthews alleged NFHL committed such breaches, through what Ms Taylor did or did not do, in four ways: firstly, by failing to pay her correctly and remedy this when it was raised on more than one occasion; secondly, failure to provide a safe workplace led to the finger injury and Ms Matthews' being affected adversely by the conduct of another employee. Thirdly by failing to follow a fair and reasonable process before giving Ms Matthews a warning, and lastly by discriminating against her on the grounds of age, family status and sexual orientation.

### *(a) Failing to respond to concerns about wages*

[50] The short point is that Ms Matthews wages remained at training rate for the duration of her employment. From May to early August, Ms Matthews says she tried to talk to Ms Taylor about her wages on more than one occasion. Ms Matthews wrote to Ms Taylor on 14 August 2019 asking for payslips so she could sort out her wages, holidays and sick days. They met after that to discuss but it remained unresolved. Ms Taylor did say that extra unpaid breaks were now being taken into account.

[51] Ms Matthews wrote again to Ms Taylor on 21 October 2019 pointing out she was being paid \$16.29 per hour when the minimum wage was now \$17.70 per hour. She stated that she did not feel her requests for a wage review had been taken seriously and noted she had asked to be paid \$24.70 an hour in her letter of 14 August 2019 but had so far had no response. The letter also raised issues about discrimination and two written warnings Ms Matthews had received.

[52] By this stage, Ms Matthews had become unwell from work related stress and wanted her working conditions and pay addressed. She included a resignation letter

with the letter of 21 October because she was now on sick leave and would return 4 days before the end of her notice period. She said she may be prepared to continue her employment if they could meet to discuss the terms and if she could have a new employment contract.

[53] Ms Taylor accepted that Ms Matthews raised the salary issue with her on more than one occasion but initially maintained salary was linked obtaining a suitable drivers licence and then performance. In her written evidence she provided:

“... Ms Matthews and I did discuss her salary. Ms Matthews was made aware that she had areas to improve upon as per contract and the letter as attached. Swearing, lack of appropriate dress, over use of cell phone, and yelling instead of talking and not being located were areas we needed to work on. Many mistakes were being made and pointed out to Ms Matthews but improvement was not forthcoming. We had a meeting with Ms Matthews and her mother as I was concerned about Ms Matthews eyesight and hearing. NFH offered to pay for hearing tests and aids if required and eye sight tests and glasses if required. This offer was rejected although Ms Matthews’ mother suggested she should take the offer.”

[54] Warnings were issued in relation to swearing and I understood the evidence to be that the dress issue was resolved early on. It was clear overuse of the cell phone was about accessing Facebook and was remedied straight away. Yelling was denied by Ms Matthews. Mistakes with paperwork were put to Ms Matthews during the investigation meeting. These were mistakes put to Ms Matthews that went back as far as May 2019 and I was satisfied from how the evidence was given, that on balance proper explanations that had not been sought previously. A fair and reasonable employer would have raised these with sufficient specificity at the time so the employee could respond and that had not occurred until the investigation meeting.

[55] The rationale Ms Taylor gave for not reviewing Ms Matthews wages predominantly focussed on the comparison with other employees and that she had linked performance to salary and to the extent there was a valid trial period, Ms Taylor’s view was that until several things happened, there would be no movement in salary.

[56] Regardless of the approach taken by Ms Taylor, given there was no valid trial period, Ms Taylor accepted the training rate was not the correct rate, so it follows that there was not only a failure to pay Ms Matthews correctly but also a failure to address

that mistake. Ultimately Ms Matthews was paid below the minimum wage, which is a breach of s 6 of the Minimum Wage Act 1983.

[57] Ms Matthews also repeatedly asked for wage and time records from approximately July 2019 to the investigation meeting date. They were provided on the second day of the investigation meeting, and I accept that some of the delay was caused by Ms Taylor's own health issues, however, there is a statutory obligation to provide these immediately when requested, under s 130(2) of the Act. It was unclear whether Ms Taylor's health issues were an operative factor at the time Ms Matthews first asked for these records.

*(b) Failure to provide a safe workplace – finger and driving incident*

[58] After hearing the evidence about the circumstances in which the finger injury occurred Ms Taylor accepted that the injury should not have occurred, but there was a dispute about whether the correct equipment was available.

[59] The obligation on employers to maintain a safe workplace arises from both statute<sup>2</sup> and an implied common law duty to take reasonable care to avoid unnecessary risk in the workplace.<sup>3</sup>

[60] Given Ms Taylor's admission that the injury should never have happened, and the course of conduct of the other employee, I tend to prefer Ms Matthews evidence, that she had been told Ms Taylor would not provide scalpel holders. That means that after hearing the evidence, I accept that this injury would not have occurred had the correct equipment been available for use.

[61] Ms Matthews driving outside the conditions of her licence on more than one occasion is also a health and safety issue and I prefer the evidence of Ms Manderson, that Ms Taylor was made aware of this by her. Ms Manderson said Ms Taylor was not interested in doing anything about her concerns and suggested that Ms Matthews was lying about the driving incident.

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<sup>2</sup> Health and Safety at Work Act 2015 (HSW Act).

<sup>3</sup> *AG v Gilbert* [2002] CA 141/00.

(c) *Failure to provide a safe workplace – another employee’s conduct*

[62] Having found above that Ms Taylor was aware Ms Matthews had driven outside the conditions of her licence, it follows she was aware there was an issue as to safety arising from the driving incident but also from her other employee’s conduct impacting on Ms Matthews, but the evidence was that she chose not to look into it because she did not think it was serious until around August 2019.

[63] While she asserts that there was no failing on her part because she took decisive action in July 2019, having accepted Ms Matthews was required to purchase lunch, pick up cigarette butts and carry out menial tasks, this was after she had sought legal advice so it follows that she must have been aware of the issue prior to 15 July but took no steps to protect Ms Matthews. Ms Manderson recalled raising this issue on more than one occasion with Ms Taylor and was told that Ms Matthews needed to grow a backbone. Ms Matthews says Ms Taylor told her to stand up for herself more.

[64] Finally, there was an escalation to an angry and aggressive outburst directed at Ms Matthews at work and Ms Taylor said she knew there was a real problem at that point as she was left with her heart was racing and feeling shaken up.

[65] While I accept that appropriate action was eventually taken, there was sufficient information provided to Ms Taylor before July 2019 for her to be aware that there was a pattern of inappropriate conduct towards Ms Matthews that had already emerged. The first driving incident should have been sufficient for Ms Taylor to take decisive action to mitigate a workplace risk that was reasonably self-evident. Ms Matthews raised it repeatedly and regularly as did Ms Manderson and although I accept, she had advice in the background and some steps were taken, Ms Taylor at no stage took steps to engage with Ms Matthews’s about safety at work.

(d) *A warning issued with no proper process*

[66] After Ms Matthews cut her finger in the mortuary, Ms Taylor was confronted with several workplace issues arising from what happened in the mortuary that day. However, the action she took, giving Ms Matthews a warning for leaving work, was without any process or investigation and was therefore premature. Ms Taylor could not have known all the facts and had not provided any opportunity for Ms Matthews or the other employee to respond to the concerns before reaching any conclusions or decisions about what to do next.

[67] When considering the statutory test for justification – that is, what the employer did, and how the employer acted, must be what a fair and reasonable employer could have done in all the circumstances at the time.<sup>4</sup> Where an employer has concerns about a worker’s conduct or performance, the employer should raise those concerns with the worker before taking any action adverse to that worker. The worker must be given a reasonable opportunity to respond, and the employer must consider any explanation given before deciding what to do. If defects in the process followed by the employer are more than minor, and result in the worker being treated unfairly, the employer’s actions may be found to be unjustified.<sup>5</sup>

[68] What Ms Taylor did failed to treat Ms Matthews with fairness in how and why she decided to issue a warning to Ms Matthews about leaving the mortuary. She had not investigated properly so was not aware Ms Matthews had been told by the other employee to put a plaster on it and then a tourniquet and to carry on working. Ms Matthews sent and received text messages that showed her distress that the injury would not stop bleeding and about not being permitted to seek medical attention. This was not taken into account at all by Ms Taylor, Ms Taylor gave evidence that it was a knee jerk reaction to what she was confronted with in the aftermath of the finger injury and she accepted no process was followed before the decision to issue a warning. This means Ms Matthews was treated unfairly in relation to this warning.

(e) *Discrimination*

[69] Section 104(1) of the Act defines a range of circumstances in which it may be said that an employee has been discriminated against. Ms Matthews will have been discriminated against in her employment if by reason directly or indirectly of her sexual orientation or family status NFHL either: dismissed or subjected her to any detriment in circumstances in which other employees of NFHL are not or would not be subjected to such detriment<sup>6</sup>; or it caused her to resign.<sup>7</sup>

[70] The conversations about pay rates with Ms Taylor, led to Ms Matthews forming the view that she was not being paid correctly because of her age. On hearing the evidence, I was satisfied, Ms Taylor had made a mistake about the correct rate of pay, and that her concern was around maturity as in life experience rather than age. Ms

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<sup>4</sup> Employment Relations Act 2000, s 103A (2).

<sup>5</sup> Employment Relations Act 2000, s 103A(3) and (5).

<sup>6</sup> Employment Relations Act 2000, s 104(1)(b).

<sup>7</sup> Employment Relations Act 2000, s 104(1)(c).

Taylor explained that dealing with families who are grieving, and the demands of the role required a degree of maturity and I accept that.

[71] Ms Matthews also said she was discriminated against in that she was prevented from fully participating in regular work dinners because of her family status. Ms Taylor gave evidence that NFHL liked to look after its employees and one of the ways it did that was to have semi regular meals out with its employees. Ms Taylor paid for these meals and affordability was the reason why she was unwilling to have additional people attend the outings.

[72] Ms Matthews also alleges she was subjected to discriminatory conduct by Ms Taylor and Ms Taylor's husband by way of conversations about sexual orientation on several occasions. On one specific occasion, when a funeral service was taking place, and both Ms Taylor's husband and Ms Matthews were in the office because they were not directly involved in a funeral, but everyone else was. Ms Matthews alleges that he said negative and derogatory things to Ms Matthews about her personal relationship, that it was abusive, and he shouted at her.

[73] Texts from Ms Matthews to her partner and mother at the time provide a contemporaneous record, showing what she said to others at the time about the conversation and is consistent with what she said in her evidence.

[74] Ms Taylor's husband was not available to give evidence due to his health, so it is difficult for the Authority to reach a conclusion about that conversation. Ms Taylor denied that her husband would have had that type of conversation with Ms Matthews. She said there was no abuse by her husband because he is unwell and gentle mannered. In any event, considering the circumstances and the nature of what the conversation was about, and the text messages, I find it more likely than not those negative things were said to Ms Matthews about her and her personal relationships.

[75] To succeed in a discrimination action, the employee needs to establish that the disadvantage arose "by reason of" one of the prohibited grounds. As such, the motive of the employer at the time of the alleged act of discrimination will be central to any decision. The meaning of the phrase "by reason of" was considered by the Supreme Court in *McAlister v Air New Zealand*. Tipping J considered that

The correct question raised by the phrase “by reason of” is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated....<sup>8</sup>

[76] Ms Taylor gave evidence of the economic reasons as to why paying for additional people at the work function was unsatisfactory to her. As Ms Taylor’s motive for refusing Ms Matthews’ request to bring an extra person was predominantly financial, I do not find Ms Matthews to have been discriminated against on the basis of family status.

[77] In the case of the conversation with Ms Taylor’s husband, despite finding it more likely than not that the conversation occurred the comments were negative about a particular sexual orientation and therefore the prohibited ground was a material ingredient in the decision to have that conversation with Ms Matthews. The content of the conversation was clearly hurtful to Ms Matthews and caused her to be disadvantaged because of how it made her feel. This means the conversation subjected her to a detriment that other employees were not subjected to. I accept that this was discrimination and a breach of a duty by the employer.

*Sufficiently serious to cause resignation*

[78] Having established that the failings on the part of NFHL to address genuine concerns about pay and workplace safety and an incident involving discrimination, it follows there has been a breach of its duty of fair treatment owed to Ms Matthews. The next question is whether they were, individually or taken together, sufficiently serious to make it reasonably foreseeable that an employee would not be prepared to keep working under such conditions. This determination has already set out an examination of the facts of what happened.

[79] Ms Matthews was not paid correctly for the duration of the employment relationship and wage and time records were not provided until the investigation meeting. Ms Matthews set out in her letter of 21 October 2019, that she felt undervalued because she did everything the other employees did so it made no sense to her why she

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<sup>8</sup> *McAlister v Air New Zealand* (2009) NZSC 1 NZLR 153 at [48].

was paid less. At that stage, it had not been established that a fundamental error had been made about the training rate.

[80] Ms Taylor has accepted she was mistaken about the wages issue, however, it was raised with her repeatedly in several different ways by Ms Matthews and given the comment in the letter accepting resignation, suggesting Ms Matthews calculation might not have taken into account the employer's Kiwisaver contributions, this tends to indicate that Ms Taylor had not up until that point and was still not prepared to give this issue genuine consideration. Had she turned her mind to it when it was raised with her at any stage over the course of the employment relationship, it is likely the mistake made about the training wage would have been identified and it could have been rectified.

[81] Ms Taylor was also informed about issues with the other employee, including after only two weeks when the issue of driving outside her licence conditions was raised with Ms Taylor by Ms Manderson. By her own admission Ms Taylor did not think it was that serious she accepted she told Ms Manderson that employees lie. She had however, noticed a pattern of conduct towards Ms Matthews and taken some action by July 2019. She took firm employment action after the outburst at work in August 2019. She accepts the conduct included making Ms Matthews buy lunch and attend to menial chores but does not accept all the aspects Ms Matthews complained about.

[82] I am satisfied that by April 2019, Ms Taylor had started to appreciate the seriousness of Ms Matthews concerns. However, this was not communicated to Ms Matthews who was reaching the conclusion that her concerns were falling on deaf ears. Ultimately this was not a sufficient level of engagement with Ms Matthews, given the concerns, to ensure that Ms Matthews had any input into making the workplace a safe environment or that it was safe for Ms Matthews.

[83] The warning delivered to Ms Matthews after she left the mortuary to get medical attention for her cut finger, was based on incomplete information and failed to consider Ms Matthews response or to take into account the workplace injury.

[84] Ms Taylor's actions fell well short of what can be expected of a fair and reasonable employer. A fair and reasonable employer would have investigated the concerns, so they had a complete picture of the facts, given the employee an opportunity to comment or respond before any final decision was made.

[85] In addition, Ms Taylor maintained her assertion that Ms Matthews used drugs and communicated that information to Ms Manderson, which is likely a breach of Ms Matthews privacy, if Ms Manderson was not acting as an agent. In addition, continuing to raise a concern for which you accept you have insufficient information to raise formally are not the actions of a fair and reasonable employer and has the potential for others to reach a jaundiced view of Ms Matthews which is unfair.

[86] The way in which both the concerns about Ms Matthews and Ms Matthews concerns about the workplace were addressed were therefore a breach of the duty of fair treatment NFHL owed to Ms Matthews.

[87] Employees have a statutory entitlement to payment for work at not less than the minimum wage in New Zealand, there is a contractual obligation in the employment agreement to investigate workplace matters in a fair and reasonable manner, and a statutory obligation in the Employment Relations Act 2000 to act as a fair and reasonable employer in the circumstances. In this case, genuine concerns were raised about pay and workplace safety, on more than one occasion, with Ms Taylor but were not addressed.

[88] I consider that the failure to address genuine concerns about workplace safety, both psychological and physical, incorrect pay, and discrimination in the workplace, means that cumulatively these actions of NFHL caused Ms Matthews resignation.

[89] The combination of the breaches outlined above caused Ms Matthews stress, unhappiness and resentment and were something more than just unreasonable. It was reasonably foreseeable she would resign rather than tolerate such conduct. In those circumstances, her resignation was caused by what NFHL did, so this was really a case of constructive dismissal rather than merely a resignation.

### **Was Ms Matthews disadvantaged?**

[90] I have already found the dismissal unjustified. Ms Matthews has also claimed for an unjustified disadvantage on the basis the same actions by her employer that led to her constructive dismissal, also disadvantaged her.

[91] I find those aspects of the claim already form an integral part of my finding that there was a constructive dismissal and as such I do not intend to consider those as separate matters.

## **Remedies**

[92] Having established her employment ended by constructive dismissal, which is a form of unjustified dismissal, Ms Matthews was entitled to an assessment of remedies for her personal grievance.

### *Wage arrears*

[93] Ms Matthews seeks arrears of wages in respect of the difference between her salary, and the relevant minimum wage for the hours she worked amounting to \$1995.14. Given Ms Matthews has a statutory entitlement to be paid at the minimum wage I consider it appropriate to make an order for payment of wage arrears in that amount.

### *Lost wages*

[94] The Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance.

[95] Reimbursement of lost wages are sought, and I accept that reimbursement is appropriate in circumstances where there has been a constructive dismissal. Ms Matthews was able to secure new employment almost straight away but still earned less than what she would have at Newberrys had she been paid at the correct wage rate. The amount she should have earned in three months at Newberrys was \$9,779.25. From that total, deducting wages of \$6,333.00 earned in her next employment, amounts to \$3,446.25. I therefore consider that reimbursement in the amount of \$3,446.25 would be appropriate.<sup>9</sup>

### *Compensation for humiliation, loss of dignity and injury to feelings*

[96] Ms Matthews' evidence established that she was humiliated by how she was unfairly treated over her concerns about her wages and safety in the workplace, as well

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<sup>9</sup> Employment Relations Act 2000, s 123(1)(b) and s 128(2).

as decisions that were made about employment outcomes about her conduct. Not having her concerns taken seriously until Ms Matthews was physically threatened by another employee, being injured at work and being disciplined for leaving work to seek medical treatment, caused distress and the situation damaged Ms Matthews health in that her general practitioner issued more than one medical certificate for work related stress. The evidence from her mother and ex-partner confirmed this to be the case.

[97] Considering the distress experienced by Ms Matthews particularly from July 2019 to October 2019, the evidence of ongoing effects on her, and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act was \$20,000.00. This is the amount NFHL must pay Sharron Matthews within 28 days of this determination as compensation for humiliation, loss of dignity and injury to her feelings.

#### *Contributory conduct*

[98] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

[99] In this case three aspects of Ms Matthews conduct contributed to the situation. Firstly, the failure to obtain her restricted licence quickly, in part lies with her, and the issues that arose because of this were not an entirely one-sided story but Ms Taylor's expectation of the timeframe in which this could be achieved was also mistaken. Ms Taylor admitted she did not realise there were three steps for Ms Matthews to obtain a full licence. She also did not consider the fact that making Ms Matthews drive the work car, which was a manual, placed additional stress on her not only because her licence at the time did not permit that, but also because she did not know how.

[100] Secondly, Ms Matthews sick leave and dress standards. Ms Taylor was right to be concerned about the amount of sick leave taken by Ms Matthews and the employment agreement stipulated a dress code and the reasons for it. Ms Matthews needed encouragement to comply with the dress code and the steps that Ms Taylor took to encourage that were reasonable for an employer to take.

[101] Ms Taylor also had concerns about accuracy of Ms Matthews paperwork which was raised at the three-month mark. She says these mistakes continued and cost the company money. Evidence was produced at the hearing of the mistakes, but I was

satisfied after hearing Ms Matthews responses that this was also not a one-sided conversation and as Ms Taylor has made admissions about Ms Matthews induction, it would not be fair to ascribe responsibility for all the errors to Ms Matthews.

[102] However, while less than satisfactory, no aspect of what Ms Matthews did or did not do was sufficiently blameworthy to require a reduction of the remedies awarded for her grievance. Accordingly, no reduction in remedies is required.

### **Orders**

[103] Newberry's Funeral Home Limited is ordered to make the following payments to Sharron Matthews:

- (a) Wage arrears for the duration of the employment relationship amounting to \$1,995.14 under 131(1)(b) of the Act; and
- (b) Lost wages amounting to \$3,446.25 under s 123(1)(b) of the Act; and
- (c) The sum of \$20,000.00 under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Ms Matthews because of her constructive dismissal.

### **Costs**

[104] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Matthews may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Newberry's would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[105] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>10</sup>

Sarah Kennedy  
Member of the Employment Relations Authority

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<sup>10</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).