IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 335
3000221

	BETWEEN	ROCHELE REID Applicant
	A N D	LEISHA ANDREWS t/a ALTERATIONS & DESIGNER GARMENTS Respondent

Member of Authority:	Nicola Craig
Representatives:	Hamish Burdon, Advocate for Applicant Rose Alchin, Counsel for Respondent
Investigation Meeting:	6 and 7 April 2017 at Hamilton
Submissions Received:	21 April, 10 May and 29 August 2017 from Applicant 3 May, 2 June and 31 August 2017 from Respondent
Date of Determination:	25 October 2017

DETERMINATION OF THE AUTHORITY

A. **Rochele Reid was subject to three unjustified actions during June and July 2016 by Leisha Andrews to Ms Reid's disadvantage concerning unpaid suspension, not allowing Ms Reid to return to work unless she accepted unpaid suspension and resuming a disciplinary process where a warning had already been given.**

B. **For those grievances Ms Andrews is ordered to pay Ms Reid $5,400.00 compensation within 28 days of the date of this determination.**

C. **Ms Reid was subject to an unjustified action by Ms Andrews to Ms Reid's disadvantage regarding a reduction in her hours of**

work.

D. For that grievance Ms Andrews is ordered to pay Ms Reid within 28 days of the date of this determination:

(i) $816.64 gross as lost wages;

(ii) $1,800.00 as compensation.

E. Ms Reid's other personal grievance claims are not successful.

F. Ms Andrews is ordered to pay Ms Reid the following arrears within 28 days of the date of this determination:

(i) $15.25 gross for work on 16.9.16;

(ii) $114.37 gross owing for the payment made on 28.7.16;

(iii) $114.37 gross as sick leave owing for 29.7.16;

(iv) $114.37 gross as statutory holiday pay for Queen's Birthday 6.6.16; and

(v) $101.26 gross as holiday pay, and $37.97 gross as Kiwisaver contributions, on the lost wages and arrears sums awarded.

G. Costs are reserved and a timetable set regarding submissions.

Employment relationship problem

[1] The respondent, Leisha Andrews, runs Alterations & Designer Garments, a sewing business and shop, operating in Tokoroa.

[2] The applicant, Rochele Reid, was employed to undertake sewing, pattern adapting, customer service and other shop duties at Alterations & Designer Garments. Ms Reid began as a casual employee in July 2014 and subsequently became a permanent employee.

[3] Ms Reid had not been the subject of any disciplinary action until she was given a warning letter in April 2016 (confirming a verbal warning) for *"using the*

shop as a drop off place for personal items" and *"making mistakes because your mind isn't on the job at hand"*.

[4] In late June 2016 Ms Andrews saw an incident on the shop's recorded surveillance video which caused her concern. It involved Ms Reid handing over a sewing machine to a customer, then leaving her in the shop alone whilst going upstairs to the sewing room, with the shop's till open and cash on the counter.

[5] As a result, Ms Andrews stood Ms Reid down from work for two weeks and gave her a warning on 8 July 2016. In the end Ms Reid did not return until 25 July 2016. Initially this time off work was unpaid, however, Ms Andrews subsequently paid Ms Reid for at least most of that period.

[6] In mid-July 2016, both parties got representatives involved. Various grievances were raised for Ms Reid. Ms Andrews then called Ms Reid to a disciplinary meeting regarding largely the same matters as were the subject of the 8 July 2016 warning.

[7] On 29 July 2016, Ms Andrews sent Ms Reid a warning letter, replacing the 8 July 2016 warning, based on serious misconduct.

[8] Reduced hours of work were subsequently offered to Ms Reid. Then in September 2016, Ms Andrews commenced formal discussion with Ms Reid about her performance, leading to a final warning on 14 October 2016 regarding poor performance.

[9] The parties attended mediation on 17 October 2016. Ms Reid went to her doctor and obtained a medical certificate on 18 October 2016.

[10] On 19 October 2016, Ms Reid handed in her letter of resignation outlining that financially and emotionally she could no longer tolerate the way that she had been treated at work, that she felt like her every move was watched and monitored and that this had caused her a great deal of stress and anxiety. Her last day of employment was 1 November 2016.

[11] Ms Reid brings a large number of claims concerning various clauses in her employment agreement, personal grievances and arrears.

[12] An investigation meeting was held in Hamilton on 6 and 7 April 2017. At the meeting, evidence was given by Ms Reid, her husband John Reid, and her mother-in-law, Isabel Reid, Ms Andrews, her partner Hohepa Yates, and an employee Carol Vermeeren.

[13] Submissions were received from the parties after the investigation meeting. The Authority later requested and received further documents and submissions about pay issues.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[15] The issues for investigation and determination are:

(a) Was Ms Reid unjustifiably disadvantaged by Ms Andrews' action regarding clause 3 of the individual employment agreement concerning re-work?
(b) Was she unjustifiably disadvantaged by actions regarding clause 6 of the agreement concerning meal breaks?
(c) Was the restraint of trade clause (clause 9) lawful?
(d) Was Ms Reid unjustifiably disadvantaged by the suspension and withholding of wages in June and July 2016?
(e) Was she unjustifiably disadvantaged regarding the 8 July 2016 warning?
(f) Was she unjustifiably disadvantaged by the repeating or re-starting of the disciplinary process in July 2016 and was Ms Andrews in breach of her good faith obligations in that regard?
(g) Was Ms Reid unjustifiably disadvantaged regarding the 29 July 2016 warning?
(h) Was Ms Reid unjustifiably disadvantaged regarding Ms Andrews' refusal to attend mediation?
(i) Was she unjustifiably disadvantaged regarding the reduction in permanent hours of work without consultation or process?
(j) Was Ms Reid unjustifiably disadvantaged by Ms Andrews' actions regarding threatening and bullying behaviour?
(k) Was Ms Reid constructively dismissed, and if so, was it unjustified?

(l) In the event that any of the above claims are successful what remedies (if any) should Ms Reid receive?
(m) Is Ms Reid owed any wages arrears, including for sick leave and public holiday entitlements?

[16] A claim was initially made for holiday pay outstanding, but it was subsequently clarified that holiday pay had been correctly paid on the basis of Ms Reid's actual earnings and this matter therefore does not need to be investigated. In the event that Ms Reid is awarded wage arrears under one of her other claims, holiday pay was sought on those sums.

[17] In the statement of problem the April 2016 warning was also raised as an unjustified disadvantage claim but the respondent objected that this had not been raised within the 90 day period as required by s 114 of the Act. The claim was later withdrawn, although it is mentioned in this determination as background to the subsequent warnings.

[18] The final written warning of 14 October 2016 was relied on in relation to the constructive dismissal claim but was not raised as a separate basis for a disadvantage grievance.

Individual employment agreements

[19] The parties were unable to agree whether there had been two or three written employment agreements between them, and whether there had been changes discussed and agreement reached to proposed amendments. At least one further agreement was provided when the minimum wage rose and Ms Reid's pay was increased to reflect that.

[20] None of the agreements was signed, but Ms Reid accepted that she was bound by the terms of them. The contents of the agreements which were provided to the Authority are largely the same other than the start date and the wage rate. In any event, I do not consider that the claims in this case are affected by any disputes as regards the formation or amendment of employment agreements.

Re-work

[21] Ms Reid claims an unjustified disadvantage grievance based on clause 3 in her employment agreement. Clause 3 imposed certain obligations on Ms Reid including:

> If a re-work is required because the job has not been completed in a satisfactory manner this re-work will not be paid time to the employee, and any cost that is incurred because of this, will be paid back to the Employer by the Employee.

[22] Leaving aside the issue of the employee having to pay back any cost, the clause purports to require the employee to undertake work for the employer without pay. I have serious concerns about such a concept, particularly for someone who is on a wage rather than a salary, and where that wage was based on the minimum wage. However, I heard little in the way of submissions on this clause.

[23] I question whether this disadvantage claim might be said to be based on an action "deriving solely from the interpretation, application or operation or disputed interpretation, application or operation of any employment agreement" and therefore excluded under s 103(3) of the Act.

[24] In any event, there was very limited evidence regarding any possible application of this clause. Ms Reid says that re-works had not been done in her own time except that she had come in on her own time in a couple of situations to fix things herself. The only specific instance she was able to identify was one entry on an undated timesheet when Ms Reid had noted on a Friday that she had "come in to finish tops in my own time". She identified this as Friday 16 September 2016.

[25] In that instance Ms Reid says that she came in off her own bat, and not as a result of being directed to by Ms Andrews. She had not expected to be paid. She came in to complete a task and there was no suggestion that this was re-work directed to be done pursuant to clause 3.

[26] On that occasion Ms Reid was not paid for that hour which was on her timesheet and should have been. I therefore order Ms Andrews to pay her the arrears of an hour of her then hourly rate, $15.25 gross within 28 days of the date of this determination.

[27] There was another note by Ms Andrews that "Rochele will make up the time this week" and Ms Reid's hours appeared to be changed on her timesheet, but the evidence was not at all clear that this was an instance of her having to work in her own time.

Meal Breaks

[28] Ms Reid claims that she did not get lunch breaks on some occasions, roughly estimated as two thirds of the days which she worked. However, she acknowledged that she was always allowed to take a lunch break.

[29] The individual employment agreements provided for Ms Reid to get a lunch break of half an hour when she worked a full day.

[30] Ms Andrews understands that lunch breaks were taken when they fell due but she was frequently away from the shop premises attending to her other business. Submissions on her behalf emphasise that Ms Reid provided no records to substantiate her claim and prior to her advocate becoming involved she had never raised this claim.

[31] There appears to have been little discussion on the issue of breaks during Ms Reid's employment. Ms Reid says that she was never told by Ms Andrews to shut the shop for a short period to allow her to take a break. She appears to have taken on responsibility to ensure that the shop was kept open in case customers came, so if there was no one else to relieve her she ate her lunch in the shop. She did not mention the problem to Ms Andrews or make reference on her timesheets to having to work through her lunch breaks.

[32] Ms Andrews produced signs which she says were put up indicating that the shop was temporarily closed. Ms Reid says she was only aware of one sign saying that the shop was shut for five minutes, which she had used.

[33] Whilst Ms Reid may have been disadvantaged on occasions by not getting a proper break from work for lunch, in order to establish a personal grievance claim it must also be shown that it was Ms Andrews' action which caused that disadvantage. I

am not satisfied that Ms Andrews did instruct Ms Reid to keep the shop open or require her to keep working, and thus this grievance claim does not succeed.

[34] On Ms Reid's behalf compensation was also sought for an unjustified disadvantage of not discussing a similar or related concern about the lunch room being on a different floor to the shop, after it was raised with other matters by her representative in his 20 July 2016 letter. The issue appears to have got swamped by the suspension and disciplinary process issues which were occurring at that time, and which were the primary subjects of that letter. The parties later mediated matters which are not in evidence due to the confidentiality of the mediation process.

[35] Although a failure to discuss issues raised may amount to a breach of the duty of good faith, there was no evidence that Ms Reid actually missed out on lunch breaks after 20 July 2016. Given that both parties acknowledge that after the 29 July 2016 warning, Ms Andrews did not want Ms Reid in the shop alone, it seems unlikely that she would have had lunch breaks alone. I can take this matter no further.

Restraint of Trade

[36] Ms Reid's statement of problem sought to clarify the lawfulness of clause 9 of the employment agreement. That clause purports to prohibit Ms Reid from solicitation of Ms Andrews' employees, starting a similar business, and accepting work from Ms Andrews' customers.

[37] However, at the investigation meeting little evidence was provided by either party relating to the restraint of trade issue and Ms Reid did not appear too concerned about the restraint.

[38] I therefore make no finding on the restraint of trade clause. In the event that either party wishes to pursue this matter, leave is given to return to the Authority on this issue.

April warning

[39] Ms Andrews gave Ms Reid a warning in 8 April 2016. The warning was for using the shop as a drop off place for personal items and making mistakes because her mind was not on the job at hand.

[40] The first point concerned Ms Reid using the Alterations & Designer Garments shop as an occasional drop off and collection point for horse covers which Ms Reid worked on independently of the Alterations & Designer Garments' work and for sewing machines which her husband, John Reid, repaired at home. The immediate problem for Ms Andrews was a machine which was getting in the way in the shop, which was to be taken home for Mr Reid.

June Video

[41] On 23 June 2016 Ms Andrews was checking video surveillance of the shop for the month, as the surveillance is only retained for a limited time. She saw for the first time footage from around 9am on 1 June 2016 that disturbed her.

[42] The video showed a customer entering the shop whilst Ms Reid was alone sorting cash on the counter with the till open. The customer collected a sewing machine from Ms Reid without making any payment. Ms Reid proceeded to search for pieces of fabric which she gave to the customer and then went upstairs to the sewing area of the business apparently to look for more fabric for the customer. The customer was left alone in the shop with the till open with money in it and cash bags on the counter. Ms Reid returned to the shop and gave the customer a bundle of fabric pieces with no payment made. The customer left with the machine and the fabric.

[43] Ms Reid phoned in sick to work on 24 June 2016. Ms Andrews did not question Ms Reid's health but asked Ms Reid to come into the Alterations & Designer Garments premises that day to look at a video. Ms Andrews did not say what she wanted to meet with Ms Reid about.

Suspension and start of disciplinary process

[44] When Ms Reid came into the shop, Ms Andrews called her into the office and showed her the video. Ms Reid said that the customer was the woman who had had her machine fixed by Mr Reid, the same machine as from the April warning.

[45] Ms Andrews told Ms Reid that she was standing her down for two weeks without pay and that she would get in contact with Ms Reid once she had made a decision about what to do.

[46] At the investigation meeting Ms Andrews provided an explanation for imposing a suspension of two weeks. She says that the first week was enough for Ms Andrews to get Ms Reid's outstanding work finished and the second week was because she was in shock and did not know what to do. However, this does not really explain what the second week was for. The need for Ms Reid's removal from the premises is not clear.

[47] Ms Reid was shocked by being told that she was suspended and did not comment regarding the standing down. She accepts that she knew straight away that leaving the cash on the counter was a silly thing to do.

[48] Ms Andrews accepts that there was no advice to Ms Reid before the meeting concerning what the meeting was going to be about. She says that she was in shock and the situation spiralled out of control. She now knows that she should have done things differently, but then she needed to get her head around what was happening and did not know what to do.

[49] There can be little doubt that the unpaid suspension was unfair. Ms Reid had no notification prior to the 24 June 2016 meeting what it was about except that it concerned a video. She did not know either the subjects to be discussed, or the possible consequences. Rather Ms Reid was suddenly told that she was being suspended. There was no opportunity to comment before the decision was made.

[50] The employment agreement did not provide for unpaid suspension, or mention suspension at all. Ms Reid received a wage payment on 30 June 2016, but this appears to have been for the period of work leading up to the suspension. She was not paid anything on the next pay day. There was a lack of clarity at the investigation meeting whether Ms Andrews paid Alterations & Designer Garments' staff right at

the end of the pay period or the week later. The latter seemed more consistent with the limited amount of handwritten timesheets available and the payroll system record of payments.

[51] The unpaid suspension was an unjustifiable action by Ms Andrews to Ms Reid's disadvantage as it was not what a fair and reasonable employer could have done in all the circumstances[1]. I will deal with the issue of remedies below.

Suspension continues

[52] At a later stage Ms Andrews called Ms Reid to set up a meeting. Ms Andrews said to bring a support person as the matter was serious. The meeting was held on 7 July 2016, two weeks after the suspension. It had been set for a couple of days earlier but Ms Reid postponed due to needing medical treatment for a broken finger. The scheduling of the meeting appears to have been because this was in accordance with the two week timetable which Ms Andrews had set for herself.

[53] Ms Andrews sought by text to postpone the 7 July date to 8 July 2016 but Ms Reid sought to have it on the 7th as she texted that she had "been feeling sick all day waiting to see if I still have a job". Although Ms Reid was not advised formally about there being possible disciplinary action or dismissal, from her text she clearly had a sense of her employment being in jeopardy.

7 July meeting

[54] Ms Reid, Mr Reid and Isabel Reid (Mr Reid's mother, referred to as Mrs Reid) attended the meeting with Ms Andrews. Neither party has any notes of this meeting.

[55] The parties discussed the sewing machine which was given to the customer on 1 June 2016. Ms Andrews believed that this was a different sewing machine to the one leading to the April warning, due to it having a different type of cover. The Reids believed that it was the same machine.

[1] S 103A of the Act

[56] The video of 1 June 2016 was discussed and Ms Reid admitted that she had "stuffed up" regarding leaving money out in the open. Ms Andrews said that Ms Reid had no right to give away fabric samples or scraps to customers.

[57] Towards the end of the meeting Ms Andrews told Ms Reid that she was going to give her a warning letter and to come back the following day with her husband to get it.

[58] Without any letter in advance setting out clearly what Ms Andrews' concerns were, or any meeting notes, there was some dispute regarding the details of what was discussed at the meeting. Mr Reid recalls that Ms Andrews mentioned theft, in relation to the sewing machine (suggesting that it was shop property which was stolen) and theft of fabric. Ms Andrews says that she was talking about theft of the business opportunity of her fixing the sewing machine, as she did some less complex repairs on machines.

8 July warning

[59] On 8 July 2016 Ms Reid came in as instructed, although she did not bring a support person with her. Ms Andrews gave her a warning letter which was mistakenly dated "24th June 2016-07-08". Ms Reid signed to acknowledge receipt.

[60] The warning concerned Ms Reid using the shop as a drop off and pick up point for her own customers, leaving money from the till on the counter and the cash register open unattended. The warning was to remain on Ms Reid's file for 12 months with any misconduct during that time possibly leading to a second and final warning.

[61] Given that this warning was subsequently replaced, I will deal with the justifiability of giving a warning on these issues later, when discussing the 29 July 2016 warning.

The second letter

[62] With the 8 July 2016 warning letter, Ms Andrews gave Ms Reid a second letter with unsigned signature provisions for both parties and a support person. This read:

> I Leisha Andrew, Stood you down (Rochele Reid) for two weeks without pay to seek legal advice on what should happen with your employment. …
> The advice I was given was to terminate the contract.
> I took into consideration the effect that would have on Rochele's future opportunities and decided that terminating her contract for serious misconduct will have a huge future effect on her reputation.
> I have decided to give Rochele a written warning, and for Rochele to except *(sic)* the stand down period without pay instead of Terminating her contract".

[63] I take the reference to "except" the stand down period without pay to mean "accept". Ms Reid told Ms Andrews that she did not think that that was fair. Ms Andrews told Ms Reid to take it to her husband to have a look at and get back to her.

[64] In her witness statement Ms Andrews said that she did not think it was reasonable for her to have to pay for Ms Reid's suspension when Ms Reid had broken her finger and been away to a funeral and would not have been able to work those two weeks.

[65] However, there appears to have been no discussion about Ms Reid's ability to work with a broken finger and the funeral was on the afternoon of the day she initially had her finger treated. Text evidence established that Ms Andrews found out on 5 July 2016 that Ms Reid was at A and E that day with the broken finger. At that point Ms Reid had been suspended for 10 days. I do not find Ms Andrews' explanation credible.

[66] There was no further evidence regarding when or from whom Ms Andrews obtained any legal advice which is referred to in the letter.

[67] Ms Andrews said at the investigation meeting that the letter was an offer which was up for negotiation. However, she did not say that to Ms Reid and presentation of the already typed letter, with no reference to draft or proposal or the like on it, with signature provisions, suggests otherwise.

[68] Ms Andrews' recollection was that she asked Ms Reid to contact her on Sunday 10 July 2016 to confirm whether she was coming back to work and whether she agreed to sign the letter or not.

[69] The implication of the letter, in combination with the question about whether Ms Reid was returning to work, was that if she did not sign the agreement that she might or would be dismissed.

[70] Ms Andrews therefore gave Ms Reid an ultimatum, either sign and accept that she got no pay or she was terminated.

Attempted return to work

[71] Despite having received the warning letter on 8 July 2016, Ms Reid's return to work was not straightforward. Despite the ultimatum given by Ms Andrews, as set out below, Ms Reid was not dismissed even though she did not sign the letter.

[72] The evidence of Ms Andrews and Ms Reid about aspects of events over the few days following the 8 July 2016 meeting is inconsistent. However, neither woman's evidence fits clearly with the evidence of the other Alterations & Designer Garments' employee Ms Vermeeren, who was a relatively neutral person at that point at least. Neither Ms Andrews' nor Ms Reid's evidence fits into a coherent picture within itself.

[73] On Saturday 9 July 2016 Ms Vermeeren went to Ms Reid's house to drop off the set of shop keys so Ms Reid could open the shop on Monday. Ms Andrews says that this was not authorised by her. However, Ms Vermeeren says that Ms Andrews had told her, probably on Friday, that Ms Reid was coming back to work on Monday. I accept Ms Vermeeren's version of events in this regard.

[74] When offered the keys Ms Reid expressed some uncertainty about whether she would be working but took the keys.

[75] Also on 9 July 2016, for no apparent reason, Ms Andrews texted Ms Reid asking for the name of the customer in the surveillance video that Mr Reid did the sewing machine repair for. Ms Reid replied that she could not remember her name and that she just knew her face.

[76] On Monday 11 July 2016 Ms Reid drove to the shop. Before she could go in, Ms Andrews phoned her and asked if she had signed the second letter. Ms Reid replied that no, she had not because she did not agree with it. Ms Andrews said she could not be at work until she did. Ms Andrews' version of events is that she said we need to sort this out before Ms Reid could come back to work. There is no evidence however, that Ms Andrews expressed to Ms Reid that the contents of the letter were up for negotiation. I find that even if Ms Andrews believed it, she did not express that to Ms Reid. Understandably Ms Reid believed that she was being given an ultimatum.

[77] I find that not allowing Ms Reid to return to work until she had agreed to sign the letter, effectively giving up claiming pay for the period of suspension or be dismissed, amounted to an unjustified action by Ms Andrews to Ms Reid's disadvantage. Remedies are dealt with below.

[78] The parties were at a stalemate. They did however exchange civil texts with each other that evening about whether Ms Reid's mother could find a payment she was said to have made regarding the shop.

12 July meeting

[79] Ms Reid was by now receiving advice from her employment advocate. She texted Ms Andrew on the morning of 12 July 2016 saying: "Hey I'm coming to work today?". Ms Andrews replied "Ok what happen with the letter and John". Ms Andrews then called Ms Reid.

[80] During that call Ms Reid says that she asked Ms Andrews if she was terminating her contract and Ms Andrews said 'yes'. Ms Andrews denies this. After the call Ms Reid texted that as per Ms Andrew's phone call, she is not signing the letter and "u terminating my contract, is this your final answer?". A few hours later Ms Andrews replied that Ms Reid needs to come in so the process can be done right. She reports that Ms Vermeeren had told her that Ms Reid was not coming back because she did not want to sign the letter.

[81] Ms Andrews denied on several occasions at the investigation meeting that there was a meeting between the parties on 12 July 2016 as she was not able to recall

one. However, Isabel Reid gave evidence, which I accept, about coming in to meet with her daughter in law and Ms Andrews and produced notes which she took at the meeting. Ms Andrews' denial appears to have been based on her lack of recollection of a meeting, whereas text messages produced clearly show a meeting being lined up. At the meeting Ms Andrews discussed various aspects of what had happened in recent days. At this point Ms Andrews did make it clear that she did not want Ms Reid to return to work until the problem or issue was sorted.

13 July meeting

[82] Another meeting with the same participants, plus Ms Andrews' partner, was held the next day. Ms Andrews showed Ms Reid a draft letter dated 12 July 2016. In the letter Ms Andrews acknowledges that she has to pay the two weeks' stand down period. She also questions whether the parties can work together without trust and honesty. The letter does seem to suggest that Ms Reid's employment was to finish, as it says that in addition to being paid the two weeks' stand down pay, Ms Reid will be paid holiday pay.

[83] Some changes to the letter were proposed by Mrs Isabel Reid and agreed to by Ms Andrews, but the latter did not agree to add in a reference that she had terminated Ms Reid's employment. A meeting was set for the following day. Ms Andrews later confirmed by text that she had made the changes, but ultimately the letter was not finalised and given to Ms Reid.

14 July meeting

[84] A short meeting was held the following day with Ms Reid's advocate attending. Ms Andrews says that she thought that he was a friend of Ms Reid's rather than a paid advocate. Further, when the advocate raised mediation, she only stated that she would go if there was a disagreement, on that basis of her understanding of the advocate as a friend. Ms Andrews later advised that she did not wish to go to mediation.

[85] The meeting was followed up with a letter from Ms Reid's advocate on 20 July 2016. The letter raised various issues about Ms Reid's employment agreement, various disadvantages and an unjustified dismissal claim, based on the 12 July 2016 (draft) letter.

Further disciplinary process

[86] Ms Andrews' lawyer then responded on 21 July 2016 saying that there was no termination, that payment would be made for the period Ms Reid was off work, and that Ms Reid was expected back to work on Monday 25 July 2016. Further, Ms Reid was requested to attend a disciplinary meeting on 27 July 2016 to provide her explanation for matters seen on the 1 June video. Although summary dismissal is said to have been a possible normal outcome for a serious misconduct matter, as Ms Reid had previously been advised that the most serious outcome was a written warning, that would be the most serious possible outcome of this process. Any such warning would replace the earlier warning. Ms Andrews was said to be anxious to get the employment relationship back on track.

[87] Submissions for Ms Reid refer to this as re-starting the disciplinary process. However, the 21 July 2016 letter does not actually withdraw the warning given on 8 July 2016. Rather it seems to extend the disciplinary process.

[88] The letter contains what appear to be inconsistent statements about whether a warning has already been issued. Earlier it appears to imply that a warning has not been given, when it states that Ms Andrews offered Ms Reid the opportunity to return to work and:

> "…be issued with a written warning, but that she would not be paid for the stand down period. This proposal was made as an alternative to terminating your client's employment for serious misconduct.
>
> Your client indicated that she was not prepared to accept this option…."

[89] However, later the letter states that any warning issued in the up-coming future process "would replace that issued dated 24 June 2016", referring presumably to the misdated 8 July 2016 warning letter.

[90] Ms Reid was in fact issued with a written warning on 8 July 2016. Ms Andrews in her own witness statement says that Ms Reid "accepted the written warning and signed it".

[91] I accept that in some circumstances an employer, having had concerns about their actions part way through a process, may, or in fact must, correct those actions[2]. However, here the employer had in fact already given a written warning almost two weeks previously. Now, through her representative, she is being somewhat ambiguous about whether that one had been issued, continuing with the disciplinary process, gathering more evidence and possibly replacing the earlier warning with a new warning. On that basis the earlier warning could potentially be left in place and no subsequent warning issued.

[92] The 21 July 2016 letter does not acknowledge difficulties with the process so far. There was no withdrawal of the warning already issued. Rather there was an attempt a few days later to categorise the process so far as being an informal one, whereas the appropriate step now was seen as being a formal disciplinary investigation[3].

[93] That is an unsatisfactory basis on which to proceed. I am satisfied that continuing or restarting a disciplinary process when the earlier warning was now a couple of weeks old and is not expressly removed or rescinded, amounts to an unjustified action on Ms Andrews' behalf which was to Ms Reid's disadvantage. I will consider the issue of remedies below.

Return to work

[94] As directed Ms Reid returned to work on 25 July 2016. Regardless of earlier comments regarding termination or resignation, I find that the parties agreed that Ms Reid's employment would continue without termination.

[95] Ms Reid's advocate subsequently objected to a second or third disciplinary process being restarted about the same event. The reference to a third process appears to have been on the basis that the April warning concerned the same sewing machine

[2] See for example, *Pacifica Fishing (Christchurch) Ltd v Buckingham* [1999] 2 ERNZ 621
[3] Letter of 26 July 2016 from Ms Andrews' lawyer

being brought into the shop, albeit to go to Mr Reid, rather than back to the customer. However, I would see the return of a machine to the shop for return to Mr Reid's customer as being a separate matter from the earlier drop off at the shop which led to the April warning. Ms Andrews' lawyer responded that in fairness to all parties, the appropriate step is to undertake a formal disciplinary investigation into the incident.

Disciplinary meeting and outcome

[96] On Ms Reid's behalf it was argued that Ms Andrews was not neutral and was effectively a witness and a decision-maker in the extended disciplinary process. With a larger employer that point would have been well made. However, this was a very small employer. Ms Andrews was the sole owner and there were no other managers who could undertake the process. I am not satisfied that her continued involvement, particularly with a legal representative assisting her, was unjustified.

[97] At the meeting on 27 July 2016 both sides were represented and events were recorded. Although there was some initial question about the particular nature of the allegations, the meeting proceeded to a lengthy discussion about allegations and an exploration of what had happened since 24 June 2016.

[98] Ms Andrews later issued a lengthy warning letter to Ms Reid. Although incorrectly dated 1 September 2007, it was sent to Ms Reid on 29 July 2016. The warning identifies that serious misconduct has occurred. The first issue outlined was using the shop as a collection point for the machine, an issue previously warned about, as well as not being willing or able to identify the customer. There is a suggestion that business opportunities may be being diverted from Alterations & Designer Garments.

[99] The second issue is identified as leaving unattended cash out in the shop with a customer and the third, giving away pieces of fabric, especially now unprocurable fabric.

[100] The letter advises that such serious misconduct as this would normally result in summary termination however, because of the previous advice, the outcome was a written warning. The letter goes on to state that Ms Andrews' trust and confidence in Ms Reid has been seriously diminished.

Justification for a warning

[101] I am satisfied that, with at least two of the issues raised by Ms Andrews, a warning was justified as something which a fair and reasonable employer could have done in all the circumstances. The first concerns the use of the Alterations & Designer Garments shop as a drop off or pick up point for items from Mr or Ms Reid's own side businesses. Ms Reid knew from the April warning that Ms Andrews did not want this to recur. Mr Reid says that he, rather than his wife, brought the machine into the shop to go back to the customer. However, Ms Reid should have taken steps to remove the machine promptly. I am not satisfied that there was a diversion of a business opportunity belonging to Ms Andrews.

[102] The issue of leaving a customer alone in the shop with cash on the counter and the till open also justified a warning. Ms Reid could offer no explanation for her actions and accepted that she had stuffed up. On her behalf it was argued that Ms Andrews did not pay for staff to work earlier than the 9am start when customers could come in. However, that does not explain why the money could not be put in the till or somewhere else secure in the event that Ms Reid needed to leave the customer alone in the shop.

[103] Reference was made on Ms Reid's behalf to some procedural matters regarding the late July process leading to the 29 July 2016 warning. However, I am satisfied that any defects at that stage were minor and did not result in Ms Reid being treated unfairly[4].

Refusal to attend mediation

[104] Ms Reid claims an unjustified disadvantage regarding Ms Andrews' earlier failure to agree to attend mediation. This claim was said to be based on an obligation in the individual employment agreement to attend mediation.

[105] Although it is perhaps unfortunate that Ms Andrews did not agree to go to mediation sooner, there was no reference to mediation in Ms Reid's employment

[4] S 103(5) of the Act

agreement. There is a question about whether the very brief clause in that agreement regarding resolving employment relationship problems complies with the employer's obligation under s 65(2)(vi) of the Act. However, that subsection only requires a plain language explanation of the services available for the resolution of employment relationship problems[5].

Remedies for grievances

[106] I now consider remedies for the unjustified disadvantage grievances which I have found established. These were the unpaid suspension, the refusal to allow a return to work without a waiver of a pay claim, and restarting or expanding the disciplinary process without rescinding the earlier warning.

[107] Much was made on Ms Andrews' behalf of the fact that Ms Reid was paid back for the wages for her period of the initial suspension and the subsequent period before Ms Reid's return to work. However, the fact remains that Ms Reid was suspended without pay. Payment was only made at the end of July, almost five weeks after the suspension started.

[108] There was a lack of clarity regarding whether there were any wages lost as a result of the grievances. For Ms Reid it was claimed that there may have been a day or so unpaid in this period. However, this was also connected with a claim that not all sick leave was paid. I will therefore deal with this below under the arrears claim.

[109] Ms Reid sought $5000 compensation under s 123(1)(c)(i) of the Act for each unjustified disadvantage grievance.

[110] Ms Reid provided some evidence of the effect on her of the events during June and July 2016. She says that her health and ability to function was affected by having to attend numerous investigation and disciplinary meetings. Ms Reid's text message of 7 July 2016 says that she did not want to postpone a meeting as she had been feeling sick all day waiting to see if she still had a job.

[5] Including the 90 day period within which personal grievances must be raised.

[111] Ms Reid was uncertain whether she even still had a job during this period. She felt pressured to sign the agreement to waive her pay entitlements from the suspension period. The weeks without pay put pressure on her family's financial position.

[112] I consider it appropriate to order a global compensation remedy for Ms Reid's grievances in the June and July 2016 period would be $6,000.00.

[113] However, I must consider whether Ms Reid contributed to the situation which gave rise to her grievances. To make a reduction Ms Reid's actions must be both causative of the outcome and blameworthy[6].

[114] Had I found that the 29 July 2016 warning amounted to an unjustified action then I would have found that Ms Reid's actions had more substantially contributed. However, the grievances which I have found are focused on procedures undertaken by Ms Andrews. Ms Reid's conduct was the background to Ms Andrews' decision to order unpaid suspension, rather than a significant cause of the actions which Ms Andrews undertook. I therefore make a 10% reduction from $6,000.00 and order Ms Andrews to pay Ms Reid $5,400.00 as compensation within 28 days of the date of this determination.

Threatening and bullying behaviour

[115] This complaint primarily concerns actions by Ms Vermeeren, but also refers to one comment by Ms Andrews to Ms Reid including a reference to "game on" just before Ms Reid resigned. Submissions filed on Ms Reid's behalf refer to other matters concerning Ms Andrews but these are covered in other claims so I will not consider them here.

[116] Ms Reid says that this claim refers to two events of swearing or abusive language, one which she complained about to Ms Andrews in a 27 July 2016 email and one which occurred later. Ms Andrews says that this was one event.

[117] The incident which Ms Andrews accepts happened, involved Ms Vermeeren calling Ms Reid a "lying bitch" following Ms Reid's disciplinary meeting on 27 July

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[6] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

2016. Ms Vermeeren was indignant as she believed that Ms Reid had misconstrued her words and misrepresented what Ms Vermeeren had said to Ms Andrews as part of the disciplinary process.

[118] Ms Reid emailed Ms Andrews on the same day as the incident complaining of bullying and harassment behaviour. This resulted in Ms Andrews speaking to Ms Vermeeren and making an arrangement that she would stay away from Ms Reid. This seems to have been relatively successful as Ms Reid recognises that she and Ms Vermeeren later became civil to each other again. She also accepts that everyone swore on occasions in the workplace.

[119] Ms Reid says that there was a second incident with Ms Vermeeren after July about a different matter and produced a recording of that event. There is no date provided for the recording. Ms Reid says that she did not raise the second incident with Ms Andrews.

[120] I have considered a transcript of the recording. The conversation starts with Ms Reid saying "morning", which does not appear to be consistent with the timing of the first incident. However, the content of the discussion is very much in keeping with events in July, the disciplinary process and Ms Vermeeren being annoyed about being caught up in it. I am not satisfied that the recording reflects a second incident.

[121] I find that Ms Andrews accepted Ms Reid's word regarding Ms Vermeeren swearing at her and took steps to ensure that it did not recur. Subsequently there was no repetition. Ms Reid has no claim in this regard.

Follow up on grievances

[122] After the 29 July 2016 warning, correspondence between the parties' representatives continued. A 19 August 2016 letter from Ms Reid's representative requested responses on the previous personal grievance claims and documents, and raised disadvantage grievances regarding reduced work hours and restructuring without consultation[7]. The 29 July 2016 warning itself was not directly raised as a personal grievance at this point, although there is reference to there having been

[7] These are detailed below

another disciplinary round leading to further written warnings. A repeated request for mediation is made. Ms Andrews' representative responded, agreeing to mediation.

Reduction in hours

[123] Ms Reid claims that she was unjustifiably disadvantaged by Ms Andrews' reduction of her hours of work, and thus pay. She was required to be in text contact with Ms Andrews about when work was available, rather than coming in regularly at the start of the day as she had done previously.

[124] Ms Reid says that her standard day had been 9 am to 5 pm with a half hour unpaid lunch break. She accepted that her working hours went up and down. Ms Andrews accepts that Ms Reid became a permanent employee after another employee left in 2014.

[125] However, the pay records do not support Ms Reid consistently working the 37.5 or 40 hours per week that might be described as full time. Her hours varied quite considerably week to week, generally averaging around 32 hours a week.

[126] It is not entirely clear when the claimed reduction in hours began. Ms Reid's recollection was that she did a normal week's work after her return to work on 25 July 2016 before the reduction started. However, a letter from her advocate to Ms Andrews' lawyer of 26 July 2016 refers to Ms Reid reporting for work. The letter refers to Ms Reid reporting to work and being "advised her normal duties have been changed dramatically in a fashion which indicates her claim of getting things back on track false". No further details are given and thus it is not clear whether this refers to a reduction in hours or the introduction of work project timeframes, which are referred to below. A letter of 19 August 2016 refers to a decision by Ms Andrews to minimise Ms Reid's hours.

[127] Ms Reid's hours were significantly less on average than they had been. From the period ending 11 August 2016 onwards until Ms Reid's resignation she worked an average of around 8 to 9 hours a week.

[128] Ms Andrews says that she treated Ms Reid as a permanent employee but with no fixed hours. She has three responses to the reduction in hours claim. Firstly, she

says that the employment agreement allowed reductions. Second, she did not trust Ms Reid to be alone in the shop. Third, the business was in financial difficulty and there was a lack of work available. I will look at each of these in turn.

Hours of work clause

[129] The employment agreement did not specify what hours of work Ms Reid worked. The hours of work clause[8] said only:

> Hours of work may vary depending on the workload in the shops.[9]

[130] There were no specified requirements on how changes to hours were to occur or be notified, although prior to mid 2016 changes seemed to occur without any difficulties between the parties.

[131] Ms Reid could not establish any kind of promise or agreement that her hours would be at a particular level. There was no evidence of her changing her position on the basis of a higher level of hours being offered.

Leaving Ms Reid in sole charge

[132] Ms Andrews says that she did not feel confident that she could leave Ms Reid unattended in the shop through this period. Therefore the only work that she could give Ms Reid was sewing upstairs rather than attending to the shop. She wanted to leave someone trustworthy in charge as there were often times when Ms Andrews was away running her other business.

[133] The sewing work was within the description of Ms Reid's duties in the employment agreement. Although Ms Reid was dissatisfied about the removal of part of her duties, she accepted that she had stuffed up in terms of leaving a customer alone in the shop with money lying around. She did not seriously challenge that Ms Andrews had reason to have lost some trust in her.

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[8] Clause 5
[9] During Ms Reid's time of work there was only one shop

[134] Ms Andrews' difficulty is demonstrating that there was any advice to Ms Reid that the result of the disciplinary process could or was to be the removal of her shop duties or her position alone in the shop.

[135] Ms Andrews lawyer's letter of 21 July 2016 sets out Ms Andrews' advice that Ms Reid is to return to "full normal duties on Monday 25 July 2016", although this was before the warning given a few days later.

[136] I accept that the 29 July 2016 warning does indicate that Ms Andrews had seriously diminished trust and confidence in Ms Reid and that it would take time and commitment from her to rebuild the trust. However, there is no suggestion in the lengthy letter that job functions would be affected as a result.

Decline in workload

[137] There had been difficulties with the financial viability of the business well before mid-2016. Ms Reid accepts that there had been discussions about the state of the business and the possibility that Ms Andrews would sell it. She did not accept that there had been discussion about any reduction in hours of work.

[138] Before mid-2016, although variable, Ms Reid assessed that she spent probably slightly less than half of her work time dealing with customers. From August 2016 she was only doing sewing work, and Ms Vermeeren and Ms Andrews were dealing with customers.

[139] Ms Andrews says that, had it not been for the trust issue outlined above, the need to reduce costs would have impacted on both Ms Reid's and Ms Vermeeren's hours of work equally.

[140] Although there was some mention at times by Ms Andrews about the general state of the business or the decline in work I find that this was not intended to be, and was insufficient to amount to, consultation in the sense of seeking Ms Reid's views about the impact of the situation on her work and alternatives.

[141] Ms Andrews provided the Authority with some financial records for the financial year beginning April 2016, which tended to support her position on the state of the business. However, there were no earlier records provided as a comparison.

There was also no suggestion that these had been shown to Ms Reid whilst she was employed.

Conclusion on hours of work

[142] Both the trust and workload factors played a part in the reduced hours offered to Ms Reid. She has not been able to establish that she had any guaranteed hours of work. The employment agreement says only that her hours may be varied depending on workload.

[143] However, Ms Reid had been averaging over 30 hours a week for more than a year and was clearly financially disadvantaged as her hours were reduced significantly.

[144] In those circumstances a reasonable employer would have undertaken a fair process before reducing Ms Reid's hours so substantially. Ms Andrews did not undertake any consultation process with Ms Reid before telling her that her hours were reduced nor give any notice before the change was implemented. Whilst Ms Andrews had reason to be concerned about leaving Ms Reid in sole charge in the shop, there was no indication that she raised that with Ms Reid during the disciplinary processes or specified that in the warning itself. She should have done so.

[145] Ms Reid's employment was unjustifiably affected to her disadvantage by Ms Andrews' actions. However, had appropriate processes been undertaken Ms Andrews may well have been able to justify her actions in reducing hours and that needs to be taken into account in determining the remedies appropriate for this grievance.

[146] Ms Reid's lost wages award should reflect the fact that had a fair process been undertaken the change could have occurred relatively quickly. Taking the fortnightly pay period ending 25 August 2016, Ms Reid was offered only 4.5 hours of work. Subject to a consideration of contribution, Ms Reid's lost wages should be the difference between that amount and the 32 hours average which she had been earning, namely 59.5 hours, amounting to $907.38 gross in lost wages.

[147] Ms Reid's conduct leading to Ms Andrews' loss of trust was a factor in the reduction of hours and I make a 10% deduction for Ms Reid's contribution. I order Ms Andrews to pay Ms Reid $816.64 gross as lost wages.

[148] There was little evidence from Ms Reid herself specifically about the effect of the reduced hours on her. However, her husband says that there was financial strain on the family and that had an effect on Ms Reid's state of mind. I consider that an award of $2000 would have been appropriate as compensation but take 10% off that for Ms Reid's contribution regarding the loss of trust component, leaving Ms Andrews having to pay Ms Reid $1,800.00.

Performance management

[149] The business had been requiring capital input and Ms Andrews wanted to assess why it was not self-supporting. From about early 2016, well before the April warning, she had been time testing. This involved calculating how long various sewing projects were taking. There had been some difficulties with the process as Ms Reid had not undertaken it as Ms Andrews intended, so the process was restarted.

[150] When Ms Reid returned to work in late July 2016 a document headed "Timeframes for Manufacturing Garments" was pinned up in the sewing room. It listed various types of garments and a length of time for each.

[151] Ms Reid was not critical of the amounts of time allowed for each garment. However, she struggled to meet the timeframes. Ms Andrews added time to it for Ms Reid. However Ms Reid found that the more she tried the more mistakes she made. She acknowledged that Ms Vermeeren was a lot faster sewer than her.

[152] Ms Reid says that she had not had quality issues before this, but accepted that there were some quality problems at this time. However, she also felt that any garment which she sent down to the shop was rejected.

[153] Ms Reid tried to explain the problems with her performance on the basis that she was under a lot of pressure with all the procedures that were happening and being constantly in meetings She was not on her game. She just seemed to end up in

another disciplinary meeting. However, she only had to attend one disciplinary meeting after the 29 July warning, and that was on 7 October 2016.

October warning

[154] By a 26 September 2016 letter, Ms Andrews started a disciplinary process regarding issues of wasting time, quality and not following instructions about sewing tasks. Following the 7 October 2016 meeting a preliminary decision that Ms Reid's explanations were not accepted was captured in a letter of the same date, although not provided to Ms Reid until 12 October 2016. A further opportunity was offered for Ms Reid to provide comment or other information.

[155] Ms Reid's representative replied but Ms Andrews, having raised with Ms Reid whether she had anything more to say, was not aware that a further response was coming and finalised the final written warning just prior to receiving the representative's response.

[156] A personal grievance about this warning was not formally raised by Ms Reid's representative, including in the statement of problem subsequently filed. However, Ms Reid then wrote to Ms Andrews resigning on 19 October 2016, giving two weeks' notice. The letter does mention that the warning was given without taking into account Ms Reid's representative's feedback.

Mediation

[157] On 31 August 2016 Ms Andrews agreed to go to mediation. However, for reasons which are not clear, the parties did not actually attend mediation until 17 October 2016. They were unable to resolve their differences.

"Game on" comment

[158] After mediation the parties were having a discussion about work. Ms Andrews said that Ms Reid's work must be completed within the timeframes set.

Both women agree that Ms Andrews made a comment to Ms Reid which included the words "game on".

[159] Ms Reid's recollection is that this was said to suggest that it was time for a battle between the two women. Ms Andrews says that she used the words in a different context, namely that Ms Reid should "get her game on". Ms Reid did not seek an explanation or clarification at the time.

[160] I accept that "game on" is a common colloquial way of encouraging good performance. Ms Reid used the words "game on" herself during the investigation meeting. When asked why she had not performed well during the period following the July disciplinary process, she said that she just did not get her "*game on*".

[161] Ms Andrews made the comment as she was walking away from Ms Reid past a doorway. In these circumstances there appears to have been room for a misunderstanding of what was said or how it was intended. I am not satisfied that a bullying allegation against Ms Andrews should be upheld on the basis of this comment.

Finishing work

[162] Ms Reid worked on 19 and 20 October 2016, then on 21 October provided a medical certificate saying she was unfit for work from 19 October onwards. Although the parties are in dispute about aspects of the medical certificate, Ms Reid's dealings with her doctor and Ms Andrews' subsequent intervention, I do not consider those issues relevant to the matters which I must decide.

Constructive dismissal claim

[163] Ms Reid claims that she was constructively dismissed by Ms Andrews, who denies the claim. Broadly Ms Andrews says that any issues which did occur were dealt with and Ms Reid affirmed her employment agreement.

[164] In *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* [10] Cooke J in the Court of Appeal listed three situations where constructive dismissal might occur:

(i) Where the employee is given a choice of resignation or dismissal;
(ii) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign; and
(iii) Where a breach of duty by the employer leads the employee to resign.

[165] No particular category was expressed as being applicable on Ms Reid's behalf. However, there was no suggestion of a choice between resignation and dismissal being given.

[166] In terms of the second category outlined in *Woolworths*, the evidence did not establish that Ms Andrews acted with a deliberate and dominant purpose of coercing Ms Reid to resign. I accept that Ms Andrews wanted Ms Reid to continue working there, although she wanted her performance to improve. Ms Andrews raised performance issues which even Ms Reid accepts were to some extent justified.

Breach of duty

[167] I now focus on the third category, namely breach of duty by the employer leading to resignation. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [11] the Court of Appeal outlined a two stage process for such cases.

[168] The first question is whether the resignation was caused by a breach of duty on the part of the employer. To determine that question all the circumstances must be examined. If the breach was causative, the second question is whether the employer's breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing, in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[169] That approach was endorsed in *Business Distributors Ltd v Patel* [12]. There the evidence did not indicate a causative link between the employer's breach of duty and

[10] *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372
[11] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168
[12] *Business Distributors Ltd v Patel* [2001] 1 ERNZ 124 CA

the resignation. The Court gave considerable weight to the fact that the employer did not seek to end the relationship and indeed wished it to continue.

The resignation letter

[170] I look firstly at Ms Reid's resignation letter. It begins by stating that the reason for her resignation was prompted by background matters over the previous six months. The one and a half page typed letter says that financially and emotionally Ms Reid cannot tolerate the way that she has been treated over the last six months. This is followed by a reference to discussion about timelines and mistakes and the "game on" comment. The letter then outlines events over recent months, in similar terms to those previously set out in her representative's letters.

[171] Submissions on Ms Reid's behalf emphasised the constructive dismissal as starting to unfold on 8 July 2016 when Ms Reid was given a warning and told to accept a two week stand down without pay or be terminated.

Events relied on

[172] I have found that Ms Reid was subject to unjustified actions by Ms Andrews to Ms Reid's disadvantage in June, July and August. However, I must be satisfied that these were causative of Ms Reid's resignation.

[173] The timeline in the resignation letter includes events which are described as being in August and September, but those dates are not accurate. They are based on inaccurate dates on various documents which Ms Andrews provided, as outlined above. For example, there is reference in the resignation to the repeated disciplinary process in August and receiving the warning letter on 1 September. The warning letter was wrongly dated "01 September 2007".

[174] Once the events are correctly dated the picture is not nearly as compelling. Ms Reid's evidence of the significance of these issues to her was also markedly less cogent than the resignation letter description. Under cross examination Ms Reid accepted various propositions about the events which suggested they were mostly of little significance and/or resolved. Her concern about the June and July issues was that she was not paid during her suspension but that issue was resolved. She accepted that the July warning/s were justified, acknowledging that she had "stuffed up".

[175] Had Ms Reid resigned in the middle of events in July her constructive dismissal case may have been stronger. The suspension without pay and purported requirement to waive any claim to payment before she could return to work may have put Ms Reid in a situation where she had an election between continuing to work or accepting repudiation/s of the employment agreement. However, Ms Reid preferred at that time to continue to work at Alterations & Designer Garments.

[176] Ms Reid was aware of the reduced hours and timeframe requirements from around early August but did not resign until the second half of October 2016.

[177] Ms Reid felt that her work was being assessed more closely. The performance issues were formally raised in late September 2016, almost two months after the warning letter given 29 July 2016. Ms Reid frankly accepts that there were problems with her performance and she appears to have been struggling to articulate why.

[178] Ms Andrews was entitled to commence a performance process. The process fairly involved putting Ms Andrews' concerns and giving Ms Reid the opportunity to respond. A preliminary decision was given with a final opportunity to comment. There was no personal grievance claim raised about the warning.

[179] Ms Andrews cannot be criticised for issuing the warning without waiting for feedback from Ms Reid's representative, as she had inquired and was not told it was coming. Although the letter of 14 October 2016 from Ms Reid's representatives raised concerns, there was no raising of a personal grievance about the October warning after it was issued.

[180] The resignation occurred only days after the parties attended mediation. To some extent an analysis of Ms Reid's motivation for resignation may be restricted by the limitation on evidence about mediation[13].

[181] Ms Reid appears to have based her decision to resign, in part at least, on the "game on" comment which I have already found was said in circumstances where there was room for misunderstanding as to the nature of what was said or meant. Ms Reid did not attempt to clarify at the time.

[13] S 148 of the Act

Conclusion on constructive dismissal

[182] Ms Reid may well have felt considerably less happy in her work than she had before the events of mid-2016. The workplace was not what it once had been when the parties and their partners were friends and socialised together. Her work was being scrutinised in a way which she found difficult.

[183] However, Ms Reid has the burden of establishing that her resignation was a constructive dismissal. I am not satisfied, for the reasons outlined above relating to the timing of events and Ms Reid's concerns about them, that Ms Reid's resignation was caused by Ms Andrews' breach/es of duty.

Arrears outstanding

[184] Ms Reid's representative queried whether she had received all her entitlements to wages, sick leave and public holidays. Ms Andrews' position is that there were no arrears.

[185] The payroll records which were provided did not always assist in easily establishing whether there were outstanding amounts. A detailed analysis had been undertaken by one of Ms Reid's representatives, which covered various underpayment issues claimed. Some uncertainty arose regarding whether particular days were paid as work days or as leave, and if so, what type of leave. The arrears amounts were claimed with sums claimed as lost wages under the reduced hours claim, which complicated matters somewhat.

[186] There was a suggestion made that Ms Andrews had altered timesheets. Ms Andrews strenuously denied this and says that some amendments were made by agreement. The evidence did not clearly establish the unauthorised amendment claim. Earlier Ms Andrews relied on her employees telling her how many hours they had worked and taking that on trust. Once timesheets were used they were not always filled thoroughly and some were undated.

[187] Claims for arrears of wages were made at a daily rate of $114.37 gross with an additional 3% as the employer's Kiwisaver contribution. Ms Reid's pay records show that she was a Kiwisaver member with contributions being made.

Sick leave and wage arrears

[188] On Ms Reid's behalf a claim was made for sick leave on 24 June 2016 when Ms Reid called in sick but was told to come into work to watch the surveillance video. In what appears to be a claim in the alternative, Ms Reid says that she was underpaid for a day of her suspension.

[189] After the suspension was ended a payment for four weeks and four days of work was made on Thursday 28 July 2016. The 28 July payment appears to have been a mixed payment for suspension and work time. The pay records were not sufficiently detailed to identify which day was not paid for.

[190] Ms Andrews appears to accept that one day of the period starting on the day of suspension 24 June may not have been paid. She says that she had intended to pay 24 June 2016 as a sick day but even if she did not, the day's sick leave entitlement was paid later in October when Ms Reid was paid for two days' sick leave. Had she not been, Ms Reid would only have had an entitlement to one day's sick leave. I could not verify whether that was all of Ms Reid's entitlement as the pay records printed on 29 July 2016 did not show any sick leave having been taken since the start of Ms Reid's employment in mid-2014

[191] In any event there was one usual working day not accounted for in the 28 July 2016 payment. I consider that as Ms Reid was called in for a disciplinary meeting and suspended on 24 June, then that day should be paid. I order Ms Andrews to pay Ms Reid $114.37 gross as sick leave for that period.

[192] Ms Reid also claims that she was not paid for the day of 29 July 2016 when she called in sick. Considering the payment made on the following pay day (11 August 2016) and the record of sick leave payments in a later timesheet history printout, I am satisfied that Ms Reid was not paid for that day and that she was entitled to paid sick leave. I order that Ms Andrews pays Ms Reid $114.37 as sick leave for 29 July 2016.

Public holidays

[193] Ms Reid claims that she was not paid for Queen's Birthday on Monday 6 June 2016. The pay for the fortnight ending on 9 June appears to have been paid on 16 June 2016. What appears to have been a week's worth of annual leave was paid on

that day but the other hours paid were 7.5 hours short of the usual working hours of 37.5 per week. I am not satisfied that Queen's Birthday was paid for as a public holiday when it should have been. I order Ms Andrews to pay Ms Reid $114.37 for the public holiday.

[194] In the Applicant's closing submissions in reply Mr Burdon raised an issue regarding other public holidays. The schedule of underpayments filed earlier included references to underpayments and lost income in the Christmas 2015 to New Year 2016 period. In those submissions the suggestion was made that the four public holidays from that period may not have been paid for, with Ms Reid receiving only annual leave payments.

[195] Then, at the Authority's direction, the Respondent's representative filed Ms Reid's pay slip dated 30 December 2015 which shows Ms Reid being paid for four statutory holidays, being the Christmas and New Year holidays. The Applicant filed a bank record showing that the payment was received. I am satisfied that the public holidays were paid for.

Holiday pay and Kiwisaver

[196] Ms Reid claims holiday pay on any amounts of wages ordered to be paid in this determination. I have awarded a total of $1265.74 gross in wages[14]. On the basis of 8% holiday pay calculation, I order Ms Andrews to pay Ms Reid $101.26 as holiday pay.

[197] Ms Reid also claims for the employer's 3% Kiwisaver contributions on the wages ordered. I order Ms Andrews to pay Ms Reid $37.97 as Kiwisaver contribution.

[14] $15.25, $907.38, $114.37, $114.37. $114.37

Costs

[198] Costs are reserved. The parties are invited to attempt to resolve the issue.

[199] If the parties are not able to resolve the costs issue between themselves, Ms Reid may file a memorandum on the matter within 28 days of the date of this determination. Ms Andrews shall then have 14 days in which to file and serve a memorandum in reply.

Nicola Craig
Member of the Employment Relations Authority