

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 96
5520965

BETWEEN MS X
 Applicant

A N D Y LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Peter Moore, Advocate for Applicant
 Mr Z, Representative for Respondent

Investigation Meeting: 16 February 2016 and 26 May 2016 at Christchurch

Submissions Received: 26 May 2016 for Applicant
 26 May 2016 for Respondent

Date of Determination: 24 June 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms X was unjustifiably dismissed and unjustifiably disadvantaged in her employment.**
- B. Ms X is awarded the remedies set out in this determination.**
- C. Costs are reserved.**

Prohibition from publication order

[1] I prohibit from publication the names of the parties, and the names of the director and employees of the respondent company, together with the names of the director's former partner and the applicant's friend. I also prohibit from publication any other information that may lead to the identity of these individuals and the respondent company being identified, other than that set out in this determination.

[2] The primary purpose of this prohibition from publication order is to prevent the identity of the applicant being made known, on the basis that evidence was heard in relation to sexual abuse of the applicant as a child by her uncle, for which she was receiving counselling at the time of her employment and, further, on the basis of allegations against the director of sexual harassment of the applicant.

[3] The applicant shall be known as Ms X, the respondent company as Y Limited and the director of the respondent company as Mr Z. Mr Z's former partner shall be referred to as Ms B and Ms X's friend as Mr A.

Employment relationship problem

[4] Ms X claims that she was unjustifiably dismissed from her employment on or around 10 September 2014 and that she was subjected to unjustified disadvantage in her employment in the way of alleged bullying, sexual harassment, failure to provide training and a failure to pay her wages.

[5] Ms X also claims a breach of s.63A(2)(d) of the Employment Relations Act 2000 (the Act) and seeks a penalty in respect of that alleged breach. She also claims a breach of statutory duty caused by the respondent failing to enrol her in KiwiSaver or pay the 3% employer subsidy into the scheme. Finally, she claims that there was a failure by the respondent to supply wage and time records as required by s.130 of the Act.

[6] The respondent did not lodge and serve a statement in reply, but it is understood that it denies each of these claims, and states that Ms X was not dismissed, but was stood down for three days for swearing at Mr Z.

[7] The Authority's investigation occurred in two parts, as Ms X wished to obtain copies of her counsellor's notes to support her claim for compensation. However, despite prolonged attempts by her advocate, she was not able to obtain copies of these notes from her counsellor, as they were apparently lost when he moved to the North Island. In the interval between the first and second investigation meetings, Ms X adduced further evidence, as did two other witnesses, concerning the circumstances of the termination of Ms X's employment. The second day of the investigation meeting was therefore convened to enable Mr Z and the Authority to ask questions of Ms X and her witnesses in relation to this additional evidence.

Brief account of the events leading to the dismissal

[8] Ms X says that she has known Mr Z for around 15 years, and that they had had an affair in the past.

[9] The respondent is a small Christchurch based company operating in the construction field.

[10] Mr Z and Ms X agreed that she would be employed by his company working in the office, and she started on Monday 19 May 2014, receiving \$650 a week after tax. Her hours were to be 10am to 4pm in the winter with different hours in the summer, although these were not agreed on at that time.

[11] Ms X says that Mr Z was aware that she was undergoing counselling for childhood sexual abuse from her uncle and that he had agreed that Ms X could take time off work to continue with her counselling.

[12] Ms X said that it was important to her that she did a good job and that she had agreed with Mr Z that he would get someone to train her on the MYOB payroll system and how to do pricing of the jobs. Ms X said that Mr Z also agreed that the company accountant would show her how to do GST returns.

[13] Ms X says that she had also asked for a written employment agreement which Mr Z said that she could get from the computer. Ms X said that she found the employment agreement template on the computer after she had started work and edited it for her job, and printed it off. She says, however, that despite asking Mr Z to go over it so that it could be agreed and signed, he put her off several times until she gave up asking. She says that a written employment agreement was never signed or agreed on. Mr Z says that Ms X had taken the draft employment agreement home.

[14] Mr Z says that Ms X and he had signed a *piece of paper* after she had commenced employment that had contained, amongst other things, a 90 day trial period, but that, after their employment relationship had broken down, he could not find it. However, such a trial period has to be incorporated into a signed employment agreement, which is entered into prior to employment commencing¹ and so, insofar as Y Ltd may be arguing that any dismissal was justified under the terms of a 90 day trial period, it cannot do so.

¹ As required by s.67A of the Employment Relations Act 2000.

[15] Ms X says that, for the first few weeks, things were going reasonably well with Mr Z checking the invoices that she had prepared before sending them out and that he was happy. She said there had been quite a backlog of invoices that dated all the way back to February, and so she was spending a lot of time catching up on invoicing.

[16] Ms X says that there was quite a lot to the job, including the need to understand details of the technical work that the company undertook, before she could take bookings. At the beginning another staff member did that aspect of the role.

[17] Ms X said that, after the first few weeks, Mr Z started to get very angry in the office, using strong swear words about staff members, although he was nice to their faces. She cites an example of him having referred to two of his staff members as being *hopeless c**ts* and of referring to a Maori employee as a *n****er* and that he could *get f****ed*. Ms X said that, although she had been married to someone in the building trade, and was quite used to swearing, she found Mr Z's behaviour distressing and uncomfortable as it was *at a whole new level*. Ms X says she did not usually say anything about the swearing and angry outbursts as Mr Z was very moody and he could get very angry and volatile. She did once tell him to calm down and he said that he would do what he *f****ing well liked*.

[18] Ms X said that this behaviour from Mr Z continued for some time until *it became an unbearable environment to work in*. She said that he would swear at the computer, hitting it, and accuse her of having changed the settings. He would also swear at his phone, throwing it to the ground, so that he broke it at least twice while she was working for the company.

[19] Ms X says that Mr Z's anger and abusiveness was also directed at her personally, including blaming her for clients not paying their bills or telling her that she was useless and that she was not doing her job properly. She says that Mr Z also told her that she lied all the time and that she was a *thieving bitch*.

[20] One incident that seems to have particularly annoyed Mr Z, according to the evidence of both Ms X and Mr Z, arose when he told her to change her wages because she had been paid for leave to which she was not entitled. She says that she effected the change as a one-off using the confirmation code that Mr Z had given her. However, as it was a one-off change, it automatically reverted back to normal wages

the following week. Ms X says that Mr Z blamed her for this, saying that she had changed the wages.

[21] Mr Z's evidence was that it had been him who had changed the wages, and that he had made it a permanent change. He had then later discovered that Ms X had changed the wages back again. Mr Z says he did not change it back to the lower amount afterwards as he had got very busy working on a big project as part of the Christchurch rebuild. It does not appear that a permanent change to her wages (to \$520 a week) was agreed to by Ms X in any event. Mr Z's rationale for the change was that Ms X was not working the hours she had been employed to. No formal disciplinary meeting was held with Ms X about this allegation though, and so Ms X did not have the opportunity during her employment to address formally Mr Z's concerns about her hours.

[22] Ms X says that the stress became huge as Mr Z escalated into mental abuse, with yelling, nasty names and degrading her about the past to the point that she burst into tears. She says that she ended up feeling that her personal safety was at risk around him.

[23] Ms X said in her written brief of evidence that Mr Z also used to *play with himself* in front of her and other staff members by putting his hands down his pants and handling his penis. She said that he did this regularly, but she never said anything about it to him. However, in her oral evidence, Ms X said that he did this only once, which she witnessed out of the office window. She says that he was talking to his (male) employees and was sideways on to her. Mr Z denied that he would have done this, but that she would not have been able to have seen him out of the window in any event, unless she was specifically looking, instead of working.

[24] Ms X says that, on one occasion, when she was alone in the office, she was sitting at her desk working on invoices on the computer when Mr Z came in, walked up to her and pressed his crotch against her left arm. She says he quickly rubbed it up and down her arm before she was able to push him away. She says she was too shocked to say anything, but he went off into his office without saying a word. Mr Z says that this was not possible, because there would not have been room for him to have done that, because of the way the workspace was set up.

[25] Ms X gave evidence that she had been promised by Mr Z that she would receive training on various aspects of her job, but that she only received around 3 hours of training from the company accountant. She says that the disadvantage that this lack of training gave her was that she was never able to do the job competently.

[26] Ms X and Mr Z have significantly different versions of the events of 10 September 2014, the day on which Ms X says that she was dismissed.

[27] Ms X states that she was in the office when Mr Z came in and asked her what she was doing. When she replied that she was invoicing, she says that Mr Z replied *that's all you ever do is invoicing. I'm sick of this sh*t. F*** off.*

[28] Ms X says that she was used to his outbursts, which happened regularly, so she carried on working. However, Mr Z made it clear that this time it was different and that he seemed to be firing her.

[29] Ms X says that she stated that she would not be leaving until she had it in writing why she was being fired and that Mr Z replied *I don't have to put it in f***ing writing.* Ms X says that she asked Mr Z not to speak her like that and he replied *I'll speak to you however I f***ing want to. F*** off.* She says that she then left the office and started to drive.

[30] Ms X says that, around 2 minutes later, Mr Z called her and asked her to come back and give him the work cellphone and the keys to the office and the PO box. She says that he called her a *thieving bitch.*

[31] Ms X then got a phone call from Mr Z's partner, Ms B. They had a conversation and it was agreed that Ms X would return the keys and cellphone to Ms B outside of the company's office. When she got there at 2pm, as arranged, Ms B was not there, so Ms X went into the office. She says that Mr Z and Ms B were there and that almost as soon as she walked through the door Mr Z yelled at her saying that she was a *f***ing thieving bitch.* He then said, holding up a piece of paper, *look at this, look at what you've done, its f***ing wrong.* Ms X says she put the phone and keys on the desk and said *I want it in writing that I have returned the items and why I've been fired,* to which Mr Z replied *I don't have to put it in f***ing writing.*

[32] Ms X says that, as she was leaving the office, Mr Z called after her *I'll see you in court you stupid f***ing c**t ... I hope your uncle f***s you again.* Ms X says this

caused her to be upset, so she left. Ms B then followed her up the drive and asked her what the *uncle thing* was all about. She says Ms B was supportive, at least on that issue as she had not previously known why Ms X had been having time off work for counselling.

[33] Mr Z's version of events is as follows. Mr Z got to the yard one day and saw Ms X in the workshop chatting to the mechanic. Mr Z started to walk into the office when, all of a sudden, Ms X pushed him out of the way and jumped on to the computer. Mr Z says he asked Ms X what she was doing as he needed to go onto the computer to which she replied *f**k off [Z]*. When Mr Z asked her what she had said, Ms X would not answer. When he looked over to see her computer, he saw that it had the NZ dating site and Facebook up, and not the MYOB program.

[34] Mr Z says that she would still not let him on to the computer so he stated *you tell me to f*** off?*, whereupon she started yelling. Mr Z told her that she was to leave the phone and keys, go home for three days when they would talk. However, she stormed out taking the phone and keys with her.

[35] With respect to the return of the keys and cellphone, Mr Z says that Ms X stormed into the office, throwing the keys at him, hitting the side of his head in front of another employee and Ms B. During his oral evidence, Mr Z said that Ms X had thrown the keys at him, hitting his ear. However, Ms B's evidence was that Ms X had thrown the keys onto the desk. Ms X says she placed the phone and keys onto the desk.

[36] It seems to be common ground that, later that evening, there was text and voice message communication between Ms B, on behalf of Mr Z, and a friend of Ms X (Mr A). This communication was about arranging a meeting between the parties which, Ms B says, was to take place on the following Monday at 9am. Ms X says that the meeting did not take place because she was advised by her lawyer (not Mr Moore) not to go. The evidence of Ms B is that the parties could not agree on the venue for the meeting, Mr Z wanting to be in the company office whereas Mr A wanted it to be in a mall or coffee shop.

[37] It appears that the issue was never resolved, as Mr Moore wrote a personal grievance letter to Mr Z on 15 September 2014, and Mr Z replied on 18 September,

refuting the allegations and making counter allegations. The meeting was never mentioned again.

The key legal principles

[38] In deciding whether Ms X has a personal grievance, I have to take into account the duty of good faith set out in s.4 of the Act, and the test of justification set out in s.103A. These are as follows:

4 Parties to employment relationship to deal with each other in good faith

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

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

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

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

The issues

[39] The following issues need to be determined:

- a. Was Ms X subjected to unjustified disadvantage by being bullied by Mr Z?
- b. Was Ms X subjected to unjustified disadvantage by being sexually harassed by Mr Z?
- c. Was Ms X subjected to unjustified disadvantage by not being given the training she was promised?
- d. Was Ms X subjected to unjustified disadvantage by not being paid wages she was due?
- e. Was Ms X unjustifiably dismissed?
- f. Is Ms X owed arrears of pay?
- g. Are penalties to be imposed?

Was Ms X subjected to unjustified disadvantage by being bullied by Mr Z?

[40] There is no statutory definition of *bullying* in New Zealand, although the WorkSafe New Zealand guidance on work place bullying defines it as *repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety*. The Authority is not obliged to adopt this definition, but it is useful.

[41] The alleged bullying behaviour identified by Ms X in her statement of problem is stated to be as follows:

Continually subjected to foul language, personal abuse, witnessing others being abused, racist comments (directed at other employees) and accusations of dishonesty and incompetence (directed at the applicant).

[42] I am satisfied that Mr Z did accuse Ms X of being dishonest and of incompetence, as there is evidence from his texts that he did so. In itself, such comments are not bullying, or disadvantageous conduct, as an employer is allowed to draw to the attention of an employee its concerns of dishonesty and incompetence. However, I am satisfied that the manner in which Mr Z made these allegations was bullying.

[43] It is acceptable to politely ask an employee to explain why an event has happened, to listen to the reply and consider it in good faith. It is not acceptable to make direct and angry allegations with a closed mind. Mr Z's actions were much closer to the second category than the first.

[44] Such actions constituted disadvantages in Ms X's employment as they caused Ms X upset and stress. I find that no fair and reasonable employer could have made the comments that Mr Z made to Ms X in the manner in which he did, in all the circumstances. Therefore, I agree that these disadvantageous actions were also unjustified.

Was Ms X subjected to unjustified disadvantage by being sexually harassed by Mr Z?

[45] There are three allegations relating to this contained in the statement of problem. The first is that Mr Z would *frequently handle his genitals in full view of his staff, including the applicant*². The second is that Mr Z *repeatedly rubbed up against the Applicant*. The third relates to Mr Z's alleged comment to Ms X on 10 September when he said he hoped that her uncle *f***ed her again*.

Handling himself

[46] In relation to the first allegation, Ms X said in her first written brief of evidence that Mr Z would *frequently "play with himself" in front of me and other staff*

² Section 2.9 of the statement of problem.

members. By “play with himself” I mean he put his hands down his pants and handled his penis. He did this regularly. It was an everyday thing with [Mr Z]. I never said anything. I just shook my head and walked away and did my best not to look up again until he was gone.

[47] However, in her oral evidence to the Authority, Ms X said that she had seen Mr Z put his hands down his pants just once, out of the office window sideways on when he was talking to his men. This is quite different from what was stated in her statement of problem and her statement of evidence. I agree with Mr Z that this was an important inconsistency and it casts doubt on her credibility on this issue.

[48] In light of this inconsistency, I decline to accept that this occurred. Alternatively, if it did occur, Ms X seeing Mr Z *handle himself* once out of the window from a distance, sideways on, when the action was not directed at her, and Mr Z was likely not to have been aware that Ms X was watching, does not constitute an unjustified disadvantage.

Rubbing himself against Ms X

[49] In her witness statement Ms X said that, on one occasion, Mr Z pressed his crotch against Ms X’s left arm one day in the office. Mr Z said that the set-up of the office would have made it impossible for him to have done this. Again, this is quite different from what was pleaded in the statement of problem where this behaviour was supposed to have been frequent.

[50] As this is a serious allegation, and there is a straight conflict of evidence between the parties, the inconsistency between Ms X’s statement of problem and her witness statement, together with the inconsistencies referred to above in relation to Ms X’s allegations relating to Mr Z handling himself, casts sufficient doubt for me to prefer Mr Z’s evidence. I therefore reject this allegation.

The remark about Ms X’s uncle

[51] I do find that Mr Z made a remark to Ms X along the lines she alleges. This is because of the consistency of Ms X’s evidence about this event, and that her friend gave evidence that Ms X told him about the remark at the time, and that it had affected her emotionally.

[52] However, as will be explained below, I also find that Mr Z dismissed Ms X instantly when he told her to *f*** off* earlier in the day. Therefore, when the remark about her uncle was made, Ms X was no longer an employee. This means that she cannot satisfy the definition of an employee which is required for her to succeed in a personal grievance action for disadvantage under s.103(1)(b) of the Act. Nor does she satisfy the definition of employee under s.103(1)(d), which refers to sexual harassment in employment.

[53] Despite this finding, I will be able to take the remark into account when considering remedies.

Was Ms X subjected to unjustified disadvantage by not being given the training she was promised?

[54] Ms X did not give a great deal of evidence about the effect on her of not having had the training she was promised. She said in her written evidence that she had a lot to learn but did not say how she was hampered by not getting training. Whilst Ms X was accused of being incompetent by Mr Z, she denied this.

[55] Overall, whilst I accept that Ms X was promised training, and that the training she got was patchy at best, I am not satisfied that the lack of structured training caused Ms X a clear disadvantage in her employment.

Was Ms X subjected to unjustified disadvantage by not being paid wages she was due?

[56] Ms X received a regular payment of \$650 a week after deduction of PAYE. However, she was only paid \$250 in the last payment she received, which covered the week ending 7 September 2014. Mr Z admitted this in his oral evidence, saying that he had withheld the remaining pay due because Ms X had been over paid because she did not work the hours she was supposed to. However, no wage and time records had been produced, and there is no independent evidence that Ms X did not work the hours she was supposed to.

[57] I am satisfied that Ms X is entitled to receive the remaining \$400 nett that was due to her in respect of the pay period in question, together with a further \$390 nett in respect of not being paid for the period 8 to 10 September 2014.

[58] However, I do not believe that the non-payment of these sums is an unjustified disadvantage in Ms X's employment because she was either not an employee when the payments fell due (in respect of the payment for the period 8 to 10 September, which were due to be paid the following Wednesday) or because any disadvantage would have lasted for a very short period before she ceased to be an employee (in respect of the short payment of wages in respect of the preceding week. I order the respondent to pay the arrears to Ms X below.

Was Ms X unjustifiably dismissed?

[59] The issue to determine in respect of the alleged dismissal is whether Ms X was dismissed on 10 September 2014 by Mr Z's words, or whether she was stood down, as asserted by Mr Z. If she was stood down, when and how did her employment come to an end? It is necessary to examine closely the interactions between the parties immediately prior to 10 September 2014, the events of 10 September 2014 itself, and those of the ensuing days, to determine exactly what is likely to have occurred.

[60] It is instructive to first examine the texts sent between Mr Z and Ms X on 8 September 2014 to get a flavour of the dynamic between them at that time. The first relevant exchange of texts is between Mr Z and Ms X and is as follows³:

[Mr Z to Ms X]: *U need to f***ing take note, I'm over it. I have had it [X]. I really over it. U be in the office tomorrow. What did you buy? I mean it, I over u and mistakes. Think you better look for other job.*

[Ms X to Mr Z]: *What the hell; you told me to pay them. 2 boxes of envelopes ask. I was told to do about 3 weeks ago and have waited for you to pay before they send them out.*

[Mr Z to Ms X]: *U paid too much and you changed your pay. Sorry, I don't think you any good for my company. You changed your pay. Paid for every day off. I'm over you, so [slowly?] you making me broke. 900 bucks for envelopes too much. So I'm over it. U changed your pay so don't lie. [that's that] you have been paid every day off. You not honest enough for me so see you tomorrow.*

[61] On 9 September 2014 the two had further text exchanges. Not all seems to be relevant, and it is not easy to follow them all, as the order of the exchanges is not clear, but they include the following:

³ All reproductions of texts have had spelling/typing mistakes corrected, and punctuation added, for ease of comprehension. Uncertainty of meaning has been indicated by square brackets and a question mark. Swear words in the original texts were written in full.

[Mr Z to Ms X]: *I just stop it. What are you doing today?*

[Ms X to Mr Z]: *What you mean you stopped it. I am doing invoices.*

[Mr Z to Ms X]: *That's all you do. You owe me how many days? How many invoices you do today?*

[texts omitted]

[Mr Z to Ms X]: *Your 3 months trial is up for review.*

[Ms X to Mr Z]: *Are you firing me? I have passed my 3 month trial. I started in May.*

[Mr Z to Ms X]: *No you haven't. U changed your wages back \$650; that's theft.*

[62] Ms X also received text messages from Mr Z on the afternoon of 10 September 2014. Mr Z again stated that Ms X had changed her wages, which he said was theft. He also stated the following:

U not fired; you havnt; u not up to speed and invoices a mess. You don't do 8 hours u not make rules. I will stop them. I will write out a cheque. U owe me 7 days so u going to pay them. We will have a meeting. How many people u like to take to court. U know u done wrong. My MYOB is a mess. Thanks for what.

*[Get] f***ed is not to be taken lightly so u got a lot to answer for. I should known better than to help u. Sorry I started. Last week May u have had over a week off. U just come to 3 months now.*

[63] Ms X's supplementary evidence was that Ms B spoke to her on 10 September, when Ms X first met Ms B face to face while Ms X was returning the keys and the phone, and that Ms B said *we need to have a meeting so we can sort it out.*⁴

[64] Ms X reproduced in her supplemental statement some contemporaneous notes which she says she made on the evening of 10 September 2014 (which I accept she did). In these notes, Ms X describes the meeting when she returns the keys and phone, and states:

*I was told to f*** off by [Mr Z] at roughly 11.30am 10th September and that he wont be paying me for last week which is due to be paid into my account tomorrow the 11 September and told by his partner [Ms B] not to come to work, yet when I asked them to also write down and sign a letter to me stating exactly what my current job status is and whether im required to attend work in the morning so they cant accuse me of abandoning my job and what im being sent home from work for [Mr Z] refused and said he doesn't have to give me anything in writing. [Text omitted] They then said im not fired after I got told to f*** off, yet im not wanted at work and have been asked to hand in the items required to do my job so that indicates to me that im being fired or dismissed, unjustified dismissal and with*

⁴ I believe that this statement was made a little while after Mr Z had sent his text to Ms X, although the timing is not entirely clear.

the lack of training given to me to enable me to do my job is also constructive dismissal, setting me up for failure after I told [Mr Z] what I could and couldn't do hence why he said he would organise the appropriate training for me which he hasn't.

*Am I suspended without pay? Am I fired? That is why I needed written signed confirmation from [Mr Z] stating what my current status is after being told to f*** off and hand the gear needed to do my job in to them.*

[Ms B] also told me she would ring me tonight the 10th September regarding a written up signed copy of my job status and the returning of the keys and cellphone. I have not heard from her at this stage of 7.30 pm.

[65] Ms X later received two voicemail messages from Ms B on the evening of 10 September. The second voice mail included the following:

Hi [Ms X], it's [Ms B] calling in regards to a time for a meeting to go forth. [text omitted]. ..there is some major issues going on with your work. You need to contact me with a suitable time to come to this meeting. Um, if you can forward me an address, I will deliver you a signed letter and we will go from there. So the sooner you contact myself or [Mr Z], the sooner we can go forth with this meeting. Many thanks. Bye now.

[66] After receiving that message, Ms X sent an email to Mr Z asking for the status of her employment, and asking, amongst other things, for the reasons why she was ordered off site. She also contacted her legal advisers for the first time and asked for their assistance as she was unsure of her employment status.⁵

[67] Mr Z replied to Ms X's email on 11 September. Whilst a long email, it is worth replicating in full, as this was Mr Z's chance to clarify Ms X's employment status, and it sheds a light on Mr Z's attitude towards Ms X at that time. Paragraph breaks, punctuation and assumed missing or misused letters and words have been added or changed to assist comprehension.

*Yes, you were asked to leave by myself [Mr Z] as I will not be told to f*** off; that's the reason. As meetings I have had, you[r] workmanship on my invoices is very poor; as you have cost [Y Limited] thousands of dollars [with] underquoted work; as you spend more time on phone with not [Y Limited] business.*

Your job is to answer phones, reconcil[e] invoicing. You have not done any of this. I'm still through the mess [and] half done work. You have been here 3 months, had 2 weeks off. You do 5 hours a day, get paid for 8. You changed your wages back after I left you to pay bills, as [I have] been to the bank.

⁵ There was produced to the Authority a number of file notes made by a member of staff of Ms X's legal advisers, as well as copy communications between them. Ms X and Mr Moore confirmed that Ms X waived the legal privilege attaching to her communications.

You have been paid for every day off you have had; all the hours you have been paid for your poor work [efforts]. You need to come clean.

It's not about you and your personal life; it's about [Y Limited]. You have told me you can't do the phones, [diary]; I can't do GST. As you not putting data in MYOB after [spending] time with John who showed you.

You have put [Y Limited] in hard times with your pricing. You haven't done all invoices. You don't follow up on people. You just leave message[s]. You don't answer calls from office phone. You changed my phone plan behind my back. You [are] not what I need in my company.

I told you we will have a meeting to talk about your job when back in the office after I finish jobs.

I have a lot of clients now ringing about incorrect invoices you know about but didn't even correct for them. The list goes on and on.

*Sorry [Ms X], this is all your doing. You do not tell your boss to f*** off. As [for] your meeting, it will be in my office. And you stop telling lies; and you sent me a text saying I better not make this personal so my lawyer takes that as a threat. You need to be honest with yourself. You owe [Y Limited] hours and have been well over paid for what you have done. You have done nothing but ride [Y Limited] out. The hours you done to the work that you done is well out, and all I hope is that I can trade out of this mess you have left. So as what you were hired for, you cant tell me you a[re] able to take office tasks on...[Mr Z].*

[68] It appears from a note of Ms X's adviser that, as at Thursday 11 September 2014, Mr Z wanted the meeting to occur the next day, although no time had yet been set. Ms X's adviser suggested that Ms X would be able to say that she could not attend as she was obtaining advice. The note also indicates that Ms B had sent Ms X a text stating that the meeting was to be disciplinary in nature, although no details were provided about what would be discussed specifically in the meeting. In her oral evidence to the Authority, Ms B said that the purpose of the meeting was to ascertain whether Ms X was *an asset or a liability to the company*.

[69] It is clear from the adviser's note that Ms X was advised not to attend the meeting until the allegations had been made clear. The oral evidence from the parties was that the date of the meeting was at some point changed to the following Monday, but that there was a disagreement as to where it should occur, Mr Z wanting it to take place at Y Limited's premises, whereas Ms X wanted it in a neutral venue.

[70] Mr Moore sent a personal grievance letter on behalf of Ms X on 15 September, and Mr Z replied by email on Thursday 18 September. In it, he stated that he did not dismiss Ms X, but asked her to leave because she had told him to *f*** off*. He also stated that Ms X was supposed to ring him after three days. He also stated *hope for*

your sake no personal stuff comes up at the meeting, but it is not clear what he meant by that reference to a meeting. It appears that Mr Z and Ms B had no further communications with Ms X or her legal advisers (until the Authority's process was underway) and so the meeting never took place.

[71] My analysis of these events is that, at the time he shouted at Ms X on 10 September, Mr Z had lost his temper due to his loss of patience at his perception of Ms X's inadequate work performance. He told her to leave and did not make it clear that he was standing her down. Whilst she was used to his swearing and outbursts, his attitude was different on this occasion, and she understood she was being dismissed.

[72] I find that Mr Z was intending to dismiss Ms X when he uttered the words he did. I come to this conclusion based on the references in Mr Z's earlier texts to Ms X when he wrote *Think you better look for other job* and *Your 3 months trial is up for review*, and afterwards, when he wrote *U just come to 3 months now* and *You [are] not what I need in my company*. I do not believe that Mr Z said the words he did because of Ms X swearing at him; but he did so because he believed that Ms X was not doing her job properly and had changed Y Limited's bank details to restore her wage rate. If Ms X swore at Mr Z, it was because she was replying to his swearing.

[73] I find that, soon after telling Ms X to leave, Mr Z calmed down and feared that he had overstepped the mark, and so consulted Ms B, who had some HR experience. I find that Ms B then embarked on a course of action to try to rescue the situation on behalf of Y Limited. This involved trying to arrange a disciplinary meeting where Mr Z's concerns could be put to her within a lawful framework.

[74] The trouble with this plan is that it came too late. Mr Z's actions on 10 September had the effect of dismissing Ms X immediately. The later attempts to re-engage with Ms X and hold a meeting were actions that the respondent could try to take, but Ms X was not obliged to attend the meeting because her employment had ended. She no longer owed a duty of good faith to Y Limited.

[75] In *Akmedov v KH International Ltd*⁶ the Authority found that a dismissal could not be withdrawn without the express consent of the employee. This follows a

⁶ [2016] NZERA Wellington 30

line of cases, including *New Zealand Labourers IUOW v Hodder & Tolley Ltd*⁷ and *Stiffe v Wilson & Horton Ltd*⁸

[76] In *Osborne v Japan Auto (NZ) Limited (t/a ABC Motor Group Ltd)*⁹ the Employment Court held that an employee's failure to enter into discussion with the employer about his grievance raised after a heat of the moment dismissal included an element of him taking advantage of the employer's lack of self-control. His Honour Judge Travis said that Mr Osborne's refusal to consider any other alternatives when pursuing his monetary compensation in a situation where it was clear that the dismissal was as a result of a loss of temper, *could arguably constitute contributory blameworthy conduct*. Judge Travis accordingly reduced the award of loss of earnings from 12 months to 6 months.

[77] I believe that the current situation is quite different, however. In the current case, firstly, Ms X was not given a clear indication of what the proposed meeting was to be about. Secondly, she continued to receive angry text and email communications from Mr Z which made a slew of allegations. Mr Z's statements in his text and email communications that Ms X had not been fired were of little persuasive impact when, in the same communications, Mr Z was making comments which indicated that Mr Z believed that Ms X was not suitable for his company and that he could dismiss her under a trial period.

[78] In those circumstances, Ms X was reasonably apprehensive about attending a meeting and was suspicious as to the motives for it. In addition, Ms X was very upset at the remark that Mr Z had made to her about her uncle. At no time during this period did Mr Z apologise to Ms X for reacting as he did and for making the remarks he did.

[79] In conclusion, I find that Ms X was dismissed on 10 September by Mr Z's actions. When the respondent attempted to rescue the situation by saying Ms X had not been dismissed, Ms X was entitled to continue to treat herself as dismissed. The prospect of re-entering employment with the respondent in order to undergo a disciplinary meeting, the agenda of which was unclear, was, not surprisingly, not sufficient to persuade her to give the respondent, and Mr Z, a second chance.

⁷ [1989] 1 NZILR 430 (LC)

⁸ EC Auckland AC94/00, 5 December 2000.

⁹ [2003] 1 ERNZ 270

[80] Accordingly, I find that Ms X was unjustifiably dismissed, as no fair and reasonable employer could have taken the actions it did in all the circumstances.

Is Ms X owed arrears of pay?

[81] I have already found that she is.

Are penalties liable to be imposed?

[82] Ms X seeks penalties to be imposed in relation to the following:

- a. Unfair bargaining; and
- b. Failure to provide wage and time records.

Unfair bargaining

[83] Section 60 of the Act provides as follows:

60 Object of this Part

The object of this Part is—

(a) to specify the rules for determining the terms and conditions of an employee's employment; and

(b) to require new employees, whose terms and conditions of employment are not determined with reference to a collective agreement, to be given sufficient information and an adequate opportunity to seek advice before entering into an individual employment agreement; and

(c) to recognise that, in relation to individual employees and their employers, good faith behaviour is—

(i) promoted by providing protection against unfair bargaining; and

(ia) required when entering into and varying individual employment agreements; and

(ii) consistent with, but not limited to, the implied term of mutual trust and confidence in the relationship between employee and employer.

[84] Section 60A provides

60A Good faith in bargaining for individual employment agreement

(1) The matters that are relevant to whether an employee and employer bargaining for an individual employment agreement are dealing with each other in good faith include the circumstances of the employee and employer.

*(2) For the purposes of subsection (1), **circumstances**, in relation to an employee and an employer, include—*

(a) the operational environment of the employee and employer; and

(b) the resources available to the employee and employer.

[85] The relevant parts of s.63A provide:

63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement

(1) This section applies when bargaining for terms and conditions of employment in the following situations:

:

(e) in relation to terms and conditions of an individual employment agreement, including any variations to that agreement:

(f) where a fixed term of employment, or probationary or trial period of employment, is proposed:

:

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement under discussion; and

(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and

(c) give the employee a reasonable opportunity to seek that advice; and

(d) consider any issues that the employee raises and respond to them.

(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.

(5) The requirements imposed by this section are in addition to any requirements that may be imposed under any provision in this Act.

:

(7) In this section, employee includes a prospective employee.

[86] It appears that Mr Z did provide a copy of the intended agreement to Ms X, as he directed her to the template on the computer. I do not believe that he advised her that she was entitled to seek independent advice about the intended agreement, but Ms X did have time to get that advice, as she was able to suggest amendments. However, Mr Z did not consider or respond to any issues that Ms X raised with him. It was for this reason that the agreement was never signed by either party. All of the requirements at s.63A(2) must be complied with, not just some of them.

[87] Y Limited is a small employer and had very limited resources. Section 60A requires me to take these factors into account when deciding whether Ms X and Y Limited were dealing with one another in good faith. From Ms X's evidence, Mr Z did not refuse point blank to listen to her concerns about the draft agreement, but kept on putting it off until Ms X gave up asking. However, s.63A makes clear that the employer must carry out, at least, the actions set out in s.63A(2). The question of good faith appears to be a separate consideration.

[88] Whilst I find that Y Limited was not bargaining in bad faith, it still failed to comply with parts of s.63A(2), and it is appropriate to impose a penalty. The penalty should be modest, as it is not clear that any serious harm was suffered by Ms X by Y Limited's failures. Although there was a unilateral withholding of final pay, I strongly suspect that that would have occurred whether or not an employment agreement had been in place.

[89] I believe that \$750 is appropriate. The penalty is to be paid to the Crown.

Failure to provide wage and time records

[90] Section 130 of the Act provides as follows;

130 Wages and time record

*(1) Every employer must at all times keep a record (called the **wages and time record**) showing, in the case of each employee employed by that employer,—*

(a) the name of the employee:

(b) the employee's age, if under 20 years of age:

(c) the employee's postal address:

(d) the kind of work on which the employee is usually employed:

(e) whether the employee is employed under an individual employment agreement or a collective agreement:

(f) in the case of an employee employed under a collective agreement, the title and expiry date of the agreement, and the employee's classification under it:

(g) the number of hours worked each day in a pay period and the pay for those hours:

(h) the wages paid to the employee each pay period and the method of calculation:

(i) details of any employment relations education leave taken under [Part 7](#):

(j) such other particulars as may be prescribed.

(1A) The wages and time record must be kept—

(a) in written form; or

(b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.

*(1B) If an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (the **usual hours**), it is sufficient compliance with subsection (1)(g) if those usual hours and pay are stated in—*

(a) the wages and time record; or

(b) the employment agreement; or

(c) a roster or any other document or record used in the normal course of the employee's employment.

*(1C) In subsection (1B), the **usual hours** of an employee who is remunerated by way of salary include any additional hours worked by the employee in accordance with the employee's employment agreement.*

(1D) Despite subsection (1C), the employer must record any additional hours worked that need to be recorded to enable the

employer to comply with the employer's general obligation under section 4B(1).

(2) Every employer must, upon request by an employee or by a person authorised under section 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.

(3) [Repealed]

(4) Every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority.

(5) An action to recover a penalty under subsection (4) may also be brought by a Labour Inspector.

[91] It is clear from the evidence presented by Ms X that Mr Moore asked for wage and time records on several occasions, but they were never provided. I agree with Mr Moore's submission that flagrant breaches of the Act should not be ignored by the Authority, and agree that a penalty should be imposed. I set that penalty at \$1,000. In this case, harm was done to Ms X by this failure, as she has had to piece together pay information from her own records. I therefore order that this penalty be paid to Ms X pursuant to s.136(2) of the Act.

Remedies

[92] Having found that Ms X was unjustifiably dismissed and unjustifiably disadvantaged in her employment, I now turn to remedies. Sub-section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

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

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[93] Section 128 of the Act states as follows:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Lost wages

[94] Ms X's evidence is that she was traumatised by what had happened to her while working for Mr Z and that, when she was dismissed, she had serious financial difficulties. There was a period when she was only able to eat oatmeal until her niece repaid a \$30 loan to her so she could then buy some more nutritious food.

[95] She also became ill, needing to call the suicide helpline, attending her GP and seeking the assistance of a psychologist. As a result, she was unable to find new employment.

[96] Although she was out of work for more than six months, Ms X seeks reimbursement of only six months' pay, which comes to \$16,900 nett of tax and deductions (\$650 nett x 26 weeks). I believe that this is a case where it is appropriate to exercise the Authority's discretion under s.128(3) and order the respondent to pay more than *the lesser of a sum equal to lost remuneration or to 3 months' ordinary time remuneration*. I therefore agree that reimbursement of six months' pay is appropriate.

[97] In addition to this lost pay, holiday pay is to be added. At 8%, this comes to an additional \$1,352 nett, giving a total of \$18,252.

[98] Ms X also seeks reimbursement of the KiwiSaver portion of her pay, as she says that she was never given the KiwiSaver forms to fill out. However, as Ms X did not ask to be enrolled, and only raises this issue now, after her employment has ended, I am not convinced on a balance of probabilities that Ms X would not have opted out

of KiwiSaver had she been enrolled. I therefore decline to add loss of the KiwiSaver benefit to her remedies.

Interest

[99] Ms X seeks interest on the sums awarded. Clause 11 of Schedule 2 of the Act provides as follows:

11 Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

(3) Subclause (1) does not authorise the giving of interest upon interest.

[100] Section 87(3) of the Judicature Act 1908 provides that the term *the prescribed rate* means the rate of 7.5% per annum, or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order-in-Council. Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 currently prescribes for the purposes of s.87 of the Judicature Act 1908 the rate of 5% per annum.

[101] The wording *recovery of any money* is drafted widely enough to permit interest to be awarded in respect of the lost wages, holiday pay and the unpaid arrears of pay. I order that interest is to be paid on these sums, as specified below under *Orders*.

Compensation for humiliation, loss of dignity, and injury to Ms X's feelings

[102] I now turn to compensation for humiliation, loss of dignity, and injury to Ms X's feelings. Ms X seeks a global sum of \$25,000, which falls in the upper part of the range usually awarded under this heading¹⁰.

[103] Ms X was undoubtedly detrimentally affected by the events she experienced during her employment, and significantly so by the manner of her dismissal. Ms X attempted to obtain evidence from her psychologist, but he reportedly lost Ms X's

¹⁰ See *Hall v Dionex Pty Ltd* [2015] NZEmpC 29

consultation notes. Whilst I am satisfied that Ms X suffered a fairly significant psychiatric relapse after her dismissal, I must be cautious of automatically assuming that it was caused solely or principally by her dismissal.

[104] Ms X has a very distressing history caused by sexual abuse of her by her uncle and it appears that some of her feelings of trauma during her employment were triggered by her counsellor telling her she was raped by the uncle. Psychiatric counselling is often a complex and unpredictable process during which patients experience intense feelings, as they relive traumatic events. As I have been unable to question Ms X's psychologist, or see his consultation notes, I simply cannot begin to tease apart what distress was caused to Ms X by the fact and manner of her dismissal on the one hand and what was caused by her relieving her traumatic past during and after counselling sessions. It would be too simplistic to assume that the relapse was caused by Y Limited alone.

[105] I believe that an appropriate award for the disadvantage I have found in Ms X's employment is \$2,500. As for the dismissal, this was carried out in a brutal way, which caused Ms X distress and upset, and Ms X was left not knowing for certain whether she had been dismissed or not, although she suspected she had been. I believe that an award of \$8,000 is appropriate for the effects she suffered immediately after her dismissal.

[106] Added to that I must take into account the comment made to Ms X by Mr Z when she returned to return company property two hours after her dismissal. In *Strachan v Moodie t/a Moodie & Co*¹¹ compensation for hurt and humiliation was increased due to the conduct of the employer after dismissal. I believe that this is a case which lends itself to such an increase.

[107] Whilst Mr Z was clearly angry at Ms X, and no doubt his anger overruled his head, he still made a deliberately cruel remark that was designed to cause Ms X maximum hurt and upset, which it did. Ms X had put her trust in Mr Z by telling him about a very upsetting period of her life, so she could attend counselling during working hours, and Mr Z betrayed that trust and acted with malice. I believe that the impact on Ms X was significant, and I believe that she is entitled to a significant increase in compensation as a result. I fix the element of that increase at a further

¹¹ [2012] NZEmpC 95 at [129]

\$8,000, bringing the total compensation for the dismissal to \$16,000 and total compensation payable under s.123(1)(c)(i) to \$18,500.

Contribution

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

[109] Mr Z says that Ms X swore at him on 10 September 2014. I accept that, in the heat of the moment, Ms X is likely to have done so. However, I find that Mr Z started the exchange when he told Ms X to *f*** off*, and that Ms X simply used swear words in reply. Furthermore, Mr Z is clearly someone who swears as a matter of course, and I do not accept that he was genuinely upset or offended by Ms X swearing back at him. In other words, I do not find that Ms X swearing contributed to the situation that gave rise to her personal grievance. I therefore decline to reduce the remedies on the basis of Ms X swearing.

[110] Mr Z also says that Ms X was not good at her job, and cost his company significant losses. However, he did not attempt to performance manage Ms X in any reasonable way, but apparently just abused her orally and by text. He also did not produce any documentary evidence to show the poor performance, or the losses. However, I do accept the evidence of Ms B that she and Mr Z had to spend a considerable amount of time after Ms X's dismissal sorting things out for Mr Z.

[111] I believe that Ms X was struggling to perform her duties properly, but that this was likely to have been because of a lack of structured training and clear instruction from Mr Z. I do not find that Ms X's performance contributed to the situation that gave rise to her personal grievance in any blameworthy way. I therefore decline to reduce the remedies otherwise due to Ms X.

Orders

[112] I order Y Limited to pay the following sums to Ms X:

- a. Arrears of pay in the sum of \$790, nett of tax;
- b. Lost wages in the sum of \$16,900, nett of tax;
- c. Holiday pay on items (a) and (b) in the sum of \$1,415.20, nett of tax;
- d. Compensation pursuant to s.123 (1)(c)(i) of the Act in the sum of \$18,500;
- e. A penalty in the sum of \$1,000;
- f. Interest on the sum at sub paragraph (a) calculated at the rate of 5% per annum from 17 September 2014¹² until payment to Ms X of such sum in full; and
- g. Interest on the sums at sub paragraph (b) and (c) calculated at the rate of 5% per annum from the date of this determination until payment to Ms X of such sums in full.

[113] The respondent must also pay a penalty in the sum of \$750 which will go to the Crown. This penalty must first be paid into the Authority by the respondent. The Authority will then pay the penalty into a Crown Bank Account.

Costs

[114] Costs are reserved. The parties are to try to agree how costs are to be dealt with. If they are unable to agree within 14 days of the date of this determination, then Mr Moore may serve and lodge a memorandum, in which he sets out what costs have been incurred by Ms X, the contribution which he seeks on behalf of Ms X, and the basis for that. Y Limited will have a further 14 days within which to serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority

¹² The latest date by which Ms X would have reasonably expected this sum to have been paid to her.