

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 74  
5374208

BETWEEN                      SONYA MILLER  
   Applicant  
  
AND                              HILLYERS OF LINCOLN (2006)  
   LIMITED  
   Respondent

Member of Authority:      David Appleton  
  
Representatives:            David Beck, Counsel for Applicant  
   Andrew Marsh, Counsel for Respondent  
  
Investigation Meeting:      27 February 2013 at Christchurch  
  
Submissions received:      28 March 2013 from Applicant  
   12 April 2013 from Respondent  
  
Determination:              6 May 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.      The Applicant was unjustifiably dismissed and remedies are awarded as detailed in this determination.**
- B.      A penalty in the sum of \$2,500 is imposed upon the Respondent, to be paid in total to the Applicant.**
- C.      Costs are reserved**

**Employment relationship problem**

[1]      Ms Miller raises a personal grievance in relation to her dismissal for serious misconduct from the respondent company on 7 May 2012. Ms Miller also seeks that a penalty be imposed against the respondent for breaches of good faith. The respondent denies that Ms Miller was unjustifiably dismissed.

**Brief account of events leading to the dismissal**

[2] Ms Miller started with the respondent company working in its café and shop in Lincoln on 12 August 2010. She subsequently gave birth and, after negotiating with her employer regarding her days and hours of return, came back to work after her parental leave in August 2011. Whilst she had been previously working four days a week, upon her return from parental leave she agreed with her employer that she would work the following hours:

*Monday 11am till 5.30pm  
Tuesday 11am till 5.30pm  
Wednesday 8am till 5.30pm*

[3] This arrangement, which was recorded in writing in a letter from the respondent, worked well for Ms Miller and enabled her to arrange childcare.

[4] It is Ms Miller's evidence that, around October 2011, a new general manager, Mr Wilson, told her that he was going to have to cut her hours back to two days a week but that, if she agreed to work in the kitchen and to work on Saturdays, she would be able to work four days a week and would receive a pay rise. Ms Miller says that she could not afford to only work two days a week. Mr Wilson denies that he told her that her hours would reduce to two days a week or that, as suggested by Ms Miller, there was any implied threat that he would reduce her hours if she did not agree to what he wanted.

[5] In any event, Ms Miller's evidence is that she told Mr Wilson that she would think about it. She was concerned that she could not manage to work on Saturdays because she had three children, including her new baby, and her 72 year old mother would not be able to cope looking after all three on a Saturday (During the week, two of her children were at school, and so presented less of a challenge for her mother).

[6] It is uncontested that Ms Miller sent a text to Mr Wilson around two days later in the following terms:

*Sonya here. Im [sic] not a hundred percent sure its going to work out but il [sic] give the kitchen a go. If it doesn't work out il[sic] let you know. Are you able to tell me when it would start?*

[7] Ms Miller's evidence, which is not contested by Mr Wilson, is that Mr Wilson called her back straightaway. However, the evidence of Ms Miller and Mr Wilson diverges as to what was agreed between them during the conversation. It is

Ms Miller's evidence that she made it absolutely clear that she would be prepared to work on Saturdays for a trial period only because she felt that her mother would not be able to cope with looking after her three children during the Saturday shift. She admitted that no details were agreed between her and Mr Wilson as to the terms of the trial, such as how long it would last, and that it was not confirmed in writing.

[8] It is Mr Wilson's evidence that there was no agreement that she would work Saturdays on a trial period only. It is his evidence that he said "*we will try this and see how it goes*". He told the Authority, however, that this did not mean that he was agreeing that Ms Miller going on to work Saturdays was a trial only.

[9] Mr Wilson's evidence is that he required every member of staff to work on a Saturday or a Sunday because of difficulties in staffing the café during those days. He said that it was very difficult to find anybody who could be recruited to work only on a Saturday or a Sunday and that, whilst there were many students available in Lincoln who could work Saturdays and Sundays, they would not be capable of producing the meals that the café served. Mr Wilson also said that it would not be fair on the other staff if Ms Miller did not have to work on a weekend while all the others had to.

[10] When Ms Miller started working in the kitchen on Saturdays, she received a pay rise as promised. It would appear from the evidence of both Ms Miller and Mr Wilson that this pay rise was not attributable to her working on Saturdays specifically, nor for working in the kitchen specifically, but for the changes to her roster as a whole.

[11] Ms Miller's evidence is that, after working on Saturdays for around four weeks, she realised that it was too difficult for her mother and so she told Mr Wilson in early December of her problems. Her evidence is that Mr Wilson agreed that he would try to get somebody else to do the Saturdays.

[12] Around the same time, according to Ms Miller, she found that she was no longer rostered on as a team leader. She had first been rostered on as a team leader on Monday afternoons on around 8 November 2011. On 20 December 2011 Mr Wilson published new rosters along with a memorandum which essentially stated that he had been trialling team leader rosters and had decided to continue with them but that only three members of staff would be team leaders. Ms Miller was not one of them. Ms Miller says that she questioned why she was not going to be a team leader after

20 December 2011, and that Mr Wilson did not give her a satisfactory answer. Having taken evidence from Mr Wilson on this point, I am satisfied that he had been trialling the concept of team leaders and that he decided that it was more efficient to have only three members of staff fulfilling that role. I accept that he did not decide to discontinue with Ms Miller as a team leader for any reasons of bad faith. In any event, Ms Miller does not seek to argue that she suffered a disadvantage by not being a team leader after 28 December 2011.

[13] After the 2011/12 Christmas/New Year holidays, Ms Miller returned to work on 6 January 2012 and found that she was still rostered to work on Saturdays. She eventually met with Mr Wilson on 13 January 2012 and Mr Wilson said that he was still trying to sort things out and that his sister-in-law might be able to cover every other Saturday. Ms Miller said that she continued to ask Mr Wilson whenever she saw him, and also called and texted him, to encourage him to resolve her Saturday working concerns. She says that he “*continued to stone wall*” her.

[14] Ms Miller says that, on 20 January 2012, she asked Mr Wilson again and he got very angry and said:

*There is no way it is going to happen and you will have to keep working Saturdays. It was never on a trial basis and there is no one who can cover it.*

[15] Ms Miller says that this was the first time that she realised that Mr Wilson was denying that they had agreed that her working on Saturdays was on a trial basis. Ms Miller says that she asked if they could attend mediation with the Labour Department and that Mr Wilson refused, saying it was company policy not to mediate and that if she did not like that then she should complain to the Employment Relations Authority. Mr Wilson denies that he stated that it was a company policy not to mediate, but accepts that he refused on this occasion.

[16] On 27 January 2012, Ms Miller wrote to Mr Wilson in the following terms:

*I am writing you a formal letter to tell you I feel I am being treated unfairly by you in the workplace.*

*When I agreed to take on the Friday and Saturday in the kitchen last year, it was agreed to by both parties that it would be on a trial basis because of babysitting issues on Saturdays, as my 72 year old mum would be the one to have to look after my three children.*

*This has not worked out & I let you know this after about 4 weeks in the kitchen & said I would not be able to carry on with Saturdays after the Christmas break. You said you would sort someone else out to do Saturdays & also try to get me a day at Leeston in Café to make up for the day I would need to drop.*

*Since then every time we have spoken about it you keep saying that you need more time to sort it out. After our last discussion last Friday you are now saying it wasn't a trial & I can not drop it & you have no-one to fill the day. Three days after our discussion about Saturdays you demoted me as Team Leader on Mondays – where I have been Team Leader since 8th November 2011. Your reason for this was because apparently I have never been Team Leader on Mondays.*

*Both these instances I feel have been unfairly treated by you. After discussions with the Labour Department & an employment lawyer-I have been advised to write you this formal letter to advise you I feel unfairly treated & that if we can not resolve these issues within the next 7 days of the date of this letter then I am willing to take this matter further to the employment relations court under Personal Grievance.*

*The resolutions I would like to see from this unfair treatment is to go back to 3 full days a week at the Lincoln Café that do not include a weekend day & that had already been okayed by the owner of the café & to be reinstated back to my position of Team Leader on Mondays, that I was demoted from for no reason.*

*I am willing to have a formal meeting with you sometime over the next 7 days to discuss these issues & come to a resolution. If we cannot come to a resolution then I am advising you now that I will apply under Personal Grievance to the Employment Relations Court to find a resolution for these matters. I am hoping it will not come to this & we can come to a resolution through in-house meetings or through mediation before it gets to this stage.*

*Thank you.*

*Yours sincerely  
Sonya Miller*

[17] Mr Wilson responded to this letter by way of a letter dated 3 February 2012 in the following terms:

*Dear Sonya,*

*I have to hand your letter dated the 27th of January 2012 outlining some concerns you have.*

*After reading your concerns I am unable to accept your interpretation of the situation.*

*I would ask you to remember a number of the staff members at Lincoln were consulted on the need for the business to change how rosters operated to try and improve our operational performance. All*

*people concerned agreed to the changes. The main change for all people concerned was working one weekend shift most weekends.*

*You were pleased with being able to return to the cooking position on Saturdays and we agreed to an adjustment to your hourly rate.*

*After a period I agree you have mentioned it was proving difficult for you and I undertook to look at alternatives. This has taken some time and unfortunately I have been unable to find a solution acceptable to the business and other staff members. I am still looking for a solution acceptable to all.*

*During the period of restructuring the management of Lincoln we have looked at a number of options and after consultation decided on a Team Leader structure.*

*My Memo of the 20th of December 2011 advised staff members of the final structure. The memo also included the roster indicating who had been appointed Team Leaders. (A copy is attached.) You will see you were not appointed a Team Leader.*

*It is my belief you have been treated in the same manner as all other staff members and there has been no unfair treatment.*

[18] Ms Miller wrote again to Mr Wilson on 27 February 2012 (whilst continuing to work on Saturdays) stating that she was again writing to let him know that she could no longer work on Saturdays. In this letter she detailed her reasons for wishing to stop working on Saturdays, reiterated that she had agreed to work on Saturdays on a trial basis and stated that there had been vacancies at the company's two other cafés which Mr Wilson had refused to let her fill. She finished her letter by saying that she was starting the process of going to the Employment Relations Authority but that a first step was to have a mediation. She stated that Mr Wilson would receive a letter from the Labour Department with a date and time that the mediation would take place.

[19] Mr Wilson responded to Ms Miller's letter stating that his letter of 3 February 2012 clearly advised the company's position, reiterating his belief that she had been treated in the same manner as other staff members and that there had been no unfair treatment and stating that the company would not be attending mediation as its position was very clear. Mr Wilson confirmed to the Authority that he had been contacted by a member of Mediation Services but that he had declined to take part in a mediation.

[20] On 27 March 2012, Ms Miller wrote a letter to Mr Wilson in the following terms:

*This is my two weeks notice that I will no longer be working Saturdays. I was not meant to do Saturdays at all this year and in good faith I have continued until you found someone else. I am unable to do this any longer. As I have 7th April off the 31st March will officially be my last Saturday. I hope you can find me a day during the week to replace this day as you agreed to.*

*Yours sincerely,  
Sonya Miller*

[21] Mr Wilson responded on 1 April 2012 in the following terms:

*I have to hand your letter dated the 27th March 2012.*

*Employees of the company do not determine the rosters. This is a function carried out by management to ensure we have all bases covered and employees are treated fairly.*

*We have covered your situation a number of times and our position as previously advised remains unchanged.*

*If you fail to turn up on your shift our House Rules covers the procedure we will follow. I have attached a copy of House Rules should you have misplaced yours.*

*Regards,  
Murray Wilson*

[22] The House Rules that were attached stated, under the heading “*Punctuality*”, the following

*It is your responsibility to check your rostered hours of work and to ensure you start work on time. If you are unable to report for duty or if you are going to be late for duty, you are required to advise your supervisor or management at your earliest opportunity.*

[23] Under the heading “*Disciplinary Procedures*”, the following was stated.

*For the avoidance of confusion the following acts listed may contravene your conditions of employment and may result in disciplinary action being taken. Continued contravention may result in dismissal.*

...

- *Absence from your place of work during rostered hours.*

[24] The house rules also gave examples of “*instant dismissal*” and stated that the following acts were considered serious misconduct and may result in summary dismissal:

...

- *Insubordination.....*

- *Refusal to perform work assigned by the employer or supervisor, or walking off the job.*

[25] In reply, Ms Miller wrote a note dated 3 April 2012 to Mr Wilson in the following terms:

*I would like to request we have a formal meeting to discuss the Saturday issue some time in the next 7 days.*

*Thank you,  
Sonya*

*Please reply in writing to [address omitted]*

[26] Ms Miller said that she got no response to this letter until 12 April 2012 when Mr Wilson said that the company had covered her situation a number of times, and the position as previously advised remained unchanged, but if she had something new to raise, he asked that she put it in writing and he would arrange a time to meet.

[27] On 18 April 2012, unbeknownst to Ms Miller, one of the team leaders, Sandi Burt-Hutchby, wrote an email to Mr Wilson in the following terms:

*17/4/12*

*There were two trays of discounted slice on the drinks chiller shelves, one for \$4.00 and one for \$6.00. I had shown them to Tamsin as she was wanting to get something to take to her grandmother so I showed her where the discounted food was and they were the only two trays of slice there.*

*Later in the afternoon Sonya was marking down some sandwiches that Margaret said had to go that day, 17/4 and later again Sonya bought the two trays of slice and they had been marked down, the \$4.00 tray to \$2.00 and the \$6.00 tray to \$3.00.*

*Tamsin had gone and wouldn't know to do that. Margaret had gone and I didn't mark anything down.*

*As staff are not allowed to mark items down and then buy them I thought I should let you know.*

*Regards*

*Sandi*

[28] The next communication from Mr Wilson to Ms Miller was a letter dated 19 April 2012 which stated as follows:

*Dear Sonya,*

*I am writing to you about allegations against you that in part might amount to serious misconduct.*

*A summary of the allegations are as follows:*

- *On the 18th of April you marked down product already reduced in price to a lower level and then purchased them yourself.*
- *On a number of occasions you have been involved in unacceptable behaviour towards other staff or supervisors.*
- *You have disregarded our letter dated 1 April 2012 regarding not turning up to work as rostered.*

*This indicates the possibility that you:*

- *Deliberately marked down the products to avoid paying the required prices and the result being the company did not receive the correct price.*
- *You have worked to create an unacceptable working environment for other staff members.*
- *Absence from your place of work during rostered hours.*

*If the above is correct, then it could amount to serious misconduct by you which could lead to disciplinary action against you, including your employment being terminated.*

*Before I reach any conclusions about this, I would like to meet with you to discuss the allegations. I would like to meet with you at 10.00am on Tuesday the 24th of April 2012. You are entitled to have a legal representative or support person present if you wish.*

*Yours faithfully,  
Murray Wilson*

[29] Between the date of Mr Wilson's letter of 19 April 2012 and the disciplinary meeting that took place on 3 May 2012, Ms Miller wrote a letter to Mr Wilson dated 27 April 2012 in the following terms:

*To Murray,*

*I am putting in writing a formal complaint against Dorothy Sampson. Over the last few months she has continuously spread rumours & gossip about me to all the staff & has continuously made the workplace uncomfortable for me. Today she has yelled & sworn at me & this is unacceptable behaviour in the workplace. Especially from a supervisor. I am making a formal complaint against her as of today.*

*Yours sincerely,  
Sonya Miller*

[30] The disciplinary meeting of 3 May 2012 took place at the respondent's lawyer's offices. Ms Miller was accompanied by her own lawyer. Before this date, at

the request of her lawyer, Ms Miller had been supplied with a number of written statements made by staff.

[31] Mr Wilson was the decision-maker and, on his instructions, Mr Marsh from Saunders Robinson Brown wrote to Ms Miller's counsel, Mr Beck, on 7 May 2012 in the following terms:

**Hillyers of Lincoln (2006) Limited – Sonya Miller**

*We refer to the above matter.*

*Further to our meeting on Thursday 3 May 2012, our client has considered your client's explanations in relation to the various allegations against her and has sought responses from various staff members to your client's various explanations.*

*In terms of the various allegations, our instructions are as follows:*

1. *Allegation that your client marked down product and then purchased that product herself in breach of policy.*

*Our client has discussed your client's explanation with Liz (team leader). Liz has stated that your client was asked to do Margaret's job on the relevant day (17 April 2012), but that she should not have marked down any products without her approval. Liz also confirmed that she had spoken to your client in the past about not marking down items and then purchasing them herself. Even though this policy was not in writing, Liz was adamant that she had had that discussion with your client in the past and your client's recollection at our meeting that there was some form of policy in this regard would tend to support that.*

*Given the further information as provided by Liz, your client's recollection that there was such a policy in place (even though it was not in writing) and your client's immediate attempt to rectify matters by paying the additional \$5.00, our client has concluded that your client was aware of the policy and breached that policy in marking down the items herself and then purchasing them herself.*

2. *Allegation that your client had been involved in unacceptable behaviour towards other staff or supervisors.*

*Our client has clarified matters further with Sandi and Dot in relation to the alleged incident on 27 April 2012. Sandi has confirmed that while she did not hear the specific conversation, in the position that she was standing she would have heard any shouting if that had occurred. She did not hear any such shouting or swearing from Dot as alleged by your client. Dot denies your client's version of events and in particular is adamant that she never swore nor raised her voice at your client during the conversation. We also enclose with this letter a copy of the written statement signed by*

*Margaret, simply confirming that she did not hear Dot swear or raise her voice at your client at that time.*

*Given this, our client has reached the conclusion that your client's allegation against Dot was untrue. Our client has also considered the various other statements as made by other staff members in the Lincoln premises and has concluded that your client's behaviour is a disruptive influence on the other staff there. Our client has also concluded that the untrue allegation made against Dot by your client further disrupted the relationship between various staff.*

3. *Allegation with regard to your client's failure to work on Saturday as rostered.*

*Our client has considered your client's explanation in relation to her failure to turn up for work. As advised at the meeting, our client understands that your client has some difficulties with working on Saturdays and has attempted to find a solution to this issue. Our client has been unable to find any solution however. Your client had agreed to the variation in her hours and that being the case, she is not entitled to simply pick and choose when she turns up to work. Simply advising our client that she will not be attending work because the day does not suit her any more is not acceptable behaviour on your client's part.*

*That being the case, our client has concluded that your client has deliberately and unjustifiably failed to turn up to work on the Saturday that she was rostered to work.*

**Conclusion**

*Taking all of the above into account, our client has reached the conclusion that your client is guilty of serious misconduct as a result of all the allegations upheld against her as outlined above. Our client has considered the situation in detail and your client's particular circumstances and the range of possible outcomes. Having considered all of these matters, our client has concluded that the relationship is irreparably damaged as a result of the above and accordingly we are instructed to give notice that your client's employment is terminated with immediate effect for serious misconduct.*

*Our client will arrange for your client's final pay and holiday pay to be calculated and paid. In the meantime, we would ask that your client arrange to return all of our client's property to our client as soon as possible.*

*Yours faithfully,*  
**SAUNDERS ROBINSON BROWN**  
*Andrew Marsh*

[32] Ms Miller alleges that her dismissal was motivated by her complaints about working on Saturdays, and was not decided upon in good faith.

### **Issues**

[33] The Authority must determine the following issues:

- (a) Whether, as alleged by Ms Miller, she was dismissed for having raised concerns about having to work on Saturdays;
- (b) If that was not the predominant reason for her dismissal, whether her dismissal for the reasons given by the Respondent was justified;
- (c) Should a penalty be imposed upon the Respondent?

### **Was Ms Miller dismissed for having raised concerns about working on Saturdays?**

[34] It is Ms Miller's contention that the allegations levelled against her which led to her dismissal were effectively "*trumped up*" by Mr Wilson and that the true reason that he dismissed her was because she raised and continued to raise concerns about working on Saturdays, insisting that she had only ever agreed to do this on a trial basis.

[35] It is my finding that this was not the principal reason for Ms Miller's dismissal from the respondent, due to the fact that Ms Miller did buy slices which she had herself marked down, which appears to have been the catalyst for the disciplinary investigation.

[36] However, although Ms Miller does not seek to argue that she suffered a separate disadvantage in her employment arising out of her treatment by the respondent in respect of her working Saturdays, as a penalty is sought by Ms Miller, I must set out my conclusions in respect of whether Ms Miller did agree to work Saturdays on a permanent basis and whether the way that the respondent handled Ms Miller's subsequent concerns amounted to a breach of good faith.

*Had Mr Wilson agreed to Ms Miller working Saturday on a trial basis?*

[37] Even on Mr Wilson's own evidence, he had said to Ms Miller words to the effect of "*we will try this and see how it goes*" (as stated in Mr Marsh's letter of 2

May 2012) or “*let’s see how it goes*” (as stated in Mr Wilson’s written statement of 15 February 2013). Although Mr Wilson did not believe that his words amounted to his agreement to Ms Miller working on Saturdays on a trial basis, it is perfectly understandable how Ms Miller would have concluded that he was agreeing a trial from his words. To “*try this and see how it goes*” is, in my view, a more colloquial way of saying “*do it on a trial basis*”. Mr Wilson was happy to communicate with Ms Miller in writing and I would have expected a permanent change to her working hours and days have been recorded in writing, as it had been when she returned from parental leave.

[38] Although Ms Miller admits that there was no discussion as to how long the trial would be, I believe that, given that the whole reason for Ms Miller’s concern about working Saturdays was because of her childcare issue (which Mr Wilson accepts was communicated to him) it is clear that the basis of the trial was to see whether Ms Miller could both work Saturdays and manage her childcare responsibilities at the same time. To her credit, it did not take Ms Miller very long (no more than a month) before she concluded and communicated to her employer that she could not juggle working on Saturdays with her childcare responsibilities and that, therefore, the trial had proven that Saturday working would not work for her.

[39] Even if Mr Wilson had genuinely believed that Ms Miller had agreed to change her hours of work permanently, my finding is that this was not the case and, therefore, the parties never had a meeting of minds on this issue. Being not *ad idem* on the issue, I cannot find that an agreement had been reached between the parties that Ms Miller would change her hours and days of work on a permanent basis.

[40] In any event, Ms Miller’s employment agreement, signed by both parties, stated at clause 19:

*The terms of this agreement may be varied by mutual agreement. Any such variation must be in writing.*

[41] A variation had been agreed on 16 August 2011 when Ms Miller’s hours were changed following her return from parental leave. This was recorded in writing. However, the company did not record in writing the further purported permanent variation to Ms Miller’s hours, by which she would work on Saturdays, and given that Ms Miller does not agree that this permanent variation was by mutual agreement, I must find that this variation was not binding.

*Was there a breach of good faith by the respondent?*

[42] As there had been no agreement of a permanent change to her working days, when Ms Miller stated to Mr Wilson that the trial had not worked and that she wished to stop working on Saturdays, Mr Wilson's failure to allow Ms Miller to revert to her previous days of work, or some other arrangement which did not require her to work on Saturdays, was, in my view, a breach of the respondent's obligations to Ms Miller under her employment agreement as well as a breach of the duty of good faith set out in s.4 of the Employment Relations Act 2000 (the Act).

[43] Mr Wilson stated that the reason he did not wish to allow Ms Miller to stop working on Saturdays was because it would be unfair to the other staff. This, however, completely ignores the fact that Ms Miller had only ever agreed to work on Saturdays on a trial basis and that she had her own individual but genuine reasons for not being able to continue to work on Saturdays. The respondent owed duties to Ms Miller individually. When Mr Wilson failed to properly consult with Ms Miller over her concerns about working on Saturdays and failed to speak to the other staff about why Ms Miller's situation was different to theirs, it is not reasonable for him to assert that it would not have been fair on the other staff to allow Ms Miller to cease weekend working. It is an assertion that he made without having explored all the facts and canvassed the views of the other staff.

[44] In my opinion, Mr Wilson's failure was exacerbated by his steadfast refusal to attend mediation with Ms Miller. Ms Miller appeared to do everything she reasonably could to persuade her employer to engage with her proactively and constructively, whereas her employer steadfastly refused to do so. Although Mr Wilson did reply to Ms Miller's letters, he did not take proactive steps to attempt to resolve the difficulties Ms Miller was experiencing. This, in my view, constitutes a breach by the respondent of its duties under s.4(1A)(b) of the Act to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[45] If Ms Miller had sought to seek compensation for an unjustified disadvantage in relation to the respondent's conduct towards her on the Saturday working issue, I would have found that such a personal grievance had been proven and would have been minded to award such compensation. However, as Ms Miller's counsel stated at the Investigation Meeting that this was not being sought, it would not be just to award

compensation in relation to the breaches that I have found as the respondent has not had the opportunity to address the issue.

*Should a penalty be imposed on the respondent?*

[46] Ms Miller has sought that a penalty be imposed upon the respondent for breaches of good faith in regard to its failure to resolve the hours of work dispute in a constructive manner, by failing to engage in mediation. Section 4A of the Act states that a party to an employment relationship who fails to comply with the duty of good faith in s.4(1), is liable to a penalty. I have found that the respondent failed to deal with Ms Miller in good faith in respect of the Saturday working issue. Therefore, I need to determine whether the failure by the respondent was:

- 4A (a) ..... *deliberate, serious and sustained; or*
- (b) ..... *intended to undermine—*
- ...
- (iii) *an employment relationship.*

[47] I do not believe there is any evidence to suggest that the failure by the respondent was intended to undermine the relationship between it and Ms Miller. In my view, Mr Wilson wanted Ms Miller to continue to work on Saturdays and was irritated by her insistence that she had never agreed to do so permanently. That does not, however, amount to an intention to undermine the relationship.

[48] However, it is clear that Mr Wilson's failure and refusal to attend mediation was deliberate. Furthermore, Ms Miller attempted on several occasions to engage with Mr Wilson about her concerns and those attempts lasted from December 2011 until April 2012. Although Mr Wilson initially said he would try to sort things out, by 20 January 2012 he was denying that there had ever been a trial and that he was going to make any changes. Despite this, Ms Miller continued to try to get Mr Wilson to change the arrangement and Mr Wilson steadfastly refused to engage with her in a constructive and proactive manner. I therefore believe that his failure to engage with her in good faith was sustained.

[49] Finally, I also find that Mr Wilson's failure on behalf of the respondent to deal with Ms Miller constructively and proactively was serious. In particular, I am mindful of his refusal to take part in mediation. Section 3 of the Act makes clear that

one of its objects is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by, inter alia, promoting mediation as a primary problem solving mechanism. This object is made concrete by the obligations imposed on the parties to an employment relationship under s.4 of the Act.

[50] Mediation is one of the tools made available at no cost to parties to an employment relationship to enable them to be active and constructive in establishing and maintaining a productive employment relationship. By deliberately refusing to engage in mediation, Mr Wilson caused the respondent to breach its obligations under s.4, obligations that are pivotal to all employment relationships in New Zealand. Therefore, I must find that Mr Wilson's failure on behalf of the respondent to engage with Ms Miller in a constructive manner and, particularly, to engage in mediation, was a serious failure.

[51] Therefore, as all elements of s.4A(a) have been satisfied, I believe that a penalty should be imposed on the respondent for its breaches of duty of good faith. I believe that an appropriate penalty would be the sum of \$2,500, the whole of which should be payable to Ms Miller.

[52] Notwithstanding my findings above, it is not my conclusion that Ms Miller was dismissed primarily because of her raising of complaints about her working on Saturdays. I say this because she did not deny that she did purchase an item that she had marked down herself and so there was a substantive issue for the respondent to investigate, unconnected with the Saturday working issue. The next stage, therefore, is to consider whether the dismissal of Ms Miller was justified.

### **Was Ms Miller's dismissal justified?**

[53] The test that the Authority must apply in determining this question is set out in s. 103A of the Act, as follows.

*(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.*

[54] It was the evidence of Mr Wilson that he had found all three allegations against Ms Miller to have been proven. First, that she had purchased products (namely slices) that she had herself marked down, in breach of the company's policy; second, that she had been involved in unacceptable behaviour towards other staff and supervisors; and, finally, that she had failed to work on a Saturday that she had been rostered to work.

[55] It was Mr Wilson's evidence to the Authority that he believed that none of the three allegations, although proven, were enough on their own to justify Ms Miller's dismissal. Collectively, however, they were sufficiently serious he said. Given this, it is necessary for the Authority to determine whether a fair and reasonable employer could have found misconduct in respect of each of the allegations. If it is the case that a fair and reasonable employer could not have done so in respect of one or more of these three allegations, then it follows that the dismissal must be unjustified, as it was only collectively that the findings of misconduct justified dismissal according to the respondent.

*The marking down and subsequent purchase of the product*

[56] It is my finding that a fair and reasonable employer could not have found that Ms Miller committed misconduct in respect of the marking down of the product. I find this for the following reason. It is uncontested that one of the team leaders,

Ms Hutchby, had been on duty when Ms Miller had purchased the slices that she had herself marked down. Both Ms Miller and Ms Hutchby gave evidence that this was the case and, further, that it was Ms Hutchby who had sold the slices to Ms Miller. Furthermore, it was Ms Hutchby who then sent an email to Mr Wilson, cited above, to say that Ms Miller had marked the slices down and then purchased them.

[57] In his evidence, Mr Wilson stated that, if Ms Hutchby, in her role of team leader, had said it was *okay* for Ms Miller to have purchased the slices which she had marked down, then Mr Wilson “*would have lived with it*”. However, Mr Wilson admitted during his evidence that he had not inquired whether Ms Hutchby had been the one to sell the slice to Ms Miller.

[58] It is my view that it is not the actions of a fair and reasonable employer to have found that Ms Miller had acted dishonestly by marking down product and then buying it when it was a team leader, Ms Hutchby herself, who facilitated that purchase. Ms Hutchby admitted that she did not say anything to Ms Miller when Ms Miller had purchased the slices. What she did, instead, was go to speak to one of her colleagues, Ms Samson, and then to complain to Mr Wilson.

[59] However, as team leader, it was within Ms Hutchby’s power and her right as a team leader to have refused to have sold Ms Miller the slices if she had felt that Ms Miller was acting incorrectly. Instead, by carrying out the transaction and allowing Ms Miller to buy the slices, and then to complain to Mr Wilson that Ms Miller had done so, raises a concern in my mind that Ms Hutchby herself was not acting in good faith.

[60] In any event, a fair and reasonable employer would have investigated the circumstances of the purchase much more thoroughly than Mr Wilson did and, having done so, would have ascertained that the complainant (Ms Hutchby) had facilitated and thereby tacitly condoned the very act which was supposedly dishonest.

[61] It so happens, in any event, that after hearing evidence from Mr Wilson, Ms Hutchby, Ms Samson and a manager, Ms Harkers, that the exact policy on when one may buy product that one has marked down oneself was unclear. It was Mr Wilson’s evidence that one could only do that if one had the express permission of a team leader or manager. Ms Hutchby and Ms Samson, on the other hand, said it was acceptable for someone to purchase product they had marked down as long as

they did so right at the end of the day. It was their belief that this was what Ms Miller had done wrong; namely, not waited until the end of the day before purchasing the slices she had marked down. Ms Harkers, on the other hand, believed that what Ms Miller had done wrong was to have marked the slices down for a third time (they already having been marked down twice before on that day).

[62] All in all, the respondent's witnesses were confused as to exactly what the policy was that Ms Miller is supposed to have breached. Furthermore, there was no written policy exactly on the point. Whilst I do not believe that Mr Wilson acted in bad faith in concluding that Ms Miller had deliberately marked down the product in order to buy it more cheaply, given the nuances in the policy and the differences in understanding it as between the various staff and, most importantly, given that the very transaction that Mr Wilson had so much concern about was facilitated by the team leader who had complained about the act, I am clear in my mind that no fair and reasonable employer could have found that Ms Miller's action amounted to misconduct, let alone justified dismissal.

[63] The respondent partially relies on the fact that Ms Miller offered to pay the money to the respondent representing the difference between the price of the slices before and after she had marked them down. I do not accept that it was reasonable for the respondent to have inferred from this that Ms Miller knew her action had been dishonest in the light of Ms Miller's overall explanation.

[64] In addition, the respondent also relied on an assertion that Ms Miller had said that she had known a policy relating to buying marked down product was in place to infer she knew she had done wrong. However, the transcript of the disciplinary meeting shows that Ms Miller actually said she remembered seeing a memorandum that had been shown to her. However, that memorandum did not cover the purchase of product which one had marked down oneself. Indeed, Ms Miller said that she "*didn't ever think about it*" and that it "*don't even enter her head*". Therefore, Ms Miller could not reasonably have been taken as saying that she knew what she was doing was wrong.

[65] In any event, Ms Miller had also explained that she had marked the product down because she had been asked to cover for a staff member who regularly did that task. However, this explanation does not appear to have been given much weight by

the respondent, and, in my view, failing to accord that explanation weight is not what a fair and reasonable employer could have done in the circumstances.

[66] Having found that Mr Wilson was not justified in concluding that Ms Miller had acted dishonestly in purchasing the slices once she had marked them down, and so, therefore, having found that he was not justified in deciding she had committed misconduct, in light of his evidence that it was her collective actions that led to his decision to dismiss her, I cannot find that the dismissal overall was justified. In any event, I will briefly look at the other two allegations.

*Unacceptable behaviour towards her colleagues*

[67] With respect to the allegation that Ms Miller had been involved in unacceptable behaviour towards other staff or supervisors, Mr Wilson's finding that she had done so was based on statements given to him by members of staff. However, his dismissal letter concentrated on Ms Miller's complaint against Ms Samson. In concluding that this allegation against Ms Samson was untrue, he decided that, in light of the other statements from staff, Ms Miller's behaviour was a disruptive influence on the other staff.

[68] Having read the statements from the other staff, most of them appear to be complaining about relatively minor issues which had been taking place over several weeks. For example, one of the complaints was that Ms Miller had told another member of staff that the other member of staff was making a mess. Another complaint was that Ms Miller had, apparently, left hash browns and bacon on a bench and had left a stove covered in dirty water. I heard no cogent evidence to enable me to conclude that it was fair and reasonable for the employer to have concluded that that Ms Miller was deliberately trying to undermine employee harmony.

[69] In his evidence, Mr Wilson accepted that the staff issues in themselves were not enough to justify dismissal of Ms Miller and that, if they had been the only issue of concern, he would have attempted to resolve the tensions between the staff by meeting with them. I believe that this would have been the correct approach. There was no doubt that there were tensions between Ms Miller and some of the other staff which were probably due to Ms Miller's stress at being unable to make any headway in the issue of having to work on Saturdays. I did not hear any cogent evidence to conclude that Ms Miller's actions were sufficient to have allowed a fair and

reasonable employer to have concluded that she had committed misconduct. In any event, on Mr Wilson's own evidence, the staff issues were not sufficiently serious to justify dismissing Ms Miller.

*Not working a Saturday shift*

[70] With respect to the final allegation that Ms Miller deliberately failed to turn up for a rostered shift this was, of course, because of the major dispute between her and the respondent as to whether or not she was obliged to. Given that Mr Wilson had refused to meet with Ms Miller (unless she had anything new to say) and had refused to mediate over the issue, I cannot find that any fair and reasonable employer could have dismissed Ms Miller in circumstances where the employer was simply refusing to attempt to resolve the dispute.

[71] In my opinion, Ms Miller had been acting in good faith by attempting to resolve the matter and, having been faced by an employer who steadfastly refused to engage with her constructively and proactively over a significant period of time, and in face of the practical difficulties she was experiencing with Saturday working, and in light of the previous hours she had agreed in writing with her employer, she chose to revert to working the shifts she had been working previously, or close to them. I accept the submission of counsel for the respondent that a better action would have been for Ms Miller to have raised a personal grievance, before taking a step of *self help*, as counsel put it. However, Ms Miller had attempted unsuccessfully to get her employer to go to mediation and she believed that mediation was the first necessary step prior to going to the Authority, so her failure to raise a grievance may be understood.

[72] However, in the light of the circumstances of an on-going and unresolved dispute between Ms Miller and Mr. Wilson about her obligation to work Saturdays, it is my firm view that no fair and reasonable employer could have concluded that Ms Miller had committed misconduct meriting her dismissal.

**Conclusion**

[73] In summary, I do not believe that Ms Miller had committed misconduct in respect of at least two of the allegations, and that the third (her relations with staff) needed to have been addressed by the employer first attempting to resolve the conflicts, as Mr Wilson had acknowledged. Therefore, I must find that Ms Miller's

dismissal was unjustified (In reaching the conclusions that I do, I do not in any way rely on the propensity evidence of Ms Misselbrook, nor on the evidence of Mrs Miller, Ms Miller's mother).

### **Remedies**

[74] Having established that Ms Miller was unjustifiably dismissed, it is necessary to determine what remedies she is entitled to. Section 123(1)(b) of the Act provides that the Authority may provide for the reimbursement of a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that, subject to s.128(3) and s.124, the Authority must, whether or not it provides for any other remedies, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. Section 128(3) provides that, despite subsection (2), the Authority may, in its discretion, order the employer to pay a sum greater than that provided in subsection (2). Section 124 deals with contribution, which I shall address below.

[75] Ms Miller's counsel asserts that Ms Miller secured alternative employment on 18 August 2012, and seeks lost wages in the gross sum of \$6,633.75 gross, calculated by multiplying 15 weeks' unemployment by 29 hours a week at a gross hourly rate of \$15.25. However, evidence was presented to the Authority that Ms Miller started work for her new employer on 13 August 2012. The period between the first day of unemployment (7 May 2012) and 12 August 2012 is 14 weeks, (or three months and 6 days), not 15 weeks.

[76] I am satisfied that the Authority should exercise its discretion under 128(3) and award more than three months' ordinary time remuneration, as this amounts to another 6 days' only. Accordingly, at a gross hourly rate of \$15.25, Ms Miller is entitled to the gross sum of \$6,191.50.

[77] Turning to s.123(1)(c)(i) of the Act, I accept that Ms Miller suffered humiliation, loss of dignity and injury to her feelings as a result of being dismissed by the respondent. I cannot take into account any specific effects suffered by her because of the actions of the respondent (via Mr Wilson) prior to the disciplinary process being initiated as Ms Miller did not bring a separate disadvantage claim in respect of that conduct by the respondent.

[78] However, I do accept that the dismissal took place against the wider context of those actions (which I have determined amounted to a breach of good faith) and that part of the reason for the dismissal was putatively because of the Saturday working issue, and Ms Miller's refusal to continue to work Saturdays when her attempts to resolve the issue were rebuffed by Mr Wilson.

[79] Evidence was put to the Authority of the effects of the dismissal upon Ms Miller. These included feeling victimized, and suffering depression and anxiety which caused her to consult a counsellor. Ms Miller's evidence suggests that her experience has also led to her having trust issues.

[80] Ms Miller also states that her distress was exacerbated because her dismissal had not been communicated to her on 7 May, and that she had turned up for work the following day when it became clear that the staff had been already told of her dismissal. She had to leave the café and no doubt felt humiliated by that experience. However, it was not clear to me whether that lapse had been the fault of the respondent and, in the absence of clear evidence that it was, I decline to take that into account when fixing the amount of compensation under s. 123(1)(c)(i) of the Act.

[81] Counsel for Ms Miller seeks compensation in the sum of \$15,000. I believe that, whilst a higher than average award of compensation is appropriate, due to the effects upon Ms Miller of her dismissal, the sum sought is too high. I conclude that the sum of \$8,000 would be an appropriate sum.

[82] Turning to s. 124 of the Act, I must consider whether the remedies should be reduced to reflect the extent to which Ms Miller's actions contributed towards the situation that gave rise to the personal grievance and, if so, whether the remedies should be reduced.

[83] Counsel for the respondent argues that Ms Miller entirely contributed to the situation giving rise to the personal grievance in that she had:

- a. deliberately refused to attend work when rostered;
- b. purchased product which she had marked down despite being aware of a policy in relation to that; and

- c. taken active steps to undermine workplace harmony, in particular by raising an untrue complaint about another employee.

[84] Addressing each of these in turn, I find as follows.

- a. As I have found, Ms Miller gave notice to Mr Wilson that she intended to stop working on Saturdays only after she had made exhaustive efforts to resolve her difficulties with Mr Wilson, who had refused to engage with her in good faith in order to do so. Ideally, Ms Miller should have raised a formal personal grievance prior to refusing to work, but she had actively tried to resolve the matter on several occasions without success. Accordingly, in light of those attempts, whilst she contributed to the situation giving rise to the personal grievance in relation to this issue by ceasing to work on Saturdays, it would not be just to reduce Ms Miller's remedies.
- b. Ms Miller purchased product after marking them down because her team leader had allowed her to do so (by facilitating the transaction). Therefore, I do not accept that Ms Miller had engaged in any blameworthy conduct in doing so. Furthermore, the policy she was supposed to have breached was unclear.
- c. I heard no cogent evidence to suggest that Ms Miller deliberately set out to undermine workplace harmony.

[85] In conclusion, I decline to reduce the remedies awarded to her in this determination.

### **Orders**

[86] A penalty is imposed upon the respondent in the sum of \$2,500, the whole of which is to be paid to Ms Miller.

[87] In addition, I order that the following sums be paid by the respondent to Ms Miller;

- a. The gross sum of \$6,191.50; and
- b. Compensation in the sum of \$8,000.

**Costs**

[88] The parties are invited to try to agree how costs should be dealt with between them. In the absence of such an agreement within 28 days of the date of this determination, Ms Miller's counsel may serve and lodge a memorandum and the respondent's counsel shall have 14 days within which to serve and lodge a reply.

David Appleton

Member of the Employment Relations Authority