IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 35
5387989

	BETWEEN	MIA NELSON Applicant
	A N D	TONY KATAVICH First Respondent
	A N D	HALDEMAN LLC Second Respondent

Member of Authority:	David Appleton
Representatives:	Luke Acland, Counsel for Applicant Kate Warrender, Advocate for Respondents
Investigation meeting:	20 December 2012 at Nelson, 21 December 2012 by telephone
Submissions Received:	21 and 31 January and 8, 13 and 15 February 2013 from Applicant 31 January 2013 and 1, 13 and 15 February 2013 from Respondent
Date of Determination:	19 February 2013

DETERMINATION OF THE AUTHORITY

A. Ms Nelson's employer was Haldeman LLC, and not Mr Katavich personally.

B. Ms Nelson's personal grievances for unjustified disadvantage (demotion) and unjustified dismissal succeed. Her personal grievance for unjustified disadvantage (suspension) fails. Her claim for unpaid wages succeeds. Her claim for a bonus fails.

C. The second respondent's counterclaim fails.

D. Costs are reserved

Employment relationship problem

[1] Ms Nelson claims that she was unjustifiably dismissed on 27 June 2012 and was subjected to actions amounting to unjustified disadvantage in her employment by being demoted and later suspended from her employment prior to her dismissal. She also claims that wages have been unlawfully withheld.

[2] The respondents deny that Ms Nelson was unjustifiably disadvantaged by being demoted and that she was unjustifiably dismissed. They counterclaim against her in respect of payment of a sum that they say was made to Ms Nelson dependent upon her remaining in employment until April 2013.

[3] There is also in dispute the identity of Ms Nelson's employer. Ms Nelson asserts that Mr Katavich himself was her employer whereas the respondents assert that Haldeman LLC was Ms Nelson's employer.

[4] Evidence was given in person at the Authority's investigation meeting by Ms Nelson and by her partner Mr Dean, as well as by Ms Warrender (an employee of the second respondent) who also represented the respondents. Mr Katavich did not attend the investigation meeting and initially had not intended to give evidence at all according to Ms Warrender. He changed his mind about this after I explained to Ms Warrender, who is not a lawyer, that this meant that Ms Nelson's evidence would carry more probative weight where it conflicted with Mr Katavich's as she was present to be questioned, whereas Mr Katavich was not. Consequently, Mr Katavich's evidence was taken by telephone on 21 December 2012.

Brief account of the events leading to the dismissal

[5] Ms Nelson, a citizen of the United States of America, was offered a job by Mr Katavich on 25 May 2011 working in Invercargill as a *writer and researcher*. She signed an individual employment agreement on 26 May 2011, the employer being identified as *Facts and Information, LLC*.

[6] The core business of Facts and Information LLC, and of its successor company, Haldeman LLC, is the sale of information such as how to obtain employment in the oil and mining industries in Australia.

[7] Ms Nelson explained that she did not have a clear role but basically carried out whatever tasks she was asked to do by Mr Katavich. One particular task that Ms Nelson says that she had to carry out, which is material to her dismissal and this determination, was to create what she called *false blogs* using a number of email accounts which were unconnected to Mr Katavich and his companies and websites, the apparent object being to influence search engine results when certain search terms were entered into Google and other search engines. Ms Nelson explained that, by creating a lot of web content containing certain key words, including the names of Mr Katavich's businesses and words such as *scam*, the nonsense blogs would show up with more frequency than real comments which were negative about Mr Katavich, his businesses and websites. I have reached no conclusion whether Ms Nelson's explanation is accurate but accept that she did create a number of email addresses as part of her role.

[8] On 23 June 2011, Mr Katavich advised all his staff by email that their email addresses had been changed from *@factsandinformation.com* to *@haldeman.co*. He also announced that the website URL had changed to *haldeman.co* and that a new *haldeman.co* website was going to be produced.

[9] During July and August 2011, Ms Nelson and Mr Katavich had some discussions and negotiations about her moving from Invercargill to Nelson. By way of an email dated 30 September 2011, Mr Katavich sent an email to the staff at the Nelson office, as well as to Ms Nelson saying the following:

> *Our Invercargill office has performed admirably since its establishment, and in recognition of this, Mia* [Ms Nelson] *was made Manager a few months back. Now that Kylie will be soon working from home in the Bay of Plenty we are wanting to now extend Mia's role to look after the Nelson office as well. This is a natural extension and I am certain she will perform admirably.*
>
> *Mia's US connection has been also incredibly helpful in completing the establishment of our sales facility in the states – and has directly contributed to the spike in sales we are starting to see from this week. Her official title is that of "Manager" while I get lumbered with the terrible title of "Managing Member".*
>
> *Mia shall be toddling up to Nelson next week to familiarise herself with the operations here. There are a number of issues that she will be working on during this time, for instance:*
>
> - *providing additional sales training, establishing targets and ensuring targets are met*

> - *streamlining the orders process and likewise, establishing targets and ensuring targets are met.*
>
> *Her list of items to work through invariably comes from me, and she acts with my authority, so instructions need to be followed. I am expecting a pleasant shakeup which will lift the performance of everyone in the Nelson office, and enhanced performance invariably leads to enhanced paycheques.*
>
> *Tony*

[10] On 14 October 2011, Ms Nelson created an email address as part of her task creating blogs, described above, called: *hitlerhatesbabies@gmail.com*.

[11] Further discussions ensued between Ms Nelson and Mr Katavich about her moving to Nelson and, on 7 March 2012, Mr Katavich sent an email to Ms Nelson which contained the following sentence:

> *I believe having you based in Nelson and looking after the new staff alongside your other duties, would benefit you financially and would certainly help keep the company's operations running smoothly, and thus me with a cherubic smile on my face.*

[12] Agreement was finally reached between Ms Nelson and Mr Katavich about her moving to Nelson in mid-April 2012 and, on 16 April 2012, Mr Katavich asked Ms Nelson to sign a new employment agreement in the name of Haldeman LLC. This was based on the agreement she had signed with Facts and Information LLC but contained different remuneration clauses. Relevant clauses included:

> ***7.2 Additional bonuses at the Employer's Discretion***
> *The parties agree that the Employee may, at the Employer's sole discretion, be paid additional bonuses. Note that the employer will only consider paying bonuses for truly exceptional performance.*
>
> ***7.5 Encouragement Payment***
> *The Employer will pay to the Employee a one-off sum of $10,000 before tax as an encouragement to work from the Nelson office rather than Invercargill. This payment is made on the assumption that the Employee will work from the Employer's Nelson office for a period of at least one year. If this revised employment agreement is terminated before twelve months have elapsed, a pro-rata deduction of this sum may be made from the Employee's pay.*
>
> ***10.3 Use of internet and email***
> *The Employee will have access to email and the Internet in the course of their employment. The Employee shall ensure that at all times their use of the email and Internet facilities at work meets the ethical and social standards of the workplace. Whilst a reasonable level of personal use is acceptable to the*

Employer during break times, this must not interfere with the Employee's employment duties or obligations, and must not be illegal or contrary to the interests of the Employer. The Employee shall also comply with all email and Internet policies issued by the Employer from time to time.

12.3 Termination for Serious Misconduct

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

(i) theft;
(ii) dishonesty;
(iii) harassment of a work colleague or customer;
(iv) serious or repeated failure to follow a reasonable instruction;
(v) deliberate destruction of property or business relationships pertaining to the Employer;
(vi) actions which seriously damage the Employer's reputation.

[13] This agreement was signed by Mr Katavich and by Ms Nelson on 16 April 2012.

[14] On 17 May 2012, a member of staff (Bettina) who was leaving her employment, sent an email to all the members of staff, except Mr Katavich, inviting them to a barbecue which was to take place at the house of a former employee called Laura. The barbecue took place on Friday, 18 May, which Ms Nelson attended, and it is Ms Nelson's evidence that, when she went to work the following Monday, 21 May 2012, she found that all the furniture had been taken out of her office save for the desk, a chair, a phone and a laptop computer. She said that the framed pictures on the wall had been removed, as well as the couch, the side table, the rubbish bin and the extra chairs. The desk had also been turned around to face the wall towards the back office so that her back would be facing the glass wall to the foyer. Ms Nelson's evidence was that the room had been *basically turned into a cell and positioned so as to put me in the "dunce hat corner"*. She said that she felt humiliated because everyone was talking about it and she did not know what it was about or why it was in that state at the time.

[15] Ms Nelson says that, when she turned on her computer, she saw an email from Mr Katavich asking her to drive out to a cabin in Brightwater (also known as *the cottage* and *the remote office*) which Mr Katavich was renting as extra office space. When she arrived, Mr Katavich asked her about the event to which he had not been invited and she realised this was reference to Bettina's barbecue. She was told to

write a list of the names of every person who was at the party and, when she did that, she was told to leave. Ms Nelson's evidence was that her impression was that Mr Katavich was concerned there had been damaging talk about him and Haldeman LLC amongst the staff, although she said that that had not been the case and she explained that to Mr Katavich.

[16] Mr Katavich then sent an email to Ms Nelson in the following terms:

> *Subject: decision making*
>
> *Mia*
>
> *You failed to disclose to me, when you had ample advance warning, that a company gathering was planned to be held at a disgruntled former staff member's house, who left on bad terms of her own making, and to which all the staff were invited. This is an area of responsibility that falls on you – I ought to have been alerted to this rather than intentionally kept in the dark, when should have been abundantly clear to you that the venue and host for a company event for my staff was utterly inappropriate.*
>
> *This was a major error of judgement. I require good judgement in staff who are to work closely alongside me. I no longer believe you are ready for "assisting with the management of staff as required", as is detailed in your contract, so will not require you to undertake these duties any longer.*
>
> *You need to focus on your projects, namely standardising the rest of the sites with australia-mining. We are paying you top dollar for this work so there are to be no distractions – no radio, no music, lose the picture cut out which obstructs your screen – you are to focus on your work and deliver results for the company. By the end of the day I want to see a complete list of the all improvements* [sic] *made to australia-mining and it's* [sic] *associated outbound emails, and details of which of these improvements need to be rolled out across the other sites. I also want a list of other outstanding projects on your list so that these may be reassigned as necessary.*
>
> *I cannot underline enough how disappointed I am in your decision making over this critical issue. I am doubtful whether I can again have confidence that you will give me wise counsel, so in future I will seek counsel from other staff on substantive issues.*
>
> *Tony*

[17] On the same day, Mr Katavich sent an email to all the staff which included the following passages:

> *As a matter of decorum and professional courtesy, I am aware a company event of sorts transpired on friday evening to which some knucklehead(s) omitted to invite me. A repeat will see the culprit(s) christmas bonus withdrawn, and a declaration of elephant month. It*

> *was a serious error of judgement that lead* [sic] *to existing staff members being hosted at the house of a disgruntled former staff member who left under bad terms, and in idiotic circumstances of her own making. I have not previously elaborated on the circumstances surrounding her departure but given the events of friday will do so now:*
>
> *Laura signed a contract to work for a specific wage rate. We paid her this wage rate for all the hours that were due. Upon receiving her second pay slip, she resigned without providing the required notice and walked out of the office, throwing a splendid tantrum in the process. In a series of childish emails, she tried to claim she had not agreed to work for the rate specified in the contract she had signed, and that she had apparently stated during the interviews she said she was not prepared to work for this rate. Her claims were a nonsense, neither I, Mia or Bettina had any recall or notes about her expressing unease about her pay rate – if she had made a fuss in the interview she wouldn't have been offered the role – and of course if she was not happy with the rate, why on earth sign the contract. There is a sensible way to go about these things – and there is the way of the spoiled brat. Several of you have approached us about pay rates and this has been dealt with in a cordial, adult way. Others have not approached me and in some instances I have increased pay of my own volition to recognise effort, and this pay adjustment process is nearing completion.*
>
> *In any case, given this it ought to be abundantly clear to anyone with the above detailed prior knowledge of the matter, that having a company function hosted at the house of a disgruntled former staff member was a monumentally stupid idea. Due to this event occurring and me not being alerted by the staff member tasked with planning of this nature, from now on Mia will be focusing on standardising all our websites. Because this work requires concentration, I ask that no-one disturb her in her office unless it is break time.*
>
> *From today, I will have Kate look after you lot, she will be the point of contact for training and support. Watson will however look after leave requests, payroll etc.*
>
> *Tony*

[18] Mr Katavich explained *elephant month* in a subsequent email, but it is not necessary to repeat it here as it was obviously meant to be humorous.

[19] It was Ms Nelson's evidence that she did not know that Laura had left the employment of the company under a cloud prior to the barbecue being hosted at her house.

[20] On Thursday, 24 May 2012, Mr Katavich sent an email to Ms Nelson asking her to go to the cabin and to bring a computer and power cable with her. It is Ms Nelson's evidence that she felt very uncomfortable going to the cabin and being alone with Mr Katavich because she was fearful of how he might try to *humiliate*

and/or discipline her again. Ms Nelson told him by telephone that she would not go and he suggested that Ms Warrender (Kate) go with her.

[21] Ms Nelson's evidence was that she felt intimidated at the prospect of being alone with Mr Katavich and with Ms Warrender, the person who, Ms Nelson said, had just replaced her as the manager, so she again declined saying that she would meet him at the office in town if he wished. Her evidence is that he then called her and threatened her, saying that if she did not come to the cabin *there would be consequences* and that she *really shouldn't go down this path*. Ms Nelson says that Mr Katavich said he would give her 10 minutes to change her mind or he would call his lawyer.

[22] Ms Nelson said she then called the *Employment Relations information line* and spoke with a woman who told her that, if she did not feel comfortable about going to the cabin, then she should not go. Ms Nelson chose to take her advice and declined to go to the cabin. Mr Katavich then offered that another member of staff (Nicole) accompany Ms Nelson instead but, according to Ms Nelson, she again declined that offer given that Nicole was more senior than her. Email traffic ensued between Ms Nelson and Mr Katavich discussing her refusal to go to the cabin. In one of the emails, Mr Katavich wrote:

> *I have already clarified this is **NOT** a disciplinary meeting and you have **NOT** been demoted. **You need to calm down and get back to work,** and present in the remote office tomorrow to discuss the work matters I have outlined.*

[23] Mr Katavich also engaged in email correspondence with Mr Dean, Ms Nelson's partner who had worked for Mr Katavich on occasions, in order to try to resolve the issue. Mr Katavich offered for Ms Nelson to be accompanied by him although Mr Dean was unable to take up that offer as he was in Invercargill at the time.

[24] Ms Nelson's evidence is that the matter was finally resolved because Mr Katavich called her to say that he did not move the furniture out of her room on purpose and, although she still felt humiliated and did not feel that it had been fully resolved, she wanted to get back to normal and do her work so she agreed to attend the cabin the following day with Nicole.

[25] On 28 May 2012, Mr Katavich disseminated a document to all staff entitled *Haldeman LLC Policies and Procedures – version 1 – effective from 28 May 2012*. This contained a number of rules that Mr Katavich wanted to implement in the office, including the following:

> *5.* ***Place, time of work and breaks***
>
> *5.1 Your place of work is the desk at which the phone bearing your name sits atop. Unless it is your break time, you should be sitting at your own desk performing your duties for the company. No-one except Kate should be in anyone else's office unless it is break time for everyone in that office. At all other times, if you need to communicate, use the phone instead of strolling over.*
>
> *…*
>
> *5.4 An audio reminder will play in the reception area to denote the beginning and end of breaks. You need to be back working at your desk once the audio prompt finishes playing. The audio also features Richard Simmons sharing some messages and thoughts.*
>
> *…*
>
> *7.* ***Distractions and work output***
>
> *There are many opportunities to get distracted in the office; many people to talk to, many wondrous sites on the internet, etc. If however I discover you are distracting yourself or others and you are not on your break it tells me two things. First that you have too much time available, and second that you are no doubt also affecting the work output of others. If this occurs, I will start to reduce your hours by up to 10 hours a week (or what is contractually agreed to), until we find the equilibrium where you can get all your work done without distractions and your work output is consistent throughout the hours worked.*
>
> *11.* ***Responsibilities to ensure these policies and procedures are followed***
>
> *We all have a duty to ensure these procedures are followed because it will result in a happy and productive workplace. If you observe behaviour that runs counter to the spirit or word of these policies, raise the issue with Kate or I.*

[26] Prior to this policy document being disseminated, Ms Warrender had emailed Mr Katavich on 23 May 2012 in the following terms:

> *Seem to be having a few Mia led congregations on break that have lasted a while, say 15 mins, twice today at 10 and 2. I have had to go in and ask for them to return to their work stations, not sure how we can nicely approach this, but just wanted to run it past you and ask if you were happy for me to have a quiet word?*

[27] Mr Katavich responded by saying *"hmm yes this is annoying, a quiet word would be in order if you would ta"*. Ms Warrender responded with the words *"words done with all staff for fairness. Josh* [Mr Dean] *never gets involved and sales girls were working, but i have explained about ten min breaks etc to everyone for fairness"*.

[28] On 1 June 2012, Ms Warrender emailed Mr Katavich which included the following paragraph:

> *I am tempted to ask Mia to have a look and fix it by close of tonight? As she is wandering around again. Even after being asked to return to her desk by her colleagues (Nicole L) she has remained in their room. (Carlie advised me Nicole had asked her do so* [sic] *while she was on the phone to Carlie.)*

[29] Later that day, Mr Katavich wrote to Ms Nelson in the following terms:

> *Mia*
>
> *I have had several reports that you have been wandering the office and interrupting other staff in their offices on times other than designated breaks. If confirmed, such conduct would put you in breach of policy 5.1 as outlined in the Policies and Procedure document issued earlier this week. I have reprinted the pertinent policy here:…..* [words deliberately omitted].
>
> *I understand your manager Kate has cautioned you about this conduct previously. If this disruptive behaviour continues, I will convene a formal disciplinary meeting.*
>
> *Please confirm by return email that you acknowledge this and that there will not be a recurrence.*
>
> *Tony*

[30] This email was also copied to Ms Warrender, who was asked to keep *ears/ears* [sic] *peeled and let me know if there are further problems*. Later that day, Ms Warrender wrote an email to Mr Katavich in the following terms:

> *Mia is still sat with orders, despite your email, and has had adequate time to have read it, I suggest, if she likes this office, she work from there and orders move to the front? The* [sic] *always moan about being in the back?*

[31] Ms Nelson had also responded to Mr Katavich's email by saying that she understood that other staff members had also been wandering the office, and outside of the office, for extended periods of time outside of designated breaks. She also

stated that this was the first she had heard of this being an issue, her manager Kate having not said anything to her. She also stated that she had not been interrupting the staff and that they were all working diligently. Ms Nelson also referred to other staff displaying *aggressive behaviour*, and cited examples. Ms Nelson's email to Mr Katavich ended by saying that she was more than happy to continue working out in the front office alone if others followed this policy as well and reserve aggressive behaviour for outside of the workplace. Mr Katavich responded to this email in the following terms:

> *If you will co-operate with providing information on other alleged unpleasantness I will investigate, but you cannot choose where you work. You need to work from your desk in the front office.*

[32] On 13 June 2012, Ms Warrender emailed Mr Katavich to say that Ms Nelson was *still wandering around, have emailed her asking for update on autoresponders*. On 14 June 2012, Mr Katavich wrote to Ms Nelson in the following terms:

> *Hello Mia*
>
> *We are going to meet at 8.30am tomorrow, Friday 15 June 2012 in the Stoke office and I would encourage you to have a witness or support person present. This person can verify what happens at the meeting. Your witness can be anyone of your choosing and they are there to observe. The meeting will be a disciplinary meeting to discuss alleged misconduct.*
>
> *Specifically the allegation concerns apparent failure to comply with the following company policy on the afternoon of 13 June 2012:*
>
> "5.1 Your place of work is the desk at which the phone bearing your name sits atop. Unless it is your break time, you should be sitting at your own desk performing your duties for the company. No-one except Kate should be in anyone else's office unless it is break time for everyone in that office. At all other times, if you need to communicate use the phone instead of strolling over."
>
> *This allegation requires an explanation from you. You will be given every opportunity to put your side and whatever you say will be given due consideration before any decision is made.*
>
> *This matter is serious and could result in disciplinary action being taken against you.*
>
> *Yours faithfully,*
> *Tony . Katavich*
> *Managing Member – Haldeman LLC*

[33] It was Ms Nelson's evidence to the Authority that she had not been going into other workers' offices gratuitously but that, in order to do her work, she needed to look at things on the computer with her colleagues which she could not do by telephone. She also said that other members of staff went into their colleagues' offices as much as she did. Evidence was given by Ms Warrender about a *meeting* that had allegedly been led by Ms Nelson on the afternoon of 13 June 2012 which Ms Nelson said had not been a meeting but merely the workers gathering together for a chat after they had all completed their work. Mr Katavich's evidence to the Authority was that Ms Nelson did not need to attend other workers' offices to do her work as her work was self-contained.

[34] Following receipt of the letter from Mr Katavich on 14 June, Ms Nelson responded that evening in the following terms:

> *Unfortunately I am unable to attend the disciplinary meeting tomorrow morning as I have decided to seek legal advice and may be supported by a solicitor. I will advise you of the time of the meeting as soon as possible.*
>
> *Regards,*
> *Mia Nelson*

[35] By way of an email dated 15 June 2012, sent in the morning, Mr Katavich wrote to Ms Nelson in the following terms:

> *Subject: Re disciplinary meeting*
>
> *Mia*
>
> *I understand you told other staff about the disciplinary meeting scheduled for today. It appears you do not understand discretion as these matters are best dealt with* ***privately*** *rather than with other staff aware of what is transpiring.*
>
> *However though since you decided to tell the other staff of your predicament, I have become aware of other deeply troubling issues which will require further investigation:*
>
> *1) that you allegedly may harbour neo-nazi views and have brought these views into the workplace when on company business, thus damaging the company's reputation. Nazism is an abominable slur on humanity and what you believe in yourself is a matter for your conscience, however evidence has come to light that these views were brought into the office and used in relation to company blogs which are publicly available, and in the procurement of supplies for the*

> *company, which if this allegation is proven, cause serious damages the company's reputation* [sic]
>
> *Specifically: that you setup an email address "hitlerhatesbabies@gmail.com" and then used the password for this company account as "ilovehitler"*
>
> *This account was then used to set up company blogs at the likes of wordpress.com etc*
>
> *You then used this same email address and password combination to make payment at a competitor's website for supplies I had requested you order.*
>
> *2) that you allegedly falsified evidence of your resume when originally applying for the role*
>
> *The second issue I recall you advised me of this yourself a little while back and it has been troubling me for some time. I need to know exactly what was falsified on your resume and what is accurate. To assist with this investigation you can provide references or accompanying documentation to confirm the previous employment and credentials you claimed in your resume. Alternatively the other option is for you to sign a disclosure permitting us have* [sic] *an independent company provide a background check in the US to confirm the veracity of your resume.*
>
> *These issues which have come to light are very serious in nature and if proven they could amount to serious misconduct, which could result in dismissal. It is imperative that the company thoroughly investigate these matters.*
>
> *I propose scheduling a disciplinary meeting to discuss the above alleged serious misconduct, and also the earlier allegation giving rise to the meeting scheduled for today. I would suggest Monday 18 June and would appreciate your legal counsel if you are going to engage one, or otherwise you, advising availability on that date.*
>
> *Given the seriousness of the above, as per our phone discussion earlier with you proposing suspension, I have considered your views and believe suspension to be the appropriate course of action.*
>
> *In the meantime,* ***you are now suspended and are to leave the office immediately****. All company property is to be left in the office, including laptop computer and charger, all papers in your possession, the company credit card, and also the login and password to access the company credit card through citibank online.*
>
> *Tony*

[36] Correspondence then ensued between Mr Katavich and Ms Nelson's counsel seeking clarification of the allegation in relation to Ms Nelson harbouring neo-Nazi views.

[37] The disciplinary meeting took place on 25 June 2012 at the offices of Mr Katavich's then legal adviser, although Mr Katavich himself was not physically present, taking part by telephone. Ms Nelson was accompanied by counsel. The Authority had the benefit of handwritten notes made by Ms Nelson's counsel (the respondents' notes apparently not being locatable). These notes show that a number of issues were discussed, including the fact that Ms Nelson had cancelled the firm's credit card while she had been suspended. (She explained that this was because it had been in her name and she did not feel comfortable having a credit card issued in her name given the course of events that were unfolding.)

[38] Ms Nelson's evidence was that Mr Katavich asked her to sign a form which would have allowed him to do a background check on her in the United States. She says she declined to do this because a background check in the USA would just investigate whether she had a criminal history and would not have been about her jobs. Therefore, undergoing such a check would not have been helpful in proving that her résumé was not false. Ms Nelson's evidence was that she had never said to Mr Katavich that she had made up half of her résumé, but that she had said that lots of people exaggerated their résumés. She said that Mr Katavich had not responded when she had said this.

[39] Mr Katavich's evidence was that his decision to dismiss Ms Nelson was not because of the credit card issue, nor the fact that Ms Nelson had been wandering around the offices, but because she had harboured Nazi views and brought them into the workplace, risking the reputation of the company. In addition, he believed that, given what Ms Nelson had allegedly said about *half of her résumé not being accurate*, he felt that he had an *imposter* in the office who had refused to cooperate in verifying the details of her CV. He felt that these two issues adversely impacted on the trust that he needed to have in her as an employee.

[40] Mr Katavich sent a letter to Ms Nelson dated 26 June 2012 which contained the following passages:

> *Dear Mia*
>
> *I have heard and considered at length your responses to the allegations of serious misconduct discussed during the disciplinary meeting that occurred yesterday.*
>
> *Haldeman LLC considers the issues serious enough to justify termination of your employment contract, and this occurred effective*

> *from 8am on 26 June 2012. …- your final pay has been issued. This is less the pro-rata encouragement payment, and the company requires immediate payment of $3725.98 to clear the negative balance. A cheque can be issued to: Haldeman LLC, P O Box 14, Wakefield 7052.*

[41] A pay slip issued to Ms Nelson shows that she was due a total of $5,145.50 in respect of 60 hours worked up to 25 June 2012, annual leave and alternative holidays. However, the sum of $8,461.54 together with a further $28.48 purportedly in respect of holiday pay owing was deducted from the sum due, leaving, according to the pay slip, a further $3,344.52 owing by Ms Nelson to Haldeman LLC in respect of the balance of the pro rated encouragement payment. The pay slip contained the following message:

> *The bonus figure denotes the pro-rata Encouragement Payment calculated as per your contract. This results in funds due to the company, and we require this sum to be paid immediately, failing which we will undertake all necessary debt recovery actions.*

[42] Mr Acland, on behalf of Ms Nelson, raised a personal grievance in respect of the dismissal by way of an email dated 28 June 2012. Mr Acland contends that the personal grievance in respect of the disadvantage claim was raised in the statement of problem dated 29 June 2012, received by the Authority on 3 July 2012. This will be examined below.

The issues

[43] The Authority must determine the following issues:

(a) Which respondent employed Ms Nelson; Mr Katavich or Haldeman LLC?

(b) Whether Ms Nelson was unjustifiably disadvantaged by being demoted on 21 May 2012;

(c) Whether Ms Nelson was unjustifiably disadvantaged by being suspended on 15 June 2012;

(d) Whether Ms Nelson was unjustifiably dismissed on 26 June 2012;

(e) Whether Ms Nelson owes Haldeman LLC the sum of $3,344.52 in respect of the encouragement payment.

(f) Whether the respondent unlawfully made deductions from Ms Nelson's final salary.

Which is the correct respondent?

[44] Mr Acland, Counsel for Ms Nelson, asserts that Mr Katavich must be the employer as, throughout Ms Nelson's employment, there was no New Zealand registered company associated with her employment. It is undisputed that, on 25 May 2011, Ms Nelson signed a written employment agreement with an entity called Facts and Information LLC. This is a limited liability company registered in Nevada, USA. A certificate of amendment to the articles of the organisation was shown to the Authority which appears to record that the name of Facts and Information LLC was changed to Haldeman LLC with effect from 6 October 2011.

[45] It is also undisputed that Facts and Information LLC had never been registered as a New Zealand company until after Ms Nelson's employment ended. The Authority was shown a copy of a certificate of registration with the New Zealand Companies Office showing that Haldeman LLC was registered under Part 18 of the Companies Act 1993 to carry on business in New Zealand on 4 July 2012.

[46] Mr Acland asserts that an overseas company can employ staff in two ways. First, staff working in the overseas company's jurisdiction but living in New Zealand, or an overseas company employing staff to carry on business in New Zealand which must have registered under Part 18 of the Companies Act 1993. Mr Acland's argument is that, as Haldeman LLC had not registered to carry on business in New Zealand until 4 July 2012, it could not have been carrying on business in New Zealand prior to that date, or if it had, Mr Katavich had failed to comply with the Companies Act and faced statutory penalties under ss.333, 334, 338 and 340 of the Companies Act as well as s.19 of the Financial Reporting Act 1993.

[47] Mr Acland also points out that Haldeman LLC did not pay Ms Nelson's PAYE as it was not registered with the Inland Revenue Department as an employer. Mr Acland submits that Mr Katavich paid Ms Nelson's PAYE although the Authority saw no direct evidence of this and Mr Katavich was hazy as to the details during cross-examination. He stated that a New Zealand trust, the Plantation Trust, was a *trustee of Haldeman LLC*, that *Haldeman pays money to the IRD*, and that Plantation Trust *was involved somewhere along the way*. Mr Katavich said that he followed the

accountant's advice and that the structure was *quite complicated*. Mr Katavich also said that he was unable to say who the trustees of the Plantation Trust were as he did not have access to the deed of trust.

[48] I am bound to say that I found Mr Katavich's evidence on this point to be unlikely. However, I do not believe that the identity of the entity or individual that pays PAYE is determinative of who is the legal employer of an employee.

[49] Mr Acland referred me to the Employment Court case of *Colosimo & Taffy's Bar Ltd t/a the Kingsley Jones v. Gordon Parker* [2007] 8 NZEmpC 98, 622. This sets out the test for determining the identity of an employer. Referring to the earlier case of *Service Workers' Union of Aotearoa v. Chan* [1991] 3 ERNZ 15 and *Mehta v. Elliott (Labour Inspector)* [2003] 1 ERNZ 451, the onus rests with the employee to determine the identity of the employer, the test being objective.

[50] In *Mehta*, Colgan J established the nature of the inquiry to be made in deciding the identity of the employer by saying that the question must be determined as at the outset of the employment and that it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way:

> *Who would an independent but knowledgeable observer have said was* [the employee's] *employer when he commenced employment?*

[51] In *Colosimo*, the Court said that the real issue was whether Mr Colosimo had ever held himself out to be the employer and, if so, the circumstances which would entitle the Court to say he personally entered into binding legal relationships with Mr Parker.

[52] Mr Acland argues that a sole trader can carry on business using any name they like but that, regardless of the use of a trading name, legal responsibility still rests with the person who is a sole trader. He points out that Mr Katavich signed the employment agreements personally with the words *I, Tony Katavich, offer this employment agreement to Mia Nelson*. On this point, Mr Katavich points out that he used the Department of Labour's employment agreement builder tool on the Department of Labour's website. It must be said that, when scrutinising the declaration of this website tool, it is confusing as it states:

> *I,* [insert employer's name*] offer this employment agreement to* [insert employee's name*]*.
> *Signed by .....*
> *Date ...*

[53] The presence of the word *"I"*, does invite the signatory to put his or her name into the following square bracketed part, even though it states that the employer's name should be inserted. For this reason, I do not believe that much weight should be put on the fact that Mr Katavich used the words he did.

[54] Mr Acland also states that Mr Katavich personally gave and made all employment directions and therefore held himself out as the employer. However, given that Mr Katavich is essentially the principal of Haldeman LLC (known in the US as the managing member), I do not consider that this is determinative either. Some human being (or group thereof) has to be the directing mind and voice of an incorporated entity and, in this case, it was Mr Katavich.

[55] In view of the fact that it is necessary to look at the arrangements that were made at the outset of employment, the correspondence that occurred at the beginning is worth perusing. First, I note that someone called Heather emailed Ms Nelson on 4 May 2011 using an email address which was *@factsandinformation.com* and that, in her email, she referred to an interview with Ms Nelson *for the trainee writer office role advertised on TradeMe for the company Facts and Information*. Mr Katavich wrote to Ms Nelson on 9 May 2011, after the interview, saying, amongst other things, the following:

> *What we wanted to do was provide you with a little more information on the role and the company ... More information on the company is available on our website at http://www.factsandinformation.com.*

[56] The whole content and tenor of Mr Katavich's email to Ms Nelson did not in any way suggest that he personally was the employer. He had signed off the email with the words *Tony W Katavich Facts and Information LLC*.

[57] The formal offer of employment, dated 25 May 2011, sent a proposed employment agreement which identified the employer as Facts and Information LLC and the offer of employment was signed off with Mr Katavich's name, identifying himself as *Managing Member*. The offer letter also gave the physical and mailing address of Facts and Information LLC.

[58] All in all, apart from the fact that Facts and Information LLC was not a registered company in New Zealand at the time of Ms Nelson's employment, I have seen no cogent evidence that convinces me that Mr Katavich was ever Ms Nelson's employer personally. I am not entirely clear of the exact basis of Mr Acland's argument that, because the company was not registered in New Zealand at the time of Ms Nelson's employment it could not therefore have been trading in New Zealand. What I do note, however, is that Mr Acland, despite pointing out various sections of the Companies Act in support of his argument, failed to point out a key section, namely s.335, which states as follows:

> ***Validity of transactions not affected***
> *A failure by an overseas company to comply with section 333 or section 334 does not affect the validity or enforceability of any transaction entered into by the overseas company.*

[59] Section 333 of the Companies Act deals with the obligation to reserve a name before carrying on business and s.334 deals with the obligation to register under the Companies Act as an overseas company.

[60] In light of s.335 of the Companies Act, and all of the evidence shown to the Authority, it is clear to me that, despite the fact that the company Facts and Information LLC, and later Haldeman LLC, were not registered as an overseas company during Ms Nelson's employment, she was clearly an employee of that company. Furthermore, now that that company is registered in New Zealand, any concerns that Ms Nelson may have had about enforcing any orders made in this determination should be addressed.

Was Ms Nelson demoted and was that an unjustified disadvantage in her employment?

[61] The first issue to consider is whether a personal grievance had been raised in respect of the alleged demotion and other actions associated with the allegations. Mr Acland acknowledges that his email to Mr Katavich dated 28 June 2012 does not refer to the alleged demotion. Mr Acland referred to the statement of problem which had been lodged and served within 90 days of the alleged demotion. Paragraph 14 of the statement of problem states:

> *On Monday 21 May 2012 the respondent summarily demoted the applicant from her role as manager.*

[62] Mr Acland does not refer to the furniture being removed from Ms Nelson's office but does quote from the email sent by Mr Katavich to all staff dated 21 May 2012, cited above. I am satisfied that Ms Nelson, through her solicitor, did raise a personal grievance in respect of the alleged demotion and, whilst the allegation regarding the removal of the furniture from her office is not mentioned specifically, I am also satisfied that it formed an integral part of the circumstances which comprised the allegation of demotion and am therefore satisfied that the Authority has the jurisdiction to determine this issue.

[63] Turning to the evidence in respect of the allegation, Mr Katavich denied that Ms Nelson was ever a manager. He states that her role was a *Special Projects Role* as was specified in the employment agreement signed by Ms Nelson on 16 April 2012. (Her pay slip recorded her role as *Writer/Researcher* until 22 January 2012, when it changed to *Secret Agent*. It is assumed that this change was not in any way an accurate reflection of her true role after 22 January). Mr Katavich points out that Ms Nelson's role was described in her later employment agreement as *assisting with the management of staff as required*.

[64] The documentary evidence which the Authority saw simply does not support the respondent's assertion that Ms Nelson did not carry out a managerial role, even if she was not formally given the job title of *manager*. First, the email from Mr Katavich to Ms Nelson dated 7 March 2012 stated the words *I believe having you based in Nelson and looking after the new staff alongside your other duties would benefit you financially …*(emphasis added). The key email, however, was the one sent to all staff by Mr Katavich on 21 May 2012 in which he stated *from today, I will have Kate look after you lot, she will be the point of contact for training and support. Watson will however look after leave requests, payroll etc*. This is in direct contradiction to the evidence given to the Authority by Mr Katavich when he said that Ms Nelson had not been a manager but had been looking after payroll and other such administrative items. What is clear is that Ms Nelson was *looking after* the staff, which was a managerial role, and that, by his email of 21 May 2012, he unilaterally, without any consultation with Ms Nelson, withdrew those tasks from her and thereby demoted her. I also find, on a balance of probabilities, that Mr Katavich removed or had removed furniture from Ms Nelson's office in order to punish her.

[65] Having found that Ms Nelson had been acting in a managerial role, and that she had been demoted from that position. I must now decide whether that demotion amounted to an unjustified disadvantage. That question is to be decided in accordance with the test set out at s. 103A of the Employment Relations Act 2000. This states as follows:

> *(1) For the purposes of section 103(1)(a) and (b), the question of whether 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 generally 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 considers 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.*

[66] In her evidence Ms Nelson said that she did not like being a manager. She also said, however, that she had felt humiliated when she had been publically demoted

and had had most of the furniture taken out of her office. That this is true is supported by the fact that Ms Nelson was very reluctant to attend the cabin with Mr Katavich shortly after this had occurred in case he carried out further similar actions.

[67] Whilst Mr Katavich no doubt felt angry at what had occurred in respect of the barbeque, his actions against Ms Nelson on behalf of her employer were not the actions of a fair and reasonable employer. First, he did not arrange any kind of process to investigate the matter before he decided to remove furniture from her office and send his email to the staff. Second, the action of demoting Ms Nelson was quite unreasonable given the mistake she was supposed to have made. In my view, no reasonable employer can have expected Ms Nelson to have predicted that her merely attending a party outside of work hours without telling Mr Katavich of it would be treated by him as a serious and almost irremediable error of judgement deserving of humiliation and demotion.

[68] It seems clear in these circumstances that Ms Nelson did suffer an unjustified disadvantage in her employment by having her managerial or supervisory duties taken away from her in such a manner. Associated with this action was the action by Mr Katavich of removing the furniture from Ms Nelson's office save for her desk, chair and computer. This was clearly associated with the demotion as is strongly suggested by Mr Katavich's email to Ms Nelson of 21 May in which he told her that she needed to focus on her projects and that there were to be no distractions. This is clear evidence that Mr Katavich was punishing Ms Nelson for not having told him about the party the previous Friday. I believe that, given Ms Nelson's evidence that all the other staff were surprised at the removal of most of Ms Nelson's furniture and that, despite Mr Katavich's evidence to the contrary, Ms Nelson's office was the only one changed in this manner, Ms Nelson is likely to have suffered distress and humiliation. This shall be addressed in more detail when I consider remedies in this determination.

Was Ms Nelson unjustifiably disadvantaged by being suspended?

[69] This complaint was first raised by Mr Acland in his submissions. There is no mention of such a personal grievance in the statement of problem, although the fact of the suspension is mentioned. Mr Acland's email to Mr Katavich dated 28 June 2012, which raises a personal grievance in relation to unjustified dismissal, does not mention suspension. Furthermore, no application has been made to the Authority

under s. 114(3) to raise the personal grievance regarding the suspension outside of the statutory 90 day time limit.

[70] In light of this, I am not satisfied that the Authority has the jurisdiction to consider a claim of unjustified disadvantage in relation to Ms Nelson's suspension.

Was Ms Nelson unjustifiably dismissed?

[71] In applying to Ms Nelson's unjustified dismissal claim the s. 103A test referred to above, one must consider both whether there was procedural fairness in dismissing Ms Nelson, as well as whether the decision was substantively fair.

[72] Mr Katavich said in his evidence to the Authority that Ms Nelson was not dismissed for wandering around the office and disturbing her colleagues as was alleged in his letter to her dated 14 June 2012. He said in his evidence that she was dismissed because she brought Nazi views into the office, thereby exposing the company to severe reputational risk and also because she had stated that she had fabricated part of her résumé and then had refused to cooperate in verifying the details on it. It is therefore necessary to examine these two allegations in detail.

Neo-Nazi views

[73] According to Mr Katavich, he was particularly concerned because, in March 2010, the television programme produced by TV3, *Campbell Live*, broadcast a programme alleging that Mr Katavich was *a con man, a fraudster and a Police fugitive.* As a result of this broadcast, Mr Katavich issued defamation proceedings against TV3 and, in October 2012, after 2½ years in litigation, Mr Campbell read an apology on air in which he stated that *Campbell Live* accepted that Mr Katavich was not wanted by the Australian Police and was not an internet fraudster or con man. *Campbell Live* withdrew and apologised for these untrue statements and regretted the hurt caused to Mr Katavich.

[74] Mr Katavich explained to the Authority that, as a result of this, he was sensitive about the reputation of his new company, Haldeman LLC, which had been set up because of the unhelpful attention given to his previous company, Facts and Information LLC. He also said in evidence that he was aware that TV3 was trying to find new information about him. Therefore, the risk that the company's name could become associated with neo-Nazi views was something he was very sensitive to as it

was an angle which the media could have adopted in order to damage the reputation of the company and himself.

[75] I accept that there is some credibility to this argument and that it was Mr Katavich's sensitivity to the media looking for stories against him that caused him to be angry that the leaving party for the staff member Bettina had taken place at the home of an allegedly disgruntled former employee. However, this concern by Mr Katavich in relation to the risk of an association between the company and neo-Nazism depends upon the association being made between the email address created by Ms Nelson, and its password on the one hand and the company on the other.

[76] Ms Nelson's evidence was that she had created this email address because it had been her job to create several email addresses and that, of course, more conventional email addresses had all been taken. Therefore she had to think of unusual word sequences in order to find a unique email address. This was her explanation for choosing the email name *hitlerhatesbabies*. She said that the password *ilovehitler* was chosen simply because she needed to use a password which she could remember and, given that it also referred to Hitler, the email address and the password were therefore associated in her mind. She said that she was not a Nazi or Hitler sympathiser.

[77] It was Ms Nelson's evidence that there would have been no association between the company and the email address and password because the whole point of creating the email address was to distance the company from blogs which were posted using the email address. Certainly, seeing some of the email exchanges between Mr Katavich and Ms Nelson in respect of this, that evidence appears to be credible. However, Mr Katavich pointed out in his evidence that Ms Nelson had used the email address to purchase a product from one of the competitors of Haldeman LLC and that the owner of the website would have been able to have seen both her name, which could be traced to his company, and the *hitlerhatesbabies* email address in the back office part of the website. Mr Katavich did not produce any evidence to support this contention, and the Authority is simply not in a position to verify this independently.

[78] On balance, I believe that there may be some truth in what Mr Katavich says and that a theoretical possibility existed that someone could have made a connection between Haldeman LLC (via Ms Nelson's name) and the email address

hitlerhatesbabies. I believe that it would not be likely at all for anyone to have seen the password used, *ilovehitler*.

[79] However, there is one important point which strongly suggests that Mr Katavich's expressed concerns were not genuine. That is, the email exchange between Mr Katavich and Ms Nelson on 23 April 2012 in which Mr Katavich not only saw the email address and password but actually commented on it saying, in brackets, that Ms Nelson needed to *use a work friendly password in future*. Mr Katavich's explanation for why he only decided on 15 June to use this issue as a matter in respect of which he needed to discipline Ms Nelson was that *the penny dropped between 14 and 15 June*.

[80] Unfortunately, I do not believe this to be credible. Mr Katavich's evidence suggested that he was, understandably, very sensitive to the reputation of the company in light of the *Campbell Live* broadcast in March 2010. In light of that sensitivity, it is surprising that he did not think of this reputational risk in April 2012, when he first saw Ms Nelson's Hitler email address and password, if he had genuinely had concerns. I simply do not believe that it is credible that Mr Katavich had only worked out on 15 June 2012 that the use of this email address created a reputational risk for the company which justified disciplinary action against Ms Nelson.

[81] If I am wrong on that, I believe that it is not reasonable, procedurally, to discipline an employee for conduct which the employer has been fully aware of for almost two months and which, at the time he became aware of it, did not indicate that she could be disciplined as a result of it. For these reasons, I find that a fair and reasonable employer could not have subjected an employee to a disciplinary process in the circumstances that prevailed in respect of the *hitlerhatesbabies* email address.

[82] For the record, I also do not believe that Ms Nelson did harbour neo-Nazi views.

Falsification of the résumé

[83] Ms Nelson's evidence was that she had never said to Mr Katavich that she had made up parts of her résumé. She said that she had had a conversation with Mr Katavich *months and months before the 15th June* in which she had said that a lot of people exaggerated things in their résumés. She said that Mr Katavich did not engage in any further conversation about that.

[84] Mr Katavich's evidence to the Authority was that it was between a week and a week and a half before 15 June 2012 that he heard Ms Nelson say that she had falsified parts of her résumé.

[85] This is a straightforward conflict of evidence and, as I found Ms Nelson's evidence in general to be candid and wholly credible, I therefore prefer her evidence on this matter. I believe that Mr Katavich either did not in fact hear Ms Nelson say that she had exaggerated part of her résumé, or even if he had, as with the issue of the email address, it was some considerable time before the 15 June 2012 email. In the latter case, for the same reasons, I find that it is not procedurally fair for an employer to seek to discipline an employee in respect of a matter that it has known about for several months.

Summary

[86] It is my view that the two issues referred to in the email from Mr Katavich to Ms Nelson dated 15 June 2012 were added in order to justify a dismissal that Mr Katavich had already decided upon. In particular, I find that Ms Nelson did not commit serious misconduct. I reach this conclusion on two bases. Firstly, whilst I accept that the bringing of neo-Nazi views into the workplace and wrongly associating one's employer with such views could amount to serious misconduct justifying dismissal, I do not believe that this is what Ms Nelson did. Mr Katavich had known that Ms Nelson had used an email address and password using Hitler's name several weeks before the dismissal and had taken no action in respect of them, despite his sensitivity to reputational risk, other than to ask Ms Nelson to *use a more work friendly password in future*. I do not believe, therefore, that any genuine material reputational risk had been created by Ms Nelson's use of the Hitler email address and password. At most, Ms Nelson's use of the Hitler name in the creation of the email address and password for work purposes was somewhat ill judged.

[87] Second, I do not accept that Ms Nelson had admitted to fabricating parts of her résumé.

[88] In light of these findings, I do not believe that any fair and reasonable employer could have dismissed Ms Nelson in all the circumstances. The dismissal was therefore unjustified and Ms Nelson's personal grievance in this respect succeeds.

Remedies

[89] Ms Nelson seeks reimbursement of lost wages from the date of her dismissal on 25 July 2012 until 27 August 2012, being 21 working days. Ms Nelson received pay from Haldeman LLC at a gross sum of $37 per hour and at 8 hours a day that equates to a gross sum of $6,216.

[90] Ms Nelson's pay in her new employment (for Invercargill City Council) was significantly less than that which she enjoyed at the respondent company, amounting to $160 per day rather than $296 per day. Therefore, Ms Nelson is entitled to reimbursement for the difference in this pay for up a further 46 working days in accordance with s.128(2) of the Employment Relations Act 2000. That equates to a further gross loss of $6,256.

[91] Ms Nelson also claims unpaid holiday pay in respect of the above lost wages at 8%. I believe that this is a legitimate claim and therefore lost holiday pay amounts to $997.76.

Counterclaim

[92] The respondent claims the sum of $3,725.98, being what it says is the balance owed in respect of the pro-rated claw back of the *encouragement payment*. On its face, the relevant clause in the employment agreement covers the situation at hand, by the words, *if this revised employment agreement is terminated before twelve months have elapsed, a pro-rata deduction of this sum may be made from the Employee's pay*. This clause does not state that the employee must have resigned, or that the termination cannot have been at the instigation of the employer. In addition, the clause does not stipulate that it only applies where the employer has lawfully dismissed the employee.

[93] However, the employment agreement in question, by way of clause 2.2, required the employer to give the employee two weeks' notice of termination in writing. Clause 12.3 allowed the employer to dismiss the employee summarily (without notice) for serious misconduct. The letter of termination, dated 26 June 2012, clearly treated the termination as on a summary basis.

[94] In light of the fact that I have found that Ms Nelson did not commit serious misconduct, the second respondent's failure to give her two weeks' notice of

termination, or payment in lieu thereof, is in breach of clause 12.2 of the employment agreement entered into in April 2012. I find that this breach of the employer's duty to give proper notice is a fundamental breach of contract, going to the root of the agreement, and thereby repudiating it. In making this finding I rely on the case of *General Billposting Company Ltd v Atkinson,* [1909] A.C. 118 (H.L.), an English House of Lords case which has been considered in a number of New Zealand cases. The most recent was the Employment Court restraint of trade case of *Janet Pottinger v Nine Dot Consulting Ltd* [2012] NZEmpC 101, in which Her Honour Judge Inglis accepted that the *General Billposting* principle raises a serious issue to be tried in New Zealand when a breach of contract has been asserted.

[95] As a direct consequence of the repudiatory action by the employer in not giving contractual notice, I find that the employer's remaining rights under the agreement, such as the claw-back provision at clause 7.5, are no longer enforceable by it. Accordingly, the second respondent did not have the right to rely upon the claw-back provision set out in clause 7.5.

[96] As an alternative approach, I believe that it is necessary for business efficacy to imply into clause 7.5 that the termination within 12 months that it refers to must be lawful in order for the claw back provision to be effective. As I have found that the termination was not lawful, being in breach of the notice provision and also in breach of the Employment Relations Act 2000, it cannot be relied upon by the second respondent. Finally, it would not be equitable for the clause to be used by the second respondent to claw back the encouragement payment in circumstances when it has brought about the termination contrary to the provisions of the Employment Relations Act 2000.

[97] I therefore find that the respondent's counterclaim must fail.

Ms Nelson's claim for unpaid wages, leave and alternative holidays for the period 14 May 2012 to 25 June 2012

[98] This claim is dependent on the success of the second respondent's counterclaim. As I have found that the second respondent had no right to claw back the encouragement payment having repudiated the agreement with its failure to give notice of termination, the second respondent's actions in withholding payment of the sums due to Ms Nelson upon her termination were also unlawful. Accordingly, Ms Nelson is entitled to payment of these sums.

[99] Following some correspondence with the parties after the investigation meeting it was clarified that Ms Nelson, but for the unlawful deduction, would have received the following gross sums:

a. $2,220 in respect of 60 hours work between 10 and 25 June;

b. $1,149.50 in respect of 3.5 days' annual leave;

c. $1,776 in respect of 6 days' alternative holidays.

[100] Ms Nelson had also had erroneously deducted from her pay the gross sum of $28.48 and was erroneously not paid for 4 hours' accrued but untaken holiday. That should have been remunerated at $148.

[101] Therefore, Ms Nelson is owed the gross total sum of $5,321.98 in respect of arrears of wages and holiday pay.

Ms Nelson's claim for loss of bonus reasonably expected to be paid

[102] Ms Nelson was in receipt of a number of bonuses during her employment, which she said were effectively regular payments, although given in accordance with Mr Katavich's moods. Ms Nelson claims that she should be paid $12,463.56, calculated by averaging her monthly bonuses received over a period of three months.

[103] The starting point in determining whether Ms Nelson is entitled to a payment for lost bonuses and, if so, how much, is to examine the clause in her latest employment agreement dealing with the right to receive a bonus. This clause, at 7.2, made clear that any bonus paid was at the employer's sole discretion, and that the employer would only consider paying bonuses for *truly exceptional performance*.

[104] Since signing the latest employment agreement, and ignoring the encouragement payment, which was a special one off payment, Ms Nelson received a bonus of $1,000 on 29 April 2012 only until she was dismissed. There is no indication what it was for. In total, Ms Nelson received $35,700 gross by way of bonuses during her employment, (excluding the one-off encouragement payment) only $1,000 of which was paid after the new employment agreement had been entered into. (The previous agreement did not refer to bonuses being paid for *truly exceptional performance*).

[105] In light of this, it would appear that, when the new agreement was entered into, a new approach had been adopted by Mr Katavich in respect of when bonus payments would be made to Ms Nelson, which she had agreed to. I do not accept the methodology adopted by Mr Acland which averages out over three months the total bonus amount paid during her entire employment, especially as he has included the one off encouragement payment in the calculation. A better approach is to consider what bonuses were paid since Ms Nelson entered into her new agreement, as the basis of her right to a bonus changed in accordance with the new bonus clause. As Ms Nelson only received one payment since that date, it is impossible to adopt the averaging approach or to predict when she would have been likely to have received a further bonus, if at all.

[106] The onus of proving what she would have received had she not been dismissed lies with Ms Nelson. I do not believe that she has discharged the burden of proof required in showing that she would have demonstrated *truly exceptional performance* had she not been dismissed, and I therefore decline to order the respondent to pay any sum in respect of lost bonuses.

Ms Nelson's claim for compensation under s.123(c) of the Act

[107] Section 123(c)(i) of the Act allows the Authority to award a remedy for humiliation, loss of dignity and injury to the feelings of the employee when the Authority has determined that the employee has a personal grievance.

The unjustified disadvantage

[108] In respect of the unjustified disadvantage suffered by Ms Nelson, she stated in evidence that she did not like being a manager. Accordingly, it is not appropriate to award any sum under s. 123(c)(i) of the Act for the fact of the loss of the managerial role as Ms Nelson not carrying out those duties any longer would not have caused her any humiliation, loss of dignity and injury to her feelings. However, I am satisfied that the manner of the demotion, and the unfairness of the reason for it, did cause Ms Nelson humiliation, loss of dignity and injury to her feelings. I believe that an award in the sum of $2,000 is appropriate compensation for this.

The dismissal

[109] Turning to the dismissal, there are two issues to consider. First, the actual dismissal itself and, second, alleged bullying conduct by Mr Katavich towards Ms Nelson after the dismissal. In respect of the dismissal itself, Ms Nelson explained that she found the process incredibly stressful and worrying. I accept that, to have been dismissed for allegedly harbouring neo-Nazi sympathies that one has brought into the work place and risked its reputation, and for having allegedly fabricated one's résumé, is likely to have caused a distress to Ms Nelson when she was innocent of the charges, and when the charges were evidently being used to wrongly justify her dismissal. Ms Nelson presented as a level headed and determined young woman, and I got the impression that her distress was, to a degree, alleviated by her sense of injustice at her treatment. For those reasons I do not believe that a significant sum should be awarded, especially as Ms Nelson had not been employed by the respondent for particularly long. I believe that an award of compensation in the sum of $7,500 is appropriate.

Post dismissal conduct by the respondents

[110] After Ms Nelson's dismissal, four further incidents occurred which Ms Nelson argues exacerbated the humiliation, loss of dignity and injury to her feelings arising from her dismissal, entitling her to enhanced compensation under s.123(1)(c)(i) of the Act.

[111] First, Ms Nelson was sued by the second respondent in the Disputes Tribunal for recovery of the balance it says she owed in relation to the Encouragement Payment. The proceedings did not continue as the second respondent subsequently chose to pursue a counterclaim in the Authority. However, I do not believe that lodging a claim in the Disputes Tribunal was an unreasonable act by the respondent, given that it was relying upon the terms of its employment agreement with Ms Nelson.

[112] The next incident followed Ms Nelson starting employment for Invercargill City Council on 25 July 2012, when Mr Katavich wrote an email to the Human Resources Department of the Invercargill City Council on 2 August 2012 stating the following:

Subject: Reference for Mia Marie Nelson

To whom it concerns

I've received a message requesting a reference for the aforementioned person. My apologies for the lengthy delay in responding to this request, I have been tied up for the past while, in fact dealing with legal employment matters relating to Mia Nelson.

Mia's work approach can become very destructive in an office environment. On 26 June 2012 Mia Marie Nelson was dismissed from Haldeman LLC, a company she had worked for, for approximately 12 months prior, following several serious issues of serious misconduct, including:

1. *The use of Nazi language through communications with the public. One atrocious example of this was "I love Hitler".*
2. *Making unauthorised access of, and interfering with a company bank account.*
3. *Allegedly falsifying elements of her resume when she originally applied for a role with the company.*

The company changed its name partway through her employment – the previous name was Facts and Information LLC.

Within the past few weeks Mia has lodged a personal grievance with the Employment Relations Authority (file number 5387989) which the company is vigorously defending. Prior to lodging this, she demanded payment of around $30,000 and a positively worded reference, which the company refused to have any part of, considering the very serious misconduct issues and the fact her dismissal was justified.

If you require more information I can be contacted on [number omitted].

I hope this reference helps you in making an informed decision; however I would strongly dissuade any organisation from hiring Mia Nelson, due to the damage Haldeman LLC has suffered during her employment.

Best wishes
Tony W. Katavich
Managing Member – Haldeman LLC

[113] The Authority was shown a copy of this email which had been forwarded to Ms Nelson from a member of the Invercargill City Council HR department who said the following:

Hi Mia,

This "reference" was sent to the Human Resources email address that can be found on the ICC website. Council did not request a reference from Mr Katavich so his mention of this is not accurate. References were provided by your employment agency prior to your appointment and I believe that they were very positive. This email

> *does not say that they* [sic] *information is privileged so I am forwarding this email to you at your request.*

[114] Mr Katavich said in evidence that he sent this email because the company had received a phone message asking for a verbal reference in respect of Ms Nelson but that, because his staff had not taken a proper message, he decided to provide the reference in writing by email using the email address on the Invercargill City Council website.

[115] In light of the email from the HR officer saying that the reference had not been requested, it is my view that Mr Katavich sent this email to Invercargill City Council unsolicited, and deliberately in order to damage Ms Nelson's reputation with the Council and to put pressure on her. The email was sent after Ms Nelson's representative had raised a personal grievance on her behalf and had lodged the statement of problem with the Employment Relations Authority.

[116] The third incident relates to Mr Katavich sending an individual called Dave McKean to Invercargill to obtain information about Ms Nelson and her partner, Mr Dean. According to the evidence of both Ms Nelson and Mr Dean, Mr McKean came to the house in which Mr Dean and Ms Nelson lived and spoke to Mr Dean, saying that Mr Katavich would issue High Court proceedings against Ms Nelson, Mr Dean and Mr Dean's company unless Ms Nelson stopped her claim against Mr Katavich in the Employment Relations Authority. Ms Nelson and Mr Dean made a complaint to the Police in relation to this incident, and a copy of the New Zealand Police job sheet was shown to the Authority reporting a complaint by Mr Dean of being harassed by Mr McKean on behalf of Mr Katavich.

[117] The New Zealand Police job sheet, dated 30 August 2012, shows that the constable who investigated the complaint formally warned Mr McKean that he was not welcome at the address of Mr Dean and Ms Nelson and that, if he continued to *act in this manner of harassment* then he would be served an harassment notice and/or charged with trespass.

[118] Mr Dean gave evidence to the Authority and said that Mr McKean had been driving past their house which had prompted Mr Dean to speak to Mr McKean. It was then, according to Mr Dean, that Mr McKean said that Ms Nelson should drop her case in the Employment Relations Authority or else a case would be brought in the High Court. Mr Dean said that he felt that the whole point of Mr McKean talking to

them was to intimidate him and Ms Nelson. Mr McKean, although present at the Employment Relations Authority's investigation meeting, said that he did not wish to give evidence.

[119] It is my belief that the events did occur as reported by Ms Nelson and Mr Dean and that the intention of Mr McKean's contact with Mr Dean was in order to put pressure on Ms Nelson to withdraw her claim in the Employment Relations Authority.

[120] The fourth incident is that, subsequent to Mr McKean's visit to the residence of Ms Nelson, Ms Nelson was served Court documents on 12 November 2012. The Authority was shown a copy of these documents in which Mr Katavich and Haldeman LLC make claims against Ms Nelson and Mr Dean and a company owned by Mr Dean. The claims against Ms Nelson are for:

(a) a breach of the Fair Trading Act 1986 in relation to an advert placed on Facebook by Mr Dean's company;

(b) injurious falsehood in relation to the use of the *hitlerhatesbabies* email address which, it is alleged, constituted a *malicious and false statement about the nature and character of Haldeman LLC, its management, staff and business*;

(c) publishing an injurious falsehood against Haldeman LLC in relation to several postings that have appeared on the internet which were critical of Mr Katavich and his companies;

(d) a claim of defamation in relation to those same postings.

[121] In total, the plaintiffs seek $800,000 in general and special damages and $60,000 exemplary damages against Ms Nelson. The respondents state in their submissions to the Authority that a series of insulting posts were made by Ms Nelson about Mr Katavich after her suspension and dismissal. These posts form the basis of the defamatory action against Ms Nelson and are, indeed, very insulting. However, the respondents present no evidence whatsoever to the Authority that these posts were made by Ms Nelson, or even made with her knowledge. No doubt the High Court will thoroughly consider these allegations against Ms Nelson and I do not take them into account in this determination for that reason.

[122] I have no doubt, however, that the second and third post dismissal actions against Ms Nelson described above have significantly aggravated the humiliation, loss of dignity and injury to feelings suffered by her as a result of her dismissal. It is accepted that the Authority may take into account the actions of an employer after dismissal in assessing the amount that should be awarded pursuant to s.123(1)(c)(i) of the Act. See for example *Abdalla v. Chief Executive Officer of the Southern Institute of Technology*, (unreported), Employment Court, Christchurch CC4/06, 5 May 2006, *Whitten v. Ogilvy New Zealand Ltd* (unreported) ERA Auckland AA200/10, 30 April 2010, *Staykov v. Cap Gemini Ernst & Young New Zealand Ltd* (unreported) Employment Court, Auckland, AC18/05, 20 April 2005 and, most recently, *Strachan v Moodie and others* [2012] NZEmpC 95.

[123] In my view, the actions of Mr Katavich against Ms Nelson have aggravated and compounded to a significant degree her loss of dignity, humiliation and injury to feelings caused by her dismissal and that it is appropriate to reflect this by doubling the amount of compensation under this heading arising out of the unjustified dismissal. Accordingly, I award a total of $15,000 in respect of the dismissal, taking into account the post termination conduct against Ms Nelson and its effects on her.

[124] I must now consider whether it is appropriate to reduce the remedies in accordance with s.124 of the Act which provides that, where the Authority has determined that an employee has a personal grievance, the Authority must, in deciding both the nature and 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 which gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[125] I have found that Ms Nelson did not tell Mr Katavich that she fabricated parts of her résumé and that she did not, in fact, fabricate it. Ms Nelson did refuse to allow the respondent to carry out a background check on her, but she gave an explanation for that which I found credible. I have also found that, although Ms Nelson did create the *hitlerhatesbabies* email address and the *ilovehitler* password, she did not do so because she harboured neo-Nazi views or wished to tarnish the reputation of the respondent. Furthermore, Mr Katavich used Ms Nelson's creation of the email address disingenuously as an excuse to dismiss Ms Nelson. Given that Ms Nelson's

actions did not contribute in any genuine way to the situation giving rise to her personal grievance, I feel that it would not be just to reduce the remedies.

[126] Accordingly, I do not find any grounds to justify the Authority reducing the remedies that it has ordered to be provided in relation to Ms Nelson's personal grievance.

Penalties

[127] In his submissions, Mr Acland asks that a penalty be imposed for breaches of the duty of good faith by the respondent. This was not raised in the Statement of Problem, and appears to have been raised for the first time in Mr Acland's submissions. I do not believe that it would be just to address this request at this late stage, and so decline to consider this request.

[128] Mr Acland also asks that a penalty be imposed upon Mr Katavich pursuant to s. 134A of the Act, which provides that every person who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation is liable to a penalty. Although Mr Katavich's actions in respect of his participation in the Authority's investigation caused some inconvenience, I do not believe that Mr Katavich's actions went as far as to obstruct or delay the Authority's investigation. I therefore decline to impose a penalty under s. 134A of the Act.

[129] In its submissions, the respondents seek a penalty against Mr Acland pursuant to s. 134(2) of the Act for having allegedly incited, instigated, aided or abetted a breach of Ms Nelson's employment agreement when he allegedly advised her not to co-operate with the disciplinary investigation by not having a third party check her background in the US. This is a novel argument to run in relation to a claim for a penalty, but it was not raised until submissions. For the same reason as I declined to impose a penalty against the second respondent, I decline to consider such an application at this late stage.

Orders

[130] I order that the second respondent pays to Ms Nelson the following sums:

a. The gross sum of $5,321.98 in respect of arrears of wages and holiday pay unlawfully withheld;

b. The gross sum of $13,469.76 in lost wages arising from her dismissal;

c. $17,000 under s. 123(1)(c)(i) of the Act.

Costs

[131] Costs are reserved. Ms Nelson and the second respondent should seek to agree how costs are to be dealt with but, in the absence of such agreement being reached within 28 days of the date of this determination, Ms Nelson may serve and lodge a memorandum and the second respondent shall have a further 14 days within which to serve and lodge any response.

David Appleton
Member of the Employment Relations Authority