

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 196/09  
5279635

BETWEEN                      PATRICIA                      BEVERLEY  
   SYKES  
   Applicant  
  
AND                              H G LIVINGSTONE LIMITED  
   Respondent

Member of Authority:      Philip Cheyne  
  
Representatives:            Gareth Abdinor, Counsel for Applicant  
   Sarah Townsend, Counsel for Respondent  
  
Investigation Meeting:    28 October 2009 at Christchurch  
  
Determination:              12 November 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Patricia Sykes worked for H G Livingstone Limited (HGL) from about August 1999 until August 2009 when her then current employment as Mall Manager at Barrington Shopping Centre was terminated in reliance on a clause in her individual employment agreement concerning her working relationship with the Centre owner.

[2] Ms Sykes says that her dismissal is unjustifiable and she seeks reinstatement and compensation. HGL says that Ms Sykes was justifiably dismissed.

[3] This problem initially came to the Authority as an application for interim reinstatement. The matter was lodged without delay and with counsels' co-operation there was a prompt telephone conference. What emerged from that was an agreement for an early substantive investigation date in lieu of pressing the interim reinstatement application. In that way we have managed to avoid the extra time and expense that might otherwise have been incurred.

[4] To resolve this problem I will briefly set out the sequence of events before applying the test for justification for a dismissal. It is helpful first to say something about Ms Sykes' position as Mall Manager.

### **Ms Sykes' position**

[5] Ms Sykes had a number of positions for HGL but in December 2005 she commenced full time as the Mall Manager at Barrington Shopping Centre. She reported to Duncan Snell who was HGL's property manager for the Centre. HGL was contracted by the owner at the time to manage the Mall. It is common ground that Ms Sykes met the expectations of the Mall owner and her employer in her work.

[6] HGL and Ms Sykes signed a written employment agreement dated 22 December 2005. HGL now relies on clause 4 of the agreement as part of the justification for its decision in August 2009 to dismiss Ms Sykes. The relevant part of the agreement is:

4. *Relationship – Centre Owner*

4.1 *The employee acknowledges and accepts that building and maintaining a constructive working relationship with the Centre Owner is a key component of the role undertaken by the Employee. The Employee further acknowledges that this, inter alia, requires the Employee to carry out his/her duties and responsibilities and generally operate in a manner that is compatible with the Centre Owner.*

4.2 *The parties acknowledge that notwithstanding the best efforts of the Employee and the Employer and through no fault of either party circumstances may arise where a constructive working relationship cannot be achieved and/or maintained. The parties recognise that in these circumstances it may not be in their interests (having regard to the need to preserve reputations and dignity) that the Employee continue to carry out his/her duties and responsibilities at the Centre and having regard to this agree that following consultation, the Employer or Employee may terminate this agreement by giving the other party three months notice in writing. The Employer may at its sole discretion dispense with the need for the Employee to attend work during the notice period, in such event salary in lieu of notice will be paid.*

4.3 ...

4.4 *The parties acknowledge and agree that should this clause be invoked by either of them, both parties agree that it shall be full and final settlement of the employment relationship, it shall be final and binding on both of them and that neither*

*party shall take any further action against the other in relation to the termination of the employment relationship.*

[7] There is a position description as a schedule to the employment agreement. It says that the key functions of the position are on site marketing, promotions, operations, maintenance and administration. There is a list of major objectives including to ensure that the owner's interests are served and to optimise returns to the owner through prudent and efficient on site management. There are other major objectives relating to retailers and the like as well as a comprehensive list of key tasks.

[8] These provisions remained unchanged through to 2009 when Ms Sykes was dismissed.

### **Sequence of events**

[9] As mentioned, it is common ground that Ms Sykes performed her work to the satisfaction of her Manager and the owner from December 2005 until September 2008.

[10] Steven Baigent is the Managing Director and a shareholder of Tinline Properties Limited. Through a subsidiary, that company bought Barrington Shopping Centre and took possession at the end of September 2008. Tinline also owns Richmond Mall near Nelson and has a contract with HGL to manage that property. Tim Raateland is employed by HGL and has been Property Manager for Richmond Mall since 2002. He and Mr Baigent have a good working relationship and Mr Baigent wanted him appointed as property manager at Barrington Shopping Centre from the outset. HGL agreed, Mr Snell was deployed elsewhere and Tinline and HGL eventually concluded a property management agreement.

[11] As a result from the end of September 2008 Mr Raateland became Ms Sykes' Manager.

[12] In October 2008 there were two or three general meetings between Mr Baigent, Mr Raateland and Ms Sykes about Tinline's plans for the Mall. Mr Baigent's evidence is that he was quickly convinced that Ms Sykes was not the right person to be Tinline's on site manager at Barrington because of his view that she could not take the Centre forward in the way that he required. This reflected the

negative view of Ms Sykes' that Mr Baigent formed during the due diligence process before settlement. Mr Baigent's evidence, which I accept, is that he told Mr Raateland about all this in October 2008 after these meetings. Mr Raateland's evidence, which I also accept, is that Mr Baigent continued to talk to him over the following weeks and months about his issues with Ms Sykes' style of managing the Centre and his doubts about her being able to meet his requirements. Mr Raateland did not convey any of this directly to Ms Sykes.

[13] Celia Folley is HGL's Corporate Services Manager and provides HR support and advice. Mr Raateland spoke to her and one of HGL's Directors about Mr Baigent's view of Ms Sykes. These HGL managers agreed that Ms Folley would go and speak to Ms Sykes to see how she was finding things. In her role Ms Folley has regular meetings with staff such as Ms Sykes so Ms Sykes understood the meeting was just a regular catch up. Ms Folley did not convey any contrary impression when arranging the meeting which was held on 3 December 2008. Neither woman made notes during the meeting. I accept Ms Folley's evidence that she made notes after her return to the office which she enlarged on that evening and from which she produced typed notes about ten days later. The hand-written notes were destroyed once the typed note was created. That is apparently Ms Folley's usual practice. Ms Sykes' evidence is that several of the things mentioned in the notes occurred between her and Mr Raateland later in time so she is doubtful about the veracity of the notes. I went through the notes in detail with her and generally she accepted that the exchange recorded in the notes did or might have happened. There were several points that she could not recall. I have concluded that the notes are a reliable account of what happened.

[14] Ms Folley's notes record some of her conclusions about Ms Sykes' attitude. They say *Pat appears very bitter and will find it difficult working under the new management structure if she does not manage to adapt. ...In my view Pat has become accustomed to working on her own and generally making her own decisions about the centre. She is feeling the pressure of the new management structure and does not like the change.* The phrase *new management structure* is a reference to Tinline and to Mr Raateland. Ms Folley did not convey these views to Ms Sykes either during or after the meeting.

[15] I accept that Ms Sykes told Ms Folley that she was finding the new management difficult; that she felt she was not being included; that she was holding back; that she did not agree with many of the plans; that she found it irritating having to use a Nelson firm for design work; and that she would just do as she was told. Ms Folley was personally supportive towards Ms Sykes. She told her to build up a relationship with the Nelson firm, be open in trying to adapt to changes, that Mr Raateland was very *hands on* and that she could learn a lot from him and Mr Baigent. She also told Ms Sykes to remember that HGL worked for the owner. What was not conveyed to Ms Sykes was Mr Baigent's view that she could not take the Centre forward in the way that he required or the risk that he might require HGL to remove her from her role as Mall Manager.

[16] In either late February or early March 2009 Ms Folley went to see Ms Sykes again at Barrington to ask her to attend a meeting with her and HGL's employment consultant (Mike Kyne). Ms Folley told Ms Sykes that Mr Raateland and Mr Baigent had some issues that needed to be worked through with her. Ms Sykes asked for a list of issues so Ms Folley in consultation with Mr Raateland drafted a letter dated 5 March 2009. The letter lists a raft of concerns under the headings *Marketing* and *Operations* introduced by the comment that *the overall impression that the owner and property manager had of the current Centre management is that if suggestions are made to address various issues the immediate response seems negative.*

[17] After the list of concerns the letter reads:

*In summary Pat, as contracted managers to the owners/shareholders of the complex we are subject to an ever changing list of requirements from them as they determine what initiatives are required to maximise their returns.*

*This is not always easy as some of the demands placed on the management contract may be difficult to accept as they may require a substantial change in focus or mindset. This requirement for change can challenge, not only our beliefs but also a perception that a contribution to date is not really valued.*

*Whether we like it or not, the nature of the services we provide will always be subject to the owners change of requirements. This is not only in the tasks we perform but also in terms of our personality, means of communication and our ability to create an effective working liaison with them.*

*You are forefront of the compatibility factor Pat because you are the Manager representing Livingtones.*

*This inevitably means your performance, demeanour, client interactions and management style compatibility will always be subject to constant scrutiny by the client attempting to maximise their investments.*

*This scrutiny may seem unfair or thankless at times, but that is an inevitable consequence of the role. Criticism directed towards the requirements of the role inevitably draws focus onto the personality of the incumbent manager. Positive effective management is as much about a state of mind as it is communicating new issues.*

*Notwithstanding that, Livingstones are contracted to provide a specific service for an agreed fee. We need to be able to meet the needs of our contract or we lose it. It is that simple. Part of our contractual obligations is to provide a management and marketing delivery that is meeting the requirements of that contract. Sometimes that is not an easy burden.*

*I look forward to catching up on Monday.*

...

[18] Having received this letter, Ms Sykes instructed a solicitor. As a result the intended meeting was deferred and her solicitor replied by letter dated 17 March 2009. The letter responds to the concerns expressed in the 5 March letter and says that Ms Sykes was shocked by the issues raised in that letter giving her commitment to her job. It also details Ms Sykes' response to the specifics of the 5 March letter.

[19] A meeting was eventually arranged for 30 March. Prior to the meeting, Mr Kyne sent a document to Ms Sykes' solicitor outlining Mr Raateland's expectations of Ms Sykes. It opens with some general comments about meeting the client's expectations, high standards and the retail industry. There is then a list of *short term tasks*.

[20] The attendees at the 30 March meeting were Mr Kyne, Mr Raateland, Ms Folley, Ms Sykes and her solicitor. There was discussion about Mr Raateland's expectations document. In general, Ms Sykes' response to the expectations was that they were not easily measurable and that no specific examples of poor performance had been given. Ms Sykes defended her past performance regarding the various specific issues. That defence is characterised by Mr Raateland and Ms Folley in their evidence as Ms Sykes' being defensive and negative. Ms Sykes said that she found Mr Raateland's criticisms of her aggressive and un-constructive. Mr Kyne acknowledged that constructive criticism needed to be conveyed in neutral language to avoid a defensive response. The meeting ended with an agreement that Mr

Raateland and Ms Sykes would endeavour to improve their communication; that Mr Raateland would make an effort to facilitate building a relationship between Ms Sykes and Mr Baigent; that Mr Raateland would walk through the Centre together with Ms Sykes each week to facilitate communication about expectations; and that Ms Sykes could access some training and new computer software.

[21] Mr Raateland's evidence is that it was his initiative to draft the 20 March 2009 list of expectations. He spoke to Mr Baigent about wanting to try and make *it* work, *it* meaning Mr Baigent having confidence about Ms Sykes' suitability. Mr Baigent asked him how he proposed to do this, and Mr Raateland explained about creating a list of expectations to give to Ms Sykes. Mr Baigent approved this. In effect Ms Folley's letter of 5 March, Mr Raateland's expectations list delivered to Ms Sykes in writing on 27 March and the 30 March meeting were her last chance to demonstrate that she could gain Mr Baigent's confidence about her ability to meet his demands. Mr Raateland knew this but no one told Ms Sykes.

[22] Mr Raateland's evidence, which I accept, is that he told Mr Baigent about the 30 March meeting and its outcome. By that time, Mr Baigent was getting more impatient with the situation and he told Mr Raateland that he had lost confidence in Ms Sykes and he no longer wanted her as his on site manager at Barrington. The evidence is that Mr Baigent had a copy of Ms Sykes' employment agreement. Mr Raateland's evidence, which I accept, is that Mr Baigent asked him about invoking clause 4 in the agreement. Mr Raateland needed to speak to Ms Folley about that and he did so in May when she returned from leave. Also, sometime after the 30 March meeting Mr Baigent visited Barrington. There was a meeting between him, Mr Raateland and Ms Sykes over business issues but no mention about Ms Sykes' precarious position. It is common ground that, apart from this occasion, there was no other meeting or communication between Mr Baigent and Ms Sykes. In evidence Mr Raateland explained that Mr Baigent did not want to meet Ms Sykes as she made him uncomfortable. Again, no one told Ms Sykes this.

[23] The first that Ms Sykes had any inkling that the concerns discussed on 30 March had not been resolved was when her solicitor received a telephone call on 17 June 2009 from Mr Kyne who told the solicitor that the Centre owner wanted Ms Sykes *out*. Next, Ms Sykes received a letter dated 24 June from Mr Kyne. The letter says that HGL requires to meet with her, that Tinline had advised that they no

longer have a level of trust and confidence in Ms Sykes because she lacks the *skills and lateral vision to manage the Mall in a proactive way and that HGL wishes to meet her to consider invoking clause 4 of the individual employment agreement.* Ms Sykes was invited to take time off on pay pending the resolution of these matters.

[24] The letter was hand delivered to Ms Sykes by Mr Kyne and Ms Folley. Ms Folley's evidence, which I accept, is that they were at Barrington with Ms Sykes for over two hours at the time and that Ms Sykes was very upset. They tried to comfort her, Ms Sykes completed some tasks before she finished up and Ms Folley ensured that a friend was with Ms Sykes before she left the Centre.

[25] In response to these events Ms Sykes's solicitor wrote recording her disagreement that HGL could lawful invoke clause 4 but her agreement not to attend work pending a scheduled meeting, which was eventually held on 21 August 2009.

[26] On Tuesday 18 August, Mr Raateland received a telephone call from Mark Adams, one of the Barrington tenants, who told him that he had met Ms Sykes when she was shopping at the Mall earlier that week and that she had been critical of HGL and the new owner. This matter was never raised with Ms Sykes.

[27] Present on 21 August were Ms Sykes, her solicitor, Mr Kyne, Mr Raateland and Ms Folley. Mr Kyne started by saying that the purpose of the meeting was to consider invoking clause 4 of the agreement. Mr Raateland and Ms Folley say in evidence that there was reference to redeployment at this stage, but I prefer Ms Sykes' evidence that redeployment was not mentioned until a little later in the meeting. In response to Mr Kyne's opening, Ms Sykes's solicitor said that it was not accepted that HGL could invoke clause 4 as there had been no effort to establish a constructive relationship. Mr Raateland's evidence, which I accept, is that the lawyer said that the meeting was a sham and that the hidden agenda was Mr Raateland's desire to exit Ms Sykes from HGL. Ms Sykes said that she did not have a problem with Mr Raateland, but that he had a problem with her. It was made clear that Ms Sykes wanted to return to work at Barrington. Mr Kyne said that the owner had ruled that out because of the loss of trust and confidence. There was then some discussion about redeployment with the only possibility being to a fixed term position apparently at a substantially lower salary. There was some mention of another role which by that time was no longer available. HGL's offer of options could best be described as

cursory. There was then some *without prejudice* discussion and an adjournment. The meeting finished shortly after without any resolution.

[28] Several hours after the meeting ended, Mr Raateland sent an email to Mark Adams requesting him to put in writing the details of their discussion on Tuesday 18 August, which Mr Adams did several hours later. None of this was raised with Ms Sykes prior to her dismissal.

[29] On Monday 23 August, Ms Sykes's solicitor wrote to Mr Kyne proposing mediation. Mr Kyne responded on 24 August declining mediation, advising that Ms Sykes's employment was terminated effective 21 August and that Ms Sykes would be paid three months salary pursuant to clause 4.2 of the individual employment agreement. Arrangements were advised regarding company property and final pay.

### **Justification for dismissal**

[30] The case for HGL is that it took steps to assist Ms Sykes to meet the new owner's requirements; that she responded defensively rather than accepting that her management style needed to change; that Mr Baigent eventually asked HGL to remove Ms Sykes as the on site manager; that HGL consulted with Ms Sykes about the situation; and that Ms Sykes was then justifiably dismissed in reliance on clause 4 of the employment agreement. I am referred to cases such as *Ward v Spotless Services (NZ) Limited and ors* 6/8/03, P R Stapp, CA87/03 that demonstrate that an employer who provides services under a commercial contract can justifiably dismiss the employee providing those services when the other party to the commercial contract no longer wants the work done by that particular employee.

[31] Whether a dismissal was justifiable must be determined on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time. The most recent high authority for the application of that statutory test is *Air New Zealand v V* (2009) 9 NZELC 93,209.

[32] A fair and reasonable employer would always comply with statutory duties such as the duty of good faith set out in s.4 of the Employment Relations Act 2000. Particularly relevant in this case is s.4(1A)(b) which states that the duty of good faith *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 s.4(1A)(c) which 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 ...to provide ...the employee with access to relevant information. There are several ways in which HGL did not comply with these duties.

[33] As at the end of September 2008 Mr Raateland knew that his style of management, consistent with Mr Baigent's expectations, differed considerably from the previous manager's style, in that he is very *hands-on* and *details orientated* with high expectations whereas previously Ms Sykes had considerable autonomy. Inevitably that was going to require some significant adjustment by Ms Sykes. There is nothing in HGL's evidence in chief about any timely steps taken by it to induct Ms Sykes to the changes required of her. Mr Raateland agreed in his evidence that it was obvious from the outset that Ms Sykes would need to adjust to meet his and Mr Baigent's expectations, but he could not describe any steps he had taken help her with this process other than telling her that they demanded high standards. That was not sufficient to meet the statutory obligation to be active and constructive in maintaining a productive employment relationship and communicative.

[34] Mr Baigent had concerns about Ms Sykes based on his impressions of her during the due diligence process prior to settlement and he became alarmed about significant aspects of her performance and style as a result of the two or three meetings with her in October 2008. Mr Baigent describes these as *core skills ...paramount and critical to ...success*. The evidence is that Mr Baigent spoke to Mr Raateland at that time about his alarm. I infer that Mr Raateland supported these views but HGL did not convey any of this to Ms Sykes at the time. This failure is inconsistent with HGL's obligation to be active, constructive and communicative.

[35] By 3 December Ms Sykes had become defensive and felt slighted and bitter because of her perception that she was not being included in plans for the future. Her perception was accurate - she was being excluded because of Mr Baigent's and Mr Raateland's *alarm* about her performance and style. The sort of approach from Ms Folley evident in the 3 December meeting was required in October before this defensiveness had developed and as soon as Mr Baigent had started raising his

concerns. By the 3 December meeting, Mr Baigent's negative view of Ms Sykes was far more developed and certain than was communicated by Ms Folley to Ms Sykes.

[36] The 5 March letter, the expectations list and the 30 March meeting were Ms Sykes' last chance to establish some credibility in the eyes of Mr Baigent, but no-one told her that. Soon after the meeting Mr Baigent told Mr Raateland that he no longer had any trust or confidence in Ms Sykes and required her removal in line with the clause in the employment agreement. Mr Raateland's evidence is that he did not regularly walk through the Centre with Ms Sykes despite the agreement on 30 March that he would do so because of other more important demands on his time. These other demands were more important because Mr Raateland knew from Mr Baigent that it was too late for Ms Sykes to meet the owner's expectations. Mr Raateland did nothing to facilitate a better relationship between Ms Sykes and Mr Baigent because Mr Baigent had already decided that Ms Sykes should be removed and had no interest in communicating further with her. None of this was communicated to Ms Sykes.

[37] There was no other communication from HGL to Ms Sykes about Mr Baigent's dissatisfaction until mid June when Mr Kyne told the solicitor that the owner wanted Ms Sykes *out*.

[38] Clause 4.2 of the employment agreement contemplates the lack of a constructive relationship between the employee and the Centre owner *notwithstanding the best efforts of the Employee and the Employer*. HGL's efforts to secure a reasonable working relationship between Ms Sykes and Tinline fell well short of *best efforts*. Nothing was done until it was almost too late and then not enough was done to try and rescue the situation; and by its inaction and omissions HGL breached its good faith obligations.

[39] The failure of HGL from October 2008 to deploy its *best efforts* means that it cannot rely on clause 4.2 to justify its decision to dismiss Ms Syke. For that reason, I find that Ms Syke has a personal grievance by way of unjustified dismissal.

[40] The position for HGL is that it had to comply with Tinline's staffing demands. However the management contract empowers the manager (HGL) to select, employ and dismiss such employees as may be agreed with and approved by the owner. It must be assumed that Tinline at least initially approved Ms Sykes. In that case, under their contract, HGL was entitled to resist Tinline's instruction about Ms Sykes. In

essence HGL preferred to end its employment relationship with Ms Sykes rather than risk its commercial relationship with Tinline. That is the broad context for HGL's failure to deploy its *best endeavours*.

[41] There are several complaints about procedural aspects of the dismissal which I will deal with briefly. HGL should have given Ms Sykes a copy of Tinline's 2 June letter but eventually it was clearly enough communicated to her that it was Mr Baigent who wanted her removed so the failure to give her the letter itself was not material. The complaint to Mr Raateland about Ms Sykes' conversation with Mr Adams (which possibly she also had with others) should also have been mentioned to her, but it was ultimately of little significance when the reason for the dismissal was Tinline's view of her. I have already referred to HGL's consideration of redeployment options for Ms Sykes as cursory at best. By that time HGL had decided to terminate Ms Sykes' employment so the consultation exercise it engaged in was not genuine. The indicated factors add to Ms Sykes' personal grievance.

### **Remedies**

[42] HGL submits that Ms Sykes' actions contributed to the situation that gave rise to her personal grievance so as to require a reduction in remedies because she failed to achieve and maintain a constructive working relationship with Mr Baigent and because she refused to consider or discuss a reasonable offer of redeployment.

[43] Addressing the first ground for this submission, a substantial reason for upholding Ms Sykes' personal grievance is that HGL did not induct her to the changes required as a result of the new ownership and management and failed to take steps at an early stage to help Ms Sykes' establish a good working relationship with both the new owner and the new manager. None of that reflected any blameworthy failure on Ms Sykes' part. It must be remembered that she was a hard working and loyal employee who had been meeting HGL's expectations before these changes.

[44] I do not accept that Ms Sykes contributed in a blameworthy way by not accepting transfer or redeployment to the fixed term position mentioned during the 21 August meeting. I have already found that HGL dealt with this in a cursory way, not even having details to hand at the meeting. The more pertinent criticism is of HGL for failing to properly consider Ms Sykes for a Facilities Manager position that had arisen earlier.

[45] In summary I do not accept that Ms Sykes contributed in a blameworthy manner to the situation giving rise to her grievance.

[46] There is a formal claim for reinstatement. The claim was not withdrawn but it was not pressed in submissions. That reflects my assessment that permanent reinstatement is not practicable now. There is no evidence that HGL has any other positions no less advantageous in which to place Ms Sykes. The Authority must recognise that the Centre owner is not going to accept Ms Sykes' as HGL's Mall Manager so reinstating her to that position may lead to the termination of HGL's contract with the owner and a potential redundancy situation for both Ms Sykes and other HGL employees.

[47] The evidence about loss of dignity, injured feelings and humiliation is that Ms Sykes suffered these effects to a significant but not extreme degree. Lucy Sykes is Ms Sykes' daughter. Her evidence, which I accept, is that her mother seems to have been worn down, has lost confidence, seems to have *aged considerably*, has had difficulty sleeping and is worried for the future. Ms Sykes gave evidence, which I accept, about her embarrassment at her dismissal due to her previously close connections with the community as a result of her employment at the Centre. There is also Ms Folley's evidence about Ms Sykes' upset during their 3 December meeting. While the dismissal arose some months later, the evidence shows how important the job was to Ms Sykes so it is not surprising that losing it unfairly has significantly affected her. All this leads me to conclude that HGL should pay Ms Sykes compensation of \$10,000.00.

[48] There is evidence from an employment consultant (Mr Webster) that Ms Sykes is most unlikely to get another position equivalent to that of Barrington Mall Manager because of her age (63), the circumstances of her dismissal for not gaining the confidence of the new owner, her lack of formal industry qualifications and her likely lack of industry experience compared to the field of candidates for such positions in the current economic climate. I accept Ms Webster's evidence.

[49] Ms Sykes has not yet lost any remuneration because the payment in lieu of notice takes her through to mid November 2009. However, I accept that Ms Sykes will probably suffer an ongoing loss of remuneration after mid November because of the difficulty she will experience in obtaining any alternative employment at an equivalent level of remuneration. The issue arises because of the impracticability of

reinstatement which recognises HGL's commercial interests in its client, given the client's almost trenchant criticism of Ms Sykes. Together, these factors make this case an appropriate one in which to make an award for future lost remuneration and benefits. It is likely because her notice.

[50] The commercial contract between HGL is for a limited term. I should recognise that as the prospective maximum expectation of continued employment that Ms Sykes could have had. The compensable loss for Ms Sykes is only the time that it will take her to find other work and the difference between what that work might pay and what she received when employed by HGL. Recognising that uncertainty of that loss, the benefit to Ms Sykes of having a lump sum now and the contingencies of life generally, I find that HGL should pay Ms Sykes a further 3 month salary to cover her future lost salary and other benefits.

### **Summary**

[51] HGL unjustifiably dismissed Ms Sykes.

[52] HGL must pay Ms Sykes compensation of \$10,000.00 pursuant to s.123(1)(c)(i) of the Act.

[53] HGL must pay Ms Sykes compensation of 3 months' salary pursuant to s.123(1)(c)(ii) of the Act.

[54] Costs are reserved. If costs cannot be agreed, Ms Sykes may lodge and serve a memorandum within 28 days and HGL may lodge and serve any response within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority