Attention is drawn to an order prohibiting publication of certain information in this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 632
3248639

	BETWEEN	VSL Applicant
	AND	ZSM LIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Ashleigh Fechney, advocate for the Applicant David Browne, counsel for the Respondent	
Investigation Meeting:	20 and 21 August 2024 in Dunedin	
Submissions Received:	6 September 2024 from the Applicant 6 September 2024 from the Respondent	
Date of Determination:	21 October 2024	

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] As the Applicant has, pursuant to s 10 (1) Schedule 2 of the Employment Relations Act 2000 (the Act), applied for an order that the existing interim non-publication order preventing publication of the parties' identities be made permanent I am using random identifiers for the parties. However, the Respondent (ZSM Ltd) opposes the non-publication being made permanent.

[2] In order to consider the application for ongoing non-publication I need to be satisfied that a sound basis exists for the exercise of the discretion the statute provides as it is apparent non-publication departs from the important principle of open justice.

[3] The full Employment Court in *MW v Spiga Ltd* [1] is a recent decision where the majority held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirms the existing leading authority of the Supreme Court in *Erceg v Erceg.* [2] The majority in *Spiga* set out a twofold test:

> (1) Firstly, there must be "reason to believe that the specific adverse consequences could reasonably be expected to occur".
>
> (2) Secondly, the "Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case". The Court said this part is a weighing exercise and that equity and good conscience may be involved. [3]

[4] The court also suggested the following "example" maters may be relevant balancing factors:

> (a) the circumstances of the case;
> (b) the interests of the person or entity applying for a non-publication order;
> (c) the interests of the other party or parties to the litigation;
> (d) the interests of any third party;
> (e) the public interest, including the rights of media;
> (f) any further issues of equity and good conscience; and
> (g) tikanga and its principles, values, or concepts. [4]

[5] VSL's advocate sought non-publication citing a belief that there was a material risk to their health should they be identified and/or sensitive matters disclosed. Overall, the harm associated with publication was seen as likely to be exacerbated due to the nature of the former employer's business that was described as being situated in a relatively small locality with a high number of clients.

[6] In support of the application, it was asserted that VSL had established a history of health issues that could potentially be compounded if they were required to 'relive' their experiences if they found themselves confronted in public by unspecified parties that may cause a retreat into helplessness (as described in their evidence). VSL's evidence on the potential adverse impact on her health, however, was sparse and not supported by any specialist medical opinion or any corroborating evidence. However, I accept that disclosure of private medical or other personal life experience details may cause real distress.

---

[1] *MW v Spiga Ltd* [2024] NZEmpC 147.
[2] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].
[3] Above n 1 at [88] and [89].
[4] At [94].

[7] In contrast ZSM Ltd's counsel opposed the interim order being extended, suggesting granting non-publication of the parties' identity would unjustly afford VSL privacy when the contributory conduct that gave rise to the personal grievance was at issue and should be held up to public scrutiny. ZSM Ltd's submission concentrated on whether or not it was equitable to shield VSL from negative publicity to prevent future job seeking prospects and made a point that a 'bare assertion' of such negative impact was insufficient. In acknowledging health matters were a legitimate consideration, it was noted by ZSM Ltd's counsel that no compelling supporting evidence had been produced to link any publication to potential ongoing harm.

[8] In weighing the factors identified, I was hampered by a lack of corroborating evidence on specific health issues including whether they were ongoing or not. I accept that VSL's own evidence pointed to a challenging upbringing and early adulthood pressures with some significant reactive health issues due to the stress of the ongoing problems they were encountering at work and the impact of the dismissal but do not consider that this sufficiently established out of the ordinary grounds for a blanket non-publication order.

[9] In my view, the circumstances of the employment relationship breakdown and the factual matrix did not involve any significant contextual issues or claims that pointed to the need to protect VSL from undue publicity. I also note that VSL's evidence is they have moved on in their life and secured alternative employment. As such, I am not convinced that the suggested adverse consequences highlighted, could reasonably be expected.

[10] As a result, I decline to order permanent non-publication of the parties' identities. However, I am convinced that certain matters in contention and parts of the factual matrix relate to private matters that I will not specifically highlight in the following determination including I will avoid making specific reference to VSL's life experiences.

Finding on VSL's application for ongoing non-publication

[11] I decline to order non-publication as requested by VSL. However, given that VSL has a right to challenge this decision I must necessarily order continued interim non-publication of their name and identity and the respondent party; not doing so would render any challenge moot. So, pursuant to Clause 10 of schedule 2 of the Act, I grant an interim non-publication order prohibiting the publication of the identity of both the parties to this employment relationship problem .

[12] The terms of the continuing interim order are:

(a) This interim order is to stay in place for 28 days commencing from the day after the date of this determination, to allow VSL to file a challenge to this aspect of my determination if they wish.

(b) If VSL files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.

(c) If VSL does not file a challenge to the non-publication order in this determination then the interim order will lapse.

Employment Relationship Problem

[13] VSL was employed by ZSM from 5 October 2022 until 7 July 2023 when the employment ended in disputed circumstances.

[14] VSL claims they were unjustifiably disadvantaged by the prior issuing of a final written warning; an alleged unjustified suspension; a unilateral reduction in hours of work and then unjustifiably dismissed. VSL is seeking compensatory remedies.

[15] ZSM Ltd contend VSL's final warning was justified and that the unrelated suspension and summary dismissal were the legitimate actions of a fair and reasonable employer in all the circumstances. The reduction in working hours is contested as being by mutual agreement.

[16] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[17] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

[18] VSL provided a written statement and attended the investigation meeting. For VSL, the current business franchise owner (Ms X) provided a written statement and attended the meeting by an audio-visual link, as did her ex-business partner (Mr Y) and two other people who had worked alongside VSL (the latter three attending in person).

[19] At the end of the investigation meeting submissions were timetabled and provided by the representatives on 6 September 2024.

Issues

[20] The issues the Authority must determine are:

(a) Was the decision to issue VSL with a final written warning on 26 April 2023, justified in all the circumstances?

(b) Was the suspension of VSL from 16 May 2023 until her employment ended on 7 July 2023, enacted in a procedurally fair manner, and justified in all the circumstances?

(c) Was the subsequent decision to summarily dismiss VSL on 7 July 2023, one that a fair and reasonable employer could have reached in the prevailing circumstances as measured against the standards set by s 103A of the Act including consideration of s 4 of the Act's good faith requirements.

(d) In the light of the claim that agreed minimum hours were not adhered to - was VSL correctly remunerated during their period of employment and if not, should wage arrears be ordered and a penalty for breach of the agreed employment terms be imposed?

(e) If VSL's personal grievance is established what remedies should be awarded, considering the claims for:

i. Arrears of wages.

ii. Lost wages.

iii. Compensation under s 123(1)(c)(i) of the Act.

(f) If VSL is successful in all or any element of their personal grievance claims should the Authority reduce any remedies granted because of contributory conduct?

(g) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[21] ZSM Ltd trades as a nationally franchised service provider with premises in Dunedin and Cromwell.

[22] VSL responded to an on-line job advert in mid-September 2022. VSL says they had just returned to Dunedin after studying and working elsewhere and was seeking full time work. VSL recalled being informally interviewed by Ms X and during the interview, a position in ZSM Ltd's Dunedin clinic was offered and accepted. VSL says Ms X offered an hourly rate of $23 for 40 hours per week. Shortly after the interview on 29 September, VSL received an emailed individual employment agreement and a comprehensive employee handbook from Mr Y who was at the time was a co-director of the business and described by Ms X as the person who handled all human resources matters.

[23] In a subsequent text to Ms X of 3 October, VSL said they were reading through the employment agreement provided and had noticed the hours of work provision was expressed as for 32 hours "but during our interview we discussed 40 hours so just wanted to check ….". Ms X responded by text acknowledging this was a mistake made by [Mr Y] and she assured VSL: "It is 40 hours. So don't panic about that. We can amend that for sure". VSL responded indicating no other issues and their intention to sign the employment agreement that was suggested by Ms X be done on the first day of work (5 October).

[24] In the event, the change in hours of work was not made and the employment agreement remained unsigned. Mr Y says he had viewed the text exchanges Ms X engaged in but thought she had got back to VSL and clarified the hours were 32 minimum. Thereafter, he recalled VSL occasionally raising concerns about hours of work and telling them in his view that 32 minimum hours prevailed.

[25] Later during a meeting of 5 April 2023 (discussed further below), VSL highlighted that they had not signed the employment agreement because they did not agree to 32 hours being the minimum entitlement. After this meeting on 8 May, Mr Y provided an amended employment agreement that changed VSL's "normal hours" of work to 38.5 hours per week (roster based). This agreement was not signed by the parties but ZSM Ltd asserts that

throughout employment VSL's hours of work never fell below 38.5 and that VSL assented to this arrangement. VSL maintained they had no choice but to accept the minimum ceiling and, in evidence says they guessed they accepted the at times shortfall in hours knowing they had also signed a two-year bonded training agreement.

First disciplinary issue

[26] VSL was absent from rostered work for the days 30, 31 March and 1 April 2023. Despite not having leave approved, VSL chose to attend a pre-arranged concert trip to Christchurch on 31 March and on the previous day had called in sick and impliedly indicated she would not be at work the next few days. ZSM Ltd became aware of the concert attendance when they viewed social media posts of VSL at the concert drinking what they assumed was alcohol.

[27] ZSM Ltd invited VSL to a disciplinary meeting by letter of 3 April 2023. The matter was initially complicated by the fact that ZSM Ltd was unaware that VSL had previously made an application for leave without pay for 31 March and 1 April as they had made the request using a payroll app that Mr Y had in the interim, not seen. Consequently, the initial disciplinary meeting invite letter was framed as VSL "fraudulently" taking sick leave for the entire period and this could if proven be viewed as "dishonesty and fraud" in breach of cl 23.4 of their Employee Handbook. Mr Y in the letter that he says was prepared in consultation with their external HR advisor, warned VSL their alleged actions if proven "will be viewed as serious misconduct" and could result in a disciplinary sanction up to and including summary dismissal.

[28] At the disciplinary meeting of 5 April, that VSL attended with their mother as a support, VSL admitted to taking the leave without consent and accepted they had done wrong and apologised. However, VSL maintained that they were genuinely sick on the first day of absence (that was notified to ZSM Ltd by a phone message) but when contacted by Mr Y, VSL ignored his communications claiming that they were having phone problems. VSL conceded they just went along with the impression created that they were unavailable for work. However, at the disciplinary meeting attended by Ms X and Mr Y, the parties continued to talk at 'cross purposes' as Mr Y was still unaware of the leave request. As a result, a fairly robust conversation was had and Ms X expressed anger at VSL for betraying their employer's trust. However, at the end of the recoded part of the meeting, both Ms X and Mr Y stressed no decision had been made and they were going to seek legal advice.

[29] The 5 April meeting was recorded and it was clear that at the end of the meeting that Ms X and Mr Y had expressed they were willing to look at giving VSL a second chance but they did not accept their proffered explanation as to their absence. Essentially, there were no mitigating factors advanced by VSL, they accepted the questioned actions were selfishly motivated and that they had failed to apprise Ms X of their intention to take leave or discussed the reasons for the leave with her. By not communicating with Mr Y during the first day of absence, VSL conceded they had given the impression they were still sick during the weekend in question and was not available for rostered work hours.

[30] It is noted that while VSL claimed to have travelled from Dunedin to Christchurch on the second day off absence no proof of this travel was offered of this travel either at the disciplinary meeting or when asked, during or after the Authority investigation meeting.

[31] Ms X and Mr Y said at the close of the meeting they advised VSL during a further unrecorded discussion that involved them raising personal health issues, that VSL could expect a final written warning and that this was the end of the matter and the parties could move on, on a 'clean slate' basis (in response to VSL's request to do so) to try and restore trust in the employment relationship. Mr Y says there was also a discussion about VSL's minimum rostered hours of work needing to be 38.5 and that VSL agreed to this arrangement. VSL disputed the latter assertion.

[32] In the interim, VSL returned to work. There was some unfortunate delay that ZSM Ltd say was caused by their HR advisor, until on 26 April, they confirmed by letter, a: "First and Final Written Warning" signed off by Ms X and Mr Y. The wording of the letter acknowledged the leave request had been made and not seen (as it was not the usual process to do it via the payroll app). The finding was that VSL had lied about being on sick leave and fraudulently took sick leave when VSL had conceded they "had always intended to attend the concert in Christchurch". The letter also noted that after the meeting, VSL had understood and agreed to this outcome (albeit objectively VSL thought this was as an alternative to being dismissed).

[33] Despite the above, in submissions VSL advanced an assertion that their actions were not deceitful and maintained they "genuinely took sick leave, and then took leave without permission". Mitigating factors cited were that: 1) a leave request had been made; 2) it was VSL's first leave request and VSL was unaware of the process to be used; and: 3)

communication between VSL and Ms X was undisputedly strained. These factors were said to support a claim that VSL had been disadvantaged and that a verbal warning was more appropriate because the assertion that VSL had engaged in deceptive conduct later influenced the decision to dismiss.

Was the final warning justified?

[34] Dealing with the first issue, I find it was objectively clear that the conduct VSL engaged in was deceptive. In giving evidence VSL accepted they knew the leave had not been approved and says that they inexplicably failed to approach Ms X or Ms Y about the lack of their approval despite having sufficient time to do so. VSL conceded they did not specify a reason for the leave request and at the time of taking leave did not disclose the purpose of the leave. In the circumstances, regardless of either explanation, ZSM Ltd was entitled to feel deliberately misled. The matter is compounded by the fact that VSL's request was for discretionary leave without pay.

[35] This was I consider objectively a situation where a fair and reasonable employer could conclude trust had been significantly eroded and was entitled to consider this as an instance of serious misconduct. While VSL suggested in submissions that the matter had been pre-determined, I do not consider that to be the case as the recording of the 5 April meeting evidenced VSL had an opportunity to provide an explanation for their actions/omissions and advanced no credible mitigating matters other than suggesting it was impulsive behaviour (when it had evidently been calculated).

[36] The delay in ZSM Ltd providing the final warning decision in writing was unfortunate but it was immediately made clear that the threat of summary dismissal had been lifted in the interim when VSL raised personal health issues. VSL did not question matters further or raise any issues of uncertainty before the warning was formalised. It was not until after the later disciplinary process that led to the summary dismissal had commenced (31 May), that VSL challenged the outcome of the final written warning that at the time they arguably had at least tacitly accepted as being warranted.

[37] I find a final warning was justified in all the circumstances and ZSM Ltd reasonably concluded that the whole period of absence involved VSL failing to communicate in good faith

and VSL engaged in deceptive conduct. I find nothing turns on the fact that the final warning was likely to be considered in the later disciplinary proceeding.

The second disciplinary issue

[38] On 1 May 2023 a co-worker of VSLs who had hitherto been friendly with VSL, provided Ms X and Mr Y with an email detailing what she perceived to be the unprofessional behaviour of VSL and how it impacted on co-workers. The email that was headed: "Based on our conversation" referred to a discussion of the previous week and then proceeded to describe he perception of VSL's negative traits displayed in interactions with other workers; VSL flouting of a direction to desist from vaping in the staff room and tardiness in timekeeping and client interactions. The email did not ask ZSM Ltd to do anything other than describe the writer feeling uncomfortable and anxious around VSL. ZSM Ltd did not immediately bring this email to VSL's attention to seek their views on it.

[39] On 8 May, Mr Y provided VSL with a second employment agreement that detailed minimum hours of work as 38.5 per week and asked VSL to sign it. VSL says they responded by pointing out the agreed hours were 40 hours per week and as Mr Y did not agree with this, VSL did not sign the employment agreement offered.

[40] On 10 May a co-worker and a registered nurse who was an informal second in charge when Ms X was absent, provided ZSM Ltd with a "To whom it may concern" email to "outline some of the issues I have encountered working alongside [VSL]". The email detailed a number of matters of concern around a perception of VSL's performance and client interactions including an observation that when confronted with issues of concern VSL often became overly defensive. The main concerns highlighted were a suggestion that shortly after VSL commenced employment, they had an approved treatment they had failed to pay for; an observation that VSL had a "number of times" undertaken make-up procedures on themself during work time without management approval and suggestions that VSL was garnering client loyalty by providing extra free treatment procedures. The email concluded: "I hope this email outlines some of my concerns around [VSL'] conduct in the workplace. Any questions do not hesitate to contact me". ZSM Ltd did not immediately bring this email to VSM's attention.

[41] On 11 May the worker who provided the 1 May email, detailed in a follow up email, "some important concerns I have regarding my work over the previous 6 months, working with

[VSL]". The email referred to a negative interaction with VSL on 4 May that led her to feeling intimidated by VSL and disclosed that she was aware through conversations with VSL, of two separate occasions (11 March and 1 April 2023) when VSL had been rostered to work but had attended concerts in Christchurch while claiming to be sick. The email ended by suggesting it should not be disclosed to VSL for fear of repercussions to the writer. The email was not immediately put to VSL for comment. Mr Y's evidence was he suspected the earlier unauthorised absence at a concert at the time but had chosen not to pursue it.

[42] In addition, at or around 14 May, it was brought to ZSM Ltd's attention by their young receptionist that VSL had performed an unauthorised treatment procedure on themself while their client was overdue, awaiting treatment.

[43] Around the same time, another co-worker who had been in a known hostile relationship with VSL, texted Ms X suggesting VSL had been "doing [their] brows and make up during [their] break, when I caught [them], [they] said "please don't tell on me for this".

The suspension

[44] By way of a text and email of 15 May, Ms X and Mr Y sought an urgent audio-visual link (AVL)) meeting with VSL for an unspecified purpose that they said would not take up too much of VSL's time. The AVL meeting occurred on 16 May and it was recorded.

[45] Mr Y led the meeting and worked off a formatted script their HR advisor had provided. He opened by generally describing three allegations they were aware of (but not their sources) – these being VSL allegedly: 1) performing personal treatments during work hours; 2) checking clients out as skin consults rather than treatments and 3) performing client treatments outside the scope of their paid clinic membership entitlements. Mr Y said he was planning to investigate the concerns and gather evidence and refused to discuss the allegations. He then said ZSM Ltd were proposing to suspend VSL so he could investigate matters.

[46] Mr Y then somewhat misleadingly, as he did not disclose the sources, indicated one co-worker (the 2 IC registered nurse) had been made aware of the allegations (and was present during the AV) but they had been kept confidential from other workers and he did not intend to discuss matters with them.

[47] Mr Y then asked for specific feedback on the suspension proposal. VSL responded by attempting to discuss the allegations asking if they pertained to two named clients. While Mr Y emphasised, he was not at this point prepared to discuss the allegations, Ms X who had belatedly joined the AVL from another location, proceeded to question VSL on whether there were other things they need to know and then Mr Y outlined the suspension process saying it was on pay and they would get back to VSL with more detail within 48 hours. However, when VSL expressed that they felt they had been 'blindsided' and did not think they had done anything wrong to warrant suspension, Ms X proceeded to firmly assert that she had and, that they possessed evidence to prove this (going as far as to say VSL could not deny the allegations). Mr Y then sensibly closed the conversation down and said if there was anything to the allegations, he would set this out in a letter and VSL would be brought in for another meeting.

[48] During the investigation I questioned Mr Y on why the emails of concern from co-workers had not simply been promptly put to VSL and he responded that on advice they had decided to hold off on disclosing the correspondence as they felt the other allegations were sufficiently serious but when VSL engaged a lawyer, they decided to use the co-worker complaints. Ms X's evidence was she was becoming frustrated at this point in time by her perception that VSL's performance and attitude had not improved since the discussion around the final warning. It was clear from the correspondence that Ms X had discussed these concerns with VSL's co-workers and I find it is more likely than not, she encouraged the concerns to be put in writing.

[49] An observation is, ZSM Ltd misled VSL into believing that an investigation was to be conducted to gather further evidence when they were already in possession of material they intended to consider. Mr Y confirmed during the Authority investigation meeting that he did not subsequently interview the other workers and took their written concerns 'at face value'. He says that after 26 May he went back over their statements and approached each one of them individually to get affirmation they stood by their statements. None of this was documented.

[50] Ms X likewise says she did later in the disciplinary process speak with the complainant workers who denied any ill motive. Ms X says she preferred their version of matters as they were 'trusted' colleagues.

[51] On 16 May the receptionist by email, provided an account of disturbing VSL in a staff room on 13 May to tell her a client was awaiting treatment and found VSL performing a

procedure on themself. The registered Nurse also provided an email saying she witnessed the receptionist coming back to her workstation and noted the client was ten minutes over their due appointment time. VSL claimed the procedure undertaken was done during a work break but this was disputed by all ZSM Ltd's witnesses who suggested this was not possible due to the time the procedure normally took.

[52] VSL then received a 16 May letter from Mr Y confirming the suspension "due to the serious nature of the allegation" and while not referring to the ostensible reason being to conduct a wider investigation, it did specify VSL should be available to "participate in any investigation process upon request". VSL was also warned not to contact co-workers without ZSM Ltd's consent.

Was the suspension justified?

[53] Procedurally, ZSM Ltd say they provided VSL with an opportunity to make a submission on a proposal to suspend. However, having listened to the recording of the meeting where no break was taken, it is clear they took no time to consider VSL's response and had by this point in time determined they would proceed with the suspension. Some of the comment made by Ms X during the suspension meeting disclosed she had already determined VSL was culpable for the matters put to her.

[54] I have also observed that the predominant reason initially given for the suspension (to conduct a full investigation) was misleading. It was later claimed the ongoing suspension was motivated by a desire to keep the workers apart while an investigation of the bullying allegation proceeded. Again, this was misleading as no full investigation occurred other than providing VSL with an opportunity to respond to the bullying and intimidation allegations that objectively were insubstantial and lacking specific details. I, however, accept ZSM Ltd's submission that the ongoing nature of the suspension was genuinely felt to be appropriate to avoid ongoing disruption once the allegations of co-worker concerns were presented to VSL has some legitimacy.

[55] I find overall that while the suspension in the ordinary course of events of an employer embarking upon an investigation with an 'open mind' would have been justified, here this was not initially the case. Then, because no full investigation of the co-worker allegations took place it renders the overall suspension of dubious validity.

[56] In regard to the allegations actually put to VSL at the suspension meeting, ZSM Ltd already had sufficient information available to proceed to a meeting and ask for an initial response – a suspension was not necessary in this regard.

[57] I also accept that a further investigation auditing ZSM Ltd's records did proceed and Mr Y later outlined the results of this in a letter to VSL's counsel of 26 May but emphasised that their concern was a on a specific transaction over undercharging for a client treatment.

[58] I have some concern about the length of the suspension and time it took to provide an outcome decision to VSL that I will deal with in the context of considering the overall fairness or otherwise of the decision to dismiss.

[59] In the contextual circumstances, I find the suspension to be procedurally and substantively unjustified and I have to consider whether VSL was unjustifiably disadvantaged and should be compensated for any distress VSL says they suffered. Given the suspension was paid there is not financial disadvantage involved and the time away from work provided VSL with an opportunity to get legal advice and prepare a response to the myriad of allegations at issue. However, the length of the suspension was objectively unreasonable and VSL was disadvantaged by being placed 'in limbo' with no communication from the employer and an inability to approach co-workers.

[60] In all the circumstances pursuant to s 123(1)(c)(i) of the Act, I find it is appropriate to award VSL modest compensation on this finding in the amount of $1,500.

Invite to the disciplinary meeting.

[61] In a letter of 17 May, ZSM Ltd says was drafted by their external HR advisor, VSL was invited to a disciplinary meeting. The letter set out more specific details of the three cited allegations. In support of the allegations limited information described as 'evidence' was provided in the form of a report authored by Mr Y and the receptionist's email of 16 May described as a "witness statement". Each allegation was described as capable of being viewed as serious misconduct "irrevocably" damaging trust and confidence and impacting business profitability. VSL was warned that "if proven" a disciplinary sanction up to termination of employment without notice was at issue. The letter concluded with reference to a "full and

detailed investigation" being assisted by VSL's attendance at a disciplinary meeting. Ms X and Mr Y were identified as the decision makers.

[62] The letter mistakenly indicated the disciplinary meeting was to occur on 11 May but then Mr Y emailed clarifying it was proposed for 18 May and that VSL had been given "at least 24 hours to find a support person". Unsurprisingly, VSL sought more time to get legal representation. ZSM however, kept pressure on to meet urgently by way of an email of 19 May suggesting they were contemplating proceeding to consider the merits of the allegations without VSL's feedback if they did not get back to them by the close of business that day.

[63] VSL engaged counsel who confirmed this with ZSM Ltd on 19 May and it was agreed a meeting occur on 24 May. In an email of 21 May ZSM Ltd provided further background material describing it as "all evidence for the disciplinary meeting".

[64] A further complaint from a co-worker of VSL's who it was acknowledged was hostile in their relationship, emerged in a Grievance Lodgement Form dated 23 May that described incidents occurring on 23 December 2022; 22 March 2023; 2, 20 and 28 April 2023 and 2 May 2023. Essentially the nature of the concerns described were related to VSL's performance and interactions with co-workers. The aggrieved worker sought VSL's dismissal. It is noted this worker has subsequently left and did not give evidence at the investigation meeting but was described by ZSM Ltd witnesses' as being difficult and confrontational.

[65] VSL's counsel responded by letter of 22 May, requesting further detailed information pertaining to the allegations prior to attending any meeting. At this point in time, Mr Y says he resolved to disclose the other staff concerns they had been concealing from VSL that he alluded to as three new "issues" in an email of 23 May.

[66] Mr Y candidly disclosed they decided to pursue these extra matters because VSL had engaged a lawyer. Mr Y in giving evidence displayed some inexplicable hostility to the fact that VSL had engaged a 'senior' lawyer and went as far as to suggest in written evidence: "As this was an internal allegation it rang alarm bells that [VSL] believed [they] needed a lawyer". I observe although Mr Y suggested the delay in convening the disciplinary meeting was unreasonable and should be attributed to VSL and her counsel being obstructive, I do not agree with this contention as vital information was not promptly disclosed and ZSM Ltd had an

unreasonable expectation of the time it takes to obtain representation and an inexplicable expressed bias against VSL's right to seek competent representation.

[67] A revised invitation to the disciplinary meeting was provided in a letter of 26 May 2023. The additional matters cited were an allegation that on 9 November and 16 November 2023 (impliedly 2022) VSL had received two significantly costly personal treatments without following through and advising Ms X that the costs of such be added to her staff account or that the treatments were subsequently paid for. This was viewed as potential serious misconduct. Ms X maintained she only became recently unaware of the nonpayment in May 2023 when advised by her 2 IC.

[68] Further, based upon the co-workers' witness statements, VSL was alleged to have "engaged in conduct consistent with bullying and harassment and intimidation" of an ongoing nature that was viewed as serious misconduct (although this was clarified later in the letter as "if proven"). Again, reference was made to a "full and detailed investigation" that required VSL attend a disciplinary meeting to provide an opportunity to respond. The earlier co-workers' statements were disclosed with the amended letter.

[69] In addition, in the 26 May letter, ZSM Ltd expanded upon the context to the allegations around undercharging of clients and provided policies prohibiting the private use of work premises for personal treatment. The letter noted in regard to the co-workers' matters, that on receipt of a formal complaint "we take action to separate employees to enable an uninterrupted investigation to take place" and that VSL had been suspended "so that a full investigation of the allegation including staff statements could be complete". I note this was somewhat misleading as no full investigation had taken place in the sense that co-workers were not interviewed and some of the staff statements pre-dated VSL's suspension.

[70] In a letter of 29 May, VSL's counsel requested further disclosure including that context be provided on how the witness statements had been obtained. Mr Y responded on 30 May but apart from asserting VSL "has breached" employee benefits' policies and displayed behaviour that "give rise to a clear breach of our bullying and harassment policy", he did not address the latter issue. However, in a further email of 31 May he said the complainant co-workers had made verbal complaints then after being reassured of no repercussions by him they submitted written statements. The evidence given by two co-workers during the investigation meeting was

they collaborated with other co-workers in preparing the statements and prior to submitting them, had discussed their concerns with Ms X.

31 May disciplinary meeting

[71] The parties agreed to meet on 31 May. Prior to the meeting in a letter of the same day, VSL's counsel expressed a view on the material provided as not founding a definition of bullying and harassment and, cautioned the allegations were at worst ones of unprofessional behaviour. In the alternative, counsel suggested the co-workers may simply be disgruntled and seeking to influence their employer to dismiss VSL. Specifically, counsel conveyed that VSL's "denies the behaviour as has been described" and requested the employer view internal camera footage and audio as well as assess Group Chat interchanges. I note in Ms X's written evidence she had referred to having viewed VSL on camera footage "standing over" a staff member and doing the same to her but no camera footage was disclosed or advanced as evidence.

[72] Counsel then suggested due to the size of the business and close relationships it was not appropriate for VSL to respond to the allegations before they had been independently investigated by an external third party.

[73] Also prior to the 31 May meeting, VSL's counsel provided another letter headed: "Notification of Various Personal Grievances". This included: challenging the 26 April final written warning as an unjustified disadvantage grievance suggesting no deceit over the leave application occurred; challenging the suspension as a disadvantage grievance on procedural and substantive grounds; a suggestion that the broadening of the disciplinary process was to achieve a predetermined outcome and that this founded an unjustified disadvantage grievance and that VSL's employment agreement had been breached by her minimum hours of work being altered. A comprehensive request for all relevant information was then made and as a remedy counsel sought VSL's immediate return to work, compensation, and legal costs.

[74] The parties met on the afternoon of 31 May. Present were VSL and her then counsel; Ms X; Mr Y and their external HR advisor. There are no contemporaneous notes or recording of this meeting but during the second day of the investigation meeting ZSM's counsel provided a copy of their HR Advisor's typed up report of the meeting; a document not disclosed to VSL at the time of the dismissal and inappropriately headed "privileged and confidential". VSL's advocate was given an opportunity to comment on the accuracy of this report (that by this point

in the proceedings had been already prior disclosed to them) when lodging submissions but did not detail any concerns. I accept while well formatted, the report is not a verbatim record of the meeting.

[75] VSL's recollection of the 31 May meeting, was they felt constrained in providing explanations as says Ms X frequently cut them off or talked over them. At the investigation meeting I was invited to consider what VSL had wanted to say in response to the allegations but I made the point that I could only assess what explanation they provided at the time and I note after the meeting, there was a considerable period of time before a decision was made when VSL had ample opportunity to provide a further explanation.

[76] Ms X's recollection of the meeting was unhelpful and Mr Y's recollection of was largely confined to concerns about counsel's robust advocacy on VSL's behalf and negative generalisations about VSL's approach to the allegations with a perception that VSL was quick to deflect blame on others and was dismissive of ZSM Ltd's concerns about personal use of their products. On the latter issue, both Ms X and Mr Y (supported by the two co-workers' evidence) asserted that it had been clearly communicated that the use of company product and/or personal treatment was only allowed with Ms X's prior consent being obtained.

[77] The report of the 31 May meeting indicated VSL:

- contested falsifying client treatment documentation;
- accepted giving clients some additional treatments gratis but claimed such practice was widespread and/or tacitly condoned by the franchise;
- accepted they used company product without permission when waxing their eyebrows during what was said to be a work break;
- accepted they had performed, without permission, a procedure utilising company product between client appointments but denied keeping the client waiting;
- accepted they had made no effort to approach their employer to arrange to pay for a reasonably costly procedure a co-worker had undertaken in late

2022 ($1,184 owing) and accepted failing to fully compensate ZSM Ltd for other costly products that had been taken just prior to Christmas 2022;

- through counsel said VSL was not "at this time" going to respond to the bullying and intimidation allegations as they were clearly a conspiracy to get rid of them.

The Aftermath

[78] Despite indicating they would consider the evidence at hand and provide an outcome as soon as practicable there was then significant delay. This led to VSL's counsel noting in a letter of 20 June that there had been "no communication whatsoever" and in their view VSL's continued suspension was unlawful and causing significant distress. I had no evidence this letter was responded to until 7 July 2013 when ZSM Ltd provided a letter concluding their disciplinary process with a decision to summarily dismiss VSL. This letter set out the reasons in some depth, why they had reached this decision. At the investigation meeting, ZDM Ltd attributed the delay to being unable to contact their HR advisor in a timely manner to assist in making their decision and drafting the dismissal letter (a matter they explained in the dismissal letter). I found this credible but did not explain why VSL had not in good faith been apprised of this at the time.

[79] The reasons set out for the decision to dismiss effective "as of the date of this letter" were described in some detail in the 7 July letter and cumulatively described as an irreparable breakdown in trust and confidence. In setting out their conclusions on the five allegations at issue, ZSM Ltd explained how they had concluded they were unable to reconcile VSL's responses with the identified matters of concern and they concluded serious misconduct was found for three of the allegations (the altered documentation and unauthorised use of company products) and that the failure to reimburse the business for a treatment was inexplicable. In regard to the bullying and intimidation allegation, ZSM Ltd indicated that they preferred the evidence of co-workers over VSL and considered the conduct "amounts to bullying at the level of serious misconduct".

The personal grievances

[80] By way of a letter of 7 July 2023, ZSM's now counsel, responded to the personal grievances raised by VSL in their counsel's letter of 31 May, rejecting in some detail the assertions made challenging the final warning decision; the reduction in minimum hours and the disciplinary process. In essence, ZSM Ltd maintained VSL had breached the high degree of professionalism and trust expected of the occupied role. In summary, ZSM Ltd suggested VSL had on various occasions breached agreed terms and conditions of employment and that:

> These occasions include wilfully taking product without correct payment, vaping in the workplace in disregard of both clause 10.4 of the handbook and a proper work instruction given to her not to do so, feigning illness to attend concerts, performing beauty procedures [on themselves] during work hours, and under reporting the treatments … performed on some clients extending to them a discount when none was approved depriving [the] employer revenue. [They] also demonstrated conduct and expressed attitudes towards [their] colleagues which reasonably constitute bullying contrary to section 9 of the handbook.

[81] I note while the above is a good summary of the reasons given for dismissal the vaping in the workplace allegation was not put as a potential misconduct issue or mentioned in the 7 July letter confirming the dismissal. If it was discussed at the 31 May disciplinary meeting it was not recorded in the meeting report.

[82] In responding to the claimed breach of contract (the unilateral reduction of supposedly agreed minimum hours) it was suggested this was out of time and otherwise denied with an assertion VSL had agreed to and accepted 38.5 hours per week without formal challenge since the beginning of 2023.

[83] The letter concluded by suggesting mediation was an option.

[84] In response, VSL's counsel by letter of 12 July, notified ZSM Ltd of an unjustified dismissal personal grievance including a claim that a failure to provide a preliminary indication of any employment investigation findings for comment, constituted a breach of s 4 (1A)(c) of the Act's good faith obligations. To support the latter claim, counsel noted ZSM Ltd had spoken to at least two additional witnesses without allowing VSL to respond to their accounts. Further, counsel noted no further comment had been invited after the 31 May meeting. Mediation was also suggested. This did not immediately occur and after receiving an application on 4 September, the Authority directed the parties to mediation on 26 September 2023. Mediation took place on 21 December 2023 but matters remained unresolved.

Was the decision to dismiss unjustified?

[85] Although the Authority does not have unbridled licence to substitute its decision for that of the employer [5] it may reach a different conclusion, provided the conclusion is reached objectively and with regard to all the circumstances at the time the dismissal occurred. [6] The Authority is essentially deciding "whether the decision and conduct of the employer fell withing the range of what a fair and reasonable employer could have done in all the circumstances". [7]

[86] Section 103A(3)(a-d) of the Act specifies elements that the Authority must objectively measure an employer's actions against. These are in summary:

(a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the worker.

(b) Did the employer raise the issues of concern with the worker prior to deciding to dismiss?

(c) Was the worker afforded a reasonable opportunity to respond to identified concerns.

(d) Did the employer genuinely consider any explanation provided by the worker before deciding to dismiss; and

(e) any other contextual factor the Authority regards as appropriate to consider.

[87] Applying the above elements broadly requires the Authoirty to look at whether ZSM's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must also have regard to the Act's good faith provisions and the relevant employment agreement. This requires that I consider various contextual factors, including broadly whether concerns were sufficiently raised by the employer with the worker; whether a full, fair, and thorough investigation was completed and whether a reasonable opportunity to respond to those concerns was given; and whether the employer genuinely considered the worker's explanations (if any) before the decision to dismiss was made (including consideration of alternatives to dismissal).

---

[5] *X v Auckland District Health Board* [2007] 1 ERNZ 66.
[6] *Air New Zealand v Hudson* [2006] 1 ERNZ 415.
[7] *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25].

[88] This was a dismissal that can usefully be divided into process and substantive elements.

[89] I find that ZSM Ltd given its recourse to specialist legal advice at an early stage, should be held to a reasonable standard in how they approached matters but balance that with their relative inexperience and the small-scale operation it was running.

[90] In addition, a key contextual factor is at the time of the dismissal VSL was the subject of a final written warning that I have found was justified. That warning involved VSL's integrity being found wanting. The warning specifically indicated that moving forward, VSL was expected to adhere to employer policies and demonstrate honesty in the employment relationship to restore trust in the employment relationship. The warning reminded VSL that any further misconduct could lead to disciplinary action up to the employment being terminated.

Process

[91] As discussed above, I find the investigation Mr Y says he was conducting to be deficient in respect to the bullying and intimidation claims in that he appears to have just unquestionably accepted the statements of the co-workers without sufficient further inquiry and, when suspending VSL he misled them into thinking his investigation had just commenced. In fact, at the time of the suspension both Mr Y and Ms X were aware of issues raised by co-workers and had evidence they were relying upon that they initially chose not to disclose to VSL. However, this albeit significant procedural deficiency was corrected prior to the first disciplinary meeting as all the allegations were put and background material disclosed.

[92] I find that ZSM Ltd's deficiency of not conducting a full or fair investigation led to an unsustainable finding on the specific bullying and intimidation issue as it was coupled with a refusal to fairly consider this distinct matter being independently and properly investigated by someone with suitable investigative skills.

[93] Objectively looking at the allegations made by the co-workers, how they were formulated and the evidence of one key co-worker who somewhat contradicted her evidence when she categorised VSL as merely being over defensive and insecure at times rather than impliedly an intentional bully, I do not consider the decision to categorise the conduct as bullying and intimidating was in any case, sufficiently available as a conclusion.

[94] However, given the context of the final warning and the totality of the evidence on the other cited issues, I find the decision makers were reasonably entitled to conclude that VSL's actions had destroyed the requisite degree of trust and confidence they were entitled to place in VSL. VSL had been placed on fair notice in early April 2023 to rebuild trust and while some of the admitted misconduct pre-dated this warning, some significant issues of misconduct fell within a later period when ZSM Ltd's reasonable expectation of improved conduct was squarely at issue.

[95] In assessing the evidence, I found ZSM Ltd's two co-worker witnesses' to be credible whereas VSL was deflective at times. While it is difficult for a small employer who works alongside workers to assess credibility issues and it was evident that VSL had unfortunately isolated themself in the workplace, I found VSL's evidence to be unconvincing and at times not appreciative of their former employer's legitimate concerns.

[96] In *Whanganui College Board of Trustees v Lewis,* the Court of Appeal has observed:

> The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does. In ascertaining the facts the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any legal standard of proof. Nor is it usual to impose the application of a legal standard of proof on decisions of a litigant. That is not needed; there is already the standard of reasonableness. But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable. That must be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances. [8]

[97] The above guidance allows an employer when wrestling with conflicting accounts, to make a finding of credibility provided the process adopted in getting to this point is reasonably fair. I have balanced this with the understandable claims of VSL that Ms X in particular was biased against her. This may have been correct in the sense that Ms X bluntly expressed her disappointment about VSL's actions but it did not mitigate VSL's actions that were admitted as being inappropriate. On the latter, the Employment Court and the Authority have depending on the circumstances, held that where an employer's investigation is deficient, the honest belief

[8] *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

that serious misconduct has occurred justifying dismissal may be dubious but such a premise does not necessarily extend to situations of admitted misconduct.[9]

[98] While ZSM Ltd did not engage in a careful, 'two step' disciplinary process of first identifying potential serious misconduct and seeking comment and then coming to a potential dismissal decision and seeking comment on such, the process they used was not rushed and VSL who was well represented throughout, had ample opportunity for input in addressing the decision makers and to explain their conduct; its motivation and any mitigating circumstances prior to the dismissal being finalised.

[99] A key to the decision emphasised in evidence, was an assessment that VSL showed no remorse or insight into their actions and how they had eroded trust, during the disciplinary process nor did VSL take any steps to reimburse the money owed for employer products used. In essence, ZSM Ltd considered VSL had been well accommodated and given significant leeway to assist in developing in the role allocated but that they failed to reciprocate chances to demonstrate professional behaviour. ZSM Ltd witnesses stressed VSL when focussed was capable and good at the job but had let themselves down in the areas highlighted.

[100] VSL reinforced during the Authoirty investigation meeting that they thought the 'trust' factor had been exaggerated which in the circumstances sadly demonstrated a lack of insight to why the employer had concerns about their approach to the employment relationship.

[101] I find that ZSM Ltd with the exception of how they approached the bullying allegations, has just satisfied the requirements of fairness and reasonableness as set out in s 103A(3)(a) – (d) of the Act by providing VSL with specific notice of their concerns; has allowed VSL ample opportunity to respond and considered the explanations given (that involved admissions of culpability on two significant matters at issue).

The substantive decision

[102] The key issue is whether after hearing from VSL at the 31 May disciplinary meeting, could ZSM Ltd conclude that VSL's actions constituted serious misconduct sufficient to destroy the ongoing relationship of trust and confidence they were entitled to place in VSL and

[9] See *Murphy and Routhan t/a Enzo's Pizza v van Beek* [20013] and *Reynolds v Amount Cook Airline Ltd* NZERA Christchurch 155.

was this a fair and reasonable conclusion that ZSM Ltd could have reached in all the circumstances.

[103] Objectively considered, after providing VSL with a final written warning concerning an integrity matter, ZSM Ltd was entitled to expect a stringent adherence from VSL to a not unreasonable workplace rule, that personal treatment and use of employer products should only be with express permission. I find that it is more likely than not, VSL was aware of these requirements but chose to ignore them. While VSL sought to justify their actions with claims others did the same (a fact not established) this did not detract from obligations and knowledge that being on a final warning their employer had emphasised displayed integrity failings was now firmly at the heart of the employment relationship. These actions of flouting this requirement in of itself justified a finding of serious misconduct and I consider dismissal was not a disproportionate penalty in all the circumstances.

[104] Having concluded that ZSM Ltd has overall not acted in an unjustified procedural manner leaves consideration of s 103A(4) of the Act that allows the Authority in considering whether they acted fair and reasonably in concluding the conduct of VSL was serious misconduct, to consider any other factors it thinks appropriate.

[105] In submissions I was invited to consider that Ms X in particular had displayed bias in her decision-making approach and was ill-disposed to VSL to the point that she pre-determined the dismissal. Having listened to the two recordings of the disciplinary meeting that led to the final warning and the suspension meeting, it is clear that Ms X was angry and firm in her approach. However, given the deceit VSL engaged in when they deliberately absented themself from work without permission (latterly discovered to be on two occasions) and then obfuscated matters by calling in sick the day before and then going 'incommunicado', Ms X's stance was understandable.

[106] In contrast Mr Y was a balance in the decision-making and I find he placed emphasis on process and fairness. In the event, VSL was given a second chance after explaining personal health pressures they were under that in any objective sense did not adequately explain or particularly mitigate her actions. Thereafter, VSL had an opportunity to restore the relationship.

[107] VSL also suggested the broadening of the disciplinary inquiry to consider co-worker complaints of bullying and intimidation was done to bolster a pre-determined outcome. I do

not find this to be the case, as while I have found these matters were inadequately investigated and ZSM Ltd could not conclude serious misconduct or otherwise was at issue in this instance, the other matters involving using employer product without permission were in of themselves, sufficient to make the decision to dismiss a justified action.

[108] I do consider ZSM Ltd was badly advised to withhold the additional bullying and intimidation complaints but am satisfied they were overwhelmed by the number of matters of concern at issue and they mistakenly considered the position of the co-workers' reluctance to have the matters openly investigated was a predominant factor. The initial decision not to disclose the co-worker complaints lacked balance and was unfair to VSL.

[109] In analysing the unusually long time taken to communicate the decision to dismiss when ZSM Ltd went 'incommunicado' for five weeks, this was less than ideal and likely caused VSL some ongoing anxiety. However, during this period VSL was remunerated and apart from signalling through counsel on 20 June that they considered the ongoing suspension unjustified, VSL took no further action and did not use this time to provide ZSM Ltd with a wider or more detailed explanation for their actions under scrutiny or any mitigating factors.

[110] In contrast, ZSM Ltd say they had significant difficulty in contacting their representative for ongoing advice and felt unable to conclude matters without this assistance.

[111] To complete the application of the statutory justification test, I find s 103A(5) of the Act does not prevail as the procedural defects apart from the matters I have highlighted and will deal with in remedies, did not in my view result overall in VSL being treated unfairly.

[112] In the final analysis, this is a matter where the Authoirty, having concluded that the employer's assessment of the worker's admitted misconduct was capable of being deemed serious misconduct, cannot substitute a view that a lesser sanction was appropriate in all the circumstances (including having found the final warning justified).

[113] In *X v Chief Executive of the Department of Corrections* the Employment Court referred to:

> A comment by the full Court in *Angus* illustrates the point; the Act contemplates there may be more than one fair and reasonable response or other outcome that might justifiably be open to a fair and reasonable employer in the circumstances. If the employer's decision to dismiss the employee is one of those responses the dismissal must be found to be justified. It follows that, if dismissal was one option open to the

> Department after conducting a proper investigation into the circumstances of the complaint, its decision ought not to be interfered with merely because the Court might, possibly, think some lesser penalty could have been imposed. [10]

Finding

[114] I find the decision to summarily dismiss VSL was one that a fair and reasonable employer could have reached in all the prevailing circumstances.

The reduction of agreed hours of work

[115] While the parties did not sign an employment agreement it was evident that VSL agreed to abide by the terms of the first employment agreement provided in all respects apart from the hours of work. I find from correspondence cited that Ms X agreed at the interview and later affirmed that a minimum of 40 hours work per week was on offer. This provision formed a crucial part of the parties' oral offer and acceptance but Mr Y subsequently refused to confirm this in writing by amending the employment agreement to reflect what had been agreed.

[116] VSL was justified in refusing to sign either of the employment agreements provided and did on occasion raise the issue of not being paid a minimum of 40 hours per week. I do not find VSL affirmed the breach of the employment agreement by the ongoing acceptance of at times, less than 40 hours minimum pay – VSL was in an invidious position with little bargaining power. From January 2023 the intention of ZSM to continue breaching the agreed terms of employment was made explicit including the later imposition of a a 38.5 hours per week roster and seeking of VSL's consent to this with an amended employment agreement. VSL specifically refused to affirm the imposed term, while highlighting they were still seeking a reversion to what had been agreed at the commencement of the employment.

[117] In these circumstances I find a breach occurred and VSL is entitled to be compensated for the shortfall of pay at times when a minimum of 40 hours was not provided. The not contested claim in this regard that I find appropriate to award, was for an additional 109.5 hours pay amounting to $2,518.50.

---

[10] *X v Chief Executive of the Department of Corrections* [2018] NZEmpC 106 at [71]

A penalty

[118] VSL seeks a penalty be imposed for the intentional breach of the agreed terms of employment. It is argued the breach was intentional, ongoing, and causative of a financial loss and distress. VSL's counsel suggested a penalty would reinforce the importance of parties adhering to agreed employment terms.

[119] In contrast, ZSM's counsel contended VSL had agreed to the change in minimum hours and that 38.5 hours per week was a reasonable reflection of the industry standard hours. ZSM Ltd wrongly suggested VSL did not raise objections to the imposed change.

[120] In assessing whether a penalty is appropriate and exercising the Authority's jurisdiction under s 161(m)(i) of the Act, I note the evidence disclosed VSL did at crucial times raise concerns about minimum hours of work; was initially assured it would be corrected and then commenced employment. What does appear to have occurred is an inexplicable breakdown in communication between Ms X and Mr Y and then the matter was just neglected until there was an unsuccessful attempt in May 2023 to get VSL to formalise the breach.

[121] While the breach was ongoing and neglectful I do not consider it was intentional as I accept Ms X had wrongly assumed a signed employment agreement was in place and Mr Y did not get round to ensuring this was the case.

[122] However, I consider the breach to be relatively serious and impactful on VSL. In the overall circumstances I find a penalty of $1,500 is appropriate and this sum should be paid to VSL.

Contribution

[123] Section 124 of the Act states that I must consider the extent to what, if any, VSL's actions contributed to the situation that gave rise to the personal grievances and then assess whether any calculated remedy should be reduced. To assess this, I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation* [11].

[11] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[124] In the circumstances given I have upheld the final warning and summary dismissal as being justified, I find that VSL engaged in serious misconduct and has contributed to events that gave rise to her personal grievances. That contribution including deceiving their employer and then disregarding workplace rules is significant. However, it has to be balanced up with my other findings that the suspension was unjustified and VSL's employment terms of engagement were breached.

[125] I find that an assessed contribution of 25 % is justified in all the circumstances and apply that reduction to the compensatory remedy only, reducing this to $1,125.00.

Outcome

[126] I have found that:

(a) VSL was not unjustifiably dismissed.

(b) ZSM Limited unjustifiably disadvantaged VSL by enacting a suspension in an unjustified manner.

(c) ZSM Limited breached an agreed term of VSL's employment engagement terms by failing to pay a minimum of 40 hours per week at all times and owe wage arrears and I award a penalty for the breach.

(d) In the circumstances ZSM Limited must within 28 days of this determination being issued, pay VSL the sums below:

(i) $2,518.50. (gross) wage arrears pursuant to s 131 of the Employment Relations Act 2000;

(ii) $1,125.00 compensation without deductions pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and:

(iii) A penalty in amount of $1,500.00 without deductions pursuant to s 133 of the Employment Relations Act 2000.

Costs

[127] Costs are reserved.

[128] The parties are strongly encouraged to resolve any issue of costs between themselves.

[129] If the parties are unable to resolve costs, and an Authority determination on costs is needed, VSL may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum ZSM Limited will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[130] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[12]

David G Beck
Member of the Employment Relations Authority

[12] For further information about the factors considered in assessing costs see: *www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1*