

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 584  
5420025

BETWEEN CHANELLE BRYAN  
Applicant

A N D ULTIMATE LIMITED (in  
liquidation)  
First Respondent

A N D ULTIMATE TEMPS LIMITED  
Second Respondent

A N D STEPHEN JOHN RYAN  
Third Respondent

A N D JOANNA WILSON  
Fourth Respondent

Member of Authority: Rachel Larmer

Representatives: Michael Smyth, Counsel for Applicant  
Stephen Ryan, director Second Respondent and in  
person as Third Respondent  
Joanna Wilson in person as Fourth Respondent

Investigation Meeting: 22 October 2013 at Auckland

Additional Information: 27 October 2013 from Third Respondent  
29 October 2013 from Applicant  
29 October 2013 from Third Respondent  
31 October 2013 from Third Respondent  
07 November 2013 from Applicant  
06 December 2013 from Fourth Respondent  
27 November 2013 from Applicant

Submissions Received: 08 November 2013 from Applicant  
15 November 2013 from Second and Third Respondents  
19 November 2013 from Applicant  
21 November 2013 from Second and Third Respondents  
21 November 2013 from Applicant  
22 November 2013 from Fourth Respondent  
27 November 2013 from Applicant  
03 December 2013 from Applicant

Date of Determination: 19 December 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The Ultimate Recruitment Corporation Limited TURCL (which changed its name to Runty Limited (Runty) shortly before going into voluntary liquidation) employed Ms Bryan from 17 February 2010 until it went into liquidation on 18 April 2012.**
- B. TURCL owed Ms Bryan \$21,095 when it went into liquidation but she is unable to recover any of this amount due to its liquidation.**
- C. Ms Wilson personally employed Ms Bryan from 19 April 2012 until her employment ended on 29 January 2013.**
- D. Ms Wilson and Mr Ryan incited, instigated, aided and/or abetted TURL's many breaches of its employment agreement with Ms Bryan.**
- E. Ms Wilson as Ms Bryan's employer from 19 April onwards breached Ms Bryan's employment agreement by:**
- (a) failing to provide a written employment agreement;**
  - (b) failing to keep wage and time records required under the Minimum Wages Act 1983;**
  - (c) failing to comply with the s.4 duty of good faith under the Employment Relations Act 2000 (the Act);**
  - (d) deducting but failing to remit all of Ms Bryan's KiwiSaver employee contributions to Inland Revenue Department (IRD);**
  - (e) failing to pay the correct KiwiSaver employer contributions to IRD;**
  - (f) incorrectly declaring Ms Bryan's total earnings to IRD;**
  - (g) underpaying Ms Bryan's PAYE tax to the IRD;**
  - (h) incorrectly calculating and underpaying Ms Bryan's annual holiday and public holiday pay.**

- F. Mr Ryan incited, instigated, aided and/or abetted Ms Wilson's breaches of her employment agreement with Ms Bryan by:**
- (a) failing to pay all of the required KiwiSaver employer contributions to IRD for Ms Bryan's KiwiSaver account;**
  - (b) deducting but then late paying some of the KiwiSaver employer contributions to IRD;**
  - (c) failing to pay all of Ms Bryan's employee KiwiSaver contributions to IRD;**
  - (d) incorrectly declaring Ms Bryan's total remuneration to IRD;**
  - (e) failing to pay correct PAYE for Ms Bryan to IRD.**
- G. Ms Wilson owes Ms Bryan wages arrears of \$6,207.94 being;**
- (a) \$2,244.28 for incorrectly paid annual holidays;**
  - (b) \$1,180.12 for incorrectly paid public holidays;**
  - (c) \$1,719.73 shortfall in KiwiSaver employer contributions;**
  - (d) \$1,063.81 shortfall in KiwiSaver employee contributions.**
- H. Ms Bryan owes Ms Wilson \$919.71 for 2.4 days annual holiday taken in advance before her employment ended. This is to be deducted from the total amount Ms Wilson owes Ms Bryan.**
- I. Ms Wilson is ordered to pay Ms Bryan wages arrears of \$5,288.23 (amount owed to Ms Bryan less amount Ms Bryan owes Ms Wilson for paid annual holidays taken in advance).**
- J. Ms Wilson is ordered to pay Ms Bryan interest at the current rate of 5%<sup>1</sup> on \$5,288.23 from 29 January 2012 until it has been paid in full.**

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<sup>1</sup> Section 87 Judicature Act 1908 and clause 14 Judicature (Prescribe rate of Interest) Order 2011.

- K. Ms Bryan's actual total gross earnings differ from what was reported by her employers to IRD.**
- L. There is a shortfall of \$12,698 between what TURCL reported to IRD as Ms Bryan's total gross earnings and what she actually earned. This resulted in Ms Bryan's PAYE to IRD being underreported and underpaid by \$4,190.34 and her KiwiSaver contributions being underpaid by \$507.92.**
- M. There is a shortfall of \$10,919 between what Ms Wilson reported to IRD when she employed Ms Bryan and what Ms Bryan actually earned. This resulted in Ms Bryan's PAYE to IRD being underreported and underpaid by \$4,428.27 and her KiwiSaver contributions being underpaid by \$2,783.54.**
- N. Ms Wilson is required to advise IRD of Ms Bryan's correct total gross earnings and to pay the correct PAYE on Ms Bryan's total remuneration to IRD.**
- O. Ms Bryan's penalty claims against Ultimate Temps Limited (UTL) and Mr Ryan for obstructing or delaying an Authority investigation do not succeed.**
- P. The following penalties are imposed:**
- (e) \$10,000 on Ms Wilson for inciting, instigating, aiding and/or abetting TURCL's many breaches of Ms Bryan's employment agreement;**
  - (f) \$10,000 on Mr Ryan for inciting, instigating, aiding and/or abetting TURCL's breaches of Ms Bryan's employment agreement;**
  - (g) \$10,000 on Ms Wilson for breaching Ms Bryan's employment agreement;**
  - (h) \$10,000 on Mr Ryan for inciting, instigating, aiding and/or abetting Ms Wilson's breaches of Ms Bryan's employment agreement.**

- Q. Ms Wilson is ordered to pay \$5,000 of the penalties imposed on her to the Crown bank account and \$15,000 of the penalties imposed on her directly to Ms Bryan.**
- R. Mr Ryan is ordered to pay \$5,000 of the penalties imposed on him to the Crown bank account and \$15,000 of the penalties imposed on him directly to Ms Bryan.**
- S. Ms Bryan was constructively dismissed from her employment on 29 January 2014. Her dismissal was unjustified.**
- T. Ms Wilson is ordered to pay Ms Bryan \$2,691.84 lost remuneration. No distress compensation is awarded.**

### **Employment relationship problem**

[1] The first respondent Ultimate Limited (in liquidation) (UL) is not a party to these proceedings. It was struck out as the liquidator does not consent to Ms Bryan bringing proceedings against UL. Although Ms Bryan is owed \$21,095.86 by TURCL she cannot recover that amount due to its liquidation because it has no assets.

[2] Ms Wilson and/or people closely associated with her<sup>2</sup> have been using the trading name "*The Ultimate Recruitment Company*" (the trading name) since 2002. Although the trading name references a "company" it is important to recognise that the trading name in itself is not a legal entity.

[3] TURCL used the trading name from April 2010 until it apparently sold the trading name to UL. The date on which that occurred is unclear despite the Authority directing Ms Wilson and Mr Ryan to provide information about that sale transaction.

[4] It is important to note that TURCL changed its name to Runty Limited (Runty) shortly before it sold its only asset (the trading name) to Mr Ryan's company UL. Less than a month after changing its name to Runty TURCL went into voluntary liquidation. I refer throughout this determination to TURCL as that is the name that was used by the business at the material time. My references to TURCL should be taken to refer to "Runty" for the period 20 March to 18 April 2012. To avoid confusion I refer to TURCL/Runty as TUCRL only.

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<sup>2</sup> Such as her father-in-law and her former boyfriend Mr Ryan.

[5] Neither Ms Bryan nor any of the other TURCL employees were notified that their employment had come to an end or that TURCL had changed its name and/or been placed in voluntary liquidation. The liquidator was not informed that Ms Bryan (or other employees) were owed money by TURCL so Ms Bryan (and other employees) do not appear in the liquidator's report as creditors. TURCL's only asset was removed from it and passed to another legal entity which Ms Wilson remained closely associated with a month before it went into liquidation

[6] I find that Ms Wilson and Mr Ryan deliberately decided not to inform the liquidator of relevant matters which should have been addressed in the liquidator's report so that they could personally benefit by continuing to run the Ultimate recruitment business effectively unchanged in all respects apart from ownership of the trading name. This action effectively put the money TURCL owed to its employees out of reach of those employees.

[7] Mr Ryan claims UL sold the trading name to UTL shortly before UL went into voluntary liquidation. Mr Ryan says UTL currently has no assets because it sold the trading name to York Limited in June 2013. Ms Wilson is the sole director and shareholder of York Limited. She continues to run the Ultimate recruitment business in the same way it has always been run. Once again the only change is the ownership of the trading name which has now reverted back to Ms Wilson's company.

[8] Ms Wilson has run her Ultimate recruitment business under the ownership following entities of which she has been a director: Recruit Group Limited (struck off), Ultimate Performance Limited (struck off), The Ultimate Recruitment Company Limited (struck off) which was liquidated in 2008 owing debts to IRD, Centre Consulting Limited (struck off) and TURCL/Runty (in liquidation). These separate legal entities just own the trading name which appears to pass to each new legal entity before the previous entity is liquidated/struck off.

[9] Mr Ryan is sole director and shareholder of UL (previously called Bios Corporation Limited) and UTL (previously called Bios Fuel International Limited). UL and UTL have apparently both operated under the Ultimate recruitment trading name. Ms Wilson and Mr Ryan say that UL and then UTL employed Ms Wilson after TURCL went into liquidation. No employment agreements or other documentation have been produced to support this claim.

[10] Ms Bryan was employed as a Senior Recruitment Consultant by TURCL under a written employment agreement dated 17 February 2010. She was remunerated by way of a base salary plus commission payments upon placements.

[11] TURCL was a company operating as a recruitment agency which traded under the name "*The Ultimate Recruitment Company*". Its sole director and shareholder was Joanna Wilson. Ms Wilson and Mr Stephen Ryan were in a romantic relationship together when Ms Bryan started work with TURCL. Ms Bryan says she knew Mr Ryan as the "company accountant." Mr Ryan told me he is not an accountant and has no formal qualifications.

[12] Although Ms Wilson and Mr Ryan's romantic relationship ended their business relationship still continued. Mr Ryan describes himself as a "business advisor". Ms Wilson says she paid Mr Ryan a four figure monthly retainer to handle the financial side of the TURCL business.

[13] Ms Wilson ran TURCL and Ms Bryan reported to her. Mr Ryan was responsible for paying TURCL's employees their salary, commission and expenses after these had been signed off by Ms Wilson. Issues such as deduction of KiwiSaver PAYE and reporting to IRD by way of the Employer Monthly Schedule were also areas Mr Ryan took responsibility for. Ms Wilson says she relied on Mr Ryan to take care of all financial matters. Mr Ryan does not dispute that.

[14] In mid-2012 the Ultimate recruitment business (I refer to it in those general terms for reasons which are discussed later) moved offices and sometime around then there was also a website refresh. Around this time Ms Bryan noticed that her KiwiSaver contributions were not making it to her KiwiSaver account. She became concerned that the move in premises had created financial problems for the business so she raised that concern with Ms Wilson who assured her the KiwiSaver payments would be made up. Over a year later that has still not occurred.

[15] In early December 2012 Ms Bryan emailed Ms Wilson and Mr Ryan about the way in which her holidays were paid. She raised concern that she was not being paid correctly because payments had been calculated based on her base salary only - her commission payments had not been included when arriving at the daily rate. Ms Bryan claims that by accruing holiday pay in this manner her employer took

advantage of money owing to her to fund its own cash flow (which included paying Mr Ryan a “management fee” and Ms Wilson a salary).

[16] Mr Ryan emailed Ms Bryan about the holiday pay issue and they then spoke by phone. He confirmed her pay rate did not include her commission and said he would accrue extra holidays for her to make up the shortfall.

[17] Ms Bryan says she told Mr Ryan that was not what was required under the Holidays Act 2003 (HA03) but he was insistent that was the way it was going to be done. Although Ms Bryan remained concerned about that approach because at that stage her payslip showed 60 days annual holiday she felt that she could not do anything about it given Mr Ryan’s determined stance.

[18] In October 2012 Ms Bryan contacted IRD to request a summary of her earnings after receiving an unexpected tax refund for PAYE in the Financial Year End 31 March 2012. Her summary of earnings listed two companies TURCL and UL as the “employer or payer”. Ms Bryan noticed that the IRD’s records of her total gross earnings did not match the gross earnings on her final payslip for that financial year.

[19] When Ms Bryan received her final payslip in March 2012 Mr Ryan had crossed the amount of PAYE tax paid and in handwriting had inserted another higher amount. Mr Ryan’s amended version does not tally with Ms Bryan’s IRD records.

[20] Ms Bryan was aware from her bank statements that the name of the payer of her salary varied and had included Bios Fuel Corporation, UL, UTL, and Mr Ryan personally. Ms Bryan was curious about why two payers were named on the IRD records but did not recognise the legal significance of that. Ms Bryan asked Ms Wilson about why two payers were recorded and Ms Bryan says Ms Wilson told her “*Stephen was a director of Ultimate because Ultimate couldn’t move premises without Stephen being a director.*”

[21] Ms Wilson confirms that she never disclosed TURCL’s liquidation to its employees and that she never discussed with them that their employment would be or had been transferred to UL. Mr Ryan confirms that he never told TURCL’s employees that UL had taken on or wanted to take over their employment.

[22] Ms Bryan also says Ms Wilson told her that “*everything was still the same*” and that she [Ms Bryan] still reported to her [Ms Wilson]. Ms Bryan says she took

from that conversation that Ms Wilson was still running the business and that Mr Ryan was a director only for legal reasons. I accept this evidence.

[23] Ms Bryan says that by the time Christmas came she was concerned about a number of work related issues (involving the way Ms Wilson was presenting and acting at work) so started looking for alternate employment. In mid-January 2013 Ms Bryan was offered and accepted a role as a Recruitment Manager at a new start up recruitment business operated by a former business associate.

[24] Ms Bryan emailed Ms Wilson her contractual two weeks' notice on 22 January 2013 suggesting she be put on garden leave and raising concern about her final pay. Her last day of work was 05 February 2013 and Ms Wilson required Ms Bryan to work out her notice period. Ms Bryan told me she could not bear to go back into what she saw as a deteriorating work environment so did not want to work out her notice.

[25] Ms Bryan took legal advice after her resignation and with the assistance of counsel pieced together that TURCL without her knowledge had advised IRD that her employment had ended on 31 January 2012. IRD had also been advised that she had started new employment with UL on 10 March 2012. On 20 March TURCL changed its name to Runty and on 18 April Runty was placed in voluntary liquidation.

[26] Ms Bryan was advised by her counsel that her employment with TURCL must have ended at the latest by 18 April 2012 when Runty went into liquidation. There was no mention in the TURCL/Runty's liquidator's report of any employees at the date of liquidation, neither does it mention any sale of the trading name to UL.

[27] Ms Bryan was concerned that her IRD records show she had not worked from 01 February to 09 March 2012 when she had in fact continued to work and be paid as normal over that period. She did not know who her employer was because her bank accounts recorded various payers. Ms Bryan claims she was constructively dismissed because there had been multiple breaches of her employment agreement and she did not know the identity of her employer.

[28] She says these issues caused her to lose trust and confidence in her employer whoever that may have been. Her lawyer wrote to Ms Wilson on 29 January alleging constructive dismissal and advising Ms Bryan would not be returning to work out her notice period. Ms Bryan started her new job on 11 February so was out of work for

eight days between ending her employment with Ms Wilson and starting her new job. She claims lost remuneration and distress compensation for her alleged unjustified dismissal.

[29] Ms Bryan asks the Authority to determine the identity of her employer from 31 January 2013 onwards. She claims she was employed by Ms Wilson and Mr Ryan acting jointly in partnership.

[30] Ms Bryan claims she is owed:

- (a) \$18,740 unpaid holiday pay since she started employment in 2010;
- (b) \$111.76 unpaid employer contribution to KiwiSaver for the period up to 18 April 2012;
- (c) \$253.96 unpaid employee contribution to KiwiSaver for the period up to 18 April 2012;
- (d) \$1,719.73 unpaid employer contribution to KiwiSaver for the period 19 April 2012 to 31 January 2013;
- (e) \$1,719.73 unpaid employee contribution to KiwiSaver for the period 19 April 2012 to 31 January 2013.

[31] Ms Bryan also says that the following income has not been declared to IRD so the PAYE remitted to IRD on her behalf is incorrect:

- (a) April 2011 – March 2012 - \$4,000 in gross earnings not declared to IRD;
- (b) April 2012 – January 2013 - \$8,700 in gross earnings not declared to IRD.

[32] Ms Bryan seeks that a penalty be imposed on UTL and Mr Ryan for without sufficient cause obstructing or delaying the Authority's investigation by cancelling an agreed mediation date the day before mediation was to occur.

[33] Ms Bryan also seeks penalties against Ms Wilson and/or Mr Ryan personally for:

- (a) Failure to provide a written employment agreement;
- (b) Breach of the duty of good faith;
- (c) Breach of HA03 by underpayment of annual holiday and public holidays;
- (d) Failure to pay all KiwiSaver contributions to IRD;
- (e) Inciting, instigating, aiding and/or abetting breaches of her employment agreement.

[34] Ms Bryan seeks that some of all of any penalties imposed be awarded to her personally instead of the Crown.

[35] Ms Wilson and Mr Ryan say that Ms Bryan was employed by UL and that she is only pursuing a claim against them personally because UL has no assets. Mr Ryan says that Ms Bryan's correct total gross earnings were reported to IRD and the correct PAYE was deducted and remitted to IRD. He attributes the gap in Ms Bryan's IRD schedule of earnings to an IRD error.

[36] IRD was unable to assist the Authority with information about this because it is currently undertaking an investigation into tax related issues involving the parties to these proceedings.

[37] UL was placed in liquidation on 30 April 2013 by resolution of its shareholders following receipt of a Labour Inspector's (LI's) report which calculated that Ms Bryan was owed \$16,316.19 in unpaid annual holiday and public holiday entitlements.

[38] The LI's report assumed UL employed Ms Bryan. It also only addressed annual holiday entitlements from her employment with TURCL which cannot now be recovered by her due to its liquidation. Ms Wilson and Mr Ryan deny that Ms Bryan was constructively dismissed. They say she voluntarily resigned because she found another job.

[39] UTL apparently also now has no assets. Mr Ryan claims UTL sold its only real asset which was the trading name to York Limited which now trades from the same offices from which Ms Bryan worked using the same equipment she used during

her employment, doing the same business, with Ms Wilson still engaged as the owner and manager of the business. As has previously occurred the only change is in the legal ownership of the trading name (assuming it was actually sold as Mr Ryan and Ms Wilson allege although evidence to support those claims has not been provided) .

[40] Mr Smyth submits that Mr Ryan and Ms Wilson have since 2010 deliberately used multi legal entities for the purpose of running the Ultimate recruitment business in order to avoid statutory obligations to pay tax and comply with employment obligations. He submits that since 2010 Ms Wilson and Mr Ryan have both run the Ultimate recruitment business in partnership.

### **Failure to provide information**

#### *Wage and time records*

[41] Despite directing that the wage and time records for Ms Bryan that are required to be kept by an employer under s.130 of the Act be provided to the Authority that has not occurred. I consider that has prejudiced Ms Bryan's ability to bring an accurate wage arrears claim under s.131 of the Act so in accordance with s.132(2) of the Act I accept the evidence she has given about the wages actually paid to her and the hours, days and time she worked.

#### *Sale and purchase of trading name*

[42] Although directing the respondents more than once to provide the Authority with copies of all documentation and in particular the sale and purchase agreements and company accounts showing the sale and purchase transactions of the trading name from TURCL (Runty) to UL then to UTL then to York Limited that has still not occurred.

### **Content of determination**

[43] In accordance with s.174(b) of the Act I do not set out a record of the evidence heard, the parties' submissions, credibility findings, or the Authority's investigation process given the length of this determination due to the extensive number of issues that have had to be determined.

## **Issues**

[44] The following issues are to be determined:

- (a) Who employed Ms Bryan from 01 February 2012 to 29 January 2013?
- (b) Did TURCL breach Ms Bryan's employment agreement?
- (c) If so, did Ms Wilson and/or Mr Ryan incite, instigate, aid and/or abet TURCL's breaches of Ms Bryan's employment agreement?
- (d) Did whoever employed Ms Bryan after TURCL's liquidation breach her employment agreement?
- (e) If so, did Ms Wilson and/or Mr Ryan incite, instigate, aid and/or abet any breaches of Ms Bryan's employment agreement by her new employer?
- (f) Is Ms Bryan owed wage arrears?
- (g) If so should interest be awarded on any wage arrears?
- (h) Did Ms Bryan's employer correctly report her total gross earnings to IRD and was the correct PAYE deducted and paid to IRD on her behalf?
- (i) Should any penalties be imposed?
- (j) If so, should some or all of any penalties imposed be paid to Ms Bryan?
- (k) Was Ms Bryan constructively dismissed?
- (l) If so, was Ms Bryan's dismissal justified?
- (m) If not, what if any remedies should be awarded?

### **Who employed Ms Bryan from 01 February 2012 until 29 January 2013?**

*01 February – 18 April 2012*

[45] Ms Bryan agreed to be employed by TURCL which as Runty went into liquidation on 18 April 2012. The difficulty arises because Ms Bryan did not agree to

be employed by anyone else. It was not until around 29 January 2013 that she found out TURCL had changed its trading name then gone into voluntary liquidation.

[46] TURCL cannot have continued to have employed Ms Bryan after it went into liquidation because it ceased trading. The issue regarding the identity of Ms Bryan's employer is further complicated by the incorrect advice Mr Ryan appears to have given IRD to the effect that Ms Bryan's employment with TURCL ended on 29 January 2012.

[47] Ms Bryan did not resign from her employment and she was not dismissed by TURCL. She continued working and was paid as usual. Her employment with TURCL must therefore have continued until it was liquidated on 18 April. Accordingly I find that TURCL continued to employ Ms Bryan on the same terms and conditions from 01 February 2012 until her employment automatically ended on 18 April 2012 when TURCL (under the new name of Runty) went into voluntary liquidation.

*19 April 2012 – 29 January 2013*

[48] IRD records show that UL appears to have assumed responsibility for Ms Bryan's IRD payments (PAYE and KiwiSaver) from 10 March 2012. IRD's records do not show that Ms Bryan received seven payments in respect of salary or expenses from UTL between 20 November 2012 and 14 January 2013.

[49] I find that from 10 March nothing changed on an operational level in terms of the Ultimate recruitment business. Ms Bryan did the same job from the same premises on the same terms and conditions she had with TURCL. Ms Wilson continued to run the business as if it were hers.

[50] Ms Wilson became a director of TURCL in August 2011 and thereafter referred to herself as "Director" or "Sales Director." Ms Wilson continued to refer to herself as "Sales Director" after UL assumed responsibility for Ms Bryan's IRD payments and after TURCL was placed into liquidation.

[51] There was no advice to employees that the Ultimate recruitment business was owned and operated by Mr Ryan's company/companies. No-one was told that Ms Wilson's status had changed to that of a non-owner employee of UL. In find there was nothing in the way in which the Ultimate recruitment business was run after TURCL's

liquidation which would have alerted TURCL's employees to the changes in ownership that Ms Wilson and Mr Ryan claim occurred.

[52] When Ms Bryan raised queries about the business and Mr Ryan's role in it in October 2012 Ms Wilson told her "*nothing had changed*" which is correct. Mr Ryan claims UL purchased the trading name for TURCL from the liquidator but that cannot be correct because UL started using the logo and brand of the trading name prior to TURCL being placed into liquidation and the liquidator makes no mention of any assets or employees at the date of liquidation.

[53] I find that Ms Wilson must have been Ms Bryan's employer after TURCL went into liquidation. Ms Bryan cannot have agreed to have entered into an employment relationship with a limited liability entity (such as UL) which she never even knew existed.

[54] Ms Wilson was the person who held herself out as owning and operating the Ultimate recruitment business and she continued to be Ms Bryan's boss. Ms Wilson effectively continued to run exactly the same business after TURCL's liquidation. I am satisfied she was the mind, front person and driving force behind the Ultimate recruitment business.

[55] I consider Ms Wilson must have employed Ms Bryan personally from 19 April 2012 onwards. I make this finding because Ms Bryan was not aware that her employer had changed. It is not open to employers to unilaterally change an employee's employment. An employee must always agree to a change in employer and that did not occur in this case. However, from a legal perspective, Ms Bryan's employer had to have changed after TURCL went into liquidation.

[56] Ms Wilson deliberately decided not to inform the staff when TURCL went into liquidation. She was the person who decided to continue trading using the same trading name. She was the person who ran the business and who Ms Bryan (and others) considered was in charge.

[57] If Ms Wilson had wanted to engage Ms Bryan via a limited liability legal entity then it was open to her to have made those arrangements. That did not occur. It is not open to Ms Wilson to nominate an undisclosed principal as Ms Bryan's employer after that employment had ended which is what she is now attempting to do.

[58] In October 2012 Ms Bryan asked Ms Wilson directly about Mr Ryan's involvement in the Ultimate recruitment business. Instead of explaining the true position Ms Wilson actively lead Ms Bryan to believe that nothing had changed.

[59] Ms Wilson says that all her actions from 19 April onwards were solely as an employee of UL so she was never acting in a personal capacity. I do not accept that. I consider it more likely than not that Ms Wilson kept running her Ultimate recruitment business as usual, notwithstanding the ownership of the business may have changed behind the scenes. Even if an agency arrangement or employment relationship had existed between Ms Wilson and UL she did nothing to draw that to anyone's (and in particular Ms Bryan's) attention. She cannot now rely on an undeclared arrangement to absolve her of personal legal responsibility for Ms Bryans' employment.

[60] Even if I am wrong about Ms Wilson employing Ms Bryan personally the doctrine of the undisclosed principal would apply to this situation. The doctrine allows Ms Bryan to pursue Ms Wilson personally notwithstanding she may have been acting as an agent for another undisclosed legal entity or undisclosed principal.<sup>3</sup> Ms Bryan has elected to pursue Ms Wilson as her employer and I find she is legally entitled to do so.

[61] I find on the balance of probabilities that Ms Wilson and Ms Bryan were in an employment relationship from 19 April 2012 to 29 January 2012.

#### **Did TURCL breach Ms Bryan's employment agreement?**

[62] Although TURCL is not a party to these proceedings I must still determine whether it breached Ms Bryan's employment agreement because she has claimed penalties against Ms Wilson and/or Mr Ryan for inciting, instigating, aiding and/or abetting TURCL's breach of her employment agreement. If TUCRL did not breach Ms Bryan's employment agreement the penalty claims against Ms Wilson and Mr Ryan cannot succeed.

[63] I am satisfied on the balance of probabilities that TURCL breached Ms Bryan's employment agreement in the following ways, it:

- (a) breached its s.4 duty of good faith in the Act;

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<sup>3</sup> *Cuttance (t/s Olympus Fitness Centres) v Purkis* [1994] 2 ERNZ 321.

- (b) failed to provide Ms Bryan with contractual notice upon termination;
- (c) breached ss.8 and 9 HA03 by incorrectly calculating and underpaying her annual holiday and public holiday pay;
- (d) breached s.27(1)(b) HA03 by failing to pay her holiday pay upon termination;
- (e) failed to inform the liquidator that she was a substantial creditor;
- (f) did not remit the correct employer KiwiSaver contributions to IRD;
- (g) deducted Ms Bryan's employee KiwiSaver contributions but did not remit all of them and/or remitted some of them late to IRD;
- (h) under-reported Ms Bryan's total gross earnings to IRD by \$4,000;
- (i) underpaid PAYE on Ms Bryan's behalf to IRD;
- (j) Incorrectly informed IRD MS Bryan's employment had terminated on 29 January 2012 when her employment had in fact continued until 18 April 2012.

**Did Ms Wilson and/or Mr Ryan incite, instigate, aid and/or abet TURCL's breaches of Ms Bryan's employment agreement?**

*Ms Wilson*

[64] Ms Wilson was TURCL's sole shareholder and director and she was the person responsible for running the business when all of TURCL's multiple and ongoing breaches occurred.

[65] As the owner and manager of TURCL's business I find she is responsible for inciting, instigating, aiding and/or abetting all of TURCL's breaches of Ms Bryan's employment agreement. It was Ms Wilson's actions and omissions which directly resulted in TURCL's breaches of Ms Bryan's employment agreement.

[66] Ms Wilson's engagement of Mr Ryan to assist with the financial side of the business does not absolve her of responsibility for inciting, instigating, aiding and/or abetting TURCL's breaches. Mr Ryan was not an accountant and he told me he is not a member of any professional body. If Ms Wilson intended to rely on advisers to

ensure she and TURCL met its legal obligations then she should have taken steps to ensure that the person she elected to engage had the necessary skills and expertise. That did not occur here.

[67] Mr Ryan's involvement in Ultimate recruitment business arose because of his previous romantic relationship with Ms Wilson. I consider it was unreasonable for Ms Wilson to rely on Mr Ryan's involvement to ensure TURCL met its contractual obligations to Ms Bryan.

*Mr Ryan*

[68] Mr Ryan was engaged by Ms Wilson and paid a four figure monthly management fee to ensure that, amongst other things, all contractual remuneration issues were taken care of. The way in which he discharged his duties resulted in TURCL breaching Ms Bryan's employment agreement on numerous occasions.

[69] I find that Mr Ryan is responsible for inciting, instigating, aiding and/or abetting the breaches by TURCL of its financial contractual obligations (i.e. obligations such as paying correct holiday pay and public holiday pay, KiwiSaver contributions and accurate reporting of Ms Bryan's income and PAYE to IRD) under its employment agreement with Ms Bryan.

[70] I consider Mr Ryan should be held personally accountable for TURCL's breaches of its financial obligations to Ms Bryan. If Mr Ryan did not have the necessary expertise required to undertake the duties he was remunerated for then he either should not have taken on those activities or he should have taken professional advice to ensure his actions complied with TURCL's contractual obligations to Ms Bryan. It was his acts and omissions that directly caused TURCL to breach Ms Bryan's employment agreement.

[71] Mr Ryan was the person responsible for liaising with the liquidator on TURCL's behalf. The liquidator should have been but was not told that TURCL had employees who were owed money by it.

[72] I find Mr Ryan incited, instigated, aided and/or abetted TURCL's breaches of its s.4 duty of good faith under the Act because he failed to inform the liquidator that Ms Bryan was a creditor so the liquidator failed to give Ms Bryan (or other

employees) contractual notice of termination and they were not identified in the liquidator's report as creditors.

**Did Ms Wilson breach her employment agreement with Ms Bryan?**

[73] Ms Wilson breached s.63A(2) of the Act because she failed to provide Ms Bryan with an intended employment agreement after TURCL went into liquidation. She also breached s.64 of the Act by failing to provide Ms Bryan with a written employment agreement after personally employing her from 19 April onwards.

[74] Ms Wilson also breached the duty of good faith required by s.4 of the Act. She failed to communicate with Ms Bryan at all over critical matters such as the identity of her employer.

[75] Ms Wilson also breached sections 8 and 9 of the HA03 by failing to pay Ms Bryan correct annual holiday and public holiday pay while Ms Bryan was employed by her. Ms Bryan was paid annual holiday and public holiday pay based on her base salary only when her commission payments should have been taken into account.

[76] Ms Wilson, as the employer, is also responsible for failing to remit employer KiwiSaver contributions to IRD and for deducting but failing to pay some of Ms Bryan's employer and employee KiwiSaver contributions to IRD. These are further breaches of Ms Bryan's employment agreement.

[77] The evidence establishes on the balance of probabilities that Ms Wilson underreported Ms Bryan's total gross earnings to IRD which meant that PAYE was underpaid on Ms Bryan's behalf to IRD, again breaching Ms Bryan's employment agreement.

[78] I find that Ms Wilson failed to inform IRD of all of Ms Bryan's commission payments in the income reported to IRD on Ms Bryan's behalf. Ms Wilson also appears to have incorrectly advised IRD that Ms Bryan's employment ended in December 2012 when it did not in fact end until 29 January 2013. These are further breaches of Ms Bryan's employment agreement.

**Did Mr Ryan incite, instigate, aid and/or abet any of Ms Wilson’s breaches of Ms Bryan’s employment agreement?**

[79] It was Mr Ryan’s direct acts and omissions which caused Ms Wilson’s many and ongoing breaches of her employment agreement with Ms Bryan. I therefore find that Mr Ryan has incited, instigated, aided and/or abetted Ms Wilson’s breaches by not ensuring that Ms Wilson met the contractual obligations (in so far as they relate to financial matters) she had under Ms Bryan’s employment agreement.

**Is Ms Bryan owed wage arrears?**

*TURCL wage arrears*

[80] I am satisfied that TURCL owed Ms Bryan \$21,095.86 wage arrears when it went into liquidation. However Ms Bryan’s claim to recover unpaid annual holiday pay, public holiday pay, KiwiSaver contributions and undeclared PAYE prior to 19 April 2012 cannot succeed. Although TURCL owes Ms Bryan money it is in liquidation and is not a party to these proceedings.

[81] Ms Wilson and/or Mr Ryan should have advised the liquidator that Ms Bryan was a substantial creditor but neither of them did so. Ms Bryan was also unable to identify herself as a creditor at the time of the liquidation because she did not know that her employer had gone into liquidation because she was not given contractual notice of termination.

*Underpaid annual holiday and public holiday pay*

[82] When Ms Bryan took leave (whether annual holiday or a public holiday) she was paid calculated on her base salary only as her commission payments were excluded. Instead Ms Wilson would accrue the balance owed to Ms Bryan as part of her outstanding holiday entitlement. By accruing holiday pay in this manner Ms Wilson took advantage of money properly owing to Ms Bryan to fund the business’ cashflow (which included paying herself a salary and Mr Ryan a monthly management fee).

[83] Sections 8 & 9 of the HA03 provide that the calculation of ordinary weekly pay or relevant daily pay must include *“productivity or incentive based payments (including commission) if those payments are a regular part of an employee’s pay”*.

[84] Commission was part of Ms Bryan's regular pay since it was a contractual part of her remuneration package and was not discretionary. She earned commission every full month she worked. I am satisfied that Ms Bryan has been underpaid annual holiday for the period 19 April 2012 to 29 January 2013 and I accept her calculations regarding the amount owed.

[85] The HA03 does not permit an employer to accrue rather than pay holiday pay attributable to commission earnings which is what Ms Wilson did. She has had the benefit of money which should have been paid to Ms Bryan whilst she was employed. I note that money remains outstanding almost a year after the employment ended.

#### *Holiday pay upon termination*

[86] Ms Bryan accrued 16.6 days annual holiday during her employment with Ms Wilson (19 April 2012 to 29 January 2013). Ms Bryan took 19 days paid annual holiday in advance over that period. She therefore owes Ms Wilson \$919.71 (being 2.4 days or 16.4 hours x \$56.08 per hour) which I consider should be deducted from the amounts Ms Wilson owes Ms Bryan.

#### *KiwiSaver contributions*

[87] Correct KiwiSaver contributions (both employer and employee) were not paid to IRD during Ms Bryan's employment. KiwiSaver payments have also been paid to Ms Bryan's KiwiSaver account after UL went into liquidation. It is not clear where this money has come from. That supports my view that UL was not Ms Bryan's employer because such payments could not have been made out of UL funds without the authorisation and approval of the liquidator and there was no evidence of that before the Authority. The evidence is that UL has no assets.

[88] From April 2012 Ms Bryan's KiwiSaver employee contributions were made in broken amounts of approximately 2-3 transactions per month on different dates. For example the May 2012 contributions were paid mid-November and September 2012 was paid in March 2013.

[89] Ms Wilson's KiwiSaver employer contributions were also made late. For example the KiwiSaver contributions for April were made in August, for May in July, for June and July in October, August and September in December, October in April 13, November and December in May and January 13 in August 13.

[90] I accept Ms Bryan's calculations regarding unpaid KiwiSaver entitlements and I am satisfied that she is owed unpaid KiwiSaver contributions of \$1,531.24 by Ms Wilson. This covers the period of her employment with Ms Wilson only not any previous period of employment with TURCL.

*Wage arrears Ms Wilson owes Ms Bryan*

[91] I am satisfied on the balance of probabilities that Ms Wilson owes Ms Bryan total wage arrears of \$6,207.94 which should have been paid to her whilst employed. However I consider the wage arrears Ms Wilson is ordered to pay Ms Bryan should be adjusted by deducting the \$919.71 Ms Bryan owes Ms Wilson for paid annual holiday taken in advance. After that has occurred I find that Ms Wilson owes Ms Bryan outstanding wage arrears of \$5,288.23.

**Should Ms Bryan be awarded interest on her wage arrears?**

[92] Ms Bryan has been deprived of the use of money that should have been paid to her during her employment by Ms Wilson. It is appropriate to award Ms Bryan interest to reflect that loss. Ms Wilson is ordered to pay Ms Bryan interest at the current rate of 5% from 29 January 2012 on her total wage arrears of \$5,086.34 until that amount has been paid in full.

**Was Ms Bryan's total gross earnings and/or PAYE correctly reported to IRD?**

[93] Ms Wilson as Ms Bryan's employer is required to deduct and remit correct PAYE tax to IRD on Ms Bryan's behalf. Ms Bryan claims that Ms Wilson under-reported her earnings to IRD by \$8,700. She has based this on a review of deposits made as recorded in her bank records which she provided to the respondents to review and respond to. Ms Wilson has not provided a satisfactory explanation to the discrepancy between what Ms Bryan was paid and what was reported to IRD as her total gross earnings.

[94] It appears that IRD were notified that Ms Bryan's employment ended in December 2012 when it did not in fact end until 29 January 2013. It also appears that all commission paid to Ms Bryan was not fully reported to IRD. It may be that these inaccuracies account for the difference between what Ms Bryan actually earned and what IRD was told she earned.

[95] I am satisfied on the balance of probabilities that Ms Wilson has not correctly reported Ms Bryan's total gross earnings to IRD which has resulted in Ms Bryan's PAYE being underpaid. I consider the repayment of the correct PAYE on Ms Bryan's behalf to IRD is a matter for IRD and Ms Wilson to resolve.

**Should penalties be imposed?**

[96] Ms Bryan claims penalties for the following alleged breaches of her employment agreement:

- (a) Failure to provide notice of termination of employment with TURCL;
- (b) Failure to seek consent to be employed by a person or entity other than TURCL;
- (c) Failure to pay to the IRD Ms Bryan's correct PAYE;
- (d) Failure to pay to IRD all of the compulsory employer contributions to Ms Bryan's KiwiSaver account;
- (e) Failure to pay Ms Bryan in accordance with the HA03 when she took annual leave and public holidays;
- (f) Failure to pay Ms Bryan holiday pay upon termination of her employment both when TURCL was liquidated in April 2012 and when her employment with Ms Wilson ended on 29 January 2013.

*Penalties not appropriate*

[97] The payment of Ms Bryan's holiday pay upon TURCL's liquidation was a matter for the liquidator so I do not impose a penalty in respect of that. Ms Bryan was not owed any holiday pay upon termination of her employment with Ms Wilson in January 2013 so no penalty is appropriate for that claim.

*Obstructing or delaying an Authority investigation*

[98] Ms Bryan seeks that a penalty be imposed on UTL and Mr Ryan under s.134A of the Act for without sufficient excuse obstructing or delaying the Authority's investigation. She says that Mr Ryan cancelled mediation the day before it was to occur.

[99] Mr Ryan explained that he was working in the Pacific Islands but had arranged to fly back to New Zealand to attend mediation. He says he had a business emergency he had to deal with the day before he was due to leave. Mediation did occur on an alternative date before the Authority's investigation.

[100] I am not satisfied the threshold required by s.134A has been met on the balance of probabilities. I decline to impose a penalty for this claim.

*Relevant law*

[101] When setting the level of penalties to be imposed I am guided by the Employment Court decision in *Xu v McIntosh*<sup>4</sup> which set out a two stage test summarised as follows:

(a) How much harm has the breach caused? How important is it to bring home to the party in breach that such behaviour is unacceptable or to deter others from it?

(b) Was the breach technically inadvertent or was it flagrant and deliberate? Regard must be had to the degree of harm suffered as a result of the breach.

*Inciting, instigating, aiding and/or abetting TURCL's breaches*

[102] Under s.134(2) of the Act every person who incites, instigates, aids and/or abets any breach of an employment agreement is liable to a penalty up to a maximum of \$10,000 for an individual.

[103] I find that the breaches of Ms Bryan's employment agreement that were incited by Ms Wilson and Mr Ryan were deliberate, serious and sustained. There are multiple breaches which occurred since she began employment with TURCL in 2010 and which continued until her employment with TURCL ended in April 2012. These breaches have benefited Ms Wilson and Mr Ryan personally whilst depriving Ms Bryan of money she was entitled to.

[104] Ms Wilson and Mr Ryan failed to inform the TURCL liquidator that Ms Bryan was a significant creditor so she had no opportunity to recover what she was owed. There is also concern that TURCL's only significant asset (the trading name) was sold shortly before it was liquidated. That sale was to the detriment of Ms Bryan and other

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<sup>4</sup> [2004] 2 ERNZ 448.

employees but to the considerable advantage of Ms Wilson who continued her recruitment business unchanged and Mr Ryan who used the trading name to generate income for two entities (UL and UTL) he was the sole director and shareholder of.

[105] The penalties imposed need to punish Ms Wilson's and Mr Ryan's behaviour and should be set at a level which acts as a deterrent to other directors who may be tempted to use money that their company owes to employees for their own financial benefit. The level of penalty must signal serious disapproval of Ms Wilson's and Mr Ryan's acts and omissions in connection with TURCL's breaches of Ms Bryan's employment agreement.

*Failure to provide a written employment agreement*

[106] Ms Wilson's breach of s.64 of the Act by failing to provide Ms Bryan with a copy of the proposed employment agreement and s.65(2) of the Act by failing to provide a written employment agreement is a serious breach. It has created uncertainty around the legal identity of Ms Bryan's employer which has required considerable time and resource to resolve. Ms Wilson's breach has put Ms Bryan to considerable unnecessary which needs to be reflected in the level of penalty.

[107] Mr Ryan was not required to provide a written employment agreement to Ms Bryan because he was not her employer so it is not appropriate to impose a penalty on him for that.

*Breach of duty of good faith*

[108] Ms Wilson was not active and constructive in establishing and maintaining a productive employment relationship with Ms Bryan in which both parties were responsive and communicative contrary to the requirements of s.4(1A)(b) of the Act. She directly misled and deceived Ms Bryan regarding the identity of her employer, in breach of s.4(1)(b) of the Act.

[109] Ms Wilson also failed to comply with her good faith obligations in respect of bargaining with Ms Bryan for an employment agreement (no bargaining occurred and sections 60, 63 and 63A(2) of the Act were not complied with).

[110] Ms Wilson's failure to communicate with Ms Bryan about TURCL's liquidation and her subsequent employment by Ms Wilson was a deliberate, serious

and sustained failure to comply with the duty of good faith in s.4(1) of the Act. It is therefore appropriate to impose penalties for Ms Wilson's breaches of good faith under s.4A(a) of the Act.

[111] Mr Ryan did not owe Ms Bryan a duty of good faith because they were never in an employment relationship so a penalty cannot be imposed on him for a breach of good faith.

*Breaches by Ms Wilson of Ms Bryan's employment agreement*

[112] Ms Wilson breached Ms Bryan's employment by failing to pay her KiwiSaver contributions and by failing to pay her annual leave and public holidays in accordance with the requirements of the HA03. Ms Wilson obtained an advantage over other employers who comply with their legal obligations by paying employees correctly and remitting the correct amounts to IRD. The penalty imposed must be significant enough to deter such behaviour.

[113] These are multiple breaches spanning more than nine months. They are serious and sustained breaches which have harmed Ms Bryan because she has been deprived of money she is entitled to for well over a year. She has had to spend time, resources and money on a Labour Inspector investigation, mediation and these proceedings when she is in strained financial circumstances.

[114] I consider that these breaches are made more serious by the fact that Ms Bryan raised queries about her annual holiday and public holiday pay calculations in October and these were not appropriately addressed at that time. I therefore find that the breaches which occurred were either wilfully blind or deliberate.

*Totality approach to imposing penalties*

[115] Under s.135(2) of the Act a penalty of up to \$10,000 may be imposed on an individual for each breach of an employment agreement or for inciting, instigating, aiding and/or abetting each breach of an employment agreement. A penalty action must be commenced within 12 months<sup>5</sup> which has occurred in this case.

[116] I adopt the totality principle to the imposition of penalties rather than awarding a separate penalty for each breach. That means one overall penalty is imposed to

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<sup>5</sup> Section 135(5) of the Act.

reflect all of the breaches in each of the categories, including multiple breaches which have occurred in each category.

*Penalties imposed*

[117] I impose a penalty of:

- a. \$10,000 on Ms Wilson for inciting, instigating, aiding and/or abetting TURCL's breaches of Ms Bryan's employment agreement;
- b. \$10,000 on Mr Ryan for inciting, instigating, aiding and/or abetting TURCL's breaches of Ms Bryan's employment agreement;
- c. \$10,000 on Ms Wilson for breaching Ms Bryan's employment agreement;
- d. \$10,000 on Mr Ryan for inciting, instigating, aiding and/or abetting Ms Wilson's breaches of Ms Bryan's employment agreement.

**Should some or all of the penalties imposed be paid to Ms Bryan?**

[118] Ms Bryan has ended up out of pocket by more than \$26,000 as a result of Ms Wilson and Mr Ryan inciting, instigating, aiding and/or abetting breaches of her employment agreement by TURCL and by Ms Wilson (when she later personally employed her). She is only going to be able to recover around \$5,000 of what she is owed.

[119] I consider it is appropriate in these circumstances for a significant proportion of the penalties imposed to be awarded to Ms Bryan. Ms Wilson is ordered to pay \$15,000 of the total penalties imposed on her to Ms Bryan directly. Mr Ryan is ordered to pay \$15,000 of the total penalties imposed on him to Ms Bryan directly.

**Was Ms Bryan constructively dismissed?**

[120] Ms Bryan bears the onus of establishing on the balance of probabilities that she was dismissed and did not voluntarily resign. Dismissal is a situation where the initiative for the ending of the employment relationship comes from the employer.

[121] Ms Bryan gave two weeks' written contractual notice on 22 January so her employment was due to terminate on 05 February 2013. However, before that

occurred, but subsequent to giving notice of her resignation, Ms Bryan's counsel advised Ms Wilson that Ms Bryan would not be returning to work out the last week of her notice because of the fundamental breaches of her employment agreement which had been discovered.

[122] I find that the scale of the breaches of Ms Bryan's employment agreement only became apparent to her after taking legal advice and she acted promptly on that discovery by immediately claiming she had been constructively dismissed. I therefore consider she was constructively dismissed as a result of serious, ongoing and fundamental breaches of the employment agreement.

[123] The nature and scope of these breaches of her employment agreement made it reasonably foreseeable that Ms Bryan would not continue working under such circumstances so it can be said that Ms Bryan's employment ended at Ms Wilson's initiative. I find that Ms Bryan has discharged the onus of establishing on the balance of probabilities that her employment ended because she was dismissed.

#### **Was Ms Bryan's dismissal justified?**

[124] Having concluded that Ms Bryan was dismissed the onus passes to Ms Wilson to justify Ms Bryan's dismissal. Justification is objectively assessed in accordance with the justification test in s.103A of the Act.

[125] Ms Wilson did not comply with any of the s.103A(3) procedural fairness tests in the Act. I find that Ms Wilson's actions and how she acted was not what a fair and reasonable employer could have done in all the circumstances. Ms Wilson is therefore unable to justify Ms Bryan's dismissal. Accordingly I find that Ms Bryan's dismissal is unjustified.

#### **What remedies should be awarded?**

##### *Lost remuneration*

[126] Ms Bryan's employment by Ms Wilson ended on 29 January and she started her new job on 11 February. She claims 8 days lost remuneration between her employment with Ms Wilson ending and starting her new job.

[127] I find that Ms Bryan is only entitled to be compensated for 6 days lost remuneration (i.e. 29 January – 05 February 2013) because her employment would

have ended on 05 February (due to her 22 January resignation which I do not consider was a constructive dismissal because her reasons for resigning were due to personal issues and not related to breaches of her employment agreement).

[128] The constructive dismissal occurred on 29 January by which time Ms Bryan only had six days of her notice period left to work. She therefore can only be said to have lost six days remuneration so can cannot be compensated for more than that.

[129] Ms Wilson is ordered to pay Ms Bryan \$2,691.84 (being 6 x \$448.64 (8 hours @ \$56.08 per hour)) lost remuneration under s.128(2) of the Act.

#### *Distress compensation*

[130] I am not satisfied Ms Bryan suffered any humiliation, loss of dignity, and injury to feelings as a result of her constructive dismissal. She had already decided to leave her employment with Ms Wilson, she had accepted another job and had given two weeks' notice of termination by the time she was constructively dismissed.

[131] Her dismissal just meant she did not work out the last week of her notice period which was something she had not wanted to do anyway. Ms Bryan had been disappointed that Ms Wilson had declined her suggestion that she be placed on garden leave.

[132] Any distress compensation to be awarded is to compensate the effects of an unjustified dismissal only. I consider Ms Bryan was happy and relieved that her employment ended on 29 January 2013 because it meant she did not have to return to a work environment she was not enjoying.

[133] Ms Bryan's evidence about why she was unhappy and decided to resign on 22 January did not relate to any of the breaches her counsel identified when he wrote to Ms Wilson on 29 January claiming Ms Bryan had been constructively dismissed. I am therefore not satisfied that Ms Bryan suffered distress as a result of her unjustified dismissal so I decline to award her any distress compensation under s.123(1)(c)(i) of the Act.

#### *Contribution*

[134] Having determined that Ms Bryan was constructively dismissed s. 124 of the Act requires me to consider the extent to which Ms Bryan's actions contributed

towards the situation which gave rise to her dismissal grievance and if so to reduce remedies accordingly.

[135] I find Ms Bryan did not contribute in any way to her unjustified dismissal so her remedies are not reduced.

### **Costs**

[136] Ms Bryan as the successful party is entitled to a contribution towards her costs. The parties are encouraged to resolve costs by agreement. If that is not possible Ms Bryan has 21 days within which to file costs submissions. The respondents have 14 days within which to respond with Ms Bryan having a further seven days in which to reply.

### **Other**

[137] A copy of this determination will be sent by the Chief of the Authority to the Commissioner of IRD.

**Rachel Larmer**  
**Member of the Employment Relations Authority**