Determination Number: AA 97/07
File Number: 5053198

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Susan Belich (Applicant)
AND	Rusty Pelican Limited (in receivership) (Respondent)
REPRESENTATIVES	Chris Rowe for Applicant Chris Patterson for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	27 February 2007
CLOSING SUBMISSIONS	7 March 2007 (Respondent) and 12 March 2007 (Applicant)
DATE OF DETERMINATION	29 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant seeks lost wages and compensation for distress arising from being suspended from her duties, an action which she says amounted to an unjustified disadvantage and dismissal.

[2] The respondent does not deny suspending the applicant for her duties but says it was entitled to do so under an agreement made as part of arrangements for the applicant and others to 'buy in' to its restaurant and bar business and work as an independent contractor.

[3] Mediation was directed but did not resolve issues between the parties. In investigating this matter I had written witness statements from the applicant; her husband, Steven Paul; Andrew Gardener, a business partner who also worked for the respondent; and Lisa Raklander, who together with her husband, Ian Raklander, are the respondent company's majority shareholders. Each witness gave sworn answers to questions at the investigation meeting. Mr Raklander, the sole registered director of the respondent, also attended and provided some additional information under oath. The parties provided written closing submissions.

[4] The respondent company went into receivership on 14 March 2007. While this may effect enforcement if any remedies are awarded, it does not affect the content of my determination which relates to an investigation that was complete prior to the receivership. It is an issue that will be addressed at the conclusion of this determination.

The facts

[5] In June 2004 the applicant began a part-time administration job for the respondent company which runs a restaurant and bar business in Matakana called "The Rusty Pelican". Initially she worked from the home of Mr and Mrs Raklander, who owned all the shares in the company through one joint share and a trust. In October 2005 the applicant began working in an office at The Rusty Pelican.

[6] From around mid 2005 the applicant and her husband were involved in discussions with

the Raklanders about buying the Rusty Pelican business. The Raklanders wanted to move back to Australia so Mrs Raklander could work on developing a business opportunity.

[7] The applicant and her husband were not able to raise enough to buy the business outright. Instead she and her husband, and Mr Gardner and his wife formed a company, called 3PK Limited, for the purpose of buying 45 per cent of the shares in the respondent company. Each of the four were to work in the business to varying extents while the Raklanders remained majority shareholders.

The Shareholders Agreement

[8] The arrangement was formalised in an agreement titled "Rusty Pelican Shareholders Agreement" dated 1 March 2006 and signed by all six people ("the Shareholders Agreement").

[9] The Raklanders were to continue as the effective majority shareholders – owing 55 per cent of the shares and described as the Group A shareholders.

[10] The applicant, her husband and Mr and Mrs Gardener were described as the Group B shareholders and were to own one share jointly, with another 499 shares owned through the 3PK Limited company.

[11] The Group B shareholders paid $280,000 for their shares. The payments were made in two separate amounts in March 2006. The transfer of shares was not completed and registered with the Companies Office until October 2006.

[12] The completion of share transfers followed the Group B shareholders commencing action on that issue in the High Court under a statement of claim dated 5 July 2006. That matter has since been discontinued. An affidavit made by Mrs Raklander in that matter states that the Group A shareholders had not given instructions for their solicitor to effect the transfer of shares until mid-September 2006.

[13] The Shareholders Agreement provided for salaries to be paid to six people on the following terms:

> *6.13 The following shall be paid by way of salary to the persons named below:*
>
> *6.13. 1 Susan [Belich] to be paid a salary of $35,000 gross per annum on terms set out in her employment contract, including the requirement to work a minimum of 40 hours a week;*
>
> *6.13.2 Steve [Paul] to be paid the greater of an hourly rate of $11 (+GST if applicable) or an administration manager's hourly rate for hours worked;*
>
> *6.13.3 Ian [Raklander] to be paid the greater of an hourly rate of $20 (+ GST if applicable) or a senior chef's hourly rate for hours worked;*
>
> *6.13.4 Lisa [Raklander] to* [sic] *paid the greater of an hourly rate of $11 (+GST if applicable) or a bar manager's hourly rate for hours worked;*
>
> *6.13.5 Lynda Gardner to be paid an hourly rate of $11 for hours worked;*
>
> *6.13.6 Andrew Gardner to be paid a salary of $35,000 gross per annum on terms set out in his employment contract.*

> *6.14 The amounts stated in 6.13 to be reviewed annually. Any changes in the above payments require the unanimous consent of all the shareholders.*
>
> *6.15 For the purposes of this clause it is agreed that all employment will be by way of independent contractor and not as an employee.*

[14] Another clause required shareholders to be supplied by the company with a series of weekly reports on business activities and monthly management accounts. A further clause stated required operating targets:

> *6.11 It is agreed that all the targets and KPI's (sic) specified in the Company's Business Plan are required to be achieved and in the event that the required targets and/or KPI's (sic) in the Business Plan are not met for two consecutive months the provision of clause 12 will apply PROVIDED HOWEVER that the time period specified in this clause will commence on the 1 April 2006.*

[15] This provision is referred to in the later clause 12 headed "Group A shareholder rights in the event of default":

> *In the event that the targets set in clause 6.11 are not achieved within the timeframes stipulated in that clause, this shall constitute an act of default under this agreement and provide the Group A shareholder's (sic) with the rights and remedies set out in this clause.*
>
> *12.1 All rights to the management and control in the company by the Group B shareholders and their nominated Directors shall be suspended until such time as the Group A shareholders can achieve the targets stipulated in clause 6.11 and maintain such targets for two months.*
>
> *12.2 The Group A shareholders shall have the right to terminate any employment arrangements of the Group B shareholders. The Group B shareholders, in the event they are found to be employees, agree to indemnify and keep indemnified in their capacity as shareholders of the Company, the Company and the Group A shareholders from all suits and claims arising out of termination of employment, including any claims for unjustified dismissal.*

[16] The agreement was declared to be entire (clause 15.4):

> *This document contains everything the parties have agreed on in relation to the matters it deals with. No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this document was executed, save as permitted by law.*

[17] Its governing law was accepted to be that of New Zealand and it provided for severability of illegal clauses:

> *If a clause or part of a clause of this document can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid that clause or part is to be treated as removed from this document, but the rest of this document is not affected.*

Work and suspension of the applicant

[18] In February 2006 the Raklanders left for Australia and the Group B shareholders were responsible for the day-to-day operation of The Rusty Pelican.

[19] The applicant accepts that at this point her work for the company had changed. It was similar to her previous work but had additional duties arising out of the absence of the Raklanders who had previously managed the business. Her administration and office management duties included preparing staff rosters and preparing financial reports.

[20] By June 2006 it appears that the Raklanders had become concerned about the financial state and prospects of the business. The Business Plan referred to in the Shareholders Agreement had not been finalised but they were concerned that financial reports were late and appeared to show the business was not trading as well as they hoped.

[21] In late June 2006 the Raklanders returned from Australia and met with Mr Paul on 26 June 2006. They describe this meeting as a directors' meeting although Mr Paul had not been formally appointed as a director of the company.

[22] At the meeting Mr Paul was told of the Raklanders' financial concerns and given a letter from a Queenland-based business consultancy, which traded under the name SAS Network ("SAS"). The SAS letter, dated 20 June 2006 and addressed to Mr Paul and the applicant, advised that from early June Mr Raklander had instructed SAS to act on the respondent's behalf in all business and financial matters. It had been instructed "to take whatever steps were necessary to ensure the continuity of the Bar and Restaurant business that is currently operated by The Rusty Pelican Limited, and all creditors thereof, in what ever way we consider beneficial".

[23] The SAS letter advised that two companies had been incorporated with one purchasing the assets of the restaurant and the other purchasing the assets of the bar. Mr Paul and the applicant were told that they could buy one or both businesses. It notes that the couple might initially "*have reservations and not understand the purpose and you may feel that these entities are not to your advantage however we assure you that they are*".

[24] The witnesses gave differing accounts of the 26 June meeting, particularly on the key issue of what was said or not said about the applicant's work.

[25] The Raklanders say that they talked with Mr Paul about the need to have an independent bookkeeper take over the financial reporting work and that Mr Paul agreed to this. Mr Paul denies the topic was discussed or that he agreed to any such proposal.

[26] What is clear is that the Raklanders spoke directly to the applicant about the matter the next day. Mrs Raklander's witness statement says:

> *My husband Ian and I came into RPL's offices on 27 June 2006 to find Sue Belich, Andrew and Lynda Gardner in the office. Sue Belich was upset and attempting to continue with her work even though she was aware that her services were no longer required at that time.*

[27] Both the applicant and Mrs Raklander give similar accounts of the discussion that ensued among the five people present about the future of the business. Mrs Raklander raised concerns about dealings the applicant had with the bank about an overdraft loan facility in the business's name. The applicant was given to understand that she would no longer have access to company accounts and asked how she could pay wages and bills.

[28] Mrs Raklander told me that she tried to talk about the opportunity for the Group B shareholders to buy the restaurant or bar but the applicant and Mr and Mrs Gardner were "very upset" and "weren't listening".

[29] I asked whether the meeting ended by her sending the three away. She replied: "Yes. And to come back with an offer." She told me that she said: "I want you to go away and come back with an offer".

[30] An email sent to Mr Paul on the evening of 27 June from Mrs Raklander's email address stated:

> *As per our directors meeting all correspondence is to be through The SAS network in Australia. In regards to the financial procedures for the Rusty Pelican it will be handled by [the company's accountancy firm] and an independent person until a resolution to your decision on rusty pelican (sic). Susan will not be required to act in this position until further notice. …*

[31] Mr Paul replied:

> *Could you please advise the exact nature of Susan not being "required to act in this position until further notice" as as (sic) an employee of the Rusty Pelican Ltd she is entitled to receive her fully (sic) weekly salary and has full rights of procedural fairness. Both Andy & Lyn Gardner are employed by the Rusty Pelican Ltd also.*

[32] A response on 28 June 2006 from Mrs Raklander's email address stated:

> *As discussed Sue is not required until a resolution has been resolved (sic) and she will be paid her salary. As for the other parties they are still in their capacity to work at the Rusty Pelican as rostered.*

Issues

[33] The issues for resolution in this matter include:

(i) whether the relationship between the applicant and respondent was one of employee-employer or independent contractor and principal;
(ii) the enforceability of some provisions of the Shareholder Agreement; and
(iii) whether the suspension of the applicant from her duties on 27 June 2006 amounted to a dismissal or an application of the 're-entry' provisions of the agreement; and
(iv) if there was a dismissal, whether the respondent acted as fair and reasonable employer in making the dismissal and how it made the dismissal; and
(v) if there was a unjustified dismissal, the extent to which acts of mitigation and contribution would affect any remedies awarded; and
(vi) the effect, if any, of the company's receivership on any remedies awarded.

The nature of the employment relationship

[34] Having reviewed all the witness statements and documents lodged, and listened to the evidence given at the investigation meeting, I am satisfied, for the following reasons, that the real nature of the relationship between the respondent and the applicant – in respect of the office management and financial administration work she performed – was one of employment under a contract of service. She was an employee.

[35] She also had a role as a shareholder, and, arising from that, a role as a manager who was by virtue of her shareholding was a part-owner of the business. Neither role extinguished rights she would have if she was also an employee rather than an independent contractor. Technically the applicant was not a shareholder at the time of the disputed events on 27 June 2006 as the transfer was not completed until October 2006 but she, and the other Group B shareholders, had paid for their shares and had a right to their transfer under the terms of the Shareholder Agreement. That, however, is not a factor I consider makes any difference to the analysis of why she was an employee.

Intention

[36] I do not accept the respondent's contention that clause 6.15 of the Shareholders' Agreement – stating that all employment of shareholders was as independent contractors – trumps any claim to be an employee.

[37] Rather, consistent with section 6 of the Employment Relations Act 2000 ("the Act"), I have considered what that agreement indicates regarding the parties' intentions but have not treated any statement made as necessarily determinative.

[38] In doing so I observe that the wording of clauses regarding payment of salaries to the applicant (6.13.1) and Andrew Gardner (6.13.6) are different from those applying to the other shareholders. Clauses 6.13.1 and 6.13.6 refer expressly to the salary being paid "*on terms set out in [an] employment contract*". By contrast the clauses relating to any work done by the Raklanders or Mr Paul each refer to hourly rates subject to "*GST if applicable*". The latter wording is consistent with an intention and arrangement for independent contractors invoicing for their work. The former – relating to the applicant and Mr Gardner – are not. Significantly, the intention and arrangement was for those two to work full-time in the business – the applicant as office manager and Mr Gardner as a pizza cook. The others were to do part-time or casual work as required.

[39] No written employment agreement was ever provided, although there was unchallenged evidence from Mrs Raklander that there were templates for employment agreements available for staff. However the applicant was – as the respondent accepts – previously employed as a part-time office administrator and had not had a written employment agreement then either. Her employment, I infer from the actions of the parties, was intended to be continuous.

[40] Supporting this view is the subsequent redundancy of Mr Gardner. He was made redundant on 28 August 2006 after the company undertook a consultation process where he was asked to work without pay to help the business but refused to do so. He then raised a personal grievance with the company and sought its agreement to attend mediation. For that reason I say no more on the evidence as to the circumstances of the end of his work for the company, apart from noting that the company saw it as appropriate by that time to end the relationship as it would for an employment relationship. Mrs Raklander told me that this was done on legal advice to minimise the prospect of a personal grievance from another shareholder.

[41] In practice the applicant and Mr Gardner filled out time sheets and received weekly pay rather than invoicing for their work as they would have done if independent contractors. As a result PAYE income tax was paid on the applicant's salary and she accumulated annual leave as would be expected of an employee and as she had done previously. However I accept Mrs Raklander's evidence that it was the applicant who was responsible for setting up the pay arrangements and keeping the pay and leave records, and, as it is not clear that the Raklanders knew that the applicant and Mr Gardner were being paid by weekly wages, I do not take those arrangements as a decisive factor in indicating the intention of the parties.

[42] However clause 12.2 – a purported indemnity clause – refers to the prospect of Group B shareholders being found to be employees. I weigh that contemplation as an indicator that the parties – particularly the Raklanders and their legal advisors who prepared and amended the agreement – understood the relationship was really one of employment, and would be seen as such, whatever other words of the agreement might say.

The control, integration and fundamental tests

[43] The applicant gained additional responsibilities once the Raklanders left for Australia. She accepts that she took more responsibility for staff, preparing rosters and doing more "on the floor" work. She was also to prepare and provide financial reports to the Group A shareholders.

[44] However, under the control and integration tests, it is clear that the applicant remained responsible to and directed by the Raklanders. Mrs Raklander told me that the applicant was responsible to her and her husband and accepted that this included approval for any significant changes in the business and providing financial reports. Referring to an example raised in evidence of changes to the décor and lay out of part of the premises, Mrs Raklander said: "We

expected everything to be put through us. But not everything was sent to us and put to us."

[45] The applicant worked solely for the respondent's business on a full-time basis. She worked more than the 40 hour minimum required but this is consistent with her salaried position. That she might benefit from that additional labour as a shareholder does not negate her rights as an employee.

[46] While she did use her own laptop to do some internet banking and payroll work through a broadband connection at home, this work was entirely for the company. She did not undertake other tasks for other employers, as she might if she were an independent contractor in business on her own account.

Enforceability of the shareholder agreement

[47] Having found that the applicant was an employee rather than an independent contractor, I must address the effect – if any – of the Shareholder Agreement. In part it has effect as an employment agreement – by stating the applicant's agreed salary and minimum hours of work.

[48] To the extent that parts of the Shareholder Agreement are in fact an employment agreement, I consider clause 12.2 to be repugnant to public policy and in breach of the Act's s238 "no contracting out" provision. The clause purports to displace the legislative protections of the personal grievance procedures and remedies for unjustified actions. If such a clause were to stand here or elsewhere, employees could themselves have to pay for the remedies to right wrongs done to them. That accords with neither common sense nor the law. It is the wrongdoer that must pay, not the wronged.

[49] Exercising the discretion to deal with questions of construction under Schedule 1 clause 1 of the Act, I find that the purported indemnity provisions of clause 12.2 of the Shareholders Agreement would amount to contracting out of the provisions of the Act. It is illegal and unenforceable. Accordingly, under clause 15.10 of the Shareholders Agreement, the parts of clause 12.2 which would require the Group B shareholders to indemnify the respondent and the Group A shareholders for the cost of any remedies awarded if the applicant were found to be unjustifiably dismissed, are to be treated as if removed from that document.

Suspension, dismissal or 're-entry'

[50] The respondent suggests that it was entitled to effectively suspend the applicant under the re-entry provisions of the shareholder agreement.

[51] It says the Group B shareholders failed to provide certain financial reports required under clause 6.7. The applicant was responsible for that failure. This, they argue, was an act of default. Under clause 12.1 they were entitled to suspend all rights of the Group B shareholders to manage and control the company. Under clause 12.2 they also claim "the right to terminate any employment arrangements of the Group B shareholders".

[52] By its statement in reply the respondent says that the Group A shareholders "exercised their right to re-enter and take over the day to day running of the business and exclude the [Group] B shareholders from day to day involvement in the respondent".

[53] It says that when the applicant did provide financial reports, the Raklanders "noticed many potentially serious issues affecting the fundamentals of the business". On returning to New Zealand on 23 June 2006 for what they say was a quarterly check on the business, the Raklanders says they found "many potential serious financial and management breaches of the Shareholders Agreement".

[54] On this basis the applicant was "asked to suspend her duties".

[55] The respondent variously described its actions as suspending the applicant and terminating her services. In her oral evidence Mrs Raklander said the applicant was suspended

from her duties as a bookkeeper until a "resolution" was reached.

[56] The resolution referred to was a decision about whether the Group B shareholders would buy either or both parts of the bar and restaurant business from the Group A shareholders.

[57] Mrs Raklander says that Mr Paul agreed to the suspension of the applicant at the meeting with her and Mr Raklander on 26 June 2006. Even if he did, that would not make such a suspension lawful. On Mrs Raklander's account Mr Paul was attending a directors meeting as a manager or a *de facto* director, not as the applicant's representative in employment matters. Even if he had agreed, that would not excuse the respondent from an obligation to hear from the applicant before imposing a suspension on her.

[58] However I consider it safer to rely on the way that the parties' expressed themselves at the time to determine the nature of their actions.

[59] Mrs Raklander's email of 27 June made it clear that the applicant would "*not be required*" to carry out what she called "*financial procedures*" until the Group B shareholders responded to the Group A shareholders' plan to divide and sell the business. Mr Paul's reply stated that the applicant was an employee as were Mr and Mrs Gardner.

[60] Without questioning this reference to the three as employees, Mrs Raklander's email response on 28 June makes it clear that the Gardners were still expected to work as rostered. By contrast, it was clear that the applicant was to stay away until the business issues were resolved.

[61] On the basis of that language used at the time, and Mrs Raklander's acceptance in evidence that the applicant was sent away, I am satisfied that the actions of the respondent amounted to a dismissal.

[62] I do not accept Mrs Raklander's suggestion that the suspension was only from financial reporting duties and that the applicant could have attended work to carry out other duties. There were no other duties suggested or offered to the applicant. That is consistent, I find, with the respondent's actual intention to stop the applicant working as an employee until she and her fellow Group B shareholders yielded to the business demands of the Raklanders.

Were the employer's actions justified?

[63] Under section 103A of the Employment Relations Act 2000 ("the Act") the question of whether a dismissal is justified is to be determined objectively by considering whether *what* the respondent did, and *how* the respondent did it, was what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[64] Because the Raklanders considered they were within their rights as stated in the Shareholders Agreement to terminate the applicant's employment, they do not appear to have turned their minds to any rights of the applicant as an employee.

[65] Mrs Raklander's identified a number of concerns that she and Mr Raklander had about the state of the business and the applicant's work by early June. Regular monthly reports expected from March were not received until May. Mrs Raklander found some errors in the reports provided and was alarmed by the "overall outcome of the figures".

[66] They were also concerned about comments made in telephone calls from a bar manager who had previously worked under their management. He had gone on leave when the Raklanders left but delayed his return and then clashed with the applicant and Mr Paul over his roster and terms of employment.

[67] The Raklanders were also concerned that the applicant had cancelled an overdraft loan facility with the respondent's bank. The loan was in the company's name but appears, on Mrs Raklander's evidence, to have been for personal interests of the Raklanders.

[68] In her evidence the applicant discussed difficulties in getting the finances of the business on an even keel. Mrs Raklander confirmed to me that in March 2006 when the financial management duties were handed over to the applicant, the company had an overdraft of $100,000, creditors were owed $300,000 and GST and PAYE had not been paid for months. In light of this, it is unclear how much of what Mrs Raklander says were alarming financial reports can be attributed to the applicant's management in the four months before her suspension in June 2006. The respondent cannot say because it never fully put its concerns to the applicant or gave her any opportunity to explain.

[69] Similarly the applicant does not appear to have been provided with sufficient information about the nature of the overdraft loan facility with the bank, nor provided with sufficient opportunity to explain her reasons for cancelling it. It was raised in an impromptu meeting on 27 June about the future of the business rather than addressed in a considered way as an employment performance issue.

[70] Neither did the respondent put to the applicant for her explanation its concerns aroused by the former bar manager's covert calls. Mr Paul was allegedly responsible for hiring and firing decisions but Mrs Raklander's evidence was that as directors and shareholders, she and Mr Raklander had a right to ask staff to contact them directly and provide information. She had information, in the form of photos taken by the former bar manager, which purportedly showed that bar fridges were not set up to display products in the way required by the brewery supplier. The applicant was not told of that information or asked to comment on it.

[71] Mrs Raklander says that since taking control of the business in June 2006, she and Mr Raklander have identified other management and financial problems. She says these included allegations of kitchen staff taking stock and bar staff giving away free drinks but accepts that she does not know if the applicant was aware of these problems.

[72] The respondent was given an opportunity early in the investigation process to provide financial reports on the state of the business in order to support its allegation that "many potential serious financial and management breaches" made the relationship with the applicant "unsustainable".

[73] The respondent was also invited to provide a witness statement from its company accountant.

[74] Neither the supposedly compromising financial information nor the accountant's evidence was provided. On the basis of that, and what was available through Mrs Raklander's evidence, I find that the respondent failed to provide sufficient evidence of a substantive justification for the suspension on that ground.

[75] Having looked at both the employer's actions in suspending the applicant on the grounds that it did, and the way that it did so without providing an opportunity to hear the concerns and respond, I find that those actions were not justified. A fair and reasonable employer would have taken more care to substantiate its concerns and put them fairly to the employee before making such a decision. The suspension was an unjustified disadvantage which by its effect – sending the applicant away from work indefinitely – became a dismissal, equally unjustified.

Remedies

[76] The applicant has a personal grievance which requires remedies. She seeks lost wages, compensation for hurt and humiliation, and costs.

Lost wages

[77] By mid-August 2006 the applicant found a part-time job at a wholesale nursery where she worked varying hours. In December 2006 she got an additional part-time job in a garage. The combined effect is that she has been working full-time since the end of 2006. At the time of the investigation meeting she was about to start a full time job with one of those employers.

[78] She claims lost wages for the period of 23 weeks from 9 July to 7 December 2007. At $673.07 a week gross (the applicant says $533.94 nett), this amounts to $15,480.61 gross (and the applicant says $12,280.62 nett). Deducting nett earnings of $4263.29 for part-time work during this period, the applicant's claim for lost wages totals $8017.33 nett.

[79] I am satisfied that the applicant took adequate steps to mitigate her loss. She did not seek work through July because she believed that matters would be resolved and she would return to work at the Rusty Pelican.

[80] Allowing for the contingencies of life I am also satisfied that but for her unjustified dismissal the applicant would more likely than not have remained working for the respondent throughout this period. She and her husband had extended their mortgage to raise the funds to invest in the respondent business and she had every incentive to remain working in it.

[81] Under s123(1)(b) and s128(3) of the Act, the respondent is to reimburse the applicant for wages lost as a result of the grievance to the sum of $8017.33 nett.

Compensation for distress

[82] The applicant gave evidence of the distress caused by her suspension. She was upset that she and her husband were under considerable financial stress to meet mortgage payments and had to borrow money from friends to do so. Through the latter half of 2006 she had to increase blood pressure medication and experienced weight gain which she says was stress-related.

[83] She says she heard rumours in the local community that she had left the business under a cloud of dishonesty. There was no evidence that the Raklanders made any such suggestion, but I accept that such rumours were probably an inevitable result of her abrupt suspension, for which the respondent was responsible. It compounded the hurt and humiliation of her dismissal.

[84] The distress may have been heightened by the subsequent legal action on shareholding issues before the employment relationship problem was filed in the Authority, however I do not consider that this negates the right to compensation for the humiliation and loss of dignity through the treatment that the applicant received as an employee.

[85] Under s123(c)(i) the respondent is to pay to the applicant the sum of $6000 (without deduction) as compensation for distress caused by the respondent's unjustified actions.

Contribution

[86] Under s124 of the Act I have considered whether the actions of the employee contributed towards the situation giving rise to her personal grievance and whether remedies awarded should be reduced accordingly.

[87] In the light of the respondent's failure to substantiate the concerns on which it relied to suspend the applicant from her duties, I do not consider there is reliable evidence for me to find that any actions or omissions of the applicant were sufficiently blameworthy to warrant reducing remedies awarded to her.

Effect of receivership

[88] As I understand it, the receiver is not personally liable for pre-receivership breaches by the company. Accordingly the remedies ordered are obligations on the company and not the receiver. I have no information on whether the business is still operating in an attempt to trade out of receivership but Mr Raklander's evidence in late February was that the business was doing well.

[89] Under s30(2)(b) and (3) of the Receiverships Act 1993 preferential payments are made in the same order as for liquidations under Schedule 7 of the Companies Act 1993. Under clause 2(bb) of that Schedule this includes reimbursement of lost wages ordered under s123(1)(b) and s128 of the Employment Relations Act up to a total amount of $16,420 (see clause 6 and 6A). However distress compensation orders under s123(1)(c) appear to be excluded as preferential claims.

Instalments

[90] In written closing submissions the respondent sought leave to apply for any payment ordered by the Authority to be paid in instalments.

[91] Respondent counsel at the investigation meeting has since advised that he longer has instructions following the receivership.

[92] If the issue of instalments is a matter that the company in receivership wishes to pursue, it may apply to the Authority within 14 days of the date of issue of this determination and an opportunity for reply by the applicant will be provided before that issue is determined.

Costs

[93] In light of the outcome, the applicant is entitled to costs. This does not include costs associated with mediation. Costs are usually awarded on the basis of well-established principles, summarised in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

[94] The parties are invited to agree the matter of costs between them. In the event they are unable to do, the applicant may lodge an application for the Authority to determine costs but must do so within 28 days of the date of this determination. The respondent will have 14 days to reply to any such application before costs are determined.

Robin Arthur
Member of Employment Relations Authority