IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 190
5390016

	BETWEEN	AMMY HULL Applicant
	AND	EDGINTON RESOURCES LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Eska Hartdegen, Counsel for Applicant Christopher Eggleston, Counsel for Respondent
Investigation Meeting:	18 December 2012 & 21 February 2013 at Auckland
Submissions received:	15 and 25 March, 2013 from Applicant 15 March 2013 from Respondent
Determination:	14 May 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Ammy Hull, claims that she has been unjustifiably dismissed by the Respondent, Edginton Resources Limited (ERL). Ms Hull also claims that she has been unjustifiably disadvantaged as a result of ERL refusing to allow her to return to full-time employment as agreed three months after she returned to employment following maternity leave.

[2] Ms Hull further claims that she is entitled to arrears of product sale commission and profit share entitlement, and to accrued annual leave.

[3] Ms Hull also claims ERL breached the duty of good faith pursuant to s 4 of the Employment Relations Act 2000 (the Act), and ss 130(4), 134 and 135(1) of the Act by failing to provide her with an employment agreement or payslips..

[4] ERL denies that Ms Hull has been unjustifiably dismissed or disadvantaged.

[5] ERL also denies that Ms Hull is entitled to payment in respect of arrears of product sales or profit share commission payments, or to accrued annual leave entitlement.

[6] ERL counter-claims that Ms Hull has breached the duties of fidelity and good faith which she owes to ERL by soliciting and carrying out private work for ERL's clients.

Issues

[7] The issues for determination are whether Ms Hull:

- has been unjustifiably dismissed by ERL
- has been unjustifiably disadvantaged by ERL not allowing her to return to full-time employment three months after she returned from maternity leave
- is entitled to payment in respect of arrears of 10% product sale commission
- is entitled to payment in respect of profit-share entitlement
- is entitled to payment in respect of accrued annual leave entitlement
- has breached the implied duties of fidelity and good faith which she owed to ERL

and whether or not ERL breached:

- the good faith provisions of the Employment Relations Act 2000 (the Act)
- ss 4A(a) and (b), 130(4), 134 and 135(1) of the Act by not providing Ms Hull with an employment agreement or payslips.

Background Facts

[8] ERL acquired the Beauty Plus Salon (the Salon) in late 2003. The Salon was located in the same premises as the Fitness Plus Gymnasium (the Gym) owned by ERL and managed by Mr David Edginton. The Salon offers a range of beauty treatments in addition to hairdressing

[9] Ms Michelle Edginton said in late 2008 she had become involved in the operation of the Salon which at that time had been managed by Ms Debbie Singh. Ms Singh had been responsible for staff management and renting Salon space to outside parties.

[10] Ms Singh had appointed Ms Hull as a therapist at the Salon in March 2006 on a base hourly rate plus a commission payment of 10% on product sales. Ms Hull said she had been paid her salary weekly in cash, and the commission payment was also paid in cash weekly. Ms Hull had not been given a written employment agreement upon appointment.

[11] On or about November 2007 Ms Hull accepted full-time employment with Caci Medispa to gain further experience, but had continued working one evening a week for ERL.

[12] On or about December 2008 Ms Singh had resigned as Manager of the Salon, and Ms Edginton said she and Mr Edginton had invited Ms Hull and her husband Mr Dainon Hull to a dinner meeting at their home to discuss the Salon. During that meeting Ms Hull was offered, and had accepted, the position of Manager of the Salon.

Terms of appointment as Salon Manager

[13] Ms Hull said that the terms upon which she had accepted the position of Manager of the Salon were that (i) her hourly rate would be increased from $14.00 per hour to $20.00, (ii) she would be entitled to a percentage of the annual profit share, and (iii) she would continue to receive the 10% commission on product sales.

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[14] Ms Edginton confirmed that Ms Hull's hourly rate had been increased to $20.00 per hour, and that she was to be entitled to a percentage share of the annual profits, however she denied that the commission payment paid to Ms Hull on product sales was to continue to apply because the position of Salon Manager did not provide an entitlement to this payment, and the increased hourly rate reflected this understanding.

[15] It is agreed between the parties that following this meeting Ms Hull had not been provided with either a written employment agreement or confirmation of the agreed terms in writing.

[16] It is also agreed by the parties that Ms Hull left her employment with Caci Medispa and returned to working full-time at the Salon as Manager in early 2009. Ms Edginton said she had attended the Salon one day each week and completed the accounts and weekly totals whilst Ms Hull managed the Salon and clients.

[17] In 2009 Ms Edginton said that the Salon name had been changed to Beauty Plus to resonate with the Gym name, Fitness Plus. Ms Edginton said that the Salon had not been profitable at the time Ms Hull had been appointed as Salon Manager, having made a loss of approximately $20,000.00 during 2008.

[18] Ms Hull stated that at the time of her appointment as Salon Manager, the equipment in the Salon had been outdated and needed replacing.

[19] Ms Edginton said that she and Mr Edginton had incurred some expenditure on the Salon during 2009 in order to make the Salon more attractive to clients, including purchasing new towels, bedding, and painting feature walls. Ms Edginton said that the purchases were primarily of second-hand items made through Trademe or at auctions, and that she personally paid for the items when the Salon had no money to do so.

[20] Ms Edginton said the Salon had engaged a contractor to design a website, however this did not result in a timely outcome, so a new provider had been appointed and the current website had been operating since 2009.

Commission and Profit Share payments

[21] Ms Hull said that she had been paid no product sales commission payments or profit share payments during her period of employment at the Salon.

(i) Product Sales Commission Payments

[22] Ms Hull said that she had informed Ms Edginton that she would defer her commission payment on product sales to the end of the year on the basis that this would increase the Salon profitability.

[23] Ms Hull said that no product sales commission payment had been made at the end of 2009, 2010 or 2011, however she had not made an issue of this, stating at the Investigation Meeting on 18 December 2012 that: "*Commission did not bother me that much. The money side did not enter my head.*"

[24] Ms Edginton denied that there had been a discussion about deferring the product sales commission payment and confirmed her original understanding that Ms Hull had not been entitled to product sales commission following her acceptance of the position of Salon Manager, and therefore it would not have been necessary to make any product sales commission payments to Ms Hull.

(ii) Profit Share Payments

[25] Ms Hull said that she had also informed Ms Edginton that she would defer her entitlement to profit share payments to the end of the year on the basis that this would increase the Salon profitability.

[26] Ms Edginton said she did not recall any conversation with Ms Hull about deferment of the profit share payment; notwithstanding that the Salon had not made any profit during the period of Ms Hull's employment.

[27] Ms Hull agreed that when she had asked for her profit share payment at the end of each year from 2009, she had been informed that there was no profit. Ms Hull said that she had not believed this to be correct despite the fact that she had not known the financial position of the Salon.

[28] Ms Edginton said that the Salon's Monthly Accounts Book had been kept below the Salon counter, and because Ms Hull had full access to it she would have been aware that the Salon was running at a loss since they would look at the Monthly Accounts Book together, and discuss what action could be taken to improve the situation.

[29] Ms Edginton said she had also informed Ms Hull just prior to Ms Hull taking maternity leave in July 2011 that if there was no improvement in the financial situation, Mr Edginton would close the Salon.

[30] Ms Edginton said that Ms Hull also had access to the Salon's Weekly Total Book which listed the amount that individual therapists charged each day for treatments, and the weekly and monthly earnings for the Salon. Ms Edginton said that Ms Hull had taken over entering the records in the Weekly Total Book in 2009 when she had been on maternity leave and as a result, Ms Hull would have been fully aware of the Salon's turnover every month.

[31] Ms Hull agreed that the hand-writing in the Weekly Total Book, which included the December 2010 records, had been hers, and that she had carried out the entire product ordering for the Salon, and that she had seen the Monthly Accounts Book from time to time, but said that she had not understood the financial information.

[32] Ms Hull further confirmed that Ms Edginton had told her that Mr Edginton would close the Salon unless there was a financial improvement.

Accrued Annual Leave

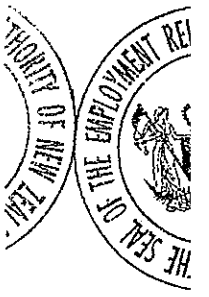
[33] Ms Hull said that she had not been paid for her accrued annual leave entitlement stating that she had only been able to take two weeks annual leave during the Christmas/New Year periods when the Salon had been closed.

[34] Ms Hull also said that she had not been paid for annual leave accrued when she had been on maternity leave.

[35] Mr Edginton said that whenever Ms Hull requested annual leave, this was granted, and confirmed that Ms Hull rarely requested annual leave.

[36] Mr Edginton said that he had known Ms Hull had annual leave accrued, and that when she had of her own volition reduced her hours during the six months prior to taking maternity leave, he had agreed to pay her for 40 hours. Ms Hull agreed that when she had taken a day off, she had on occasion asked Mr Edginton to use her annual leave as extra hours.

[37] In November 2010 Ms Hull said she had become pregnant and had been very unwell throughout the pregnancy. As a result, Ms Edginton said ERL had initially employed Ms Donna Pemberton to cover for Ms Hull, and later Ms Amanda Bailey, who was employed as a part-time therapist in May 2011. Ms Bailey had increased her hours to full-time when Ms Hull left to go on maternity leave in July 2011.



Return to employment following maternity leave

[38] Ms Hull said that she had been due to return to work from maternity leave on 22 October 2011, and it had been agreed that for the first three months following her return she would work only 15 hours per week, resuming full-time hours at the conclusion of the three month period..

[39] During the period of her maternity leave Ms Hull said that Ms Katie Howes had been appointed as Salon Manager.

[40] Ms Hull said that in January 2012 she had requested to resume full-time hours, however she had been informed that another beauty therapist, Ms Amanda Bailey, who had been appointed in January 2011 to cover some of Ms Hull's hours due to her having required a significant amount of time off during her pregnancy, had been appointed on a full-time basis. As a result, the position Ms Hull herself now occupied was part-time.

[41] In March 2012 Ms Hull said Ms Bailey had resigned and Ms Howes had offered her full-time hours, which she had resumed from that time.

[42] Ms Edginton said that during her maternity leave Ms Hull had informed her that she had not been sure that she wanted to return to her position as Salon Manager, but that she would prefer to carry out the role of beauty therapist and be able to enjoy the time with her baby. Ms Edginton said that she and Ms Hull had discussed appointing Ms Howes as Salon Manager.

[43] Ms Edginton said Ms Hull would often visit the Salon during her maternity leave and sometimes have a hairdressing appointment with Ms Howes. Ms Howes said that Ms Hull told her on several occasions that she had been happy that she (Ms Howes) had taken over management of the Salon.

[44] Ms Edginton said that once Ms Hull had returned from maternity leave, there had been a staff meeting to discuss ceasing discounted treatments to the Salon's clients. The following morning Ms Edginton said she had telephoned Ms Hull to check that she had accepted the changes, including the appointment of Ms Howes, and Ms Hull had confirmed that she had been happy with Ms Howes' appointment.

[45] Ms Edginton said there had been agreement that Ms Hull would return on part-time hours, but would resume full-time hours within a 4 to 5 month period after her return.

Commission Payments

[46] Ms Howes said that at the beginning of 2012, with the agreement of Ms Edginton, she had informed all the employees that they would receive a 5% bonus on retail sales over $200.00 as the Salon's financial situation would no longer justify a 10% commission payment on product sales.

[47] Ms Howes said that Ms Hull had not queried this decision about the level of commission payment, but had in fact asked if her entitlement to the 5% commission payment could be back-dated to cover the previous Christmas period as she had sold a lot of product during that time.

Employment Agreement

[48] On or before 14 April 2012 Ms Hull said that Ms Howes had given her an individual employment agreement (the Employment Agreement) together with a letter explaining the proposed terms of her employment.

[49] Ms Howes said she had asked Ms Hull on a number of occasions to return a signed copy of the Employment Agreement, or to raise any issues concerning it, however Ms Hull had not signed or returned the Employment Agreement, and had not raised any issues concerning it.

Product Shrinkage

[50] Ms Edginton explained that a previous employee who had been appointed just prior to Ms Hull taking maternity leave, had raised concern about the level of product shrinkage, and advised that systems should be installed to prevent this happening.

[51] As a result, Ms Edginton said the Salon had installed a salon computer system, Kitomba, to manage client bookings, payments and stock takes. Additionally security cameras had been installed in the reception area and small screens in the therapy rooms during the period when Ms Hull had been on maternity leave.

[52] Ms Edginton said that employees, including Ms Hull, had also been asked to keep their bags in the lunchroom and out of their therapy rooms, and had been advised that they were not to enter the Salon on the days when it was closed, or take products home without asking Ms Howes first.

Events 20 & 21 June 2012

[53] Ms Edginton said that when she had arrived at work on 20 June 2012 Ms Howes had told her that Ms Hull had been unable to attend work that day, and also that when she (Ms Howes) had turned on the computer to update the Salon Facebook page, she had found Ms Hull's Facebook page open.

[54] Ms Howes said that she had been concerned as some of the entries on Ms Hull's Facebook page had concerned the Salon and its clients, and had confirmed her view that Ms Hull had been treating Salon clients at her home.

[55] Ms Edginton said that following discussions with Ms Howes about the Facebook entries, they had decided to arrange a meeting with Ms Hull to discuss what they had found.

[56] Later that day Ms Edginton said that one of the beauty therapists had asked her for oil/mask products for a client's treatment early the following morning as she had been unable to find any. Ms Edginton said she arrived at the Salon on the following day, 21 June 2012, and looked for the oil/mask products in all the cupboards, including those in Ms Hull's therapy room.

[57] Whilst looking for the oil/mask products in Ms Hull's therapy room, Ms Edginton said she noticed that Ms Hull's handbag had been left open on the bottom shelf in the therapy room and she could see a plastic zip lock bag packaged up with eyelash extension products marked "Fab Lashes' which she believed to be Salon stock. Ms Edginton said she had also noticed some Flaxseed Capsules which were of the brand Mr Edginton sold in the Gym.

[58] Ms Edginton said that after taking a photograph of Ms Hull's handbag and its contents, she had checked the Salon computer system which had confirmed Ms Hull had not purchased any Flaxseed Capsules on her staff account, and she had then spoken to Mr Edginton and showed him the photograph.

[59] Ms Edginton said that they had decided to ask Ms Hull to consent to a bag search after she finished work that day. Mr Edginton said he had waited until Ms Hull approached her car, and then had requested that she return to the Salon.

[60] Ms Hull had returned to the Salon and had opened her handbag. Ms Edginton said that the products she had seen earlier were no longer there, and although Ms Hull had taken a tray of 'Fab Lashes' from the handbag, these had been of a different make to those she had seen earlier.

[61] Ms Hull said that Ms Howes had also been present during this search; however Ms Edginton said that there had been no clients present in the Salon and no beauty therapists.

[62] Ms Hull said that although the search had found no products belonging to the Salon in her bag, Mr Edginton had not apologised, but Ms Edginton had started crying and had told her that she knew Ms Hull had not taken anything. Ms Hull also said that Mr Edginton accused her of servicing clients at home.

[63] Mr and Ms Edginton said they had not accused Ms Hull of theft, although Ms Edginton agreed that she had asked Ms Hull if she had been seeing clients at home, to which Ms Hull had replied 'No'. After that exchange Ms Edginton said Mr Edginton had apologised to Ms Hull and left the Salon.

[64] Ms Hull said she and Ms Edginton had had a discussion after Mr Edginton had left, and she (Ms Hull) had suggested numerous ways in which to eliminate theft of stock, after which she and Ms Edginton had hugged, and Ms Hull had left the Salon.

[65] Ms Hull said she had been very upset and felt humiliated by the bag search.

22 June 2012

[66] Ms Howes said that when Ms Hull had arrived at work the following day, Friday 22 June 2012, she had been visibly upset and had told her (Ms Howes) upon arrival that she was to expect her resignation as her mother had been talking to a lawyer and the intention had been to file a personal grievance claim.

[67] Ms Howes said Ms Hull had asked her if she had been searched, to which she had replied 'no', and Ms Hull had also telephoned another employee, Ms Michelle Schicker, to ask if she had been searched.

[68] Ms Hull said that when she had asked if she had been searched, Ms Schicker told her that her that she had not been which had upset her even more, and made her feel physically ill and that she was being accused of theft.

[69] Ms Howes said that during the course of the morning Ms Hull had received a call from her sister, Ms Mandy Gillott, following which she had become very distressed and agitated. Ms Howes said she had suggested to Ms Hull that she go home, however she had decided to stay at the Salon and had seen a client. Ms Howes said Ms Hull was with the client when Ms Hull's mother, Ms Susan Thorn, had telephoned.

[70] Ms Howes explained that Ms Thorn had been vocal in her defence of Ms Hull, and insisted that Ms Hull have the rest of the day off. Ms Howes said she had agreed this would be best, and told Ms Thorn that she would ask Ms Hull to call her as soon as she was available.

[71] Ms Howes said that during the telephone conversation, Ms Thorn had accused her of being the instigator of what had caused distress to Ms Hull. Ms Howes said she had been upset by the call.

[72] Ms Howes said she had then received a call from Ms Hull's sister, Ms Mandy Gillott. Ms Howes said she had tried to tell Ms Gillott that Ms Hull was engaged but Ms Gillott demanded to speak to her and became agitated and rude towards her (Ms Howes), so after a short while, she had terminated the call.

[73] Ms Howes said that after Ms Hull had finished with the client she had called her mother and her sister. Following this Ms Howes said Ms Hull had proceeded to pack up her

belongings, removing pictures from walls, candle holders, a Perspex display stand and a toilet roll holder.

[74] Ms Howes said that there had been a frangipani print which Ms Hull could not fit into her bags, and she had destroyed this, explaining than she would rather destroy it than leave it behind.

[75] Ms Howes stated that Ms Hull had also started writing out a list of clients whom she told Ms Howes she had brought to the Salon, and whom she would be taking with her; however she had left this list when she left.

[76] Ms Hull said she had completed writing the list of clients, which contained the names of close family and friends, to advise ERL that these clients would no longer be using the Salon. At the Investigation Meeting Ms Hull explained her action in compiling this list as being attributable to the fact that she had no longer wished to support ERL.

[77] Ms Howes said that Ms Hull told her that she was no longer going to put up with "*all this bullshit*" and that she should watch her back as Mr and Ms Edginton would: *"screw me over"* as they had done to her.

[78] Ms Howes explained that Ms Hull had then asked her to search her bag to ensure she had not removed any Salon goods, stated that she intended taking all the clients she had brought to the Salon, and further stated clearly that she would not be returning. Ms Howes said Ms Hull had also said that she would be raising a personal grievance.

[79] Ms Hull said Ms Howes had asked her for her set of the Salon keys as she was leaving. Ms Howes confirmed that she had done so, and explained that she had done so because she did not believe that Ms Hull intended returning to her employment. Ms Howes said that Ms Hull had not told her at that time that she needed to retain the keys as she would be returning to the Salon.

[80] Ms Hull agreed she had taken all her personal belongings from the Salon on 22 June 2012, and said this had been because she had feared that Mr Edginton might damage them.

[81] Ms Howes said that after Ms Hull had left, Ms Thorn had telephoned and said that she would be at the Salon later that day to collect Ms Hull's final pay wages and a printer she had not taken with her.

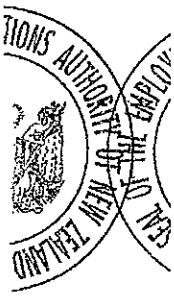
[82] Ms Howes said that Ms Thorn had told her that Ms Hull's lawyer had notified them that Ms Hull was not to talk to them, and if ERL needed anything, it was to telephone her.

[83] Ms Thorn said she had explained that Ms Hull wanted her weekly wages, and a friend would call in to collect them.

[84] Mr Edginton said he had been in Hamilton on 22 June 2012 and had received a call from Ms Howes informing him that Ms Hull had '*walked out*' and wanted her final pay. Mr Edginton explained that the PAYE book was in his office in Auckland and only he had the key to the office. Mr Edginton said that he had then been informed that Ms Hull's lawyer was going to the Salon at 4 p.m. to collect Ms Hull's monies.

[85] Ms Howes said that a woman had arrived that afternoon to collect Ms Hull's monies; however she had no identification with her, and appeared not to know who Ms Thorn was when Ms Howes asked her. On this basis Mr Edginton said he had refused to give Ms Hull's monies to this person.

[86] Later that same afternoon (22 June 2012) Ms Edginton said she had received a telephone message from Ms Hull informing her that she (Ms Hull) was filing a personal grievance against ERL, and that Ms Edginton was not to contact her.



Events post 22 June 2012

[87] Mr Edginton said he had been called to the Gym's reception area on 25 June 2012. Ms Gillott had been waiting for him and had handed him a medical certificate in respect of Ms Hull. The medical certificate issued by Ms Hull's doctor stated that Ms Hull was unfit for work until 2 July 2012. Mr Edginton said he had asked why Ms Gillott was giving him the medical certificate as his understanding had been that Ms Hull had resigned and left her employment on 22 June 2012.

[88] Ms Gillott, who denied she had been abusive to Mr Edginton, said she had informed Mr Edginton that Ms Hull's lawyer would be in touch, and not to contact Ms Hull directly. Ms Gillott said Mr Edginton had accepted the medical certificate and he had not said that he believed Ms Hull had resigned.

[89] On 11 July 2012 Mr Edginton had written to Ms Hull. In the letter Mr Edginton had written:

We received a phone call yesterday 10 July 2012 at the Salon from someone advising that you were still [unwell] and would not be into work.

The week before last we also received a Doctors certificate stating that you were unfit for work.

I am sorry to hear that you are unwell and unfit for work, however I am at a loss to understand why you are sending these notes and why someone is making calls to the Salon your behalf as you resigned from your role with us without giving notice on 22 June 2012.

On the day of your resignation you also voluntarily handed back you (sic) key to the Salon and advised that you would get someone to collect your final wages and your outstanding holiday pay.

These were paid to you on 25 June 2012 and 28 June 2012 and you were sent final pay advice showing a breakdown of the payment along with a certificate of employment detailing your period of employment with Beauty Plus.

I wish you well for the future and hope you are feeling better soon. In the meantime however please stop sending medical certificates and having friends or relatives ringing the Salon on your behalf advising that you are unfit for work as it is of no commercial concern to us as you are no longer an employee of Beauty Plus.

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[90] The parties had attended mediation in relation to the employment relationship problem but were unable to resolve the issues between them, and on 17 August 2012 Ms Hull filed a Statement of Problem with the Authority.

Determination

Was Ms Hull unjustifiably dismissed by ERL?

[91] Mr Edginton claims that he had believed Ms Hull to have resigned from her employment with ERL on 22 June 2012. Ms Hull claims that she had not resigned, but had been dismissed by ERL.

[92] Mr and Ms Edginton had asked Ms Hull if they could search her bag on 21 June 2012. The bag search had taken place in circumstances in which the product shrinkage was an issue for the Salon, of which the employees had been made aware, and after the instruction had been issued that their personal bags should not be kept in treatment rooms.

[93] I find that on 21 June 2012 Ms Hull had consented to the bag search, appeared to accept the apologies of Mr and Ms Edginton, had hugged Ms Edginton following the bag search, and had offered suggestions to Ms Edginton on how to tackle the product shrinkage problem.

[94] I do not find that Ms Hull had, as a result of these actions, been dismissed by ERL on 21 June 2012, given that Ms Hull had consented to the bag search, and there is no evidence that ERL accused her of theft.

[95] However, I observed that in her witness statement Ms Edginton makes significant mention of missing product and appears to consider Ms Hull as being involved, in fact there is no mention of any other employee as a possible culprit. This, together with the incident of Ms Hull's bag being searched, is sufficient for me to form a view that ERL considered that Ms Hull may have committed an act of misconduct. However ERL did not inform Ms Hull of the allegations it appeared to have formulated.

[96] Moreover ERL did not act in accordance with clause 24 of the Employment Agreement which specifies the procedure to be followed in relation to disciplinary matters.

[97] I accept that following overnight consideration, Ms Hull had been become distressed by the fact of the bag search which she believed indicated that Mr and Ms Edginton thought her guilty of theft, and this distress had been compounded the following day after she had arrived at the Salon and discovered that she appeared to be the only employee who had been searched.

[98] ERL said that it believed that in light of Ms Hull's actions and behaviour on 22 June 2012 she had resigned from her employment with ERL.

[99] I have considered whether the behaviour of Ms Hull which gave rise to ERL's belief that she had resigned arose in circumstances in which it was unsafe for ERL to rely upon the resignation.

[100] I note that Ms Hull had been provided with the Employment Agreement on 14 April 2012 which she had not signed and returned; however on the basis that Ms Hull confirmed that she had read it, had raised no issues regarding the Employment Agreement and had

continued to work thereafter, I consider that she can be held to have accepted the terms thereof.

[101] In accordance with clause 21.2 of the employment agreement, Ms Hull was required to provide ERL with one week's notice, however she had not resigned in writing, nor had she provided any notice.

[102] On Monday 25 June 2012, Ms Hull submitted a medical certificate to ERL, stating that she was unfit to work until 2 July 2012, and this had been followed by a telephone call to ERL on 10 July 2012 advising that she was still unfit for work.

[103] I observe that at the time when Ms Hull had indicated to Ms Howes that she intended to resign she had been very upset and emotional.

[104] In *Boobyer v Good Health Wanganui Ltd* the Employment Court said in this type of case that the employer cannot safely insist on what the employee may have said:

> *This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties".*

[105] In this case, Ms Hull had not only told Ms Howes that she intended to resign, but had removed or destroyed all of her personal possessions, including a toilet roll holder. This operation occupied some little time. Ms Hull had also ensured that her personal printer had been collected from the ERL premises later that day. These actions are indications of an intention on an employee's part to be no longer bound by the employment relationship.

[106] However the indicated verbal notice of intending resignation had not been confirmed either in writing or to Mr or Ms Edginton by Ms Hull following Friday 22 June 2012, although there had been notification to Ms Edginton that Ms Hull intended to raise a personal grievance.

[107] On Monday 25 June 2012 ERL had been provided with a medical certificate for Ms Hull, which together with the subsequent telephone call, I consider put ERL on notice that Ms Hull, despite her actions, had not in fact resigned, but appeared to consider that she had continuing employment with ERL which required her to provide medical certificates to account for her absence.

[108] On 28 June 2012 ERL had paid Ms Hull's final wage payment.

[109] In this situation I find that there was a good faith duty on ERL to be: *active and constructive in ... maintaining a productive employment relationship"* pursuant to s 4(1A)(b) of the Act, specifically by contacting Ms Hull following submission of the medical certificate and the telephone call stating that she was still unfit to work on 10 July 2012, to ascertain the true nature of the situation.

[110] I note that Mr Edginton had been informed by Ms Thorn on 22 June 2012 that he was not to contact Ms Hull in accordance with the legal advice she had been given, and Ms Hull had also informed Ms Edginton of this advice. However this fact alone I do not consider sufficient to displace the good faith duty of ERL to make every effort to ascertain the true situation concerning Ms Hull's intentions.

[111] In addition to the failure to follow its own disciplinary procedures in relation to the perceived misconduct issue, I find that ERL failed to make any effort to ascertain the true situation in light of the events in June 2012 and acted in accordance with its belief that Ms Hull had resigned.

[112] In these circumstances, I determine that Ms Hull was unjustifiably dismissed by ERL.

Remedies

Lost Wages

[113] Ms Hull is seeking lost wages from the date of her dismissal and had stated that she had been too distressed by what had occurred to turn her mind to obtaining alternative employment until approximately October 2012.

[114] Employees are under a duty to mitigate their loss and in this case there was insufficient evidence presented to the Authority to support the fact that Ms Hull had made a real effort to mitigate her loss. As Chief Judge Colgan made clear in *Allen* v *Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")* (2009) 6 NZELR 530, par 78:

> *... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.*

[115] Considering all the circumstances I find that there is no compensation for lost wages is payable to Ms Hull.

Compensation

[116] Ms Hull said that she had been distressed and had suffered a loss of confidence as a result of what had occurred towards the end of her employment at ERL.

[117] In respect of the dismissal grievance, ERL is ordered to pay Ms Hull the sum of $5,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[118] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[119] I find that Ms Hull's behaviour on 22 June 2012 to be consistent with that of an employee intending to be no longer bound by the employment relationship, which was reinforced by her comment at the Investigation Meeting that the reason she had compiled a list of clients was because she no longer intended to support ERL, or to promote the Salon.

[120] During the morning of 22 June 2012 whilst at the Salon Ms Hull had:

- on arrival informed Ms Howes that she was to expect her resignation and that she was raising a personal grievance;
- packed up and removed all her belongings;
- destroyed a frangipani print rather than leave it behind;
- compiled a list of the Salon's clients consisting of 16 names, against which Ms Hull had written: "*clients ammy brought here. There are more but can't think. I will be taking them.*"
- advised Ms Howes that she should not trust Mr and Ms Edginton and that she was no longer prepared to put up with "*all this bullshit*"
- given the Salon keys to Ms Howes when requested to do so without informing Ms Howes that she would need them as she had not resigned.

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[121] I find that these actions, together with (i) Ms Hull's stated intention in compiling the client list, (ii) the notification that she had taken legal advice in connection with the raising of a personal grievance, and (iii) the disparaging comments made regarding Mr and Ms Edginton, reasonably gave rise to the belief on ERL's part that Ms Hull was resigning and had no intention to be any longer bound by the employment relationship.

[122] I find significant contributory fault on the part of Ms Hull and reduce the sum awarded in respect of the compensation for hurt and humiliation by 100 %.

Was Ms Hull unjustifiably disadvantaged by ERL not allowing her to return to working full-time three months after she returned from maternity leave?

[123] Ms Hull had been employed as the Salon Manager in a full-time capacity prior to taking her parental leave and, in accordance with the Parental Leave and Employment Protection Act 1987, was entitled to return her previous position or to a similar vacancy following her parental leave period.

[124] Ms Hull confirmed that it had been by mutual agreement that she had by returned to work on a part-time basis for a limited period following the end of the parental leave period on 22 October 2011, and I accept that there is no argument on Ms Hull's part that she did not intend to return to the Salon Manager's position.

[125] Ms Hull claims that the mutual agreement was for a period of three months only, and that she had not been allowed by ERL to resume full-time working hours following her request to do so in January 2012.

[126] Mr Eggleston submits that this issue ought to have been raised as a complaint pursuant to s 56 of the Parental Leave and Employment Protection Act 1987 which stipulates the requirements for bringing a valid parental leave complaint, and specifies at s 56(2)(a) that a complaint shall not be made after the expiration of 26 weeks from the date on which the subject-matter of the complaint arose. Accordingly Mr Eggleston submits the time limit for bringing the complaint under the Parental Leave and Employment Protection Act 1987 expired on or about 22 July 2012.

[127] Mr Eggleston further submits that Section 56(4) of the Parental Leave and Employment Protection Act 1987 clarifies that parental leave complaints are not to be considered as personal grievances:

> *A parental leave complaint to which this section applies is not a personal grievance within the meaning of section 103 of the Employment Relations Act 2000.*

[128] Notwithstanding Mr Eggleston's submission I note that the procedures for settlement of parental leave complaints are dealt with under s 57 and s 58 of the Parental Leave and

Employment Protection Act 1987, and failing resolution between the parties such a complaint may be referred to the Employment Relations Authority.

[129] In the Statement of Problem filed with the Authority on 17 August 2012 Ms Hull presented not being allowed to return to full-time working hours after three months as an unjustifiable disadvantage personal grievance claim. An unjustifiable disadvantage claim must be raised within the 90 day statutory period set out in s 144(1) of the Act.

[130] There is no evidence that Ms Hull raised the issue as a personal grievance at any time during the 90 day statutory period which would have commenced on or about 22 January 2012, and there is no evidence that ERL waived the 90 day statutory time period. Nor do I find that there is any evidence presented to the Authority that (i) Ms Hull followed the procedures set out in ss 56-58 of the Parental Leave and Employment Protection Act 1987, and (ii) that the matter was referred to the Authority pursuant to s 58 of that Act.

[131] I find Ms Hull to be time-barred from raising it under either piece of legislation.

[132] I determine that Ms Hull failed to raise either a parental leave complaint or a personal grievance in relation to her complaint that she was not allowed to return to work full-time three months after her return from parental leave within the statutory time periods as specified in s 114 (1) of the Act and ss 56 - 58 of the Parental Leave and Employment Protection Act 1987 .

Is Ms Hull entitled to a payment in respect of arrears of 10% product sale commission during the period?

[133] Ms Hull accepted the position of Salon Manager on the basis of an increase in her hourly rate from $14.00 to $20.00 per hour and an entitlement to a percentage share of the annual profit. Ms Hull stated that she had also been entitled to a continuation of the 10% commission payment based on product sales to which she had been entitled in her previous position as a therapist.

[134] Ms Hull did not receive commission on product sales during any of the years ended 2009, 2010 or 2011 and there is no evidence that she asked for payment of the commission following her appointment as Salon Manager at the beginning of 2009.

[135] I find this behaviour to be consistent with Ms Edginton's explanation that the Salon Manager had no entitlement to product sales commission, especially when considered in conjunction with the fact that Ms Hull had received a significant increase in her hourly rate of

payment and an entitlement to a percentage share of the annual profit share when accepting the position of Salon Manager.

[136] I do not find Ms Hull's explanation that she had agreed to defer the product commission payments convincing, particularly in light of the period of time involved and when considered in conjunction with the following:

- Ms Hull's reply at the Investigation Meeting when asked if she ever queried the non-payment of commission that two weeks after she had started as the Salon Manager she had said to Ms Edginton: "*I won't take commission anymore*".

- Ms Hull's comment at the Investigation Meeting when asked if she had requested payment for the extra hours she claimed she had worked that: "... *It was my choice not to get commission payments or extra hours*".

[137] I determine that Ms Hull is not entitled to a payment in respect of arrears of product sales commission.

Is Ms Hull entitled to payment in respect of profit share entitlement?

[138] It is not disputed that Ms Hull became entitled to a payment in respect of profit share entitlement upon her appointment as Salon Manager.

[139] An entitlement to profit share was by its very nature, dependent upon the Salon making a profit, and also the word 'profit' in this context is invariably defined in financial terms. In the absence of any documentation to the contrary I consider that the profit shared would be based on the standard financial net profit definition.

[140] Ms Hull stated that she had offered to defer her profit share entitlement on the basis that this would increase the Salon's profitability. I observe that deferring entitlement to a profit share might benefit cash flow, but would not impact upon profitability.

[141] Ms Edginton's evidence was that the Salon had not been profitable during the period for which Ms Hull had worked, and therefore there had been no profit to fund a profit share payment.

[142] Ms Hull said she had been unaware of the financial position of the Salon. I find however that this statement is undermined by the evidence that Ms Hull had access to the

Salon's Monthly Accounts Book, and also had access to, and made entries in, the Salon's Weekly Total Book.

[143] Further Ms Hull had stated that at the time of her appointment as Manager, the Salon's equipment had been outdated and in need of replacement, which I consider to support Ms Edginton's evidence that the Salon had been running at a loss.

[144] Moreover I note Ms Hull's own evidence that she had been told by Ms Edginton that Mr Edginton would close the Salon unless there was an improvement in the financial position.

[145] I find that Ms Hull had been aware at all times of the financial position of the Salon, in particular that it had not been profitable during the period of her employment.

[146] In the absence of any contradictory evidence I accept Ms Edginton's claim that the Salon was not profitable and therefore determine that Ms Hull is not entitled to a payment in respect of profit share entitlement.

Is Ms Hull entitled to a payment in respect of accrued annual leave entitlement?

[147] During the Investigation Meeting both the Applicant and the Respondent provided to the Authority detailed information regarding the payments made to Ms Hull during her employment.

[148] There was a certain amount of correlation between the two sets of calculations, with a significant difference being that the Applicant's representation via a third-party consultant representing that the difference in payments made during the period January to June 2011 to 'top-up' Ms Hull's weekly payment was to be treated as sick leave entitlement rather than accrued holiday payments.

[149] It was accepted by both parties that Ms Hull had taken only a small amount of her allocated annual leave entitlement in each year, and she had therefore accrued a significant annual leave entitlement. The evidence also established that Ms Hull had needed to take a large amount of time off due to being unwell during the period of her pregnancy.

[150] ERL claims that as a result of her being unwell during her pregnancy and not being able to work full-time Ms Hull had requested that her weekly hours be 'topped-up' to a 40 hour a week level by utilising her accrued annual leave. Ms Hull claims that in order to achieve this ERL advanced sick leave entitlement to her. I note that to achieve this objective the advance of sick leave entitlement would amount to payments in excess of $3,700.00.

[151] Ms Hull had not agreed in writing to her accrued annual leave entitlement being applied in this way and therefore there is no evidence before the Authority to support the Respondent's argument that Ms Hull had requested that she be allowed to use her accrued annual leave for the purpose of 'topping-up' her weekly payments during her periods of sickness absence.

[152] However the Holidays Act 2003 does not require agreement in writing. What is required pursuant to s 18(4) is that an employer: "*not unreasonably withhold consent to an employee's request to take annual holidays*".

[153] Ms Hull had exhausted her entitlement to sick leave by the end of March 2011, but had a significant amount of accrued annual leave and had been unwell during the period of her pregnancy, requiring a significant amount of time off work.

[154] In these circumstances, and in light of the fact that Ms Hull agreed during the Investigation Meeting that she had made requests that her accrued annual leave be used to 'top-up' her hours on previous occasions, I find it more credible that this was what had occurred on this occasion, rather than applying an amount equivalent to sick leave in advance which, in the event that Ms Hull left her employment before the accrual had reached the required amount, would need to be repaid to ERL.

[155] I determine that Ms Hull is not owed a payment in respect of accrued annual leave entitlement.

Did ERL breach ss 4A(a) and (b), 130(4), 134 and 135(1) of the Act by not providing Ms Hull with an employment agreement or payslips?

(i) Non-provision of an employment agreement

[156] Employers are under an obligation to provide employees with an employment agreement pursuant to s 63A of the Employment Relations Act 2000 ("the Act"), which states:

> *63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement*
>
> *(2) The employer must do at least the following things:*
>
> *(a) provide to the employee a copy of the intended agreement, or part of the intended agreement, under discussion; and*
>
> *(d) consider any issues that the employee raises and respond to them*

[157] Section 65 is also relevant:

65 Terms and conditions of employment where no collective agreement applies

i. The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-

1. must be in writing; and or her employer –

2. May contain such terms and conditions as the employee and employer think fit

[158] Further the Employer has a duty of good faith pursuant to s 4 (1A) (b) of the Act, which states at s4 (1A)(b):

4 Parties to employment relationship to deal with each other in good faith

(1A)

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative (emphasis mine)

[159] ERL admitted that it had failed to provide an employment agreement to Ms Hull as required to do under the Act, however I note that an employment agreement was provided to Ms Hull in April 2012, albeit some 6 years after Ms Hull commenced employment with ERL.

[160] Ms Hull had not returned the Employment Agreement to ERL, nor had she raised any issue regarding the terms and conditions of employment contained therein. I have not found that Ms Hull has suffered any disadvantage in respect of the non-provision of an employment agreement during the period of her employment preceding the provision of an employment agreement in April 2012.

[161] ERL has also put systems in place to ensure that employment agreements will be provided as appropriate in the future. In this respect I consider that no public policy considerations will be served by imposing a penalty against ERL for the non-provision of an employment agreement to Ms Hull.

(ii) Non-provision of wage and time records

[162] Employers are required in accordance with s 130 of the Act to provide employees with a wage and time record.

[163] Whilst I find that there is no breach of the requirement under s 130(g) to record the hours between which the employee worked each day on the basis that Ms Hull was paid a set hourly pay rate which varied in accordance with the number of hours she worked, I do not find that the records kept by ERL as provided to the Authority fully complied with the requirements of s 130 of the Act.

[164] I observe that ERL has also put in place a new payroll system which will ensure the Employee time and wage records comply with the requirements under s 130 of the Act.

[165] Accordingly I make no order for a penalty.

Has Ms Hull breached the implied duties of fidelity and good faith which she owed to ERL?

[166] ERL claims that Ms Hull breached her duties of fidelity and good faith by soliciting and carrying out private work for ERL's clients whilst an employee and also during her agreed non-solicitation clause.

[167] The Employment Agreement which had been provided to Ms Hull in April 2012 contained a non-solicitation clause at clause 15 which states:

> *During the term of your employment with us, you must not directly or indirectly either as an employer, consultant, agent, principal partner, stockholder, corporate office, director or in any other individual or representative capacity own, operate, control or assist or participate in any other business, company or organisation which is in direct or indirect competition with our business without our prior written consent.*

[168] Although Ms Hull had not signed or returned the Employment Agreement issued in April 2012, I have already noted that she had read it and raised no issues in connection with the terms contained therein. Ms Hull had further continued to work in accordance with the terms contained therein with effect from the date of that agreement.

[169] Restraint of trade clauses in employment agreements are unenforceable unless the restraint is reasonable by reference to the interests of the parties and the public.[1] However the

[1] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; *Medic Corporation Ltd v Barrett & ors* [1992] 3 ERNZ 523, 537

restraint of trade clauses in employment agreements may be upheld if it can be shown that the employer had a sufficient business interest to protect, and provided that the restraint is reasonable in all the circumstances.

[170] I observe that Ms Hull had been employed for some 6 years prior to being presented with the Employment Agreement, that there had been no previous discussion about the inclusion of the restraint of trade clause, there was no indication that Ms Hull had expressly agreed to be bound by it, and no additional consideration had been provided to Ms Hull in consideration thereof. Additionally clause 1.3 of the Employment Agreement states: "... *this agreement replaces any previous agreements, contracts or understandings.*" In these circumstances I do not consider that ERL can safely rely upon the restraint of trade clause in the Employment Agreement.

[171] However all employees are bound by the implied duty of fidelity and good faith in the employment relationship. Ms Hull was, in accordance with the implied duty of fidelity, required not to conduct herself in any way which had the potential to adversely affect her employer's business.

[172] Ms Hull had denied servicing clients at home when questioned about this by Ms Edginton following the bag search on 21 June 2012. However in her evidence Ms Hull had stated that during her employment she had provided services to friends at home, on the basis that these friends either were not happy with the Salon services, or could not afford the treatments.

[173] The Facebook entries made by Ms Hull and discovered by Ms Howes indicated that Ms Hull, during the period of her employment with ERL, had been servicing clients in her own time, and there is no evidence that any monies she had received in respect of these services had been paid to ERL.

[174] I find that ERL has suffered loss as a result of Ms Hull's breach of the duty of fidelity and good faith which she owed to it. ERL is seeking damages. In *Schilling v Kidd Garrett Ltd*[2] it was held that the correct approach in these matters is to first decide if the employer would have had any appreciable chance of retaining the custom if it had a proper opportunity to do so. If the chance was not substantial, then nominal damages would be the appropriate outcome.

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[2] [1977] 1 NZLR 243

[175] In light of the evidence provided, I am not convinced that the Salon would have retained or obtained the further custom of those clients whom Ms Hull had serviced in her own time.

[176] Moreover I observe that I have not made any award of remedies to Ms Hull in regard to the unjustifiable dismissal claim because of the level of contributing behaviour on her part. The Authority is an equitable jurisdiction, and had I not already determined that no award of compensation in respect of the unjustifiable dismissal was appropriate, I would in these circumstances have taken this breach of fidelity and good faith into consideration in assessing the level of contribution.

[177] I order that Ms Hull is to provide to ERL full disclosure of all clients whom she provided services whilst an employee of ERL, and of earnings in respect thereof for which she is accountable to ERL.

[178] I anticipate that the parties will be able to agree in respect of the quantum, noting my observation that in this situation damages should be nominal. If the parties are unable to do so, leave is granted to return to the Authority.

Costs

[179] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority