

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 724
3169882

BETWEEN	KYLIE WILSON Applicant
AND	EAST COAST CLEANING LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Ashleigh Fechny, advocate for the Applicant Deepak Badhwar, for the Respondent
Investigation Meeting:	8 August 2023 at Gisborne
Submissions received:	23 August and 22 November 2023 from Applicant 19 September and 29 November 2023 from Respondent
Determination:	06 December 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Kylie Wilson was employed by East Coast Cleaning Limited (East Coast) as a commercial cleaner. East Coast was at all times represented by Mr Deepak Badhwar, its sole director and shareholder.

[2] Ms Wilson's job was to provide nightly cleans to one of East Coast's major clients, BDO. Ms Wilson took pride in this job, describing the importance of keeping the well-appointed offices clean to a high standard.

[3] Mr Badhwar said that there were some concerns with Ms Wilson's performance, including the taking of a key to the cleaner's cupboard, and the presence of Ms Wilson's son in the building.

[4] However, from his perspective, matters came to a head when BDO contacted him, saying that it had CCTV footage showing Ms Wilson bringing an unauthorised person into the workplace, and taking a large box to the entrance-way, which spilled open showing a volume of BDO tea, coffee, and similar supplies in Ms Wilson's possession.

[5] BDO said that this was not acceptable, and after being called in to BDO to be shown the video footage, Mr Badhwar dismissed Ms Wilson.

[6] Ms Wilson raises a claim of unjustified dismissal, and unjustified disadvantage, in relation to a written warning; as well as claims of breach of good faith, and a breach of the Wages Protection Act 1983 in relation to money she says was deducted from her final pay. Ms Wilson seeks remedies of lost wages, compensation for hurt and humiliation, and costs.

[7] Mr Badhwar on behalf of East Coast says that Ms Wilson's dismissal was justified. He says that he was essentially left with no alternative after the client she was employed to service lost trust and confidence in her, over theft of supplies and bringing an unauthorised person into the workplace, both of which were visible on the security footage. He denies any remedies are properly owed.

The Authority's investigation

[8] For the Authority's investigation a written witness statement was lodged from Ms Wilson. Mr Badhwar provided documents. All witnesses answered questions under affirmation from me and the applicant's representative. Both parties provided written closing submissions.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[10] The issues requiring investigation and determination were:

- (a) Was Ms Wilson unjustifiably dismissed?
- (b) Did Ms Wilson suffer an unjustified disadvantage?

- (c) If East Coast's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
- Lost wages (subject to evidence of reasonable endeavours to mitigate loss);
 - Loss of benefits; and
 - Compensation under s123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Wilson that contributed to the situation giving rise to her grievance?
- (e) Did East Coast act in breach of its good faith duties?
- (f) Did East Coast breach the Wages Protection Act 1983?
- (g) Should either party contribute to the costs of representation of the other party?

Background

[11] Ms Wilson came to be employed by East Coast, as she helped her mother with some work for East Coast. Mr Badhwar then contacted her, and asked if she would be interested in employment.

[12] Ms Wilson and Mr Badhwar discussed the terms of employment, and agreed that Ms Wilson would work five nights per week, 5 hours per night, cleaning a large office. She would be paid by the hour.

[13] Ms Wilson asked if her partner could come to site to assist her on occasion, and Mr Badhwar agreed. From Ms Wilson's perspective, this meant that with her partner's assistance, she could complete the work in half the time, but would still receive the same amount of pay.

[14] Ms Wilson's standard hours were approximately 5.00 pm to 7.30 pm (or longer for those nights when her partner was unable to assist).

[15] Ms Wilson gave evidence that occasionally she would work in the mornings, especially on Saturday mornings when the office was shut. On at least one occasion, she brought her son to work with her on a Saturday morning. The client, BDO, complained to Mr Badhwar about this, and he told Ms Wilson that this was

inappropriate as the client had not consented to have a minor on their premises and he felt it posed a health and safety risk.

[16] Ms Wilson's perspective was that she had mentioned this in the Cleaners Book, and the client manager had not given her any negative feedback through a reply comment in the book.

[17] Other instances of note occurred towards the start of Ms Wilson's employment that BDO raised with Mr Badhwar, and which he in turn raised with Ms Wilson. The first was when Ms Wilson took a packet of microfibre cloths from a donation basket in the reception area. She had misunderstood the purpose of the basket and was very embarrassed when it was explained to her that the purpose of the basket was to collect items to be donated, rather than for common use. Mr Badhwar replaced the cloths. The second was when Ms Wilson took the key to the cleaner's cupboard home with her by mistake, and BDO could not access the cupboard in her absence. Ms Wilson did not take the key home with her on any other occasion.

[18] BDO also complained that Ms Wilson was using significantly more rubbish bags than expected. She accepts this, saying that she was taking care to replace the rubbish bags used in the small personal bins frequently because of recent Covid-19 outbreaks. This was never raised with Ms Wilson during her employment.

[19] One evening, Ms Wilson was at work and went to refill and replace a water cooler. She was unable to get a proper seal, and it leaked. She then had to hurriedly stop the leak and clean and dry the spill. She said as a result, she was hurried and stressed, as she not only had to fix the problem, but also complete the usual cleaning work. She says that, in her confusion, her husband picked up a cardboard box of drink and sugar sachets together with a bundle of wet towels, and put them in their vehicle at the end of the evening.

[20] Ms Wilson says she washed and dried the used towels ready for the following evening, and realised that the box of sachets also needed to be returned. She packed both the clean towels and the box back in the vehicle and brought them back to BDO.

[21] She recalls it was raining heavily that evening. In addition, Ms Wilson had brought with her another lady to assist her with the cleaning work. Ms Wilson said that

she had written in the Cleaners Book that this lady would accompany her for training purposes. Mr Badhwar was not aware of this; this was Ms Wilson's own initiative.

[22] Ms Wilson said that as she brought the box of sachets inside, the box became wet because of heavy rain. It then came apart, and the sachets spilled out over the floor in the BDO entrance-way. Ms Wilson and the lady accompanying her picked them up, and Ms Wilson says, returned the sachets to their usual spot and cleaned as usual.

[23] Mr Badhwar was contacted by BDO the following day on an urgent basis. BDO had security cameras which footage was reviewed from time to time. BDO provided a written statement¹ to Mr Badhwar which stated:

[We] saw a woman who we did not know turn up and wait there. [Ms Wilson] arrived with a box and when the woman tried to help her with carrying the box in it tipped over and sugar sachets/coffee sachets fell out and rubbish bags were visible in the box. [Ms Wilson] picked them all up and then came inside.

Once we saw this footage [the relevant BDO manager] asked [Mr Badhwar] to remove [Ms Wilson] from the site, as this was unacceptable to us, as we need to be able to trust our cleaners.

[24] Mr Badhwar explained that he was called to the BDO offices urgently. There, he was shown the footage showing Ms Wilson and the other unknown lady, and the box full of sachets and rubbish bag. He says that BDO told him that Ms Wilson would not be permitted to work at the BDO offices anymore, and that they believed she had stolen rubbish bags, sachets, and was in essence, untrustworthy and unreliable.

[25] Mr Badhwar further said that this put him in an impossible situation as he had employed Ms Wilson to work at the BDO offices, and if BDO did not want her there, this effectively meant that her work no longer existed and her employment must come to an end.

[26] Mr Badhwar prepared a letter headed Termination of Employment Without Notice dated 21 October 2020. He gave it to another employee of his, who was Ms Wilson's manager. Ms Wilson met her manager at the BDO offices. Her manager told Ms Wilson that her employment was terminated, and handed her the letter. Ms Wilson asked why, and was told "it's all in the letter". She recalls mention of "video surveillance" and "uplifting property".

¹ Dated 23 March 2022.

[27] Ms Wilson refused to take the letter, as she was concerned that this would indicate she had accepted her termination. She left, saying that she would be talking to her lawyer.

[28] Ms Wilson sought the advice of her advocate. On advice, she then asked for a copy of the letter of 21 October 2020. The letter set out 4 reasons for the termination of Ms Wilson's employment, as follows:

Repeatedly failed to follow reasonable instructions involving to return all property belonging to the employer;

Actions that seriously damage the employer's reputation;

A serious breach of the employer's policies and procedures;

Compromising the Client & Employer's trust by removing items from site belonging to the Client and Employer.

[29] At the investigation meeting, Mr Badhwar explained that the first point related to Ms Wilson keeping the vacuum cleaner at home, rather than leaving it at the BDO premises. The second point related again to the vacuum cleaner, talking about her payrate with her manager, and Ms Wilson's mother calling BDO to complain when Mr Badhwar raised the issue of Ms Wilson's son being in the building and a complaint about vacuuming. The third point related to Ms Wilson not filling out the written employment agreement that Mr Badhwar had provided her after she started work, and letting others into the building. The fourth point related to the taking of the sachets.

[30] Mr Badhwar described the fourth point as the main point that led to Ms Wilson's dismissal.

[31] Mr Badhwar takes the view that the security camera footage showed that Ms Wilson was stealing from BDO. He also states that she was stealing from East Coast, by not returning an upholstery machine belonging to East Coast. In his view, this is serious misconduct that justifies dismissal in terms of Ms Wilson's (unsigned) employment agreement.

[32] Mr Badhwar further explains that Ms Wilson's manager had previously issued Ms Wilson with a written warning (via text message) about bringing her child to work, and that he had also spoken with her about this. His view expressed at the investigation meeting was that there had been continuing problems with Ms Wilson's employment, which BDO had raised with him and in turn he (or Ms Wilson's manager) had raised

with Ms Wilson. But in the end, it was BDO's belief that Ms Wilson was stealing sachets and rubbish bags (which Mr Badhwar accepted on the basis of the footage he had viewed) that had resulted in the termination of her employment.

[33] Mr Badhwar accepted that money (\$358.02) had been withheld from Ms Wilson's final pay in respect of the upholstery cleaner, which he indicated would be "released" once the machine was returned².

Analysis

[34] Ms Wilson claims that she was unjustifiably dismissed. In considering this, I must apply the test of justification set out at s 103A of the Act, which states that I must consider:

- a. whether, East Coast sufficiently investigated the allegations against Ms Wilson before her; and
- b. whether East Coast raised the concerns that it had with Ms Wilson before dismissing her; and
- c. whether East Coast gave Ms Wilson a reasonable opportunity to respond to those concerns before dismissing her; and
- d. whether East Coast genuinely considered Ms Wilson's explanation before dismissing her.

[35] In addition I may consider any other factors that I think are appropriate.

[36] To summarise, Ms Wilson believed that her employment was secure, and although she acknowledged that Mr Badhwar (through her manager) had raised some issues with her at various points, she believed these had all been resolved after discussion. Based on Mr Badhwar's evidence, it seems that he had a somewhat negative opinion of Ms Wilson based on the number of items he had cause to discuss with her, however, none of these items seem to have been of such a serious nature that they could have, or did, put Ms Wilson's employment at risk.

[37] Rather, the key event was the events of 20 and 21 October, when Ms Wilson was seen on the security cameras with the box full of sachets and rubbish bags, together with another person who was not known to BDO and who had not been authorised by BDO to be on site. BDO formed the view that Ms Wilson had stolen from them. They

² East Coast's submissions dated 19 September 2023, on page 2.

called Mr Badhwar urgently for a meeting, showed him the video footage, expressed the view that Ms Wilson had been stealing, and told him that she was not to work at the site anymore.

[38] Mr Badhwar prepared a letter terminating Ms Wilson's employment, and terminated her employment that same day.

[39] The only investigation Mr Badhwar did was to view the footage that BDO showed him, and accept BDO's views as correct. He took no steps to carry out his own investigation into the matter, such as speaking with Ms Wilson, or her partner or the woman who was with her (who Ms Wilson says was known to Mr Badhwar and had performed work for East Coast). Here I note that the video footage itself was not available to Ms Wilson or at the investigation meeting, as Mr Badhwar had never been given a copy of it and it appears had never asked for it. In addition, Ms Wilson's manager did not give evidence.

[40] Mr Badhwar did not raise these concerns with Ms Wilson before dismissing her. He simply instructed her manager to tell her that her employment was terminated, and to hand over the letter of 21 October 2020 that he had written.

[41] In the absence of any communication between Mr Badhwar and Ms Wilson before she was advised of the termination of her employment, it will be apparent that East Coast did not give Ms Wilson any opportunity to respond to the allegations against her before dismissing her.

[42] There was no opportunity for East Coast to genuinely consider Ms Wilson's explanations. As became clear at the investigation meeting, Ms Wilson does have an explanation for the events in question. She accepts that she took a box with BDO property home the night before, but says that this was by mistake caused by her having to unexpectedly clean up a large spill, and that she promptly returned the box the very next night, which was what was caught on camera. I note that even BDO's letter dated 23 March 2022 states that Ms Wilson was carrying the box "in" to BDO, and that she picked up all the spilled sachets "and then came inside".

[43] Taking all this into consideration, East Coast has not met the test of justification as required by the Act.

[44] Turning to Mr Badhwar's other submissions, he takes the view that Ms Wilson had stolen BDO property and that this constituted serious misconduct that would enable him to terminate her employment without notice under the terms of her employment agreement. The difficulty Mr Badhwar faces is that I can not be satisfied, on the limited evidence before me, that this is in fact the case. Mr Badhwar took no steps to establish for himself that this was the case. He did not carry out any investigation other than viewing the footage shown to him by BDO and passively accepting their view. As I have set out above, there were other steps he could and should have taken to investigate matters himself and come to his own conclusions.

[45] Mr Badhwar also explained that, regardless, BDO had effectively banned Ms Wilson from their premises. As she was employed to clean the BDO offices, there was therefore no work for her. Ms Wilson expresses some surprise at this, saying that East Coast also had contracts cleaning a local school, and there may have been work there for her.

[46] A similar hurdle arises for East Coast in this regard. It may have been that, if Ms Wilson was unable to work at BDO, there was no further work for her, and that the ending of her employment would then follow. However, Mr Badhwar did not explore this for himself. His evidence at the investigation meeting was that he dismissed Ms Wilson on the basis that BDO would not have her on its premises. Again, he adopted BDO's views without considering what other options might be available to him or discussing this with Ms Wilson. The views of BDO do not mean that East Coast and Mr Badhwar were able to avoid taking responsibility for moving through an employment consultation process with Ms Wilson.

[47] Finally, I consider the four bullet points in the termination letter. I have found, based on the evidence at the investigation meeting, that the primary and likely the only cause of Ms Wilson's dismissal was the allegation of stealing. However, even if the other matters raised in the dismissal letter coloured Mr Badhwar's view of the matter, they do not assist him in justifying Ms Wilson's dismissal. This is because there is no evidence that these concerns were ever formally put to Ms Wilson for her to respond to, or that Mr Badhwar took the time to consider these responses.

[48] Ms Wilson's dismissal did not meet the test of justification as required by the Act. Having been unjustifiably dismissed, she is entitled to remedies.

Remedies

[49] Ms Wilson has claimed lost wages pursuant to s 123(1)(b) of the Act, loss of a benefit pursuant to s 123(1)(c)(ii) of the Act, and compensation for hurt and humiliation pursuant to x 123(1)(c)(i) of the Act.

[50] Ms Wilson claims \$3,682.50, which she says is her lost wages over a 13 week period, less the sum of \$3,500 she earned in cash payments from casual work during this period.

[51] The loss of benefit claimed is that Ms Wilson did not receive paid notice, as set out in her (unsigned) employment agreement, as she was summarily dismissed. This appears to be a duplicate claim for the same time period, as it is submitted that Ms Wilson should have received a fair and reasonable process which it is submitted would take 2 weeks, followed by dismissal on one week's contractual notice³. It appears the equivalent of 3 weeks wages is claimed under this head, although this is not specified in written submissions.

[52] No rationale is provided as to why Ms Wilson should be awarded this amount on the basis of her advocate's estimate of how long a "fair and reasonable process" culminating in dismissal and the payment of contractual notice should have taken, when Ms Wilson's underlying claim is that she is entitled to remedies on the basis that she should never have been dismissed (triggering the requirement for payment of notice) at all.

[53] I will assess Ms Wilson's claim for reimbursement on the basis that she is entitled to reimbursement for lost wages as a result of the unjustified dismissal that I have found occurred, rather than on the basis of a counter-factual situation.

[54] Having been unjustifiably dismissed, Ms Wilson has a personal grievance, and has lost money as a result of losing her employment. In accordance with section 128 of the Act, Ms Wilson is therefore entitled to receive the lesser of a sum equal to that lost remuneration, or to 3 month's ordinary time remuneration. Ms Wilson has claimed a sum that is less than 3 months ordinary time remuneration, which she says represents

³ Page 14 of the submissions for the applicant dated 22 August 2023.

her actual loss. It is to her credit that she has accounted for cash earnings during this time. She is entitled to an award of \$3,682.50. Orders are made accordingly.

Compensation for hurt and humiliation

[55] Ms Wilson claims compensation for humiliation, loss of dignity, and injury to feelings in the sum of \$20,000.

[56] Ms Wilson gives evidence of the impact of her dismissal on her. She says she felt completely broken, demoralised, and was “completely lost” for three days. She says she felt this all the more deeply because she had been accused of theft, and was very concerned about whether this might impact on her social work registration, and future employment prospects. Ms Wilson says that she had already started making preparations for Christmas, and struggled due to the sudden loss of income. Ms Wilson’s sense of hurt has continued up until the investigation meeting. I accept her evidence.

[57] In considering what award to make under this head, I take into account that the allegation levelled against Ms Wilson – that of theft – is a very serious one. There is no doubt that such an allegation could affect Ms Wilson by making her feel “completely broken” in the way she describes. In addition, Mr Badhwar did not speak with her at any point during this process, either to ask her for her side of the story, or even to deliver the message that her employment was terminated. This was done for him by another staff member who did not give evidence at the hearing. I also have some concerns about the potential for reputational damage to Ms Wilson given the involvement of it appears, at least three staff members at BDO who called Mr Badhwar in to show him the video footage. Taking all this into account, my view is that it is appropriate to award Ms Wilson the amount that she has claimed, of \$20,000. In making these orders, I take into account the comments of the court as to appropriate current levels of compensation⁴.

Contribution

[58] Having awarded Ms Wilson compensation, I need to consider in accordance with s 124 of the Act, the extent to which her actions contributed towards the situation

⁴ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101.

that gave rise to the personal grievance; and if those actions so require, whether there should be any reduction in the remedies that would otherwise have been awarded.

[59] Ms Wilson did not contribute to the procedural failings of East Coast discussed earlier. However, even on her own evidence, she did take home property of BDO. She says that she did this by mistake, but when she discovered her mistake, she did not attempt to alert BDO or Mr Badhwar or her manager (both of whom she kept in contact with by text) to let them know of the mistake and that she would be returning the box. This led directly to the situation where BDO were concerned to see that Ms Wilson had in her possession a box of cafeteria supplies and rubbish bags which she had not been authorised to take from the BDO building.

[60] In addition, Ms Wilson was at the time accompanied by another person, who she says at the investigation meeting was a person she had brought in to show how the cleaning work was carried out, with a view to having this person “cover her” if needed. She had not advised either BDO or Mr Badhwar that she had invited another person on to the site. In addition, there was no reason for Ms Wilson to have taken it upon herself to train another person to provide cover, as this was not part of her responsibilities as an employee, she had not been asked by anyone to do so, and she did not mention any reason why she might actually need to have this person “cover” her work. Having this person attend site to help her deal with the box of goods she was not authorised to have in her possession is both unexplained and, to put it colloquially, “not a good look”.

[61] Taking all this into account, and particularly that Ms Wilson could have alleviated concerns by doing nothing more than sending a text message about the box, I consider a reduction of 20% appropriate. This will be reflected in the orders made below.

Unjustified Disadvantage – written warning

[62] Ms Wilson also raises a claim of unjustified disadvantage, resulting from a written warning issued to her via text message, as discussed above⁵. It is submitted for Ms Wilson that she “was provided a warning on 14 October 2021, in circumstances that were neither fair nor reasonable.”⁶ There is a difference of opinion on this matter, with

⁵ For completeness, I note that Ms Wilson’s grievances can be proceeded with, as set out in the preliminary determination in this matter dated 24 August 2022.

⁶ Submissions for the Applicant dated 22 August 2023 at paragraph 22.

Mr Badhwar saying that he spoke with Ms Wilson about this, and Ms Wilson saying that she simply received a text message containing the written warning.

[63] Section 103(1)(b) of the Act defines an unjustified disadvantage as a situation where 1 or more conditions of the employee's employment was affected to the employee's disadvantage by some unjustifiable action by the employer.

[64] In submitting that it was not fair or reasonable for a written warning to be issued by text message, Ms Wilson addresses the issue of whether East Coast's actions were justified. She says they were not. However, Ms Wilson did not point to any disadvantage that she suffered in her employment as a result. Rather, she had never been permitted to bring her child to work, she was told not to (Mr Badhwar says he also spoke with her about it), and it appears that this never occurred again after this was clarified to Ms Wilson. In these circumstances, I am not persuaded that, despite what appear to be some process failings in the issuing of this warning to Ms Wilson, that she suffered any disadvantage in her employment as a result. In addition, no remedies are sought. Accordingly, no orders are made.

Breach of Good Faith

[65] It is submitted for Ms Wilson that East Coast breached its obligations of good faith, by failing to be active and constructive in maintaining the employment relationship.⁷ This is said to be by way of the following:

- a. Failing to advocate for the applicant's interests in its dealings with BDO;
- b. Failing to raise the concerns of BDO with the applicant in a timely manner;
- c. Issuing the applicant with a written warning; and
- d. Dismissing the applicant.⁸

[66] No penalty is sought, simply a declaration of breach of good faith.⁹

⁷ Submissions for the Applicant dated 22 August 2023 at paragraph 3.

⁸ Submissions for the Applicant dated 22 August 2023 at paragraph 32.

⁹ Submissions for the Applicant dated 22 August 2023 at paragraph 33.

[67] The matters of the written warning and the dismissal have already been discussed above, and remedies awarded for them. I will make no further comment, as this is a duplicate claim.

[68] My understanding of the other two concerns relating to a lack of communication with Ms Wilson about BDO's expectations is that this stems from BDO's letter of 23 March 2022, where BDO list a range of concerns which Ms Wilson either had not been aware were serious concerns, or had thought had been resolved. Two examples of this were, first the incident when she took a pack of microfibre cloths from the donation basket to use, which Mr Badhwar replaced upon this being raised with him by BDO. Both she and Mr Badhwar believed this matter was an unfortunate mistake which had been rectified by the replacement of the cloths. The second is the mention by BDO of what they considered to be an excessive use/replacement of rubbish bags by Ms Wilson. It is not clear that this was ever raised with Mr Badhwar at the time, although both incidents were apparently considered sufficiently important by BDO that they were mentioned in writing some 18 months later.

[69] I am sympathetic to the pleading that Mr Badhwar should have "advocated" for Ms Wilson with BDO, so as to help maintain a better working relationship which would have benefited both East Coast and Ms Wilson. It appears from the 23 March 2022 letter that BDO had a negative view of Ms Wilson that she was not aware of at the time.

[70] Having said this, I am not convinced that Mr Badhwar acted inappropriately. To follow through the two examples above, he raised the issue of the microfibre cloths with Ms Wilson, accepted her apology, took practical action to replace them for BDO, and did not attach any ongoing importance to the matter once it had been resolved. There is no evidence he was aware of BDO's concerns with the rate of rubbish bag replacement at the time. BDO did have an issue with Ms Wilson bringing her son to site, chose to raise it with Mr Badhwar rather than Ms Wilson when she mentioned it in the Cleaners Book, and Mr Badhwar clarified expectations with Ms Wilson and the matter was not repeated. I am also alive to Ms Wilson's evidence that she would leave notes in the Cleaners Book for the relevant person at BDO to read, and reply back to her. Ms Wilson's evidence was that there were habitually no replies. This does not necessarily mean there were no concerns. It suggests that not all concerns were communicated.

[71] In these circumstances, I am not convinced that Mr Badhwar failed to advocate for Ms Wilson or failed to raise BDO's concerns with her, such that he was aware of those concerns and their importance at the relevant time. Especially as there is no direct evidence from BDO, I decline to find that any breach of good faith occurred.

Breach of Wages Protection Act – deduction from wages of \$358.02

[72] Mr Badhwar confirms in his evidence that he deducted the sum of \$358.02 from Ms Wilson's final pay, in respect of the non-return of a carpet upholstery cleaning machine. Ms Wilson raises a claim for a breach of the Wages Protection Act 1983, in that this sum was unlawfully deducted from her final pay, without first consulting with her as required by that Act, and without checking with her about the whereabouts of the carpet upholstery cleaning machine, which she says she does not have.

[73] Mr Badhwar relies on the general deductions clause in Ms Wilson's employment agreement. Section 5(1A) of the Wages Protection Act requires that deductions must not be made from an employee's pay "without first consulting the worker." Mr Badhwar did not consult Ms Wilson before making the deduction. This means that the deduction is unlawful.

[74] If Ms Wilson had been consulted, then it would have become apparent to Mr Badhwar that there was a dispute as to whether Ms Wilson was in possession of the relevant machine, and he would have been in a better position to investigate this. As it is, a deduction has been made that is not only in breach of the relevant Act, but there remains an unresolved dispute as to what happened to the machine in question. This dispute means that Mr Badhwar may not have been able to rely on the deductions clause in the employment agreement at all.

[75] Ms Wilson is entitled to be reimbursed for the sum deducted, as the deduction was not lawful. Orders for reimbursement of the deduction are made accordingly.

Costs

[76] Ms Wilson seeks legal costs and expenses, in the sum of \$8,750.00, plus the filing fee of \$71.56. These costs are made up as follows:

- a. The sum of \$6,750, being the daily tariff for one-and-a-half days of hearing time, noting that the substantive matter was set down for 1 day,

and a preliminary question of whether a personal grievance was raised within time being 1-half day.

- b. An uplift of \$1,000 as a result of the respondent's nonparticipation, including the failure to file a witness statement;
- c. A further uplift of \$1,000 as a result of the respondent's failure to provide timely notification of his inability to attend the previous investigation meeting, resulting in additional costs for the applicant.

[77] Mr Badhwar on behalf of East Coast, objects.

[78] The starting point is the daily tariff. I note that the substantive investigation meeting was set down for 1 day, and arrangements were made on this basis. In the event, it ran from 10.00 am to 2.00 pm (without breaks), suggesting that allowing a full day's tariff would be a generous approach.

[79] I am not minded to give the requested uplift for the respondent's failure to provide a witness statement, as Mr Badhwar did provide documents, and gave evidence in person at the investigation meeting. The failure to provide a witness statement did not prolong matters, as the respondent's position had been made clear.

[80] There is no evidence before me as to the additional costs the applicant incurred as a result of the respondent's failure to provide timely notification of his inability to attend the previous investigation meeting. Accordingly, I cannot take this any further.

[81] Rather, my view is that a fair approach is to award the daily tariff as claimed for the two investigation meetings that took place at different times, first a half day hearing amounting to \$2,250, and second, a full day hearing amounting to \$4,500. I consider it appropriate to award the full tariff for the substantive hearing despite my comments above that this might be viewed as a generous approach, as this was set down for a full day and I accept that all involved made personal and travel commitments (and incurred costs and loss of time) on this basis.

[82] In addition, Ms Wilson has been successful in her claims, and is entitled to the reimbursement of the filing fee of \$71.56. Orders are made accordingly.

Orders

[83] East Coast Cleaning Limited is ordered to pay to Kylie Wilson within 28 days of the date of this determination:

- a. The sum of \$3,682.50 gross in lost remuneration;
- b. \$16,000 without deduction in compensation for humiliation, loss of dignity, and injury to feelings;
- c. The sum of \$358.02 on a gross basis, as reimbursement for an unlawful deduction from wages;
- d. The sum of \$6,750 without deduction as a contribution to costs; and
- e. The sum of \$71.56 as reimbursement of the filing fee.

Claire English
Member of the Employment Relations Authority