

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 32  
5384012

BETWEEN	SHEILA MAREE ROSE MILNE Applicant
AND	NEW LEAF BEAUTY THERAPY LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Barbara Buckett, Counsel for the Applicant Jills Angus Burney, Counsel for the Respondent
Submissions received:	1 & 21 February 2013 for the Applicant 13 February 2013 for the Respondent
Investigation Meeting:	23 January 2013
Determination:	25 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ms Sheila Milne says she was unjustifiably dismissed from her employment with New Leaf Beauty Therapy Limited (New Leaf).

[2] Ms Milne says that New Leaf had commenced a series of negotiations with her for the purpose to reaching a mutually agreed variation as to her guaranteed hours of work. She says she was never advised that her position with New Leaf was in jeopardy or that it was considering termination of her employment until she received notice of her dismissal. She says the process undertaken by New Leaf was procedurally and substantially unfair and in breach of its obligations to treat her in good faith.

[3] New Leaf opposes Ms Milne's claims and says that at all times it acted in good faith towards her. New Leaf submits that its decision to terminate Ms Milne's employment by way of redundancy was based on sound business and economic reasons. It says Ms Milne's termination of employment was both substantively justified and procedurally fair.

#### **Summary of relevant information and events giving rise to Ms Milne's claims**

[4] New Leaf salon provides skin care beauty services and treatments. It was purchased by new owners on 27 May 2011. In December 2011 New Leaf decided to employ a senior beauty therapist. It contacted Ms Milne, who had approached New Leaf about six weeks earlier indicating her availability to work on a full or part time basis. The parties negotiated terms of employment and on 7 January 2012 New Leaf offered Ms Milne a position as Senior Beauty Therapist/Assistant Manager.

[5] Ms Milne commenced work on 17 January 2012. Her individual employment agreement recorded New Leaf's commitment to offer her a minimum of 30 hours per week and that her hourly rate was set at \$25.00 (gross). The employment agreement provided for a 90 day trial period in accordance with the statutory requirements set out at s. 67A and s. 67B of the Employment Relations Act 2000. Provisions of the agreement associated with '*restructuring and redundancy*' the agreement defined redundancy in the following terms:

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.

[6] At the end of March 2012 on review of New Leaf's turnover figures for the previous two months, the directors of New Leaf say they had significant concerns that a pattern of reduced client bookings had developed.

[7] On 10 April 2012 Ms Milne met with New Leaf's directors, Ms Satsuki Okazaki and Ms Natalie Shearer, having become aware of the meeting earlier in the day via her electronic diary. It is common ground that New Leaf advised Ms Milne that there were insufficient clients to cover the cost of her wages and that it considered it could not continue to provide 30 hours of guaranteed work per week and sustain Ms Milne's remuneration rate of \$25.00 per hour. Arrangements were made to meet again on Friday 13 April 2012 and Ms Milne was asked to consider New Leaf's concerns and whether she had any solutions that may assist in resolving the issue. At

the end of the meeting New Leaf informed Ms Milne that her position was permanent and her employment would continue after the 90 trial period.

[8] A number of letters were exchanged between the parties between 10 and 21 April 2012. I have replicated significant portions of those exchanges as these are material to my assessment as to the content of the discussions held between the parties.

[9] On 12 April 2012, New Leaf wrote to Ms Milne and advised the following:

As we discussed at our meeting on 10th, we value your ongoing work within the salon and would wish to confirm your employment beyond the 90 day trial period.

Also as discussed we are financially constrained in terms of paying the agreed hourly rate of \$25 for extended periods where there are no paying clients to cover this cost. After some consideration we would like to suggest a change to the terms of the employment contract that will allow us some flexibility financially to ensure your ongoing employment.

We wish to amend clause 6.1 to remove the minimum guaranteed hours, which would leave clause 6.1 reading:

**“6.1 Part time hours.**

*The parties agree that the employee is being employed to perform duties on a part time rate with a goal of providing approximately 30 hours per week.*

...

[10] The letter further advised that New Leaf expected a senior therapist to generate income at the rate of 2.5 times the total sum of their wages to cover overheads and to not do so would be *“financially impossible for us to continue”*. It stated that Ms Milne’s sales income was currently 1.5 times her earnings and that to achieve the required level of return NLBT required billable hours to be *“around 60% of the actual hours worked, compared to your current 48%”*. The letter concluded with the statement *“We hope this change to the employment contract will be acceptable to you, and would suggest that it be reviewed again in three months”*.

[11] The meeting tentatively scheduled for 13 April 2012 did not occur but the parties met at midday on 18 April 2012. Ms Milne was supported by experienced HR consultant and friend, Mr Nigel Hilland. There is a factual dispute as to the content and detail of the discussions held between the parties although it is accepted that Ms Milne proposed to work 24 hours per week. New Leaf agreed to provide Ms Milne with a copy of her ‘utilization hours’ (time booked with clients) and advised it would consider Ms Milne’s proposal and would respond in the near future. Both Ms

Milne and Mr Hilland each gave evidence that New Leaf had not opposed Ms Milne's proposal and each believed an agreement had been reached.

[12] Later in the afternoon following the meeting New Leaf gave Ms Milne a letter which stated the following:

We wish to amend clause 6.1 to remove the minimum 30 guaranteed hours per week, and replace it with a guaranteed 15 hours per week. There is an expectation on both parties that the hours will increase up to 30 hours as bookings increase.

[13] Attached to the letter of 18 April 2012 was a one page document which recorded the number of hours Ms Milne had been booked with clients for each working day over the course of her employment with New Leaf. The document reflected an average of 12.5 hours a week in which Ms Milne was engaged with clients.

[14] On 20 April 2012, Ms Milne responded by letter to New Leaf and counter-proposed the following:

I advise that the proposal is not acceptable to me in its current form. Reducing from a guaranteed 30 hours to a guaranteed 15 hours will seriously disadvantage me. Here is my proposal to assist New Leaf through its financially difficult period.

- a. A guaranteed minimum of 20 hours per week with a guaranteed minimum of four hours work on any one day.

...

[15] Ms Milne's letter further stated that a reduction in hours would impact on her ability to achieve sales targets and build a client base. She proposed that these disadvantages be addressed by receipt of 5% commission on product sales and to have every third new client allocated to her. She asked also to have the non-competition clause removed from her employment agreement.

[16] The following day (21 April 2012) Ms Milne met briefly with the directors of New Leaf and was told that her proposals were unacceptable and given an envelope containing a letter. Before reading the contents of the letter Ms Milne asked "*where do we go from here*" and says she was told "*we are terminating your contract*".

[17] The letter dated 21 April 2012 stated, amongst other things, the following:

The revised clause as suggested by New Leaf was not acceptable to you, and as a result further negotiations were held on the 18th April in an attempt to

find a suitable agreement. At the conclusion of that meeting New Leaf agreed to review the booked hours over the period worked, and offer a level of guaranteed hours commensurate with the amount of booked hours.

An alternative was made by New Leaf on the 18th April which gave an option for 15 guaranteed hours per week which is around four hours more than the average booked hours.

This offer was not acceptable to you and you counter-offered on 20th April with a greater number of guaranteed hours and other changes to the employment contract.

We have to advise that this counter-offer is not acceptable to New Leaf.

Accordingly we regret to advise that we are unable to reach agreement to vary the contract; ...we are unable to extend your employment is confirmed.

...

[18] Ms Milne worked out her notice period. Her final day of work was 3 May 2012.

[19] Ms Milne raised a personal grievance and the parties attended mediation but were not able to resolve matters. It now falls to the Authority to determine Ms Milne's claims.

### **The issues arising from Ms Milne's claims and relevant law**

[20] As with any allegation of unjustified dismissal, the onus is on the employer to demonstrate that its decision to terminate an employee's employment was justified.<sup>1</sup> The Authority must objectively assess whether New Leaf's actions in dismissing Ms Milne were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The test requires two considerations, first, what New Leaf did (the substantive dismissal and the grounds for it) and, second, how New Leaf acted (the process leading to that outcome)<sup>2</sup>.

[21] In assessing New Leaf's actions, the Authority is required to consider the factors set out at s103A(3)-(5) of the Employment Relations Act 2000 as follows:

- a. the resources available to New Leaf and whether it sufficiently investigated the allegations against the employee before dismissing or taking actions;
- b. whether New Leaf raised the concerns that it had with Ms Milne before dismissing;

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<sup>1</sup> Section 103A Employment Relations Act 2000

<sup>2</sup> *X v Auckland District Health Board* [2007] ERNZ 66

- c. whether New Leaf gave Ms Milne a reasonable opportunity to respond to the employer's concerns before dismissing;
- d. whether New Leaf genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing.

[22] In a recent decision of the Employment Court in *Angus v Ports of Auckland Ltd*,<sup>3</sup> the Full Court noted that literal interpretations of the considerations prescribed at s. 103A(3) do not sit easily in circumstances where a dismissal is not a result of alleged blameworthy conduct on the part of the employee. However the Court concluded that "*the Authority and the Court should try to give a sensible interpretation to subs (3)*".<sup>4</sup>

[23] The Authority may also consider any other factors it thinks appropriate<sup>5</sup> however the Authority must not determine a dismissal or an action to be unjustifiable solely because of defects in the process taken by an employer if the defects were minor, and did not result in the employee being treated unfairly<sup>6</sup>.

[24] In addition, where an employer is proposing to terminate an employee's employment, including circumstances where it is considering redundancy, an employer must provide the employee with access to information relevant to the continuation of employment, about the decision; and an opportunity for the employee to comment on the information before a decision is made<sup>7</sup>.

[25] The Authority needs to consider and determine:

- a. whether Ms Milne's dismissal is justifiable, in that;
  - i. the redundancy was genuine;
  - ii. a fair and reasonable process of consultation was conducted;
  - iii. the dismissal was the action of a fair and reasonable employer;
- b. if Ms Milne was dismissed unjustifiably, what remedies should be awarded?

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<sup>3</sup> [2011] NZEmpC 160

<sup>4</sup> Ibid at para [52]

<sup>5</sup> Section 103A(4) of the Act.

<sup>6</sup> Section 103A(5) of the Act.

<sup>7</sup> Section 4(1A)(c) of the Act.

**Is Ms Milne's dismissal for reason of redundancy justifiable?**

[26] It was not argued on behalf of New Leaf that Ms Milne's employment was terminated pursuant to the 90 day trial provisions within her agreement.

[27] The Employment Court discussed the law relating to a dismissal on the grounds of redundancy in *Simpsons Farms Limited v Aberhart*<sup>8</sup>. Regarding the genuineness of a redundancy, the court said:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employee's redundant is for the employer to make and not for the Authority or the Court, even under s. 103A<sup>9</sup>.

[28] The court concluded:

Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.<sup>10</sup>

[29] New Leaf presented its case before the Authority as a dismissal by way of redundancy and submits that its decision to dismiss was made based on genuine economic reasons.

[30] New Leaf provided the Authority with financial data including 'Turnover Comparisons' for the years 2010 to mid 2012 and 'Profit and Loss' statements for the period between 1 April 2011 to 24 July 2012 to evidence concerns that in the first quarter of 2012 that there was increasing downward trend in New Leaf's monthly turnover as compared to the same period in the previous two years. The directors acknowledged that this information was not provided to Ms Milne until after her dismissal and I shall return to the issue of provision of information later in this determination.

[31] Ms Milne's counsel challenged the validity of New Leaf's financial data. However, I have no reason to reject the content of those statements. The data

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<sup>8</sup> [2006] ERNZ 825

<sup>9</sup> Ibid – a case that was determined pursuant to the s. 103A justification test prior to 1 April 2011 amendments

<sup>10</sup> Ibid

indicates that during March and April 2012 New Leaf's turnover had fallen by approximately 25% and that the business' operating profit was running at a loss.

[32] On behalf of New Leaf, Ms Shearer says that at the end of March 2012 the directors were becoming increasingly anxious as regards New Leaf's financial health. She says that New Leaf's financial profit had fallen dramatically over the previous two months. Ms Shearer states that New Leaf took a number of measures to reduce costs but that wages represented a significant portion of its outgoings and New Leaf could not sustain the fixed cost of its wages liability.

[33] Little by way of evidence was produced as to why it was Ms Milne who was selected to engage in negotiations to vary hours of work as opposed to the other two employees engaged at New Leaf. However it was apparent during the investigation that the two other employees were considerably less experienced, less qualified, and were paid at a lower rate of remuneration than Ms Milne. Ms Shearer and Ms Okazaki testified that as Ms Milne was "last in" in terms of appointment and paid the highest hourly rate of the then three employees, it made good business sense to negotiate a variation to Ms Milne's hours of work.

[34] Ms Milne argues that her position was not genuinely redundant. She submits that her position remained and she was simply replaced. I do not consider the evidence reflects this proposition. New Leaf employed a junior beautician approximately 4-6 weeks following Ms Milne's dismissal however that individual did not have qualifications comparable to Ms Milne, worked only as and when required and on a much reduced remuneration than that of Ms Milne. I do not accept that this appointment was the same role as Ms Milne's.

[35] There was some evidence that when Ms Milne commenced her role that Ms Okazaki had been working very long hours and had hoped to reduce her hours of work but I accept her evidence was that her hours of work remained consistent prior to and following Ms Milne's dismissal. In this respect I do not accept the submission from counsel that Ms Milne's position remained but that Ms Okazaki placed herself into Ms Milne's role.

[36] Considerable emphasis was placed in submissions for Ms Milne that her position could not have been genuinely redundant in circumstances where she was dismissed for failing to agree to a reduction to her hours of work. However in the

context of the economic circumstances facing New Leaf in early 2012 I consider an attempt to reduce Ms Milne's hours of work does not invalidate the genuineness of her redundancy. Having assessed all the circumstances I consider Ms Milne's position was genuinely redundant in so far as her position was no longer viable at the level of hours and associated remuneration stipulated in her employment agreement.

[37] There is no persuasive evidence to support a conclusion that Ms Milne's purported redundancy was maliciously contrived or was used as a sham for some ulterior motive. It is clear from the correspondence that New Leaf wished to continue Ms Milne's employment albeit on altered terms and conditions. However whilst I consider there was genuine rational to restructure Ms Milne's position I do not consider Ms Milne's dismissal was in any way procedurally fair for the reasons set out below.

[38] It was apparent from the evidence advanced on behalf of New Leaf that it had not obtained HR or legal advice before or during its discussions with Ms Milne.

[39] New Leaf entered into a consultation process with Ms Milne with a view to vary her hours. New Leaf submits that its consultation process satisfies procedural requirements set out at s. 103A(3) of the Act. It is apparent that the focus of the meetings held between 10 and 21 April were to negotiate the removal of Ms Milne's contractual term guaranteeing a minimum of 30 hours of paid work, and Ms Milne's wish to have certainty about the level of guaranteed hours of work she could anticipate. Whilst I accept that New Leaf did consult with Ms Milne as regards its proposal to remove the level of guaranteed hours provided in her agreement there is no evidence that New Leaf's consultation process included any discussion about the possibility that her position would be surplus to requirements if the parties could not reach agreement as to a reduction in hours of work.

[40] Ms Shearer concedes that she could have used words that made it clearer to Ms Milne that her position may become redundant. She considers however that throughout their exchanges it had been made clear to Ms Milne that her employment position could not continue on the terms she had been engaged.

[41] In support of her view, Ms Shearer referred to the letter of 12 April 2012 "*...a change to the terms of the employment contract that will allow us some flexibility financially to ensure your ongoing employment*" and also to statements made by Ms Milne's support

person, Mr Hilland. Ms Shearer says Mr Hilland's observations during the meeting of 18 April 2012 that New Leaf appeared to be acting in good faith by looking to re-negotiate terms of employment instead of terminating employment within the trial period and/or making Ms Milne redundant led New Leaf to conclude that Ms Milne was in receipt of good advice and that she understood the implications of New Leaf's concerns.

[42] Mr Hilland accepts that he spoke generally about an employer's right to terminate employment during a trial period and an employer's ability to implement redundancies according to business need. However his evidence, which I prefer, is that that there was no proposal or discussion whatsoever that either of those options were being considered by New Leaf with regard to Ms Milne's employment.

[43] Ms Shearer says further that she expected Ms Milne, as an assistant manager with considerable experience, to have understood that a reduction in clients led to a reduction in work and the possibility of "*no job*", and that coupled with general conversation within the salon that New Leaf was financially strained, it should have been obvious to Ms Milne that her position was not sustainable.

[44] I do not accept Ms Shearer's view. I find there is no basis to support a proposition that Ms Milne should have drawn inferences from general discussions about New Leaf's downturn in business to lead her to reasonably conclude that her position was no longer required or that such a proposal was in the mind of her employer. I do not accept arguments advanced on behalf of New Leaf's that it was, or should have been, clear to Ms Milne that her position was likely to become redundant in the absence of her agreement to the proposed restructure.

[45] My view that Ms Milne was not advised of the possibility of redundancy is reinforced when I consider the totality of the written communication made by New Leaf. None of those documents evidence a proposal to consult with Ms Milne about the disestablishment of her position or that Ms Milne's position was regarded as surplus to requirements. The letter of dismissal dated 21 April 2012 unequivocally states

Accordingly we regret to advise that we are unable to reach agreement to vary the contract; the original notice that we are unable to extend your employment is confirmed.

[46] The Employment Relations Act 2000 requires an employer to be active and communicative with its employees<sup>11</sup>. This statutory obligation is heightened in circumstances where an employer is proposing a decision that is likely to have an adverse effect on the continuation on an employee's employment<sup>12</sup>. The requirement to provide an employer with information relevant to a proposal to disestablish a position clearly includes an obligation that the employer must convey to the employee the existence of the proposal.

[47] New Leaf was not able to dismiss solely on the basis that it had not obtained agreement with Ms Milne to a variation of terms of employment. Having been unable to reach agreement New Leaf was not able to form a view that Ms Milne's position was surplus to requirements without engaging in a process of genuine consultation as to that view and providing Ms Milne with an opportunity to respond. New Leaf's omission to properly discuss its intentions to terminate employment if the parties were unable to agree to a variation to terms of employment gives rise to a serious and significant defect in the process undertaken by New Leaf and I cannot consider that defect as minor. I conclude the defect in the process resulted in Ms Milne being treated unfairly and in all the circumstances were not the actions of a fair and reasonable employer.

[48] I find also that New Leaf failure to advise Ms Milne that it was considering making her position redundant or provide her with any information as to how it formed that view was a breach of its obligation to act in good faith<sup>13</sup>. New Leaf's actions disadvantaged Ms Milne unjustifiably and her dismissal was unjustified.

## **Remedies**

### ***Loss of remuneration***

[49] Ms Milne initially sought payment of lost wages for six months following termination of her dismissal. This claim was amended during the Authority's investigation and she requests reimbursement of wages from the date of her dismissal to the commencement date of her new employment on 23 July 2012 plus the differential between her current wages and the wages she would have earned for the following three months had she remained in employment with New Leaf.

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<sup>11</sup> Section 4(1A)(b) of the Act

<sup>12</sup> Section 4(1A)(c) of the Act

<sup>13</sup> *ibid*

[50] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee “*as a result of the grievance*”.

[51] If a redundancy is genuine but a personal grievance claim for unjustified dismissal is upheld on grounds such as where that the procedure undertaken by the employer was procedurally flawed resulting in the employee being treated unfairly, any loss of remuneration is said to flow from the loss of the position as opposed to the failure to consult properly. Against this proposition is an argument that a finding that a redundancy is genuine does not inexorably lead to a conclusion that there can be no remedy in respect of lost remuneration. It is still necessary to consider whether, if the employer had acted fairly, would redundancy have occurred. Although decided under earlier legislation the Full Court of the Employment Court took the following approach:

‘... there may be problems with speculation, but where the grievant has been denied an adequate opportunity for consultation and the discussion of alternatives, the consequences should rest upon the employer who would otherwise benefit from wrongful action. There may be plausible evidence of the existence of other options or reasonable alternatives which might have prevented the job loss or have delayed it. If there is, the grievant may have more readily discharged the onus of proving that remuneration has been ‘lost by the employer as a result of the grievance’<sup>14</sup>...

...

[52] Given New Leaf’s financial circumstances I do not consider that there was a reasonable possibility that Mr Milne’s existing guaranteed hours would have continued. However the prospect of reaching an alternative arrangement remained.

[53] It was clear from the evidence that Ms Milne actively engaged with New Leaf’s consultation process to reduce guaranteed hours. During early discussions Ms Milne indicated she would accept a reduction to 25 hours per week. Later she made a counter proposal to work 20 hours. Ms Milne’s evidence that had she known that New Leaf’s proposal of 15 hours of work per week was the most New Leaf considered it could offer she says she would have accepted the variation to the role.

[54] Ms Shearer says Ms Milne’s position was disestablished after her dismissal but accepted in evidence that had Ms Milne accepted the proposed reduction of hours

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<sup>14</sup> *GWD Russels (Gore) v Muir* [1993] 2 ERNZ 332

to 15 a week then the position would have continued although she says that it was likely to have been disestablished later in the year.

[55] While I consider a certain amount of scepticism should be attributed to Ms Milne's speculation as to what would one would have done, in the circumstances of this particular matter I am persuaded by Ms Milne's conduct, evidenced in meetings and correspondence between the parties where she had compromised her position on several occasions during the consultation process. I consider she was likely to continue to do so had she not been dismissed. I conclude that had a proper consultation process occurred whereby New Leaf had fairly advised Ms Milne of its bottom line as regards available hours and that the position would be redundant if no agreement reached, it is more likely Ms Milne would have accepted the proposal of 15 hours per week.

[56] Ms Milne seeks reimbursement of lost wages as a result of her grievance. Her grievance is that she was dismissed unjustifiably from her position. Given my findings that there was a likelihood that Ms Milne would have accepted the role of Senior Beauty Therapist, with 15 hours guaranteed per week at \$25.00 per hour, I consider it is the loss of this position that she should be reimbursed for. Ms Milne should be reimbursed for lost wages associated with the restructured position until she obtained alternative employment 11 and ½ weeks later.

[57] Pursuant to s123(1)(b) I order New Leaf to reimburse Ms Milne \$4,312.50 (minus PAYE) as reimbursement of wages lost as a result of her grievance. I also order pursuant to s123(1)(c)(ii) that New Leaf reimburse Ms Milne \$86.25, the sum equal to 2% employers Kiwisaver contribution attached to those wages.

### ***Humiliation and distress***

[58] Ms Milne claims compensation of \$10,000 for hurt and humiliation as a result of the way New Leaf dismissed her. I am satisfied that Ms Milne did not in any way contribute to the situation which gave rise to her personal grievances.

[59] Ms Milne gave evidence as to the shock and surprise she experienced on realisation that her employment was terminated in circumstances where she had no prior warning about the matter, or any information about why that decision was made. I accept her evidence that she felt humiliated as a consequence of the process undertaken taken by New Leaf. I order New Leaf to pay the sum of \$6,000 as

compensation for Ms Milne's distress arising from the way in which she was dismissed.

**Breach of good faith**

[60] No remedies associated with Ms Milne's claim of breach of good faith were requested and I decline to make any award in respect of this element of her claims.

**Costs**

[61] Costs are reserved.

**Summary of orders**

[62] New Leaf is to pay to Ms Milne:

- i. pursuant to s.123(1)(b) the sum of \$4,312.50 minus PAYE, as reimbursement of her lost wages as a result of the grievance;
- ii. pursuant to s.123(1)(c)(ii) New Leaf reimburse \$86.25, the employers Kiwisaver contribution attached to her lost wages.
- iii. pursuant to s.123(1)(c)(i) the total sum of \$6,000 as compensation for her personal grievances.

Michele Ryan  
**Member of the Employment Relations Authority**