

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 152  
5503866

BETWEEN            TINA CURRY  
                                 Applicant  
  
A N D                ISS HOLDINGS NZ LIMITED  
                                 Respondent

Member of Authority:    Helen Doyle  
  
Representatives:        Anna Oberndorfer, Advocate for the Applicant  
                                 Jo Douglas, Counsel for the Respondent  
  
Investigation Meeting:    17 and 18 June 2015 at Christchurch  
  
Submissions Received:    On the day  
  
Date of Determination:    12 October 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. Tina Curry was unjustifiably disadvantaged by the issue of a final written warning by ISS Holdings NZ Limited.**
- B. Tina Curry was unjustifiably dismissed from her employment with ISS Holdings NZ Limited.**
- C. ISS Holdings NZ Limited is ordered to pay to Tina Curry taking contribution into account the sum of \$12,150 being compensation under s 123 (1)(c) (i) of the Employment Relations Act 2000.**
- D. ISS Holdings NZ Limited is ordered to pay to the Authority to be paid into the Crown bank account a \$4000 penalty for a breach of good faith.**
- E. Costs are reserved and a timetable set.**

**Employment relationship problem**

[1] Tina Curry was employed by ISS Holdings NZ Limited (ISS) from 16 September 2013 as one of two contract service managers (CSM) in the Christchurch region. Her role was to supervise the commercial cleaning contracts of ISS. The other CSM at the material time was Natasha Lee.

[2] Ms Curry was party to an individual employment agreement (the employment agreement) dated 28 August 2013 with ISS.

[3] ISS carries on the business of providing cleaning services across New Zealand. Barry Bentley has, since June 2014, been employed by ISS in the role of Northern Region Operations Manager responsible for covering Taupo to the top of the North Island. At the material time, he was employed as the Central Regional Manager and was responsible for Palmerston North, New Plymouth and Hawke's Bay. He was asked to troubleshoot in the Christchurch area where there were a number of issues for ISS and was involved in the restructuring process.

[4] At the time Ms Curry was employed, the branch manager at the Christchurch branch was Cathy Scott. Ms Scott resigned in early December 2013 and for a period of three months the branch operated without a branch manager until Rebecca Mason commenced as the new branch manager on 3 March 2014.

[5] Ms Curry says that she was unjustifiably disadvantaged in her employment when she was issued with a final written warning dated 16 April 2014. She says that she was further disadvantaged by a subsequent breach of her privacy on the part of Ms Mason which was not resolved to her satisfaction by an apology. Ms Curry says that she was then unjustifiably dismissed on 6 May 2014 under the pretext of a redundancy.

[6] Ms Curry says that the misleading and deliberately undermining actions of ISS were in breach of the good faith obligations within the employment relationship.

[7] Ms Curry seeks a payment of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), a penalty for breaches of good faith and reimbursement of costs.

[8] ISS says that Ms Curry was not unjustifiably disadvantaged in her employment. It says that she was responsible for serious failings in managing the health and safety of her team and that when the breach of privacy was raised it was dealt with appropriately. ISS say that Ms Curry's position was disestablished for reason of genuine redundancy and was both substantively and procedurally justified.

### **The Issues**

- (a) Was the issue of the final written warning an unjustified action causing disadvantage?
- (b) Was there a breach of privacy by ISS?
- (c) Was the investigation into Ms Curry's concern of a breach of privacy that of a fair and reasonable employer?
- (d) Was the apology an outcome available to a fair and reasonable employer?
- (e) Was the dismissal for reason of redundancy justified?
- (f) Was there pre-determination about positions to be made redundant?
- (g) If Ms Curry was unjustifiably disadvantaged or dismissed from her employment then what remedies is she entitled to?
- (h) Was there a breach of good faith for which a penalty should be awarded?

### ***Was the issue of the final written warning an unjustified action that caused disadvantage?***

[9] Ms Curry said that she was extremely busy at the start of her employment and described some of the sites she was responsible for as a *shambles*. She said that she worked long hours and undertook, with the then branch manager Ms Scott, some of the cleaning herself to get the sites up to standard. Ms Curry said that she was expected to work long hours around the clock. In or about January 2014, two contract service supervisors, J J Love and Tehara Leary nee Doller, were employed to alleviate some of the workload from the cleaning contracts in Christchurch, Ashburton and Timaru.

***Employment agreement and policies***

[10] Clause 25 of the employment agreement deals with health and safety and provides amongst other matters in 25.1 (a) for a requirement to comply with all health and safety statutory requirements, policies, procedures, training, guidelines and recommendations given by ISS or health and safety consultants. Clause 25 (1) (b) provides that all work related injuries and accidents are to be reported immediately.

[11] In the position description attached to the employment agreement as schedule B there are health and safety responsibilities which include leading by example to reinforce and promote ISS's commitment to safe work practice and ensuring all elements of ISS health and safety management system are complied with at all levels within the region.

[12] On 18 September 2013, Ms Curry signed an acknowledgment headed *training record* that she had read and understood the Team Member Handbook which set out a requirement for an employee to report any work injury or near miss during the shift that had occurred using the injury and incident report form. The Handbook provided that it was the supervisor or manager's position to know where the site safety register was kept and to receive and forward the injury and incident report forms to an email address of the health and safety team.

[13] There was an email to all managers on 19 September 2013 from ISS health and safety which made it clear there was an obligation to ensure same day reporting of injuries and incidents. The email further provided that managers have a responsibility to ensure that once an accident/incident occurred an accident/incident report should be completed and emailed to health and safety within 24 hours. As that was the week Ms Curry started work I could not be sure she received that email.

[14] The same message though was provided to staff including Ms Curry by email on 26 February 2014 for the OSH toolbox talk. Lisa Bartholomew, the health and safety manager at ISS emailed through information about how to conduct the toolbox talk and that was passed onto front line staff including Ms Curry. Ms Curry was required to conduct toolbox meetings with the cleaners on a monthly basis. The February toolbox talk was about injury reporting and actions and responsibilities.

[15] The information accompanying the 26 February 2014 email for the toolbox talk provided that injured employees must report the injury/incident to their

supervisor/manager during the shift it happened. The supervisor/manager arranges for the injured employee to immediately visit a medical practitioner for assessment and if required treatment. The employee's supervisor/manager completes the accident report and emails it to ISS claims administrator within 24 hours and ensures the hazard that caused the accident/incident is managed and that the site/equipment is safe for others to use and also follows up on corrective actions. WorkAon and the manager/supervisor manage treatment of the injured employee and the return to work. If there is no accident/injury form submitted then there can be a delay in payments to the employee.

***Start of the events leading to final written warning***

[16] Ms Mason was involved at the start of the disciplinary process that led to the issue to Ms Curry of a final written warning although she was not involved in the second meeting and outcome process.

[17] Ms Mason by letter dated 27 March 2014 to Ms Curry asked her to attend a formal investigatory meeting to discuss five employee health and safety incidents. I shall summarise the five incidents referring to each individual by initials only as expressed in the letter to Ms Curry.

- (a) IC injured 07/03/2014 – tripped over a vacuum cord and was taken to hospital with cuts. IC's partner N texted Ms Curry from the hospital to advise of the accident but no response received. N texted again the next day and still no response. About a week later Ms Curry telephoned N about an unrelated matter and N tried to talk about the incident but the reception was bad. N asked Ms Curry to call her that night at 6pm but although she said she would call she never called. Ms Curry allegedly never completed the required Injury Reporting paperwork.
- (b) M – injured 25/02/2014 – M was cleaning above his head and the chemical from the spray bottle ran down his arm. M asked Ms Curry what to do if he got a chemical burn and she told him to put the area under water for 10 mins. M told Tegal on 04/03/2014 that he had sustained a chemical burn and Tegal arranged for M to get medical treatment and antibiotics. Ms Curry went to Tegal on 04/03/14 to talk

to M and to investigate and fill in the paperwork. The paperwork was returned to Ms Mason numerous times by Tehara as it was incomplete and it took approximately 2 weeks for the paperwork to be sent to ISS H & S. The incorrect date of the incident was on the report.

- (c) RA – injured 13/03/2014 – R, a supervisor felt burning whilst kneeling cleaning the floor. She advised Ms Curry of the incident the following morning and was told to take photos and fill out an incident report and fax it through. Ms Curry allegedly failed to chase up the form or talk to R until 25/03/14.
- (d) TM – injured 18/03/2104 – T felt an irritation on her lower right calf muscle and when she finished her shift she felt burning. She applied burn cream and notified R<sup>1</sup> her supervisor the following day. R told Ms Curry on 19 March 2014 who allegedly told R to get T to take photos and fill in the paperwork. Ms Curry apparently failed to contact T re the incident and/or did not chase up the paperwork with R. T worked on the night of 20/03/14 but had 21/03/14 off due to discomfort.
- (e) HR – injured 24/03/2014-H did not notice anything during the shift until she got home and noticed burning to her lower left calf muscle. She notified R and R notified Ms Curry on 25/03/14. Management called Ms Curry on 25/03 at 6.57 pm and Ms Curry informed management of the H incident and was advised to fill in the paperwork and get it to management by end of the following day. It appears that Ms Curry did not complete the required paperwork as it was not available when management arrived at Ashburton Meats on the night of 26/03/14. H also confirmed that Ms Curry had not made contact with her.

[18] Ms Curry attended an investigation meeting on 28 March 2014 and was happy to proceed without a support person. Ms Mason also attended that meeting with Mr Bentley attending by telephone and Selena Hancox the branch administrator as a note taker.

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<sup>1</sup> The same person who was injured on 13/03/ 2014

***Explanation to the incidents at investigation meeting***

[19] Ms Curry denied having received a text or a call about the IC injury from N. She said that the first she knew about the injury was when she received an email from Ms Hancox who had been asked by the health and safety manager Lisa Bartholomew for the accident investigation report on 25 March 2014. Ms Curry when asked for the incident report form *ASAP* advised IC was based in Timaru 2 hours away and hardly has reception on his phone. She advised Ms Leary was going to Timaru that evening and will be meeting IC and will get the incident report done. Ms Leary then sent an email to Ms Curry on 26 March 2014 to advise there was a change of plan and Ms Mason was going there on 27 March 2014 and Ms Curry then sent Ms Mason an email on 27 March 2014 to remind her to get the incident report.

[20] Ms Curry said that she had M fill in the incident form and she gave it to Ms Leary as instructed by Ms Mason. Ms Leary had not ticked some of the boxes and the form was placed on Ms Mason's desk where it was found when there was an urgent request for it from Ms Bartholomew. Ms Curry said that the process she was told by Ms Mason was to give the form to Ms Leary and then to Ms Mason.

[21] Ms Curry said that she asked R for her incident forms and photos on several occasions and asked R to get T to fill in her forms after her incident/accident and to send them through. In respect of H she said that she was held up at Tegal so Ms Mason picked up the form. Ms Curry said that she did not completely understand the health and safety process and would like to know what it is and who is responsible for filling the form – supervisor or contract manager. She said that she was now aware of the risk of not reporting in these situations and would like clarification of the procedures that need to be taken in the future.

[22] She felt that she had done everything in the five situations she could have. There is a disputed feature of the notes in that they record when Ms Curry raised an issue about the process that Ms Mason advised she will find out about the process and get back to Ms Curry with the answers. Ms Mason said that she always knew about the process and did not accept that the notes were accurate in that respect. Ms Mason asked to be removed from the process at that point as she was concerned Ms Curry was trying to argue that the process was biased with her involved.

***Progression to disciplinary meeting following investigation***

[23] On or about 7 April 2014, Ms Curry was invited by letter to a formal disciplinary meeting on 8 April 2014. She was encouraged to bring a representative and/or a support person to the meeting. The meeting was to be attended by manager Lynda Wooding and Mr Bentley and details of the five allegations were again set out in the letter. A summary of the meeting notes for the meeting on 28 March 2014 were attached to the letter.

[24] It was set out in the letter of 7 April 2014 that it was the view of ISS Ms Curry had failed to report and manage the health and safety processes as required by company policy and procedures especially in regards to injury reporting during and after the five incidents and that may be in breach of company policy and the code of conduct. Further that Ms Curry as part of the management structure may have failed the company with her duty of care and obligation to act in the best interest of the company and that she may have undermined the company's obligation to provide a safe work environment as required by the Health and Safety in Employment Act 1992.

[25] Ms Curry requested more time to prepare for the meeting which was agreed to and the meeting took place on 15 April 2014.

[26] Ms Curry attended the meeting with a support person, her partner Paul Steele, and was given an opportunity to explain in relation to the five incidents. Ms Curry gave an explanation in relation to the five incidents including that she did not understand the process for filling in the incident report. She said that *Cheryl* who was there for a health and safety meeting said supervisors take care of all the paperwork. Mr Bentley stated that injuries were to be reported within 24 hours. Ms Curry showed two text messages on 17 March and 20 April 2014 to support her position that she had chased R to get the forms returned. The notes record that Ms Curry was asked if she believed she had taken every reasonable step possible by asking supervisors and managers to follow up on injury reports as she could not get to sites to collect the paperwork required. She said that she felt she had.

[27] A final written warning was given to Ms Curry on 16 April 2014 which concluded that the allegations are proved on the balance of probabilities and that the conduct amounted to misconduct at the more serious end of the scale. Just prior to the

final written warning Ms Curry complained that Ms Mason had left open a calendar entry that other staff could view that Ms Curry had been invited to a disciplinary investigation meeting. Ms Curry raised a personal grievance about this matter. The matter was investigated and Ms Mason apologised in writing to Ms Curry.

***Conclusions about justification of the warning***

[28] Section 103 A of the Employment Relations Act 2000 (the Act) provides the test of justification which I must apply to the claims that the final written warning was unjustified, the breach of privacy and the claim of unjustified dismissal. That test requires the Authority to objectively assess whether the actions of ISS and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[29] There are four procedural fairness tests in s 103A (3) of the Act the Authority must consider together with other factors that it thinks appropriate under s 103A (4). The Authority must not determine a dismissal to be unjustified if the defects in the process were minor and did not result in an employee being treated unfairly under s 103 (5) of the Act.

[30] A fair and reasonable employer could be expected to comply with the good faith obligations in the Act.

[31] ISS were justified in their concerns and entitled to investigate further the periods of delay between five injuries sustained by cleaners and a supervisor at its worksites and the subsequent investigation and reporting of the injuries to ISS. The incidents all occurred within a three/four week period. Ms Douglas is correct in her submission that the consequences are potentially very serious for ISS if they fail to deal appropriately with health and safety issues and investigate injuries when they arise including the possibility of prosecution.

[32] A breach of the health and safety policy can amount to serious misconduct although the distinction is not always clear cut between misconduct and performance issues. Objectively assessed the concerns were about Ms Curry's performance as a manager of her duties and her failure to recognise any responsibility she had in the need for timeliness for the investigation and provision of incident/accident reports. The outcome of the process should have been consistent with performance concerns

as set out in the company policy and handbook where there is poor performance. I shall come to that.

[33] Ms Curry did have explanations for each of the specific allegations. She said that she did not know about the incident for IC until well after the event, asked other people to do tasks which they didn't and/or she was told there was a process for completing the reports that did not involve her and responsibility should fall elsewhere. She said that she had kept Mr Bentley advised of difficulties in getting R to complete the injury/accident forms. She thought Ms Mason was happy to collect the forms in Ashburton including for H. Ms Curry was correct that a supervisor could complete the accident and injury forms but when there was delay in completing the forms and investigating the incident the responsibility I accept fell to her to make sure they were done.

[34] The explanations were inadequate for ISS. Mr Bentley said in his written evidence<sup>2</sup> that Ms Curry did not appear to appreciate the seriousness of her inaction. Mr Bentley said what was of greater concern was the complete lack of care or investigation into what was causing the accident and making sure the staff were ok, had medical care and the cause of the incidents was investigated. He said that it was not just about form filling.

[35] ISS was dissatisfied with Ms Curry's performance and objectively assessed there was reason for that for some of the incidents. For example Ms Curry failed to see that she needed to take steps for the matters involving R and TM beyond sending text messages or telling Mr Bentley/Ms Mason there were difficulties in getting a response. If R as supervisor had failed to complete her own accident/injury paperwork between the date of her injury on 13 March and the date of TM's injury on 18 March then it is somewhat surprising that R was again delegated the task by Ms Curry to send through TM's accident/injury forms. The situation with M though does seem to have arisen from confusion and Ms Curry thought that Ms Mason had already addressed that matter.

[36] ISS are entitled to regard health and safety issues seriously and expect a higher standard of performance from Ms Curry where there had been an incident or accident. There was a lack of insight on the part of Ms Curry about the level of responsibility

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<sup>2</sup> At 35

she had as a manager in the process for reporting an accident or incident, conducting an investigation and checking on cleaners' well-being following an incident. She seemed unaware of the potential liability for ISS if such steps were not taken promptly and Mr Bentley raised a genuine concern in his evidence about what would have happened in the event of a serious harm incident. At least some of the incidents indicated a serious issue with delay and no-one taking overall control and responsibility. Ms Curry had management responsibility for those sites.

[37] There was information given to Ms Curry at the commencement of her employment and by email including close to the five incidents about what should happen in the event of an accident/incident which should have alerted her to the requirement for some urgency and follow up for reporting and investigation in the event of an employee injury/accident.

[38] A fair and reasonable employer in those circumstances could have issued under the company policy and handbook a first written warning which is an action available for poor performance. It could have been accompanied by performance management or a performance plan. In terms of the overall fairness of the process Ms Curry was given details of the allegations and an opportunity to respond. Her responses were considered although it was not concluded they were adequate. The real issue is that the issues were dealt with as misconduct when they were performance in nature.

[39] I do not find that a fair and reasonable employer could have concluded the performance concerns were serious misconduct that justified a final written warning in all the circumstances. There had not been any previous warnings. I do note that Ms Curry was told to chase up a late accident report urgently on 23 January 2014 by Mr Bentley where the employee had hit the front of their head on a metal beam on 9 January 2014. Although I did not hear evidence about the background to that matter there was no suggestion of an investigation and disciplinary action at that stage.

[40] Whilst a first written warning for the performance issues could have been a justified outcome I do not find that the final written warning for serious misconduct was what a fair and reasonable employer could have done in all the circumstances. It was unjustified and disadvantaged Ms Curry because it made her employment less secure. I shall consider if any remedies flow from that finding after I have considered the claim for unjustified dismissal.

**Breach of privacy**

[41] On 15 April 2014 Ms Curry raised a personal grievance claim with Mr Bentley which she copied to the General Manager of ISS Facility Services Russell Kerr and the Human Resources Manager Neels de Coning. She said that the private and confidential matters relating to her investigation, disciplinary and other correspondence were open on Ms Mason's calendar notes for viewing by others.

[42] A meeting was held on 17 April 2014 with Ms Curry and Mr Steel as her support person and Mr Bentley and Ms Hancox to investigate the complaint from Ms Curry's perspective. Mr Bentley further investigated with Ms Mason about the calendar notes.

[43] The outcome was recorded in a letter from Mr Bentley dated 24 April 2014 that it was deemed appropriate for Ms Mason to submit a letter of apology to Ms Curry and her letter was attached. It also recorded that Ms Mason acknowledged her actions were an oversight and had apologised for any discomfort caused and the company considered the matter was concluded.

[44] Ms Curry was not happy with the outcome or the letter of apology although I accept Ms Douglas's submission that it was not altogether clear what she would have considered an appropriate outcome. There was a suggestion that an apology in person would have been more appropriate.

[45] The concern was investigated promptly by ISS with input from both Ms Curry and Ms Mason. I find that as a result of that investigation a fair and reasonable employer could conclude that there was an oversight on the part of Ms Mason about the calendar entry rather than a deliberate action. It was a breach of Ms Curry's privacy and it was unfortunate that it happened at a time when Ms Curry was under considerable pressure with both the disciplinary process and notice of a restructuring. The period of disadvantage though was limited and the apology was an outcome available to a fair and reasonable employer to deal with the concern.

**Was the dismissal for reason of redundancy justified?*****Was there pre-determination of the positions to be made redundant?***

[46] Mr Bentley carried out a review of the Christchurch branch in or about March 2014 and had concluded that it was not operating profitably. In particular he said that ISS had a contract with Ashburton Meats for the provision of the cleaning services in their meat processing plant and there were difficulties performing the contract profitably and safely. A decision was made to terminate the contract as money was being lost on it.

[47] A decision was then made to commence a restructuring consultation process in the Christchurch Branch. The initial group identified as potentially at risk were the two CSM's, Ms Curry and Ms Lee and the two contracts supervisors Ms Leary (nee Doller) and JJ Love.

[48] The first document to be presented in the process was a memorandum dated 14 April 2014. The memorandum explained that the branch had been under-performing financially across a number of sites and that there had been notice given to terminate to a client, Ashburton Meats. There was also information that ISS had forecasted the Christchurch branch would make a loss for the year ending December 2014. The memorandum set out that it was proposed that the CSM position for Burnham would be excluded from the scope of the review because that role was for a profitable stand-alone contract.

[49] The memorandum set out that potentially affected staff were entitled to be supported or represented throughout the process and that the review may result in a variety of possible options including redeployment by mutual agreement or redundancy. There were four phases to the process. The first phase was consultation and feedback and there was a meeting on 16 April about this. The second phase was that the proposed changes were shared and there was a further opportunity for consultation. The third phase was selection and deployment and finally phase 4 was for implementation and final announcements of the new structure. The meeting for phase one was set for 16 April 2014 at 9.30am.

[50] Mr Bentley explained that as he was not based in Christchurch he had asked the branch manager of the related company upstairs to print the internal memorandum

dated 14 April 2014 out and for Ms Hancox to put the letters into envelopes and put on each individuals desk.

[51] This seemingly inconsequential matter about who printed the memorandum off and distributed it assumed some importance in the evidence before the Authority. Ms Leary when she gave her evidence to the Authority said that she knew before this first document in the process that there was going to be a restructure. That was she said because she was present when there was a discussion between Mr Bentley and Ms Mason about that. She knew that two less people were required and Mr Bentley and Ms Mason were not happy with the way things were done and had concerns about the group dynamic. Ms Leary agreed that there were difficulties in the working relationship between Ms Curry, Ms Lee and her and JJ which she put down to communication difficulties.

[52] Ms Leary said that she was emailed the 14 April memorandum by Ms Mason and asked to print it off and put them in envelopes to hand out. She said that she was told not to worry as she and JJ were safe and their jobs were protected. She said that Mr Bentley told her to look surprised when she got her copy of the memorandum. Ms Leary said *basically everyone* except for Ms Curry and Ms Lee knew what was going on before the first meeting after the 14 April memorandum was distributed. Mr Bentley told her to ask questions to make it look as though she was worried about her job.

[53] Ms Leary said that although she was told her job was safe the whole thing made her feel pretty nervous that if ISS was doing that to Ms Curry and Ms Lee she wondered if they were doing the same thing to her. She said that she asked Ms Mason *are you spinning me shit? or are you doing the same to me as them?* Ms Leary said that she was reassured her job was safe. Ms Leary said that she was asked before decisions were made to create a list of sites and how they would be shared between Mr Love and her. Ms Curry and Ms Lee in their evidence to the Authority said that during the process there was a noticeable decrease in emails and text messages sent to them. Ms Leary said that she was told not to email or text Ms Curry or Ms Lee by Ms Mason and Mr Bentley because they did not want them to have anything in writing.

[54] After the consultation period the new structure required two fewer positions. There were interviews for the remaining two newly created positions. Ms Leary said

that the interview panel added things to her answers because they *needed to make it look good* when the papers were sent to Auckland. Ms Leary was successful in obtaining one of the two new positions. JJ was the other successful candidate. Ms Leary's evidence is to the effect that the whole restructuring process was a farce as it was always known Ms Lee and Ms Curry would be made redundant. People at ISS in Auckland and Wellington knew about this she said. She said that when she attended a health and safety course/meeting in Wellington after the restructuring process she went to a bar with Mr Bentley and Brent Dalton who had interviewed her for one of the new positions and there was talk about it at that time.

[55] Ms Leary said that she felt bad for Ms Lee and Ms Curry at the time of the restructuring but she was glad for herself. She said that Ms Mason during the process went through the belongings in Ms Curry's desk which she said would be visible on the security cameras. Ms Mason denied that.

[56] Ms Mason does not accept that she advised Ms Leary to print out the 14 April memorandum and says that she asked another person from a related company to do that. She accepts that Ms Hancox handed them out to affected staff and she says that it does seem Ms Hancox must have involved Ms Leary in the printing once she realised the printer was not working. She denied talking to or reassuring Ms Leary her job was safe or saying anything about the process to indicate that. Ms Mason was not involved in the restructuring process. She does not accept that Ms Leary was told not to email or text Ms Curry or Ms Lee or that she was asked to create a list of sites before the decisions were made. She did not accept that Ms Leary questioned her about whether she was doing the same to her as she was to Ms Curry and Ms Lee.

[57] Mr Bentley denies that the restructuring outcome was pre-determined, does not accept that he suggested to Ms Leary it was at any time and says that the process was genuine and fair. Mr Bentley also denies an instruction that Ms Leary was not to email or text Ms Curry or Ms Lee.

[58] Ms Douglas submits that I should prefer their evidence and that Ms Leary's evidence is not credible. She observes that Ms Leary's own employment was terminated after the restructuring for misconduct that involved her not being truthful with ISS.

[59] It is extremely difficult to assess credibility from the demeanour of a witness and I am alive to the need to proceed with caution in assessing credibility because of the way the relationship ended between Ms Leary and ISS. My observation of Ms Leary when she gave her evidence was that she was a straightforward witness and was unshaken by Ms Douglas's cross examination. She readily accepted when questioned that the reason for her dismissal was that she was not honest with ISS. The evidence supported that the relationship between Ms Curry, Ms Lee and Ms Leary was not good at the time of restructuring. Ms Leary said that she was quite upset about an incident during the restructuring process with Ms Curry after which she wrote a complaint about Ms Curry. Her evidence therefore was not all in Ms Curry's favour.

[60] I have considered whether there is other reliable evidence which is consistent with Ms Leary's evidence about the restructuring.

[61] There is some written evidence in the form of notes taken at various meetings by Ms Hancox to support Ms Curry and Ms Lee had a concern at the time of the restructuring that Ms Leary and Mr Love showed little concern and that decisions had already been made. There is reference to bias in the process during the consultation meetings in April meetings about the relationship between Ms Leary and Ms Mason. There are entries in the notes taken from the phase two meeting by Ms Hancox to the effect that Ms Lee, the other CSM said she did not think the process was fair and that decisions were already made. In an expression of preference form dated 24 April 2014 Ms Curry noted her preference was to make Ms Leary's role redundant *as she stated in the first meeting that she had no problem with the re-structure.*

[62] Ms Leary was enrolled in an *Impac* two day health and safety representative stage one course which was confirmed to Ms Mason on 11 April 2014 starting on 23 June 2014. I accept Ms Mason's evidence that the course providers enabled her to substitute another delegate but it can be weighed and considered with the other evidence as to whether there was some knowledge Ms Leary would not be made redundant.

[63] There is some consistent evidence in emails sent by Ms Leary and Ms Hancox on 14 April 2014, the same date that the memorandum was distributed to the four affected employees. Ms Hancox at 10.27am, clearly cross with an earlier email from Ms Lee emails Ms Leary and writes *All about her...fuck I want the printer to be*

*working so I can give her her letter !!!!!!!* I find that Ms Hancox is referring to the memorandum of 14 April 2014. The printer was not working that day. Ms Leary then almost immediately responds to Ms Hancox by email and writes *Rebecca said the same thing, she can't wait to see their faces lol*. Ms Mason denied saying that. I find that it would be unusual in a restructuring process that Ms Leary as a potentially affected employee would not show any concern herself about the process rather focusing on others concern. Ms Mason denies that anything was said in that respect by her but I find it less likely that Ms Leary would write something about Ms Mason making a comment if one had not been made.

[64] For the first meeting on 16 April 2014 all four employees attended but thereafter Ms Leary and JJ attended individual meetings. Ms Lee and Ms Curry attended further meetings together at which Ms Curry was also supported by Mr Steel.

[65] There is some feedback in notes from the joint meetings held with Ms Lee and Ms Curry. I provided an opportunity for ISS to provide feedback from the individual meetings held with Ms Leary and Mr Love after 16 April 2014. I did this because Ms Leary said that she would just chat at those meetings with Mr Bentley and *talk about life in general* but nothing to do with the restructure. No notes were provided of any discussions at subsequent meetings between Ms Leary and Mr Bentley or JJ and Mr Bentley.

[66] I have carefully considered Ms Leary's evidence. I find that there is other reliable evidence that is consistent with her evidence that the outcome of the restructuring was pre-determined. There are the concerns expressed by Ms Curry and Ms Lee that decisions had already been made and suggesting a lack of concern on the part of Ms Leary. There are the emails from Ms Hancox and Ms Leary on 14 April 2014 that I find are consistent with knowledge of the process and a lack of concern on the part of Ms Leary for her own role. That lack of concern is unusual as is the reference to Ms Mason. There is the enrolment of Ms Leary in a health and safety course shortly before the restructuring for dates after the restructuring. Finally there is the restructuring process itself that I consider was short and somewhat formulaic. I will explore that further below. On the balance of probabilities I find that the outcome of the restructuring process was pre-determined from its commencement. The allegation that Ms Mason went through Ms Curry's belonging in her desk is a serious allegation and I could not be satisfied on the balance of probabilities that that

occurred. Ms Curry and Ms Lee felt communication with them had decreased and I accept that as likely.

[67] Of the four affected employees I find on the balance of probabilities ISS had made a decision about who would stay after the restructuring. I find it more likely than not that it was known Ms Curry would be going. A fair and reasonable employer acting in good faith could not go through a restructuring process where a decision had already been made before consultation who would retain positions at the end of it.

### ***Restructuring outcome***

[68] Ms Curry attended a further meeting on 24 April 2014 with Mr Bentley and Ms Hancox. She was supported by Mr Steele and Ms Lee also attended the meeting. Ms Curry said that she became concerned that information she requested was not provided and that the process was rushed. The notes taken reflect questions from Ms Lee and Ms Curry about feedback from Ms Leary and Mr Love to inform options and the concerns about the available positions. I am not satisfied that that information was supplied. Concerns were also raised about the failure to include those working at Burnham in the CSM and CSS role in the review. It was pointed out by either Ms Lee or Ms Curry that the position description contained incorrectly described new roles as customer service management roles and not client service manager roles. The position description was subsequently changed.

[69] On 28 April 2014, Ms Curry was provided with a copy of a letter setting out the decision of ISS regarding the final structure. It was explained in the letter that all four positions would be withdrawn and consolidated into two new client services supervisor positions. It was intended the new roles would be similar to both the client service manager/client service supervisor roles but the level of the role would depend upon the successful incumbent.

[70] The letter gave notice that Ms Curry's current role would be discontinued from 15 May 2014 and it was anticipated that in the interim, interviews would be held and that the individuals affected would then either be appointed to one of the new roles or would be given notice of termination. The letter did refer to moving to the redeployment programme if an affected individual was not appointed to one of the new roles and every endeavour being made to identify and offer another position in the company. Ms Curry was invited to attend an interview on 30 April 2014 with the

cleaning excellence manager, Garry Kirkland, and the national account manager, Brent Dalton.

[71] Mr Bentley said he appointed the two managers to provide an independent assessment of the team and an unbiased recommendation for appointments to the new roles. He took their views on board in deciding who to appoint.

[72] On 30 April 2014, Ms Curry did not attend the scheduled interview. I find that she advised Mr Bentley the reasons she did not attend was because she regarded the process as a *sham* and/or *farcical*. Ms Lee attended an interview but was not appointed to one of the two new positions although she was the most experienced employee out of the four employees.

[73] On 1 May 2014, Ms Curry raised by email a personal grievance in which she alleged institutional racism, conspiracy and dishonesty. The letter was provided to the New Zealand General Manager of ISS Russell Kerr and Mr Bentley. She wrote about the non-attendance at the interview the previous day *I see no point in attending a meeting for a new position when it is clear that the outcomes are predetermined and member of staff having this knowledge in advance of the selection process*. There was a threat in the letter that if her issues and concerns were not addressed by 6 May then she would encourage Pacific workers at ISS to strike for one day in protest of *institutional racism*. She also wrote that she would send a press release about the facts of her case to TV, Press, and radio including Fair Go and the Paul Henry Show. She asked for an exceptional redundancy package and advised she would continue to do her job until 15 May 2014.

[74] The following evening on 2 May 2014 Ms Mason was telephoned by Mr Love as she was driving back from Ashburton. Mr Love was in the Christchurch office and said that he was concerned Ms Lee and Ms Curry were printing off large volumes of documents. Ms Mason drove to the Christchurch office and observed that Ms Curry had about two reams of printed paper on her desk. Ms Mason telephoned Mr Bentley because she said that she was concerned that Ms Curry was planning on removing confidential information. Mr Bentley immediately took steps to close off Ms Curry's access to printing by disabling the print function. Ms Curry said that she was printing out work related documents and emails.

*Termination of employment*

[75] On 6 May 2014 Ms Lee telephoned Ms Curry and advised that she had been called into Mr Bentley's office, given a letter advising that she had not been appointed to one of the new positions and was told to leave company property and empty her car. Ms Lee noticed that although there was reference to a redeployment programme during the notice period there was no discussion about it.

[76] Ms Curry was anxious following that call and she asked her partner Mr Steele to accompany her to work in the morning on 6 May because if she left the ISS car at work she had no way to get home. Mr Bentley called Ms Curry into a meeting and she was provided with a letter advising of the decision not to appoint her to one of the new roles. Mr Bentley advised that she was to leave her employment immediately and empty her car.

[77] There is inconsistency with the way the employment ended and the way it was stipulated to end in the letter of 6 May 2014. The letter refers to Ms Curry moving onto the redeployment programme and being encouraged to consider vacant positions for possible redeployment. ISS were also to make endeavours to identify and offer positions for which she was suitably skilled. The letter advised employment would terminate on 6 June 2014. The notice period in the employment agreement was one month and clause 21.1 provided that in the event of employment being terminated on the grounds of redundancy *you will be given the contractual period of notice or payment in salary in lieu thereof.*

[78] Mr Bentley said that he decided to pay Ms Curry out in lieu of working through her notice because of the threats in her letter of 1 May 2014 and the printing issues.

[79] Following the investigation meeting Ms Oberndorfer provided the Authority with a copy of Ms Curry's final pay including holiday pay. That shows that payment was made for the period 1 June to 30 June in June 2014 in all likelihood on or about 6 June 2014.

**Conclusion of justification of dismissal**

[80] I have found on the balance of probabilities that the outcome of the restructuring/review process was pre-determined. The consultation process and

selection was not genuine and was not in accordance with good faith obligations. The conduct of ISS in requiring Ms Curry to go through a restructuring process where decisions had already been made that she would not be retained at the end of the process misled and deceived her. The information provided to Ms Curry through the process was limited, Mr Bentley did not always fully answer questions with some questions not answered at all and the process was short and formulaic.

[81] Even if there was a genuine reason to restructure, the financial information was quite limited, the outcome of the restructuring was pre-determined. Ms Curry was dismissed summarily and without warning on 6 May 2014. There was no discussion before doing so at any time about the concerns ISS had regarding printing and the threats in the 1 May 2014 letter. There was no consideration of redeployment despite that being a clear requirement of the restructuring process and in the letter handed to Ms Curry on 6 May 2014.

[82] Objectively assessed in terms of the s 103A a fair and reasonable employer could not have justifiably dismissed Ms Curry in all the circumstances.

[83] Ms Curry has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

### **Remedies**

[84] Ms Curry seeks a global award for compensation for hurt and humiliation in the sum of \$15,000.00. The issuing of the final written warning and the restructuring/review occurred at a similar time.

[85] Ms Curry said that she felt shocked at the way she was treated. She had worked very hard for ISS and she said that she could not believe she could be treated in this way. She said that when her suspicions about the redundancy were confirmed she felt sick at the way she was treated and what she considered was a conspiracy against her. Ms Curry said that she had migraines during the process and this was confirmed in an email to Mr Bentley whilst she was still employed.

[86] About four to six weeks after her termination Ms Curry collapsed. Ms Curry and her partner said that doctors could not pinpoint what had caused the collapse but they believed it was the on-going stress and unfair way that she was treated

throughout the process. A significant part of Ms Curry's concerns were that no-one believed her at the time that the decisions had already been made.

[87] I find that Ms Curry did suffer significant loss of dignity and humiliation throughout the restructuring process which was not genuine. Her fears about pre-determination from the start of the process to the end were with good foundation. She did not attend an interview as she considered the outcome pre-determined and was then advised in the letter of 6 May that it was disappointing that she did not attend the interview or provide any reason for her decision not to do so. Ms Curry advised Mr Bentley why she did not attend the interview because she thought it a sham. This was also clearly set out in the 1 May 2014 letter. I accept Ms Curry felt betrayed by ISS proceeding with a restructuring with decisions made about who would be selected for the remaining jobs.

[88] Dismissal of a summary nature on 6 May 2014 occurred without Ms Curry being able to understand why she was being asked to leave immediately rather than working out her notice. There was no discussion about what would happen about any redeployment options. Ms Curry was not told at that time about Mr Bentley's concerns regarding the threats to go to media and encourage strike action and accordingly did not get an opportunity to explain them.

[89] I accept that there was stress for Ms Curry about the issue of a final written warning. I take into account I have found a first written warning for performance concerns could have been given.

[90] Subject to any finding about contribution I consider an award for unjustified dismissal of \$13,500.00 is appropriate.

### *Contribution*

[91] The Authority is required once it determines that an employee has a personal grievance to consider in deciding remedies the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If it is found that the actions so require then the remedies that would otherwise have been awarded should be reduced.

[92] Ms Douglas submits there should be a 100% reduction for contribution.

[93] I have in assessing compensation for the unjustified final written warning already taken into account some substantive justification in that a fair and reasonable employer could have issued a first written warning.

[94] For the unjustified dismissal the only matter where there could be any consideration about contribution is the threats in the letter on 1 May 2014. I am not satisfied that Ms Curry was printing out non work related material the following day.

[95] The conduct of Ms Curry in making threats to ISS that she would encourage strike action and to go to the media if she did not get a suitable resolution by 6 May 2014 I find contributed to the decision by ISS to pay her in lieu of notice served and have her leave immediately. I accept that Ms Curry wanted someone from ISS to take her concerns seriously and that she did not get any sort of response to her concerns. She was I accept very upset. It was not however the proper way to go about things. Ms Curry's actions impacted on the ability of ISS to have continued trust and confidence in her as a manager and employee during her notice period. Her actions though did not contribute to the lack of procedural fairness at that time of the 6 May 2014 meeting where there was a failure to explain why that decision was made, how that may impact on redeployment and allowing Ms Curry to respond and explain or give her views about being paid in lieu of notice.

[96] Most of the humiliation and loss of dignity Ms Curry suffered occurred during the restructuring process in the knowledge that it was a sham. The dismissal that occurred as a result was unjustified. Contribution is assessed on the decision not to enable Ms Curry to work out her notice period and I assess contribution at 10% in the circumstances.

[97] Taking contribution into account I make the following order:

- (a) ISS Holdings NZ Limited is to pay to Tina Curry the sum of \$12,150.00 begin compensation under s 123 (1)(c)(i) of the Act.

### **Penalty for breach of good faith**

[98] A penalty is sought under s 4A (b) of the Act that the breach of good faith in s 4 (1) was intended to undermine the employment relationship between ISS and Ms Curry. I find that there was a very serious breach of good faith by ISS when it undertook a pre-determined process under the guise of a restructuring process

knowing that Ms Curry would not be selected for a role. It was intended by ISS that the process would as Ms Oberndorfer submits undermine and indeed end its employment relationship with Ms Curry.

[99] I find that a penalty should be awarded. In assessing the amount of the penalty I take into account the award already made to Ms Curry.

[100] ISS is to pay a penalty for a breach of good faith of \$4000 to the Authority who will pay it into the Crown Bank Account and I so order.

### **Costs**

[101] I reserve the issue of costs. Ms Oberndorfer has set out in submissions the cost of an air fare for Ms Leary to fly from Invercargill to Christchurch to give evidence and return of \$630. Ms Oberndorfer is to provide documentary evidence about the airfare with her cost submissions which are to be lodged and served by 26 October 2015. Ms Douglas then has until 9 November 2015 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority