IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 18
5639392

	BETWEEN	CATHERINE SHERWOOD Applicant
	AND	PROJECT CLOTHING PTY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Sarah-Jane Neville, Counsel for the Applicant Rebecca White, Counsel for the Respondent
Investigation Meeting:	20 December 2016
Determination:	23 January 2017

DETERMINATION OF THE AUTHORITY

A. Project Clothing Company Limited (PCPL) acted unjustifiably in how it gave Catherine Sherwood notice of dismissal on the grounds of redundancy and then, during her notice period, dismissed her for serious misconduct.

B. In settlement of her personal grievance for unjustified dismissal PCPL must pay Ms Sherwood the following sums within 28 days of the date of this determination:

(i) $18,464 for her eight week notice period (less any of that amount already paid); and

(ii) $1477.12 as holiday pay due on wages for the notice period (less any of that amount already paid); and

(iii) $298 as reimbursement for mobile phone and wifi costs to the end of the notice period; and

(iv) $18,464 for redundancy compensation due under her employment agreement but not paid to her; and

(v) Interest on the amounts due at (i), (ii), (iii) and (iv) at the

rate of five per cent from 23 June 2016 to the date of payment; and

(vi) $4616 as compensation for a further two weeks' wages Ms Sherwood might reasonably have been expected to earn if PCPL had carried out some consultation with her before deciding on the redundancy of her position; and

(vii) $18,000 as compensation for humiliation, loss of dignity and injury to feelings caused by dismissing her twice and how it treated her after she raised a personal grievance in the notice period.

C. Within 28 days of the date of this determination PCPL must also pay a penalty of $5000 for its breaches of the terms of its employment agreement with Ms Sherwood. The penalty must be paid to the Authority for transfer to the Crown Account.

D. Costs are reserved, with a timetable set for memoranda to be lodged if an Authority determination of costs is necessary.

Employment Relationship Problem

[1] Catherine Sherwood began work for Project Clothing Pty Limited (PCPL) on 11 January 2016 with the job title of General Manager New Zealand and Pacific Region. PCPL is a Melbourne-based business that sells what is described as "technical clothing" for athletes and sports teams. Ms Sherwood was employed to develop its New Zealand business.

[2] On 27 April PCPL's founder and managing director Graeme Clarke telephoned Ms Sherwood and dismissed her. In an email sent shortly afterwards Mr Clarke gave this explanation for her dismissal:

> As per our recent telephone conversation I wish to confirm that we have decided to terminate your employment under clause 13.1 of your employment contract – citing general lack of sales generated to support your role moving forward.

> As you were aware at your appointment – the role was a predominantly sales position initially to ensure we reached the sales KPI included in your employment documentation.
>
> Whereby we acknowledge that you have been actively seeking sales to date you have posted zero sales and orders since your engagement on the 11th of January 2016, which is now not sustainable.
>
> Your final day of work for Project Clothing will be Wednesday 22nd June – we would expect that you carry on your role to the best of your ability over the next 8 weeks in an effort to fulfil your duties under this agreement. Should you wish to leave the role prior to this date – please forward this request in writing for our review.

[3] Mr Clarke had not advised Ms Sherwood that he was considering making a decision to terminate her employment and had not given her an opportunity to comment on any information relating to that decision before making it.

[4] The employment agreement clause referred to, 13.1, was headed General Termination. It provided that "the Employer may terminate for cause, by providing 8 weeks' notice in writing to the Employee". It also allowed for payment in lieu of some or all of the notice period.

[5] The agreement also included clauses defining redundancy, setting a redundancy process, requiring eight weeks' notice if the employment was to end by reason of redundancy, and providing for the payment of eight weeks' salary as redundancy compensation.

[6] Five days after receiving notice she was to be dismissed for redundancy Ms Sherwood raised a personal grievance, through a human resources consultant acting for her at the time, which was then pursued by her lawyer. Mr Clarke did not respond to correspondence from Ms Sherwood's lawyer sent on 2, 9, 13 and 16 May. The correspondence asked PCPL to attend mediation about Ms Sherwood's grievance. The 16 May letter expressed concern Ms Sherwood was not paid salary due to her on 11 May and said this appeared to be "retaliatory action for raising a personal grievance".

[7] The 16 May letter also described Ms Sherwood as medically unfit for work at that time due to stress and anxiety resulting from "micromanagement" and "unreasonable demands" made on her to provide reports to Mr Clarke. On 6 May Ms Sherwood's GP had issued a medical certificate stating she had "significant levels of

stress and anxiety" and expressing the opinion she was unable to work for the next 14 days. Ms Sherwood had provided Mr Clarke with a copy of the certificate.

[8] By email on 29 April Mr Clarke had asked Ms Sherwood to provide twice weekly updates of appointments she made during her notice period. In the following week, after Ms Sherwood had not sent one of those updates on the due date, Mr Clarke sent a further direction that her update emails should provide a daily breakdown of her work in two-hour blocks with "detailed notes of what was performed in that period". Ms Sherwood had told him the delay on one report was the result of the password on her email account being changed by PCPL's IT support personnel without her knowledge.

[9] On 18 May Ms Sherwood was dismissed for a second time. In a letter to her lawyer Mr Clarke said Ms Sherwood's employment was terminated, "effective immediately", under a clause in her employment agreement allowing for summary dismissal for serious misconduct. The letter identified four instances of what was said to be serious misconduct by Ms Sherwood – firstly, theft and deliberate destruction of property in relation to "IP" said not to have been returned after a written request; secondly, "harassment" of a work colleague in Melbourne by urging him to leave his job that "directly influenced" his resignation; thirdly, repeated failure to follow instructions to forward a list of appointments and client contacts; and fourthly, damaging PCPL's reputation by contacting a sponsor of a sports' event.

[10] Prior to her dismissal on 18 May Ms Sherwood was not told of the allegations of serious misconduct, provided information about them or given the opportunity to comment on them before being advised, through her lawyer, that she was dismissed on those grounds.

[11] In her application to the Authority Ms Sherwood sought findings that PCPL's dismissals of her, for redundancy and for serious misconduct, were both unjustified. She sought orders for payment of outstanding contractual entitlements (including for the notice period and redundancy compensation), distress compensation, lost wages, interest on money due to her, and imposition of a penalty on PCPL.

[12] PCPL's statement in reply asserted the redundancy of Ms Sherwood's position was decided for genuine reasons but made no detailed response regarding her dismissal on the alleged grounds of serious misconduct.

The issues

[13] The issues for investigation and determination were:

(i) Did PCPL, in what it did and how it did it, act as a fair and reasonable employer could have done in all the circumstances at the time, in
   (a) giving Ms Sherwood notice on 27 April 2016 of her dismissal for redundancy; and
   (b) its dealings with her between 2 May and 18 May 2016 after she raised a personal grievance about that decision; and
   (c) dismissing her for serious misconduct on 18 May 2016?

(ii) If PCPL acted unjustifiably, what remedies should be awarded or other orders should be made, considering:
   (a) whether any amounts were owed to Ms Sherwood for wages, holiday pay, redundancy compensation or other contractual entitlements; and
   (b) lost wages; and
   (c) compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act); and
   (d) whether interest should be awarded on any amounts found due to Ms Sherwood?

(iii) If any remedies are awarded, was any reduction required under s 124 of the Act for any blameworthy conduct by Ms Sherwood that contributed to the situation giving rise to her grievance?

(iv) Did PCPL breach any terms of its employment agreement with Ms Sherwood that warranted imposition of a penalty under s 134 of the Act and, if so, what penalty should be imposed?

(v) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[14] For the purposes of the Authority's investigation written witness statements were lodged from Ms Sherwood, Mr Clarke and Gillian Watson. Ms Watson had worked for Ms Sherwood in a previous business and was a personal friend. Ms

Watson's evidence touched on Ms Sherwood's previous business experience and Ms Watson's observations of the effects on Ms Sherwood of how her employment ended at PCPL. Each witness attended the investigation meeting and, under oath or affirmation, confirmed their written statement and answered questions from me and, if asked, from the parties' representatives. The representatives also provided closing oral submissions, speaking to a written synopsis provided at the time.

[15] As permitted by 174E of the Act this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The dismissal for redundancy

[16] In closing submissions PCPL conceded its process in dismissing Ms Sherwood for redundancy was "lacking" but submitted there were genuine business reasons for its decision that had to be taken into account.

[17] In answering questions during the Authority investigation meeting Mr Clarke said he was not familiar with the requirements of New Zealand employment law at the time he decided to dismiss Ms Sherwood. He acted on the assumption he could dismiss her in the way that he said would apply in Australia for someone "at general manager level" and on the salary level Ms Sherwood was paid. It is not clear that was, in fact, the case across the Tasman Sea because the "high income threshold" there, that bars an employee pursuing an unfair dismissal claim under Australia's Fair Work Act 2009, is currently AUD 138,900 (around NZD 146,000). Ms Sherwood's annual salary was NZD 120,000. However, in Australia, she would not have been able to pursue her claim because she had less then six months' service on her individual employment agreement with PCPL.

[18] PCPL had given some indication before 27 April of its concerns about the cost effectiveness of Ms Sherwood's position for its business. In an email to Ms Sherwood on 7 March Mr Clarke said "the NZ expansion" was "not sustainable" without sales being created and sought assurances that the sales needed to support her salary were "in hand" and that her "prime measurable KPI" of making those sales would be met. However, before making the decision to end her employment that she was told about seven weeks after that 7 March email, Mr Clarke had not provided her

with access to information about his proposal to make such a decision that would have an adverse effect on the continuation of her employment. She had no opportunity to comment on any such information before he made that decision. Those failures meant PCPL patently and comprehensively failed to observe its good faith obligations under s 4(1A)(c) of the Act. As a result, its redundancy decision was not one a fair and reasonable employer could have made in all the circumstances at the time. Its action in dismissing her in those circumstances was, therefore, unjustified.

[19] It was, however, also necessary to consider whether the decision itself was one a fair and reasonable employer could have made for genuine business reasons. A conclusion on that point was relevant to the remedies that might apply to Ms Sherwood's unjustified dismissal for redundancy.

[20] Ms Sherwood had made no sales since starting work for PCPL in mid January 2016. Her evidence, in much paraphrased form, was that her efforts to make sales were hampered by a lack of necessary resources from PCPL. In particular she did not have available a full range of sample clothing for the various sporting codes to show prospective decision-makers in the relevant sport and athletic organisations and clubs. She said this hampered her efforts to engender the necessary confidence in those potential customers in order to close sales. It was not necessary for this determination to set out the extended toing and froing between Ms Sherwood and Mr Clarke over this issue and their efforts to resolve it between 11 January and 27 April 2016. The short point was that Mr Clarke disputed Ms Sherwood lacked the necessary resources and did not want to commit more without sales being made.

[21] The standard for assessment of the genuineness of a redundancy decision is whether the decision was what a fair and reasonable employer could have done in the circumstances, based on business requirements, and was not used as a pretext for dismissing a disliked employee.[1]

[22] In this case there was no evidence sufficient to conclude that the redundancy decision made by Mr Clarke had any ulterior pretext. Ms Sherwood's argument, that she could have made sales if she had more resources to assist her pursuing them, was one she was entitled to make. However, the employer was also entitled to make a

[1] *Grace Team Accounting Limited v Brake* [2014] NZCA 541 (CA) at [85].

business decision about the level of resources it was prepared to commit to its attempt to build its business through the activities of a New Zealand-based sales representative. Some businesses might have taken a longer-term view and accepted the risk of continuing to commit those resources after three months with no sales. Making a commercial decision not to do so, however, was within the range of reasonable responses, on an objective standard, that a fair and reasonable employer could have made in those circumstances. Such an employer might, reasonably, decide to 'pull the plug' before it lost any more money on what appeared to be a fruitless project. That is what PCPL did. On the evidence available, its decision had to be accepted as genuinely made on its assessment of its business requirements at the time. It disestablished the position to which Ms Sherwood was appointed and had not replaced her with a new employee. The effect of that conclusion is that, if PCPL had followed the basic procedural requirements of New Zealand employment law to consult and consider alternatives before making such a decision, it was more likely than not that PCPL would still have given her notice, after the slightly longer time such consultation might have required, on the grounds that the position was "surplus to the requirements of [its] business" (as redundancy was defined in Ms Sherwood's employment agreement). In those circumstances Ms Sherwood cannot be said to have lost wages that she might otherwise have earned, beyond whatever additional time might have added by a consultation process and beyond the end of the eight week notice period provided in her employment agreement for termination due to redundancy. As a matter of broad assessment of business practice, based on the Authority's knowledge across a range of cases, a minimum of around two weeks may have been added by a simple but fair consultation process involving one position.

Dealings with Ms Sherwood between 2 May and 18 May 2016

[23] Between 27 April and up until her dismissal on 18 May Ms Sherwood was still serving the notice period PCPL had advised would run through to 22 June. She remained an employee and PCPL was required by s 4(1A) of the Act to be active and constructive in maintaining a productive employment relationship with her. This included a duty to be "responsive and communicative" in dealing with the personal grievance she had raised on 2 May. It was not. PCPL's failure to respond to queries from her lawyer, including a request to attend mediation and to address a failure to pay her salary when due, were not actions that a fair and reasonable employer could have taken in all the circumstances at the time.

Dismissal for serious misconduct on 18 May 2016

[24] In closing submissions PCPL conceded its termination of Ms Sherwood's employment on the grounds of serious misconduct was "procedurally lacking". While the allegations were never put to her for response before that decision was made and sent to her, the information PCPL provided to the Authority investigation also failed to substantiate, to the evidential standard necessary under s 103A of the Act, the grounds given in the letter of dismissal.

[25] The first allegation, that Ms Sherwood had committed "theft" and "deliberate destruction" of PCPL, was a very serious one to make. It arose from what Mr Clarke said was a check he had PCPL's "IT guys" undertake of Ms Sherwood's email records on PCPL's system. He said this showed Ms Sherwood had deleted her 'sent' emails and his IT advisors could not find them. The emails were important for the commercial information and customer contact details they might contain. PCPL was subsequently able to re-establish access to those emails, numbering around 1495, but Mr Clarke said this occurred after the letter of dismissal was sent to Ms Sherwood. Mr Clarke's allegation that she was responsible for the access problem was supposition. Ms Sherwood's evidence suggested she was locked out of PCPL's email system by a change of password, instigated by Mr Clarke. There was no reliable evidence to establish she had destroyed PCPL property by deleting emails or was responsible for any temporary difficulties accessing them.

[26] The second allegation, that she harassed a work colleague, urging him to leave the company and influencing his decision to resign, was similarly unsubstantiated. Ms Sherwood confirmed she had spoken for work purposes on a weekly basis to the particular Melbourne-based PCPL employee. His last call to her was on 27 April after she had news she was being dismissed for redundancy. She said she started crying on the phone when talking to him that day but had not spoken to him again before she was dismissed for serious misconduct on 18 May.

[27] Mr Clarke's evidence was that the particular employee resigned after Ms Sherwood was given notice of redundancy. He said he spoke to that employee around 10 days before he sent the 18 May letter. He said he asked the employee if he had spoken to Ms Sherwood. The employee answered yes. He then asked if that

conversation influenced his decision to resign. He said the employee again answered yes. Mr Clarke said he took from those responses "that if that phone call had not been made, he would not have resigned".

[28] Allowing for hearsay nature of the evidence of what the employee said and Mr Clarke's interpretation of what he thought that meant, his conclusions were too speculative to substantiate the allegation of serious misconduct made about Ms Sherwood. The employee may have been influenced in his decision to leave the company because of what happened to Ms Sherwood but there was no evidence sufficient to establish, as more likely than not, that she encouraged him to resign.

[29] The third allegation, of serious or repeated failure by Ms Sherwood to follow a reasonable instruction, was said to be based on her having "responded in writing" that she refused to supply a list of appointments and client contacts after she was given notice of redundancy. No such refusal in writing existed. Asked if that aspect of the allegation was true or false, the best Mr Clarke could say was: "In my eyes it is true, but it could be seen as being false". In response to Mr Clarke's request on 5 May for Ms Sherwood's weekly updates to be broken into two hour blocks of time with detailed notes on what was done in each block, Ms Sherwood complained about the "extra stress" of being asked "to time keep" but did not refuse to provide the information. From 8 May to 18 May she did not work because she had a medical certificate stating she was unfit to do so. She did not provide any reports in that period because she was not working.

[30] The fourth allegation, of damaging PCPL's reputation, concerned contact she was said to have had with two businesses that were sponsors of the World Masters Games. The Games is an international sports event scheduled to be held in Auckland in April 2017. PCPL has a franchise to provide apparel and other merchandise for competitors and supporters from around 100 countries expected to attend the Games.

[31] Mr Clarke said he had two complaints from a Games official relaying concerns said to have been expressed by two sponsors that Ms Sherwood's contact with them was too "aggressive". After the first complaint Mr Clarke had told Ms Sherwood he could deal with all matters to do with the Games but later received a complaint that she had been in touch with another sponsor about possible interest in

PCPL providing its employees' uniforms. He considered that contact breached the earlier direction given to Ms Sherwood. In neither instance did he provide details of the concerns to Ms Sherwood at the time they were raised with him or give her the opportunity to explain what happened. Hearing some of that information for the first time at the Authority investigation, Ms Sherwood had a different account of events. She also pointed out that she had copied Mr Clarke in on an 11 April email with a sponsor he later said she should have known not to contact. The email mentioned she had been in contact with that business as she "heard they may be shopping around for uniforms". Mr Clarke had not commented on the email at the time or asked why she was in touch with that business. What was clear from their respective evidence was that an allegation of serious misconduct on this point could not have been established by PCPL on 18 May 2016 without Ms Sherwood having a proper opportunity to respond to the allegation and without PCPL carrying out some further investigation about the relevant conversations and contact she had with the potential client.

[32] In light of the identified shortcomings in establishing the four allegations made, PCPL failed to meet the statutory test of justification for its decision to dismiss Ms Sherwood for serious misconduct on 18 May. It had not acted as a fair and reasonable employer could have done in all the circumstances at the time of making that decision. Consequently Ms Sherwood's dismissal on 18 May was also unjustified. She was entitled to an assessment of remedies and the other orders she sought to address her personal grievance.

Remedies and orders

Orders for payment of contractual entitlements

[33] Following Ms Sherwood's dismissal on 18 May there was an extended dispute between the parties about arrangements for her to return office equipment and stock held at her home office, which was still not resolved by the time of the investigation meeting. Ms Sherwood was said to have been willing to send the material but PCPL would not make arrangements for its packaging and shipping that were satisfactory to her. PCPL considered her proposed arrangements unnecessarily complicated.

[34] The result of that dispute was PCPL continued to withhold money due to her as salary during the notice period it had given and as payment of redundancy compensation provided as a term in her employment agreement. There also may have

been some doubt about whether her dismissal for serious misconduct, three weeks after her eight week notice period began, affected the payment of the notice period and redundancy compensation.

[35] Because Ms Sherwood's dismissal for serious misconduct was unjustified she was, without any doubt, entitled to the payment of the notice period and the redundancy compensation due to her as a result of PCPL's earlier decision to dismiss her for redundancy. PCPL could not avoid those obligations, as it sought to do, by its unjustified decision to dismiss her for serious misconduct on 18 May. Under its earlier redundancy decision Ms Sherwood's employment by PCPL was to end on 22 June 2016. It was by that date that the notice should have been paid in full and the redundancy compensation, of a further eight weeks pay, was also due.

[36] PCPL paid Ms Sherwood $3454.05 on 30 November 2016 but the evidence did not establish precisely what part of its obligations to her were covered by that payment. Mr Clarke thought Ms Sherwood was paid all holiday pay accrued to 18 May but was not sure what salary payments had been made and said he would have to check with his payroll provider.

[37] PCPL was obliged to pay Ms Sherwood for the following entitlements under her employment agreement (with the sums due subject to deduction of any payments PCPL has already made for them):

(i) Eight weeks' pay for the notice period (being four instalments of her fortnightly ordinary pay of $4616); and

(ii) Holiday pay of eight per cent on that amount, being $1477.12; and

(iii) Reimbursement of $298 for mobile phone and wifi costs (being two instalments of the rate of $149 a month); and

(iv) Eight weeks' pay as redundancy compensation (totalling $18,464).

[38] PCPL should have completed payment of those amounts when Ms Sherwood finished work on 22 June 2016 but, partly as a result of its unjustified actions up to 18 May 2016, did not do so. Ms Sherwood was entitled to the use of that money from 22 June so was properly due an award of interest on the amount (totalling $38,703.12)

from 23 June 2016 until it is paid in full in accordance with the orders made in this determination. The rate of interest is five per cent a year.[2]

[39] Ms Sherwood also sought orders for payment of a monthly car allowance of $800 and $1000 as half of an annual clothes allowance. Her evidence did not sufficiently establish those were contractual entitlements to which orders for payment should now be made.

Order for payment of compensation under s 123(1)(c)(ii) – loss of benefit

[40] As noted earlier in this determination Ms Sherwood might reasonably have expected to be consulted about the prospect of redundancy. Such a process was likely to have taken a minimum of two weeks. It would have meant that, assuming a redundancy decision was still made, her notice period would have run to 6 July rather than only 22 June. She was entitled to an order for a further two weeks' pay, that is $4616, that she might reasonably have been expected to obtain if the personal grievance for a procedurally-flawed dismissal for redundancy had not arisen.

Lost wages

[41] As a dismissal for redundancy could justifiably have been made for genuine business reasons, if carried out in a procedurally fair way, Ms Sherwood could not receive an award for lost wages beyond the expiry of her notice period. She would not have continued to earn wages in that position after that time.

Compensation for injury to feelings, humiliation and loss of dignity

[42] Ms Sherwood gave evidence of the emotional impact on her of being dismissed, not once but twice, and a resulting loss of confidence in seeking other work. She described sleeplessness and "not being able to leave the house without having what I learnt was anxiety attacks". She was humiliated by having to tell family and friends of what had happened and distressed by the financial consequences, which resulted from PCPL withholding payments due to her. Her friend, Ms Watson, described observing Ms Sherwood's frequent tearfulness, stomach upsets and weight loss associated with the distress resulting initially from notice of dismissal for redundancy and then the dismissal for serious misconduct.

[2] Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.

[43] The evidence warranted a significant award of compensation under s 123(1)(c)(i) of the Act, particularly because how PCPL failed to properly respond to the initially-raised personal grievance and withheld money due to Ms Sherwood had aggravated the distress she experienced from the two dismissals.

[44] An award of $18,000 was appropriate to compensate Ms Sherwood for the loss of dignity, humiliation and injury to her feelings resulting from her two dismissals and how they were carried out. It was a relatively modest sum, in light of the evidence, but set mindful of the need not to keep compensatory payments artificially low.[3]

Any reduction of remedies due to contributory behaviour?

[45] PCPL's closing submissions acknowledged that employment ended on the grounds of redundancy was "a no-fault dismissal". For that reason no reduction could be required for any conduct by her that contributed to those aspects of the situation that gave rise to her personal grievance.

[46] However PCPL submitted she had contributed to her subsequent dismissal for serious misconduct by "repeated failing to comply with reasonable instructions from her employer". For reasons already given, its evidence did not substantiate that allegation so no reduction was required.

[47] Mr Clarke's oral evidence also suggested Ms Sherwood had contributed to the situation by not disclosing complete information about her prior business experience before she started working for PCPL. Ms Sherwood had been involved in two failed clothing businesses, which she had operated under her married name before reverting to her more recent use of her family surname. He also suggested those former companies, in liquidation, were the subject of investigation by the Serious Fraud Office.

[48] However Mr Clarke accepted, under questioning, that Ms Sherwood had told him about those failed business before her employment with PCPL started and had told him that a person involved in handling financial matters at those companies had been investigated for fraud. Further details were readily available by an online check of Companies Office records and media stories but Mr Clarke took no such steps at

[3] *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

the time. His subsequent references in the Authority investigation to those business failures and an SFO investigation failed to establish any behaviour by Ms Sherwood that would warrant a reduction of remedies awarded for her personal grievance over how PCPL had acted unjustifiably in ending her employment.

Penalty

[49] Ms Sherwood sought imposition of a penalty on PCPL for breaches of her employment agreement by not paying her wages and holiday pay when due. Before it dismissed her on 18 May PCPL had failed to pay wages due to Ms Sherwood on 11 May. It was not until 30 November PCPL paid money it accepted was due to her.

[50] The failure to pay Ms Sherwood her wages for the notice period and her redundancy compensation were both breaches of express terms of her employment agreement. Such breaches rendered PCPL liable for penalties of up to $20,000.

[51] They occurred in a context where PCPL also failed to comply with its statutory good faith duties in respect of both its redundancy decision and the subsequent dismissal for serious misconduct. Those failures were deliberate, serious and sustained but no penalty was sought on those grounds.

[52] Withholding money due to Ms Sherwood occurred over many months, between at least 18 May and 30 November. It was a deliberate breach, not made inadvertently. It caused Ms Sherwood financial difficulty and embarrassment at a time when she was vulnerable due to the loss of her job. There were no prior instances of similar conduct by PCPL but it had not previously employed anyone in New Zealand. It showed no remorse for its actions.

[53] A penalty of $5000 was appropriate for PCPL's breaches of the terms of Ms Sherwood's employment agreement as punishment for its conduct and to deter other employers from behaving in the same way.

[54] Ms Sherwood sought a portion of any penalty imposed on PCPL be paid to her. In light of the orders for payment of arrears and compensation to her already made in this determination, I have declined that request. PCPL must pay the penalty to the Authority for transfer to the Crown Account.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[56] If they are not able to do so and an Authority determination on costs is needed Ms Sherwood may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum PCPL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate (at the rate applicable to matters lodged after 1 August 2016) unless particular circumstances or factors required an upward or downward adjustment of that tariff.[4] As a preliminary indication, to assist the parties, information garnered through the course of the investigation meeting suggested this was a matter where an uplift by one-third of the tariff was likely warranted for the one-day investigation meeting, that is to $6000. Factors favouring uplift include the additional effort required between 2 and 16 May in attempting to engage PCPL in resolving the grievance when first raised and for service overseas of the statement of problem. Legal costs relating to a dispute over arrangements for Ms Sherwood to return office equipment were a waste of time and money by both parties and should lie where they fall.

Robin Arthur
Member of the Employment Relations Authority

[4] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].