

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 252
5333625

BETWEEN ATARANGI GLEN
 Applicant

A N D WILFRED INVESTMENTS
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Karina Coulston, Counsel for Applicant
 Paul Brown, Counsel for Respondent

Investigation Meeting: 14, 15 March, 30 April and 1 May 2012

Submissions Received: 5 June and 11 July 2012 for Applicant
 9 July 2012 for Respondent

Date of Determination: 19 November 2012

DETERMINATION OF THE AUTHORITY

- A The applicant has a personal grievance that she was unjustifiably dismissed.**
- B The respondent's counterclaim is dismissed.**
- C The respondent is ordered to pay the sum of \$8372 gross to the applicant for lost wages under s 123 (1) (b) of the Employment Relations Act 2000.**
- D The respondent is ordered to pay the sum of \$9000 compensation without deduction to the applicant under s 123(1)(c)(i) of the Employment Relations Act 2000.**

E The Authority has set out the correct approach to holiday pay but asks that any leave that was unrecorded be deducted and has reserved leave for the parties to return to the Authority if there are difficulties.

F Both penalty claims fail.

G Costs are reserved and a timetable set.

Employment relationship problem

[1] Atarangi Glen was initially contracted from in or about March 2010 on a part-time basis to assist her sister, Miriama Mekomoko and Ms Mekomoko's partner, Tom Harpur at Wigram Manor Function Centre (Wigram Manor) with accounting and payment of wages. Ms Glen was paid for her work at this time by Wilfred Investments Limited (WIL) on presentation of an invoice. The director of WIL is Harmon Wilfred.

[2] Mr Wilfred is associated with a number of different companies and charitable trusts as director or trustee including the charitable trust, La Famia Foundation NZ which employed Ms Mekomoko, and the company La Famia Number 2 Limited which employed Mr Harpur. Ms Glen undertook financial and accounting work for these entities. WIL operated its business as an investment company.

[3] The contracting arrangement with respect to accounts and payroll continued until 1 June 2010 when Ms Glen commenced as an employee with WIL. Mr Wilfred was aware at the time he had offered Ms Glen an employment position that she was Ms Mekomoko's sister. The evidence supported that the importance of family was the philosophy behind the charitable trust *La Famia* and this extended to decisions to employ family members within the associated businesses.

[4] Ms Glen entered into a written employment agreement with WIL that described her position as Business Development and Financial Manager. She was also provided with a job description. Ms Glen received an annual salary at the material time the Authority is concerned with of \$45,760.

[5] Ms Glen says that she was given 30 days' notice of redundancy on 26 January 2011 by Mr Wilfred without any consultation or fair process preceding it and was then on 31 January 2011 summarily dismissed.

[6] Ms Glen says that she has a personal grievance that she was unjustifiably dismissed from her employment and seeks reimbursement of lost wages, payment of compensation, payment of annual leave entitlements, wages and other entitlements and a penalty against Mr Wilfred and Wigram Manor for failing to pay her holiday pay.

[7] WIL do not accept that Ms Glen has a personal grievance and says that the dismissal of Ms Glen was justified and that any procedural issues were minor and would not have changed the outcome. In terms of the redundancy notice it says that there were discussions initiated with Ms Glen about a temporary reduction only in her hours but that Ms Glen would only accept a commitment of full hours. It said that Ms Glen advised if full hours were not possible then she preferred to be made redundant. WIL then gave Ms Glen 30 days notice by email of redundancy but say she was then justifiably dismissed within that notice period.

[8] WIL seeks a penalty from Ms Glen because it says she removed, in breach of her employment agreement, most of WIL's financial records, documents, bank deposit book, payroll records, account payable files, cheque book, deposit book and copies of reconciliations.

[9] WIL also counterclaim against Ms Glen for the following:

- Reimbursement of \$660 paid for overtime;
- Reimbursement of all the salary paid to Ms Glen in the sum of \$26,488;
- Reimbursement of the sum of \$20,000 for the recreation of financial records;
- Reimbursement of an unauthorised Visa payment from the company account in the sum of \$1,361.56.

[10] There were other matters referred to in the respondent's final submissions as they relate to Ms Glen:

- Did she obtain her position/employment by deception, and if the answer to that is yes, was she entitled to her salary?
- Did she fail to monitor the Trent's invoices and allow purchases for the personal use of two other employees which they did not pay for?
- Did she fail to monitor the BPX statements and allow other employees to purchase a television for their own use without the approval of the respondent?
- Did she fail to monitor the cashflow from the bar in general and specifically between 5-31 January 2011?
- Did she pay another employee for a furniture and freezer without WIL's approval?

Test in section 103A of the Employment Relations Act 2000

[11] The former test in section 103A of the Employment Relations Act 2000 applies in this case as the dismissal occurred before 1 April 2011. This test requires the Authority when looking at justification to determine on an objective basis whether the actions of WIL and how WIL acted was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action arose.

The issues

[12] The issues for the Authority to determine in this case are as follows:

Personal grievance

- What was the process and relevant background leading to the giving of notice of redundancy on 26 January 2011?
- What was the reason for Ms Glen's dismissal during the notice period on 31 January 2011?
- Was there a full and fair investigation at the end of which a fair and reasonable employer would conclude Ms Glen's actions amounted to serious misconduct?

- Would a fair and reasonable employer have made a decision to dismiss Ms Glen?
- If Ms Glen was not justifiably dismissed, then what remedies is she entitled to and are there issues of mitigation, contribution or other factors that should be taken into account in making orders as to remedies?
- Should there be a penalty awarded for the failure to pay holiday pay and wages?
- What is owing by way of holiday pay?

Counterclaim

In relation to the allegations of breach:

- Did Ms Glen breach her employment agreement?
- If she did, then did the breach or breaches cause loss to WIL?
- Was the loss reasonably foreseeable to the parties from the time they entered into the employment agreement as likely to result from a breach?

In relation to the claims for reimbursement:

- Should Ms Glen reimburse her overtime payments?
- Should Ms Glen reimburse her salary?

Penalty

- Should a penalty be awarded for the removal of records that cannot be found?

[13] Ms Glen's personal grievance and WIL's counterclaim was dealt with on consecutive days with Ms Mokomoko's and Mr Harpur's personal grievances and counterclaims. It was agreed for the purposes of efficiency when it was apparent evidence in one case would be relevant to another the witness would not be required to give evidence two or three times over the four day period in which the personal grievances and counterclaims' were dealt with. The personal grievances and

counterclaims against Mr Harpur and Ms Mokokoko have recently been determined in [2012] NZERA Christchurch 242.

[14] At an early stage it was unclear whether criminal charges could be laid against Ms Glen for some of the matters in the counterclaim. By the time of the investigation meeting that prospect seemed unlikely although the Authority generally reminded the parties and counsel about privilege against self incrimination. Ms Coulston confirmed in final submissions that criminal proceedings against Ms Glen are not to be pursued by the police in relation to any complaints by Mr Wilfred.

The background against which the issues are to be assessed

[15] Before Ms Glen commenced working for WIL she had a fulltime position working 40-45 hours per week as an administrator.

[16] When she commenced working as a contractor on a part-time basis at Wigram Manor her role involved the emailing of coded invoices on a daily basis and processing of information through the MYOB accounting system. Ms Glen also received daily bank statements and would reconcile all the separate businesses that were under the umbrella of WIL. Ms Glen would send a cashflow report and highlight when creditors needed to be paid through to Mr Wilfred.

[17] In May 2010 Ms Glen described Mr Wilfred as being impressed with her accuracy and knowledge of account processing and her sharp turnaround. Mr Wilfred said that Ms Mokokoko had been complimentary about Ms Glen's ability. Ms Glen was interviewed by Mr and Mrs Wilfred and I accept that the requirements of the role were discussed and will be set out shortly in more detail. Ms Glen was offered and accepted the role and commenced on 1 June 2010 as an employee.

[18] It was suggested to Ms Glen in or about June 2010 by Mr Wilfred that she apply for a visa under her personal name to purchase sundries such as stationery for the daily running of the office at Wigram Manor. Ms Glen agreed to do this. Mr Wilfred provided a letter to the BNZ on 25 June 2010 that confirmed the employment of Ms Glen and her annual salary. The reimbursement of the credit card was an issue relied on at the time of dismissal but there did not appear to have been anything particularly eventful in terms of the way the credit card arrangement operated until January 2011.

Employment agreement

[19] Ms Glen's employment agreement provided that she was to perform her duties at Wigram Manor, 14 Henry Wigram Drive, Christchurch and at any other reasonable location which she may be directed to from time to time by her employer. The hours of work in her employment agreement were stipulated as 40 hours per week between 8.00am – 4.30pm. Her employment agreement provided that:

The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. Where extra hours are performed the Employee shall be entitled to overtime pay as set out in the wages clause below.

[20] The wages clause stipulated that where the employee was required to work overtime and it was approved then the employee would be entitled to payment for each hour of overtime at the employee's equivalent salary rate. It was provided that the employee would be responsible for completing all work within the allocated 40 hours per week unless otherwise approved by the employer. There was also reference to a redundancy situation in clause 12.5 of the employment agreement which provided that:

In the event the Employer considers the Employee's position of employment could be affected by redundancy, ... the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role).

[21] The clause provided the employer shall provide to the employee sufficient information to enable understanding and meaningful consultation and shall consider the views of the employee with an open mind.

[22] The employment agreement also referred to a trial period in clause 3.2 of three months. That provision stated that the employer and the employee would provide guidance, feedback, and any necessary support to each other during this period and both parties would promptly discuss any difficulties that may arise and appropriate notice if either is contemplating termination.

[23] Ms Glen's job description provided that the purpose of the position was to maintain day-to-day financial, accounting and administrative services in order to meet legislative requirements and support operations as well as investigate and follow up

on all new business opportunities as directed by the employer. The scope of the role was also described and it was noted in the job description that failure to provide adequate services may result in lost or misused revenues, inaccurate financial statements and financial mismanagement for employees, contractors and suppliers if the payroll and/or accounts payable are not processed in an accurate and timely manner. One of the responsibilities was the reconciliation of the general ledger and ensuring the safeguarding of all company funds.

[24] Ms Glen said that she raised issues around the trial period end but she thought that Mr Wilfred was *more than impressed with her role*. She recalled a discussion at the end of the trial period where it was agreed that as the Manor was closed Monday and Tuesday she would work at home on a Monday. I accept for that purpose Ms Glen had various work related items at her home office.

7 September 2010

[25] On 7 September 2010 Ms Glen was sent an email from Mr Wilfred. The email subject was *La Famia #2- Updated for the 20th Sept 2010 As at 07 September*. The contents of the email were relied on by Mr Wilfred in reaching a decision to dismiss Ms Glen on 31 January 2011. Mr Wilfred in the email amongst other matters told Ms Glen that she was not to make decisions on her own to loan money out of WIL. This was in circumstances where she had paid Mr Harpur's wages from WIL as she said there was not enough in his employer's, La Famia No 2 Limited's account to pay wages. The email made it clear that in those circumstances Ms Glen should have contacted Mr Wilfred and left the making of loan and handling emergencies to him. The email made it clear that making loans to other entities was not within Ms Glen's authority. Ms Glen in her written statement said that she had not seen or had any knowledge of the email until the time she was dismissed. It was attached to the letter confirming her dismissal. In her oral evidence Ms Glen said that she would have looked at the update referred to in the subject line but did not remember seeing the email. She described the email as part of a sequence of emails going back and forth.

[26] Mr Wilfred said that as well as the email he had a discussion with Ms Glen about his concern that she was intermingling funds from the different businesses.

The meeting at which there was first the suggestion of reduction of hours

[27] Ms Glen and Ms Mokokoko were asked to attend a meeting on 18 January 2011. They understood the purpose of the meeting was to discuss a marketing strategy for a meeting that was to be held the following day with two external people who had some expertise in the area. There were both surprised when the discussion turned to a restructuring.

[28] In terms of her own position Ms Glen says that Mr Wilfred advised her that a quote had been requested from Smart Office for a lady in that office called Angela to take over the accounts and that Ms Glen's current role in the business was gone. Ms Glen said Mr Wilfred made reference that she would go back under the umbrella of Wilfred Investments as his personal assistant to work with Chomondley Home and with him on the upcoming *Prenzel* project. Mr Wilfred said that there was a misunderstanding that Ms Glen's role would disappear altogether although he accepted he had advised Ms Glen that her hours would be reduced.

[29] On 20 January 2011 Ms Glen attended with Mr Wilfred at an interview with Angela Smalley. Ms Glen understood that Ms Smalley would be undertaking her role. That again is a matter in dispute although I do not find I need to resolve that. That is because sensibly, given that there was I find genuine confusion for Ms Glen she emailed Mr Wilfred on 26 January 2011. In her email she set out her understanding of the situation and succinctly set out her main concerns. They were expressed as; *am I being made redundant from my current position (or part of) Administration Officer as you have stated that Angela will be taking over the finances, book keeping and payroll duties and that my position with Wilfred Investments have shifted to an unguaranteed hours of work.*

[30] Mr Wilfred said that Ms Glen had expressed to him in an earlier telephone discussion that she had an absolute requirement for 40 hours per week. Ms Glen did not accept that she had said that. Had that been the case then I would have expected to have seen that in her email but there was nothing to that effect. I am not satisfied that Ms Glen expressed an absolute position about her hours although clearly her preference would have been to retain the status quo.

[31] Mr Wilfred emailed Ms Glen back within an hour or so on 26 January 2011 and said in his email that given the management restructure there was no guarantee of

full time employment with WIL for Ms Glen although Mr Wilfred said he was open to ideas that could make that possible. He referred to some new business projects. The first paragraph suggested some possibilities for continued, albeit different, employment for Ms Glen. The second paragraph provided that because of Ms Glen's absolute requirement for 40 hours per week and the circumstances of the business there was no acceptable full time alternative for Ms Glen and the email was formal notice of redundancy. Mr Wilfred advised that he would support Ms Glen to find new employment in every way possible in the next 30 days.

[32] The evidence supports that Ms Glen was quite shocked to receive this email and immediately set about trying to find another position. She was allowed to take some paid time to look for another position although was dismissed before this time could actually be taken.

The dismissal

[33] Ms Glen in processing the accounts after having received notice of her redundancy realised there was money outstanding on her credit card that I have referred to earlier that she obtained for work related purchases. When she gave her evidence Ms Glen said that she would have had a discussion with Mr Wilfred before paying her credit card along with a discussion about other payments that were to be made from the account. Ms Glen produced a copy of an email that she had sent to Ms Coulston on 31 January 2011 which was the day of her dismissal (doc 42). I find that to be consistent with a discussion with Mr Wilfred after processing of the credit card payment had taken place. I will set out the relevant paragraph.

Friday I realised that the card still had Wilfred purchases on it and like I do when processing the creditors for Wilfred I paid the account- directly after I emailed Harmon to inform him that account is low and he will need to look at a Line of credit before Tuesday for payroll on Tuesday of this week. Harmon called me and I informed him that I had been working on the Wilfred Accounts and payment of the credit card was due and as I was now made redundant – that as normal- I processed the payment. Harmon said that was ok as he did not want me to be stuck with the credit card bill for Wilfred Inv purchases as I have all the receipts.

[34] Mr Wilfred said that he had to ask Ms Glen about the payment that she had made to her credit card on or about 28 January 2011. He said that he was concerned that some of the expenses claimed were for purchases for other companies and not just WIL. I have taken that to be the same conversation although I accept Ms Glen's

evidence that Mr Wilfred did not express concern at the time about payment of the outstanding balance on the credit card.

[35] On 28 January 2011 Ms Glen asked Mr Wilfred if she had permission to give Ms Smalley the bank account detail and passwords.

[36] On Saturday 29 January 2011 Mr Wilfred emailed Ms Glen instructing her that as of that morning he had changed all the bank account passwords and had given them to Ms Smalley. Mr Wilfred asked that Ms Glen meet with Ms Smalley and give her some instructions on MYOB, the payroll and go over the payable accounts with her. That handover never happened because of the events that were to come but Ms Glen had on 27 January 2011 provided Ms Smalley with a fairly detailed email setting out her duties and information where the company information and documents were located.

[37] On 31 January 2011 Ms Glen returned to her office at Wigram Manor to pick up her phone charger and cleared her emails. This was one of the days which Ms Glen was to attend to job search activities as agreed with Mr Wilfred. When she was in her office she received an email at 8.44am with the letter of dismissal. The letter of dismissal provided amongst other matters that there had been discovery of an unauthorised removal of funds from WIL's bank account to Ms Glen's personal credit card. Further the letter said that Ms Glen's explanation that she used the card for WIL's expenses was unacceptable. Although it acknowledged in the letter that she was authorised to use the card for preapproved expenses the letter provided this was an unauthorised reimbursement for materials purchased for La Famia No 2 Limited for which company Ms Glen also did the books and accounting. Mr Wilfred said in the letter that Ms Glen had now wilfully and deliberately comingled unrelated company transactions for the second time without his knowledge and approval. The letter provided that Ms Glen's final pay up to 31 January 2011 would be paid to her bank account. Shortly after Ms Glen received the letter of dismissal she was sent another email from Mr Wilfred asking her to leave the office and any building key she had locked in her office on departure.

[38] Ms Glen said that Mr and Mrs Wilfred then arrived at the office and she was instructed by Mr Wilfred to leave the office leaving her laptop and cell phone behind. There was some concern in the evidence of Mr Wilfred that Ms Mokomoko was with Ms Glen in the office but Ms Glen said that Ms Mokomoko had come to talk to her

and make sure she was okay. Ms Glen said that the only items she removed from her office were personal, a pot plant and a teapot and she did not accept that she had removed any other items from her office. She said that she was escorted from the premises by Mr and Mrs Wilfred who saw what she took with her. Ms Glen said that she did have some documents at home because with Mr Wilfred's permission, she worked from home one day per week on a Monday. All items that Ms Glen had in her home office were returned to Wigram Manor by the police. Mr Wilfred had complained to the police about Ms Glen, Ms Mokomoko and Mr Harpur with allegations that they had stolen property and Ms Glen was interviewed by the police.

Conclusions about the redundancy process

[39] Consultation was required with Ms Glen under her employment agreement and s. 4 of the Employment Relations Act 2000 about any proposal that may have an adverse affect on the continuation of her employment. In order to be able to sensibly comment on any proposal Ms Glen had to know what it was. I do not find that she was clear what impact any changes talked about at the meeting on 18 January 2011 would have on her role. When Ms Glen asked for clarification from Mr Wilfred in her email of 26 January 2011 she was advised the same day of a decision to make her position redundant. The process I find was not that which a fair and reasonable employer would have undertaken in all the circumstances. Although Ms Glen was then actually dismissed during her notice period there was insufficient evidence objectively assessed to satisfy me that the redundancy was genuine.

Conclusions about the dismissal

[40] Mr Wilfred said in his evidence that he dismissed Ms Glen because she wilfully and deliberately co-mingled unrelated company transactions and that she did not obtain approval to make the payment to her credit card. He relied on the earlier 7 September email and instructions not to co-mingle unrelated transactions. Although the letter of dismissal suggests that Ms Glen acted wilfully and deliberately for a second time Mr Wilfred said in his evidence that he only considered the occasion on 28 January had involved wilful and deliberate conduct and not the earlier occasion to which the 7 September 2010 instruction related.

[41] There was an absence of any fair process preceding the dismissal. A fair and reasonable employer would have put the allegation to Ms Glen that she paid from the

WIL account for purchases made for that and another company La Famia No 2 Limited to her credit card without authorisation and that such conduct was viewed seriously and could lead to dismissal. The final submission for WIL refers to purchases for other businesses on the credit card. That may have been so but letter of dismissal only referred to WIL and La Famia No 2 Limited. A fair and reasonable employer would have invited Ms Glen to attend a meeting with a representative of her choice to answer the allegations and would have listened to her explanation with an open mind. Further investigations would have been carried out as required before a decision was made.

[42] Mr Brown submitted that this process would not have changed the outcome. I do not agree. There were a number of matters that a fair and reasonable employer would have had to consider. Most importantly there was the issue of what had occurred historically with the credit card payments. The documentation supports historically all credit card payments were made from the WIL account and a fair and reasonable employer would have wanted to reach a conclusion as to whether authorisation was required on those other occasions. A fair and reasonable employer would have wanted to know if Ms Glen was clear that WIL would only pay for purchases made for its benefit on the credit card.

[43] Ms Glen said that she did not read the 7 September 2010 email and wasn't clear about the requirement not to co-mingle funds. She said that she had not worked in an environment where she was responsible for both companies and charitable trusts. Mr Wilfred would have had to form a view as to whether payment of the credit card from the WIL account for La Famia purchases was a deliberate act in known defiance of his earlier email or whether Ms Glen lacked the knowledge that it was inappropriate or, and perhaps most importantly, whether she thought that any and all work related purchases on her credit card were met by WIL. If she had made an error about paying all the credit card purchases from the WIL account then a fair and reasonable employer would regard that as performance related rather than serious misconduct.

[44] It is important to record that on the face of the credit card records there was no evidence to support that the purchases Ms Glen made on her credit card that were subsequently paid for from the WIL account were not for work related expenses. Ms Glen was therefore entitled to be reimbursed for those purchases. That narrows

any allegations considerably and a proper investigation was required before any conclusion as to substance could be arrived at for the reasons set out above. That did not occur.

[45] For the above reasons I find that there is a significant overlap between the complete lack of any procedural fairness and the substantive justification in Ms Glen's dismissal. I find that Ms Glen's dismissal was procedurally unjustified as dismissal was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

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

Remedies

Lost Wages

[47] Ms Glen seeks lost wages in the sum of \$14,080.00 gross. She was unable to get a job for 10 weeks after her dismissal and based on her salary of \$45,760 her lost wages are \$8,800. Ms Glen was then successful in obtaining a position in mid April but was paid at a lower rate than she was at WIL of \$110 per week. Her claim is for 48 weeks lost wages at the lower rate of \$5280 gross. The records show that Ms Glen was paid to 30 January 2011 so loss runs from that date. There was no claim for unpaid wages only reimbursement.

[48] I accept that Ms Glen attempted to mitigate her loss. She registered with placement agencies and although she attended interviews during the first ten week period she said that it was difficult because she was being investigated by the police.

[49] In this case I am not satisfied that had Ms Glen not been dismissed her employment would have lasted beyond a period of 13 weeks. Ms Glen's sister and her partner were also dismissed at or about the same time as Ms Glen and I find continued employment for Ms Glen for an extended period of time would have been very difficult under the circumstances. Given that finding I limit any reimbursement of lost wages to 3 months or 13 weeks and I do not exercise my discretion under s 128 (3) to award a greater sum.

[50] Subject to any findings I make about contribution, Ms Glen is entitled to reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000 for a period of 13 weeks. That is made up of ten weeks without any income at the rate of \$880 per week = \$8,800 gross and then three weeks at \$110 per week shortfall = \$330 gross. The total lost wages amount is \$9100 gross.

Compensation

[51] Ms Glen gave evidence that she believed her dismissal contributed to the breakdown of her marriage of 25 years and that she felt worthless and the dismissal affected her self confidence. She had already I find been quite shocked to have received notice of her redundancy. She was also very concerned at the involvement of the police and thought that no-one would want to employ her. Ms Glen said that she experienced significant financial hardship and struggled to pay the bills. When she got a new job in mid April she was so grateful she cried.

[52] The sum of \$20,000 is sought under this head in the amended statement of problem. Ms Coulston in final submission wanted \$25,000 each for what she described as two unjustified dismissals. I have focused the award on the dismissal on 31 January 2011. I accept there was significant humiliation and loss of dignity for Ms Glen in relation to how she was dealt with at the time of her dismissal. She was escorted off the premises without any opportunity to explain what had occurred with the credit card. The evidence though does not support an award of \$20,000. Subject to any findings I may make about contribution the sum of \$10,000 is a fair award.

Contribution

[53] Up to this point I have not been required to consider whether Ms Glen did what she was alleged to have done in such a way as to have contributed to her dismissal. I am though required under s 124 of the Employment Relations Act 2000 to consider whether there was any contribution on the part of Ms Glen towards the situation that gave rise to the personal grievance and if the actions require it I must reduce the remedies that would otherwise have been awarded.

[54] It is less credible in my view that Ms Glen did not read the 7 September email sent to her by Mr Wilfred or at least talk to Mr Wilfred about his concern. I think it likely that Ms Glen was aware either from the 7 September email and/or discussion with Mr Wilfred that he did not want one business paying for liabilities of another

without his authorisation. I find though on the balance of probabilities that Ms Glen paid for everything work related purchased on her credit card from WIL's account even if items purchased were for the use of another business entity. As she explained in her email to Ms Coulston dated 31 January 2011 the purpose of the credit card was for work related expense and *Wilfred Investments will make payments on it* and that *to date that has been the process*.

[55] Ms Glen displayed no understanding otherwise in the evidence that it was wrong to make payments from WIL for work related credit card purchases even if purchased for another entity. I do not find on the balance of probabilities that she wilfully and deliberately co-mingled funds. She just did what she had done in the past. The documentary evidence supports that payments for the credit card were made from the WIL account (see document 4.8 attached to amended statement in reply).

[56] I find some blameworthy conduct in that Ms Glen did not obtain authorisation before processing a payment to her credit card of \$1361.5, rather she simply advised Mr Wilfred after the fact. The sum transferred was a larger amount than had been paid previously on the credit card and she was in her notice period for redundancy. It would have been prudent to obtain clear authorisation for the payment. I find a contribution on that basis and the remedies awarded are to be reduced by 10%.

[57] Applying that figure of contribution to the awards above I make the following orders.

[58] I order Wilfred Investments Limited to pay to Atarangi Glen the sum of \$8372 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

[59] I order Wilfred Investments Limited to pay to Atarangi Glen the sum of \$9000 without deduction under s 123 (1) (c) (i) of the Employment Relations Act 2000.

Holiday Pay

[60] Holiday pay is claimed as set out in the applicant's document 38 on the basis of 19.56 days of annual leave. I am not sure how that figure is arrived at. In any event the proper way to calculate Ms Glen's annual holiday pay is under s 23 of the Holidays Act 2003 because Ms Glen's employment ended within 12 months. She is

entitled to 8% of her gross earnings therefore less any annual holidays taken in advance. The records do not record any leave. Ms Glen did refer to a Melbourne trip that she had taken (22 July 2010). My understanding from the evidence was there was a possibility she took some leave for that trip in advance of her entitlement. If that is the case then any leave will have to be deducted from the 8% of the gross earnings.

[61] To assist the parties in working the leave out I record Ms Glen's gross earnings were \$26488. 8% of those gross earnings from 1 June 2010 to 30 January 2011 is \$2119.04 gross. Ms Glen, if she took leave, will have to deduct the amount of leave from the gross sum of \$2119.04. If she took no leave then \$2119.04 gross will be the amount owing. I reserve leave for either party to return to the Authority if there are difficulties with leave.

Penalty

[62] Holiday pay should have been paid but I am not minded to award a penalty because of the circumstances in this case. The records which Ms Glen was responsible for were not accurate for other employees. Leave taken was not accurately recorded. There is a possibility that Ms Glen did not record her leave for the Melbourne trip. It was further unclear how Ms Glen arrived at the amount she claimed for holiday pay which exceeded her actual entitlement under the Holidays Act 2003.

[63] In the circumstances I make no award for a penalty.

Counterclaims

[64] In support of the counterclaims I heard from Mr Wilfred, Ms Smalley who was employed on 26 January 2011 by La Famia No 2 Limited as the Function and Facilities Manager of Wigram Manor and Renee Taylor who was part of a team who completed a review of the Manor's operations after Ms Glen, Ms Mokomoko and Mr Harpur were dismissed. The review was referred to as a forensic audit and business review.

[65] There was a consistent view of the witnesses that Ms Glen had co-operated and colluded in alleged theft, fraud and general misappropriation of funds with Ms Mokomoko and Mr Harpur. The evidence supports that this view was reached at

an early stage after Ms Glen's employment was terminated. It was inevitable in my view that that flavoured any review of the Manor operations and emphasis was placed on matters that on the surface appeared suspicious but for which there may have been a perfectly adequate explanation. Ms Taylor's and Ms Smalley's firm view was that Ms Glen had not competently undertaken her duties. Ms Glen did not accept that and said that she always carried out her duties to the best of her ability and in a professional manner.

Reimbursement of salary paid of \$26488 and \$20,000 to pay additional staff to correct the accounts

[66] This claim was made on the basis that Ms Glen was not capable of fulfilling her role at WIL and obtained it *by deception* and that the accounts had to be completely reconstructed after Ms Glen's dismissal.

[67] Ms Glen was appointed to the position after an interview with Mr and Mrs Wilfred. There was no evidence that Ms Glen misrepresented or overstated her skills at the interview. She continued on in the role after a three month trial period. She was required under clause 4.2 (ii) of her employment agreement to perform her duties with all reasonable skill and diligence.

[68] Ms Glen's focus and previous experience appeared from the evidence to be largely on processing of accounts and administrative work. The evidence did not support that she questioned the information she was provided with for processing and recording, at least that which came internally, but rather simply went through the task of processing it to the correct business. Ms Glen said for example in her evidence that she took the coding made by Ms Mocomoko and Mr Harpur about various items they had purchased on the company Trent's account at face value, Ms Glen being unfamiliar with the kitchen and bar requirements. She said that she did introduce a system so that she was clear exactly what went into the various costs codes, for example kitchen or bar purchases, and implemented some other procedures for financial control. She said that she asked the bar to write down each transaction.

[69] In terms of pay roll Ms Glen accepted that she did not query any absences and simply applied the same pay rate each week unless an employee advised otherwise. That approach did I find result in processing errors in the payroll system and in terms of the purchases for kitchen and bar a failure to pick up at least one obvious purchase

on the Trent's account of nappies that should not have been made on that account. I am not satisfied that that was fraudulent but rather an oversight. The payroll issues could not be attributed simply to Ms Glen. There was a responsibility on others to provide her with the correct information as to whether they were sick and on leave. I also record that the wage and time records seemed to be inadequate for a period before Ms Glen was employed.

[70] Ms Glen said in her evidence though that she was not aware that she was expected at WIL to be a financial controller in the sense I took to be a gate keeping role. The job description though for the role does contemplate not only the administration of the financial system but the monitoring of it as well. Consistent I find with the view of her role Ms Glen continued to refer to herself as an administrator rather than a financial controller/business development manager in various emails produced including to Mr Wilfred and Ms Smalley. The evidence does support that she received Mr Wilfred's approval for payments to creditors which was financially prudent. These were discussed at a weekly meeting.

[71] Ms Glen worked without any significant issues being brought to her attention until she was dismissed. She was assessed by the company accountant at the start of her employment as having sufficient expertise in MYOB. If she was unsure of any matters I accept she would talk to the company accountant Kim. Ms Glen said that she would zip a file to Kim for three or four months of MYOB transactions for her to look at and tell her if they had been incorrectly coded. Ms Glen said that she was not advised that there were inaccuracies aside from a backlog issue with PAYE.

[72] Ms Smalley said that after Ms Glen's dismissal it took her over four months to reconstruct the financial records because of significant errors and it took Ms Taylor over a year. Ms Smalley said that it was necessary to completely unwind two general ledger accounts. When I asked her to specify what Ms Glen had done wrong she referred as an example to a bill from Contact Energy that was paid by way of part payment. She said that the part payment was added to the system without the invoice. Ms Glen explained that the Manor had got behind in paying the bill and she paid off the arrears and kept up with the current invoices. She said that the agreement made with Contact Energy and the dates for payment was recorded for payment as arrears.

[73] Ms Smalley and Ms Taylor referred to invoices not being entered correctly and invoices for a three month period over October, November and December having

gone missing. Ms Taylor said that the petty cash for La Famia No 2 Limited was incorrect for two months but the rest of the period was right.

[74] Ms Smalley said that she received phone call from people who were owed money who were not in the creditors' schedule. Ms Smalley referred to the fact Ms Glen processed the payroll run twice through the ACE payroll. Ms Glen explained that was because someone got their timesheet in late. It did not result in payments being made twice but did impact on the subsequent calculation of holiday entitlements. I was not satisfied that Ms Glen understood that would happen.

[75] Another of the concerns was that the creditors' accounts did not balance with the accounting system, some bank transactions had been entered into the system twice and no balance sheet codes balanced. An example was provided of a cash flow Ms Glen provided which said the bank balance was \$125.85 but the bank statement showed a balance of \$11,104.25. I was not persuaded having heard the evidence that I could entirely rely on that document in isolation to tell the full picture and therefore I place no reliance on it.

[76] Ms Glen said that she entered every invoice correctly and that she believed all accounts were entered properly. She said that MYOB always reconciled and denied as alleged by Ms Taylor that she had left invoices in a pile on the office floor.

[77] Ms Taylor accepted that Ms Glen reconciled the general ledger on a weekly basis but said that there were errors that Ms Glen should have identified. Both Ms Taylor and Ms Smalley accepted that some of the errors could have occurred at an earlier stage when others were undertaking the accounts. They accepted that not all the blame could be laid at Ms Glen's door for errors they found whilst undertaking the forensic audit.

[78] The evidence supports that there was on the balance of probabilities some errors on the part of Ms Glen in terms of processing. Some of these can be explained by a lack of understanding of the consequence, for example the double processing of the payroll. Some of the errors were historical and not identified as being made by Ms Glen. I am not satisfied that those matters were a breach on her part. Some are because Ms Glen did not undertake her full role as contemplated under the job description such as the proper analysis of coded invoices rather than just relying on them at face value and the failure to recognise and draw to Mr Wilfred's attention as

unusual the furniture and freezer invoices. Payment of these invoices was though I find approved by Mr Wilfred and they did appear on a spreadsheet that I find it likely he saw. There were payroll errors. These omissions and some errors could have been said to have amounted to a breach of Ms Glen's employment agreement. I am not satisfied though that Ms Glen noticed anything unusual about the cash flow from the bar and specifically between 5 and 31 January 2011 and breached her obligations about that. That that was unusual was really only able to be ascertained by a comparison after Ms Glen was dismissed. Ms Glen did explain that in January 2011 there was a low occupancy rate in the Manor and not many functions and that she did not consider the lack of cash transactions unusual.

[79] I am not satisfied that a loss of \$46488 is attributable to any breaches by Ms Glen. I am not satisfied that the responsibility for part or most of the loss does not lie with others who did the accounts before Ms Glen did or in part with the information that Ms Glen was provided with by other employees. Ms Glen was not asked to undertake a forensic audit and/or had the time or the skills to do so as to enable her to identify any historical errors and correct them as Ms Smalley and Ms Taylor were instructed to do. Even if there were breaches on the part of Ms Glen and even if it could be said that it was reasonably foreseeable to Ms Glen that if there were errors made by her WIL would suffer a loss I am not satisfied that the loss claimed was attributable to the breaches. The evidence did not enable me to conclude if not \$46,488 what the loss was. This claim fails.

Overtime

[80] Ms Glen was paid overtime. The claim is for \$660 paid to be reimbursed. I accept Ms Coulston's submission that there was an entitlement in Ms Glen's employment agreement to overtime. This claim is concerning in some respects because Mr Wilfred did recall asking Ms Glen to attend evening meetings as his personal assistant. That was overtime and she was entitled to be paid for the extra hours worked. Ms Glen also said that she covered while Ms Mokomoko and Mr Harpur were away. Mr Wilfred said that was unnecessary but I am not satisfied that Ms Glen did not do extra during that period. Ms Glen I found was a straightforward and credible witness and clearly quite confused and agitated by the claims against her. This claim fails.

Unauthorised visa payments

[81] Ms Glen was entitled to be reimbursed for these work purchases and this claim must fail as well.

Removal of records

[82] I understand how frustrating missing records must be for WIL. The evidence did not satisfy me though that Ms Glen removed any records that are still missing. There is simply no evidence that she did. The claim for a penalty on this basis must fail.

BBX dollars

[83] I am not satisfied that Ms Glen was provided with these statements.

Conclusion

[84] In conclusion I find that the counterclaim against Ms Glen fails in its entirety.

Costs

[85] I reserve the issue of costs. The applicant has until 6 December to lodge and serve submissions as to costs and the respondent, bearing in mind the Christmas period, has until 17 January to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority