IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 23
5461956

	BETWEEN	NADIA SMITH Applicant
	A N D	EXTENSIONS TO LIFE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Kevin Murray and Shayne Boyce, Co-Advocates for the Applicant Graeme Malone, Counsel for the Respondent
Investigation Meeting:	10 November 2015 at Nelson
Submissions Received:	16 December 2015 & 22 February 2016 on behalf of the Applicant 9, 17 & 22 February 2016 on behalf of the Respondent
Date of Determination:	7 March 2016

DETERMINATION OF THE AUTHORITY

A. **Ms Smith was unjustifiably dismissed.**

B. **Ms Smith suffered unjustified disadvantage in her employment in respect of the process followed when she was given a written warning in 2014 and when she was suspended.**

C. **Ms Smith was not paid in accordance with the requirements of the Minimum Wage Act 1983 when she worked sleepover shifts.**

D. **The respondent did not breach Ms Smith's employment agreement in respect of her sleepover pay, and I decline to impose any penalties upon the respondent.**

E. **Costs are reserved.**

Prohibition from publication order

[1] The Authority heard evidence relating to a family member of the owner of the respondent company. This family member is physically and mentally disabled, and took no part in the proceedings. The respondent wishes his identity to be protected, and no objection was made to this by Ms Smith. Accordingly, I order that no information should be published that discloses the identity of this family member. He shall be referred to in this determination as *X*.

Employment relationship problem

[2] Ms Smith claims that she was unjustifiably dismissed from her employment on 7 April 2014. She also claims that she suffered unjustified disadvantage in her employment by being issued with written warnings without consultation, discussion or due process and by being suspended from her employment without consultation, discussion or due process.

[3] Ms Smith also claims that the terms of the Minimum Wage Act 1983 have been breached because she was not paid the relevant minimum wage rate for each hour that she was required to undertake sleepover duties.

[4] The respondent denies that Ms Smith was unjustifiably disadvantaged in her employment or that she was unjustifiably dismissed. It also denies that there has been any breach of the Minimum Wage Act.

Brief account of the events leading to dismissal

[5] The respondent is a company that was set up by its director, Murray Kerr, to facilitate the provision of care to X, who is permanently physically and mentally disabled. The respondent is contracted to provide for X's care and caregivers are employed by the respondent company for that purpose. The care took place in X's home.

[6] Ms Smith started employment with the respondent in February 2009 as a care giver and, during her employment, was promoted to supervisor. At the time of her dismissal, she was paid $18.75 per hour.

[7] Ms Smith supervised four other care givers who provided care to X. It was Mr Kerr's evidence that there was some staff unhappiness regarding Ms Smith in 2013, but that he thought that things had improved by the beginning of 2014.

[8] On 17 January 2014, Ms Smith emailed a complaint to Mr Kerr about a staff member who had allegedly lied to him and to a close relative of X, Maree Langford. Mr Kerr subsequently spoke to this staff member, and to other staff, and became aware that staff members were again not happy. Mr Kerr said that he was concerned about X's safety in the house and wanted to know how each staff member was feeling. He said in evidence that this was not an investigation about Ms Smith at that stage, which I accept.

[9] Accordingly, Mr Kerr had the staff members, including Ms Smith, each write a statement. The Authority saw these statements, and they covered a range of concerns that the staff harboured about each other. However, it was clear from the statements that a common thread was a text that Mr Kerr had sent to one of the care givers (Sandi Davies). It would seem that staff had become unsettled when it had become known that Mr Kerr had sent the text to Ms Davies in which, to a texted question as to what she should bring along to a barbeque that Mr Kerr was arranging, he had replied *just bring ya legs.* It appears that rumours had then started about the nature of the relationship between Mr Kerr and Ms Davies, and about the possible jealousy of another caregiver.

[10] It would also appear that Ms Langford had got upset when she heard about the text and, I infer, had spoken to Mr Kerr about it. There also seemed to be some concern voiced by Ms Langford around this time about some posters being stuck on the inside of the van which was used to transport X, which Ms Langford had considered to be inappropriate or offensive.

[11] It was Mr Kerr's evidence that he had read each statement and had noted in Ms Smith's statement that she had admitted telling Ms Langford about Mr Kerr sending the text to Ms Davies and that she had also mentioned to her that the care givers were wondering whether something as going on between Mr Kerr and Ms Davies. Mr Kerr said that he decided that Ms Smith should be given a warning about the need not to pass on gossip as it caused dissention.

[12] For her part, Ms Smith said that she had thought she had been telling Ms Langford the information in confidence, and that she had been trying to convey to Ms Langford how things can get misrepresented or misunderstood by people. I understand that Ms Smith felt some resentment that what she had said in confidence had subsequently been used against her and that her account had not been accepted by Mr Kerr.

[13] The wording of the written warning issued by Mr Kerr to Ms Smith was as follows:

> *17/03/2014*
>
> *Ref: Nadia Smith*
>
> *I am referring to an incident that occurred around mid January 2014 where you and Maree Langford* [omitted] *were having a discussion in regards to her feelings of so called inappropriate posters on the inside of* [X]s *van.*
>
> *In your statement you say that Maree asked you if you were offended by them and your reply was.*
>
> *I FELT I WAS IN NO POSITION TO QUESTION THAT AS I HAD NOTHING TO DO WITH IT AND I NEED TO BE CAREFUL WHAT I SAY AND DO AROUND THE HOUSE.*
>
> *After explaining to Maree on how careful you have to be you then went on to other subjects that were irrelevant to the posters in the Van.*
>
> - ***A txt that was sent to Sandi by myself that mentioned her legs.***
> - ***Interrelationships between Sandi, myself and Paula's feelings towards this.***
>
> *In your statement you also say.*
>
> *PAULA HAD **CONFIDED** IN ME ABOUT FEELING JEALOUS ABOUT COMMENTS AND PRAISE THAT MURRAY GIVES SANDI.*
>
> *You say you have to be careful what you say and do around the house but appear to have scant disregard to what you say or who you say it to.*
>
> *When Colleen has passed on to you the information she had been told regarding the txt I had sent Sandi that had presumably been shown to Maree, she mentioned her feelings towards Sandi as she was very upset from what she believed to be true from the gossip coming back into the house.*
>
> *The two comments were in reference to not trusting Sandi as far as she could kick her and Sandi was brown nosing when taking her flowers when she was in Hospital.*

Both comments were then passed on to Sandi by yourself bringing in even more dissention between the staff.

If you believed that there was an issue in the house that has caused personal grief to staff and gossip was appearing then it should have been brought to my attention to resolve. (ref: Paula) But instead you tell Maree.

As the house Supervisor it is your responsibility to maintain good working relationships with staff not get involved with the gossip or pass it on.

It clearly states in your contract under

CONDUCT OUTSIDE OF WORK
Behaviour outside of employment may amount to misconduct where it reflects on the reputation of the employer or involves dishonesty or violence or brings the employer or the employee into conflict with its clients or other employees.

Your actions of discussing matters that had been going on in the house that involve the staff and myself to Maree plus telling staff what other staff members are saying about them thus causing dissention within the house is way out of line for the responsibilities of someone who has been employed as house Supervisor. This amounts to serious misconduct.

I remind you about your contract and also your lack of professionalism plus you have been spoken to before about you behaviour and have also had a written warning this thus leaves me with no option bar to state.

I am hereby giving you this written warning in regards to your unprofessional behaviour in allowing yourself to discuss personal happenings within the house to outsiders, causing dissent within the staff by passing on comments that other staff tell you as there [sic] supervisor not to mention my reputation and the personal grieve [sic] that this has caused not only myself but my Family.

Any further misconduct will leave me with no choice bar that of instant dismissal.

Murray Kerr
Founder and Director

[14] *Colleen* in the above letter refers to Colleen Smith, Mr Kerr's sister and one of the caregivers, and *Paula* refers to another caregiver. The reference to a previous written warning refers to a warning that Mr Kerr had issued to Ms Smith on 14 May 2013 for posting a comment on Facebook about her feelings regarding her position, which resulted in comments from others, one of whom was a past employee who posted a negative comment.

[15] The 2013 written warning cited the same extract from Ms Smith's employment agreement as the 17 March 2014 warning, and was stated to be *in regards to* [Ms Smith's] *unprofessional behaviour in allowing* [herself] *to show your personal feelings and to discuss issues at your place of work on the WEB I.E. Face Book.*

[16] After having received the written warning dated 17 March 2014, a meeting took place in the house with all of the caregivers, Ms Smith and Mr Kerr present. Mr Kerr said that the purpose of the meeting was to *put the past behind us* and to move forward more positively, which he believed had been achieved. Mr Kerr said that no mention was made of the written warning that Mr Kerr had issued to Ms Smith.

[17] However, it would appear that, on 22 March 2014, there was some awkwardness between Ms Smith and Ms Langford when Ms Langford arrived at X's house close to the time when Ms Smith's shift was ending. It would appear from the evidence that Ms Smith did not greet Ms Langford and did not engage fully in a conversation between Ms Langford and Ms Davies, who was also present, although she did reply to a comment from Ms Davies.

[18] On Sunday 23 March 2014 Mr Kerr sent a text to Ms Smith as follows:

> *Good afternoon Nadia. I hav reason to beleive that an incident occurred at* [Xs] *on Sat the 23rd* [sic] *that involved yourself and Maree.*
> *Could u please provide me in writing of what happened an why.*
>
> *Thank u Murray.*

[19] There then followed a short exchange of texts between Ms Smith and Mr Kerr as follows:

> Ms Smith: *Hi there Murray, would you like that by email or printed or both?*
>
> Mr Kerr: *I wood like it printed and given to me at meeting that i want to hav with u an u friend if you u wish to be there asap. Thank u*
>
> Ms Smith: *When suits you for meeting?*
>
> Mr Kerr: *Any time monday at a place that suites u.*

[20] Ms Smith provided a written account of what happened the day before on 22 March. In this she said, amongst other things, that Ms Langford made minimal eye

contact with her and that some conversation did ensue in which Ms Smith took part. Ms Smith, however, said that she felt awkward and *Sandi and I raised our eyebrows at each other.*

[21] The note also stated the following:

> *I then was surprised to get a late phone call from Maree asking me what my problem was. I said to her I was not allowed to talk about anything and she said I could because she had just called Murray. He told her to call me.*
>
> *I apologized to Maree for making her feel uncomfortable and I told her I felt uneasy because of recent event and it was not intentional and it was the end of my shift and I had to collect Jack from a friend's house.* [Jack is Ms Smith's son]
>
> *She also put on the end of that conversation to forget that she called me.*
>
> *I cannot be responsible for everybody's feelings, I acted in a very professional manner.*
>
> *My job was handover at the end of my shift.*

[22] Ms Davies also gave a statement about the events of 22 March. This was written on 24 March. Her account of the incident included the following:

> [Ms Langford] *walked in & said 'Hi' I said 'Hello'. Nadia didn't say 'Hello' to Maree, but did look at her. Right away there was an uncomfortable feeling. I know I felt uncomfortable. Nadia got up off the couch & went into the kitchen to pack up her things. Maree sat on couch & I said 'how are you' as I could tell Maree was feeling awkward. She said 'okay' then was talking to* [X] *about his swimming & how great she had heard he had been. I joined in the conversation & said yip he was doing amazing in the pool. I looked at Nadia & joined her in on the conversation & she did say* [X] *had been doing good things in pool. Nadia then picked up a bag of couch and said Bye & left going down hallway. There was not a good vibe in the air & I felt awkward being caught in the middle of it.*

[23] On 24 March 2014 a meeting took place between Mr Kerr, Ms Langford, Ms Smith and her support person, Heather Couper, a friend. There is a conflict in evidence between Ms Smith and Ms Couper on the one hand and Mr Kerr on the other about how Mr Kerr and Ms Smith behaved at the meeting and about who was to blame for it ending prematurely. There is no need for me to replicate in detail the relevant extracts of the respective notes made by Ms Couper and Mr Kerr, but having

heard the evidence, I am able to come to a conclusion about what is likely to have occurred at the meeting.

[24] It appears that Ms Smith was stressed at the meeting, and was feeling defensive about Ms Davies' comments about being made to feel uncomfortable, and about Ms Langford's attitude. This led Ms Smith to refer to comments that Ms Langford had made to her about how X's house was run. The meeting then degenerated into an argument, and was unable to continue. Mr Kerr left the meeting, and returned a few minutes later to say that he was standing Ms Smith down without pay.

[25] Mr Kerr then wrote a letter to Ms Smith dated 25 March 2014 in the following terms:

> *Nadia Smith*
>
> ***Re: EMPLOYMENT – EXTENSIONS TO LIFE LIMITED***
>
> *I refer to our meeting on 24 March during which I was unable to go through matters I wished to discuss and as a result of which I advised I would need to stand you down and seek advice.*
>
> *As a result of past incidents and your behaviour at the meeting I have formed a preliminary view that we cannot maintain a working relationship and that as a result it is best if we end the employment relationship.*
>
> *The incident on the weekend with Maree was disappointing to me because, although your friend considers it a simple matter of minor misconduct, the fact is that it was yet another incident where, after being spoken to about your behaviour, your attitude and responses were unfriendly and caused discomfort to other staff and Maree.*
>
> *Of far more concern to me however was the disrespect and attitude you displayed towards me. Your attitude was angry dismissive and rude and it was impossible for me to move the meeting forward. You denied that we had even had meetings the week before or that you had received written warnings. You also threatened to lay a complaint against me.*
>
> *Your responses are symptomatic of your responses to me of late and it appears apparent that you have no trust and respect for me or loyalty towards me as your employer and I cannot see how I cannot have any trust or confidence in you.*
>
> *I have arranged a room at the Victory Square Community Centre and ask that you attend a meeting with me on 1 April 2014 at 10.00am to discuss this matter and your views. You will be paid for this meeting. After hearing from you I will make a decision as to whether your employment is to continue, and if so any other action that may be*

> *appropriate or whether to terminate your employment. Your* [sic] *invited to bring a representative or support person to the meeting.*
>
> *Yours faithfully*
> ***EXTENSIONS TO LIFE LIMITED***
> *Murray Kerr – Director*

[26] On the same day, Mr Kerr sent an email to Ms Smith to say that he had made an error in saying that her stand down was to be without pay.

[27] The oral evidence of Ms Smith regarding the 1 April meeting (at which Ms Smith and Mr Kerr were accompanied by their legal advisers) was that, by then, she felt that *there was no way* [she] *could go back to work and have a working relationship with anyone, and she meant anyone*. She said that she and Mr Kerr agreed that they could no longer have a working relationship. When asked why she could no longer have a working relationship with anyone, Ms Smith said that it was because of the statements that her colleagues had made to Mr Kerr, which *overruled* hers, and which she had not seen but been told about. She said that nothing could have repaired the relationship by 1 April.

[28] Ms Smith says in her written brief of evidence that she was given until Friday 4 April 2014 to respond to Mr Kerr's proposal that she be dismissed but said that, by Mr Kerr's actions to date, she had believed that he had pre-determined his decision to terminate her employment and felt that there was nothing she could put forward that would dissuade him from dismissing her.

[29] It was Mr Kerr's evidence that, at the meeting of 1 April, Ms Smith advised him that she had *absolutely no faith in* [Mr Kerr] *and could never see herself working for* [him] *and agreed the relationship was over*. Mr Kerr says that, after some discussion, with no other solution being suggested, Ms Smith was advised that, as there no longer appeared to be a workable relationship, he proposed that he terminate her employment on four weeks' pay in lieu of notice. Mr Kerr says that, having heard nothing else from Ms Smith, he terminated her employment by way of letter of 7 April 2014. This letter stated as follows:

> *Ref: Nadia Smith*
>
> *Following our meeting and correspondence between representatives I understand that there is nothing further you wish me to consider and so can confirm termination of your employment on four weeks notice.*

Murray Kerr
Founder and Director

The issues

[30] The following are the issues the Authority needs to determine:

(1) Whether Ms Smith was unjustifiably disadvantaged in her employment by having been given written warnings.

(2) Whether Ms Smith was unjustifiably disadvantaged in her employment by having been suspended.

(3) Whether Ms Smith was unjustifiably dismissed from her employment.

(4) Whether the respondent breached the provisions of the Minimum Wage Act 1983 in relation to Ms Smith's pay during her sleepover duty.

(5) Whether the respondent breached the terms of Ms Smith contract by underpaying her during her sleepovers.

(6) Whether a penalty should be imposed for a breach of s.4 of the Employment Relations Act 2000.

Relevant legal provisions

[31] Section 103A of the Employment Relations Act 2000 (the Act) sets out the test of justification which the Authority must apply when deciding whether an action or a dismissal is justified. It provides as follows:

> ***Section 103A Test of justification***
> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
> *(3) In applying the test in subsection (2), the Authority or the court must consider—*
> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
> *(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
> *(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
> *(a) minor; and*
> *(b) did not result in the employee being treated unfairly.*

[32] Section 4 of the Act provides:

> ***4 Parties to employment relationship to deal with each other in good faith***
> *(1) The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other.*
> *(1A) The duty of good faith in subsection (1)—*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[33] The relevant terms of Ms Smith's individual employment agreement were as follows:

> *Pay Details*
> *The employee will be paid at the rate of $13 per hour for all hours worked including additional hours unless mutually agreed otherwise. Wages will be paid fortnightly by cheque or direct credit to the employee's nominated bank account.*
> *....*
> *Employer's right to Suspend*

In circumstances where the employer suspects the employee on reasonable grounds of having been guilty of any serious misconduct the employer will be entitled to suspend the employee. In the first instance the suspension will be without pay, but in the event that the employee is not shown to have guilty of any serious misconduct and is reinstated the employee will be paid for the time he or she was suspended.

…

<u>Serious Misconduct</u>
In the event of an allegation of serious misconduct against an employee, the employer will advise the employee of the allegation and all information it has relating to that allegation and shall advise the employee that if the employer finds that such misconduct occurred then the employee will or may be dismissed.

The employee shall be requested to reply to the allegations made again him/her and, if the employee so wishes, the employee shall be given an opportunity to consider the matters raised and obtain representation.

The employer shall fairly hear and consider the employee's reply before making a determination of the matter.

<u>Less Serious Misconduct</u>
In the event of an allegation of misconduct not justifying instant dismissal the following provisions shall apply:

(a) On the first such occasion the employee shall be advised of the allegation and that it amounts to misconduct and shall be invited to reply to the allegation. If having considered the employee's reply the employer holds that such misconduct occurred the employee shall be advised of the fact and shall be advised that this amounts to a first written warning. The employee shall sign an acknowledgement that they have received a written warning; failure to sign such acknowledgement amounts to serious misconduct.

(b) On the second allegation of misconduct the employee shall be advised by the employer of such misconduct and shall be advised that such misconduct amounts to the second occasion that misconduct has occurred and if the employer finds that such misconduct occurred the employee will or may be dismissed. The provisions relating to serious misconduct shall then apply.

Note: Incidents giving rise to the above process may not necessarily be repeats of earlier incidents.

<u>Conduct outside of Work</u>
Behaviour outside of employment may amount to misconduct where it reflects on the reputation of the employer or involves dishonesty or violence or where it brings the employer or the employee into conflict with its clients or other employees.

<u>Redundancy</u>

> *In the event that the employer proposes to declare the position of the employee redundant arising from reasons other than restructuring as defined below, the employer shall:*
>
> - *Consult with the employee a reasonable time in advance over its intention (including the operational reasons for such intention, and its reasons for selecting the employee), before arriving at a final decision to give notice of termination of employment;*
> - *In the event that a decision is reached to declare the employee's position redundant, engage in further consultation with the employee over any other alternatives to redundancy;*
> - *Give the employee such reasonable time off while working out any period of notice as may be necessary to enable the employee to seek alternative employment;*
>
> *These provisions relating to redundancy shall also apply to any situation where the employer elects to terminate the employee's employment upon the grounds that irreconcilable differences exist between the employer and employee or the employee and another employee or employees or determines that the interest of the employer would be best served by terminating the employee's employment notwithstanding that the employee has not been guilty of any conduct or omission that would justify dismissal upon the grounds of misconduct or poor performance.*

Was Ms Smith unjustifiably disadvantaged in her employment by having been given written warnings?

[34] No personal grievance was raised within 90 days of the 2013 written warning, although Ms Boyce did raise one on behalf of Ms Smith in respect of the written warning issued to Ms Smith on 17 March 2014. I am of the view that Mr Kerr did not follow the minimum standards imposed by s.103A of the Act with respect of this 2014 warning. Whilst he did meet with Ms Smith on 16 March, Mr Kerr did not:

a. warn Ms Smith that his investigation could result in disciplinary action being taken against her once he had realised that there may be grounds for such an action,

b. make clear that the meeting of 16 March was to be a disciplinary meeting;

c. make clear to her that it was advisable that she bring a support person to that meeting; or

d. advise Ms Smith in advance of the meeting about his concerns about her supervisory performance and conduct which he had formed as a result of the investigation.

[35] Having found these fundamental flaws in the process followed by the respondent in issuing the 2014 warning, I must conclude that it caused Ms Smith a disadvantage (as the resultant written warning was of the nature of a disciplinary sanction) and that it was unjustified, as no fair and reasonable employer could have failed to have followed a fair process in all the circumstances. Accordingly, I find the personal grievance in respect of the 2014 warning to be proven.

Was Ms Smith unjustifiably disadvantaged in her employment by having been suspended?

[36] The employment agreement provides that the respondent has a right to suspend Ms Smith where the respondent suspects the employee on reasonable grounds of having been guilty of any serious misconduct. This means that the respondent must have had reasonable grounds for suspecting that Ms Smith had committed serious misconduct.

[37] Serious misconduct is defined in the employment agreement as including, without limitation, a number of examples of misconduct. Two may be relevant:

a. Gross insubordination to the employer by the employee; and

b. The employee wilfully refusing or failing to follow instructions.

[38] It is my view that the conduct that Mr Kerr was investigating (essentially, not being friendly to Ms Langford) could not reasonably be seen as a matter of serious misconduct. Whilst it needed to be investigated, because Ms Langford had complained, it appears to have been little more than awkwardness between two people. That would have been clear to Mr Kerr at the time he suspended Ms Smith.

[39] However, I am satisfied that Mr Kerr suspended Ms Smith because of what he regarded as her unacceptable behaviour at the meeting on 24 March 2014. This meeting quickly degenerated into an argument, and I conclude that Ms Smith and Mr Kerr must share equally the blame for that situation.

[40] Mr Kerr made a note of the meeting after it had ended which included the following:

> *Nadia then began to loose* [sic] *her temper and started to verbally attack Maree over the things that she had said to her about me and the company and why don't you tell Murray that.*

> *She got that wild to the point of giving her the big threatening steer as you would if you were going to get up and clonk someone.*
> *…*
> *In the end it was impossible to say anything as she held her hand up say I'm not listening I'm not listening.*
>
> *The meeting would have lasted 10 to 15 minutes max it was a total waste of time Nadia mocked argued and got angry.*

[41] Whilst written colloquially in places, this note tends to show that Ms Smith's attitude during the meeting did cause some problems for Mr Kerr in trying to investigate his concerns.

[42] However, evidence was also given by Ms Smith's support person, Ms Couper, who said that Mr Murray himself behaved in an aggressive manner during the meeting. Ms Couper's notes of the meeting appear to support this; in particular, she noted that Mr Kerr was standing, pointing his finger at Ms Smith at one point.

[43] On balance, I believe that the conduct Ms Smith demonstrated during the meeting of 24 March did potentially fall within the definition of serious misconduct, and that it did fall within the range of responses of a reasonable employer to treat that conduct as potentially amounting to serious misconduct.

[44] I also take into account the fact that Ms Smith was employed to supervise staff members who had in their care a severely handicapped person. Mr Kerr was entitled to harbour doubts about the safety and well-being of X in the context of the conduct he had just seen Ms Smith display.

[45] I therefore conclude that the suspension of Ms Smith was substantively justified in all the circumstances. However, as is conceded by Mr Malone on behalf of the respondent, Mr Kerr did not seek Ms Smith's views prior to suspending her. There will be times when it is appropriate to suspend someone immediately, such as where violence in the workplace is threatened, or has been committed. That was not the case here, however. Whilst Ms Smith was agitated, so was Mr Kerr, and I conclude that his hasty action was due to his agitation rather than Ms Smith's. A fair and reasonable employer could not have failed to have consulted with Ms Smith about suspending her in all the circumstances. The suspension was therefore procedurally unjustified.

[46] Being suspended caused Ms Smith a disadvantage in her employment, as it obviously demonstrated to the staff that an employment relationship problem existed between her and her employer. As I have noted above, it was also effected in a procedurally unjustified way. It therefore caused Ms Smith an unjustified disadvantage in her employment.

Was Ms Smith unjustifiably dismissed from her employment?

[47] The sequence of events that led to the termination of Ms Smith's employment seems to have been as follows;

a. Ms Smith was invited to give an account of the events of 22 March;

b. She was invited to a disciplinary investigation meeting on 24 March in order to answer Mr Kerr's questions;

c. Ms Smith was able to have a support person with her;

d. Both Ms Smith and Mr Kerr lost their tempers at the investigation meeting;

e. Mr Kerr had to abandon the meeting because he was no longer able to keep it on track;

f. Mr Kerr suspended Ms Smith;

g. Mr Kerr wrote a letter to Ms Smith asking her to attend a disciplinary meeting on 1 April and stating, inter alia, that:

    i. the incident on 22 March was *yet another incident where, after being spoken to about your behaviour, your attitude and responses were unfriendly and caused discomfort to other staff and Maree*; and

    ii. Ms Smith responses on 24 March were *symptomatic of your responses to me of late and it appears apparent that you have no trust and respect for me or loyalty towards me as your employer and I cannot see how I can have any trust or confidence in you.*

h. At the subsequent meeting of 1 April it was agreed that the parties could no longer work together.

[48] Mr Kerr's letter of 25 March shows that he had, by then, decided that Ms Kerr had committed misconduct on 22 March, by her unfriendly responses. However, this decision was reached without the benefit of a properly conducted investigation meeting. Whilst it is not clear whether Mr Kerr regarded this as misconduct or serious misconduct, he was not in a position to have reached that decision at that stage as the meeting of 24 March had to be abandoned shortly after it had started. The action of doing so was not the action that a fair and reasonable employer could have taken in all the circumstances. The correct action would have been to have reconvened the meeting, and taken steps to ensure that it proceeded more calmly, possibly by not having Ms Langford there.

[49] Mr Kerr was, however, entitled to treat with concern Ms Smith's conduct at the 24 March meeting and to invite her to comment on his concerns. The meeting of 1 April was convened in order to hear Ms Smith's comments on those concerns. It is not clear whether Mr Kerr was going to let Ms Smith comment on his concerns about the 22 March incident involving Ms Langford. His letter of 25 March would suggest not, as he had already decided about that.

[50] It appears that the meeting of 1 April did not take the form of a disciplinary meeting, but was a meeting at which Ms Smith declared that she could no longer work at the respondent, which Mr Kerr agreed with. It appears that, based on that declaration, Mr Kerr terminated her employment on 7 April.

[51] The question is, did Ms Smith reach her decision that she could no longer work at the respondent based on unreasonable conduct by it, or for some other reason for which the respondent cannot reasonably be held responsible?

[52] Ms Smith stated in the Authority's investigation meeting that she could not return to work because of what the staff had been saying about her, referring to the statements they had made. Having read the statements made by the staff, I can conclude that some are broadly supportive of Ms Smith[1] and some are critical of her. These statements were commissioned by Mr Kerr as a result of concerns he had about

[1] For example, Ms Davies' statement says that *Nadia did the right thing, and should have been acknowledged for that* and Paula's statement, which said that she thought *Nadia has been doing her job well lately*.

the way the house was being run. I accept his evidence that he was concerned for the safety and well-being of X. I therefore accept that he was entitled to have commissioned the statements as part of his investigation. He was also obliged to make known to Ms Smith what comments had been made about her in the statements. However, he did not actually show the statements, which run to nine pages, to Ms Smith.

[53] This failure to show Ms Smith the written statements is a fundamental flaw in the process adopted by the respondent. The written statements contain a range of comments which Mr Kerr almost certainly could not have accurately and comprehensively summarised for Ms Smith. Whilst it is speculation as to how Ms Smith would have felt had she read the statements in their entirety, there is at least a reasonable chance that her understanding of her colleagues' views would have been more nuanced.

[54] Mr Malone submits that Ms Smith said that she was aware of the issues, and had had a chance to speak to them. However, being aware of the issues is not the same as understanding the nuances of what each staff members said about her. These were not just Ms Smith's colleagues, but also the staff she was responsible for as supervisor.

[55] Furthermore, it is not surprising that Ms Smith felt that she had lost trust in Mr Kerr given that he had concluded that she had been at fault in what had happened on 22 March with Ms Langford, despite the investigation meeting on 24 March not having finished.

[56] When I stand back and examine the causes that led to Ms Smith' employment being terminated, it is clear that they stem from Mr Kerr not letting Ms Smith have full access to the written statements that staff had made about her, so that she had an unbalanced view of their attitude towards her, and from Mr Kerr concluding that Ms Smith had been to blame for the awkwardness between her and Ms Langford on 22 March, even though the disciplinary meeting had had to be aborted.

[57] In all the circumstances, no fair and reasonable employer could have failed to have made the written statements available to Ms Smith, given that Mr Kerr's written warning was based upon it, and no fair and reasonable employer could have failed to have reconvened the disciplinary investigation meeting before concluding that Ms

Smith had been at fault for the awkwardness that occurred on 22 March. These failings were, I find, material to Ms Smith's decision that she could not return to work, nor restore the working relationship. That decision, in turn, led to Mr Kerr dismissing Ms Smith.

[58] I therefore conclude that Ms Smith's dismissal was unjustified, both substantively and procedurally.

Remedies

[59] Sub-section 123(1)(a) to (c) of the Act provides as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[60] Section 128 of the Act states as follows:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[61] Ms Smith said in her evidence to the Authority that she was given four weeks' notice, and so was paid up to 6 May 2014. Mr Murray and Ms Boyce submit,

however, that she suffered loss of earnings from 8 April 2014 for 13 weeks. This cannot be correct.

[62] It is well established that a party seeking reimbursement of lost wages arising out of an unjustified dismissal must prove that they took steps to try to mitigate their loss. In other words, seek alternative employment.[2] Ms Smith's evidence, which was commendable in being candid, was that she did not apply for jobs until later in the year, and that she was not sure when she was dismissed whether she should seek employment, as she was not sure where she was going having had a relationship of five years recently breakdown.

[63] This was Ms Smith's choice. I do not accept the submissions of Mr Murray and Ms Boyce that this hiatus in seeking work was because her confidence had been knocked as a carer. There were other jobs she could have applied for, as she is an articulate and intelligent person. I must therefore accept the submissions of Mr Malone that Ms Smith did not take steps to mitigate her loss and so cannot be awarded any award under s.123(1)(b).

[64] Turning to compensation under s.123(1)(c)(i), I have found that Ms Smith suffered an unjustified disadvantage in her employment when she was given a written warning in 2014, and by the way she was suspended. She was also unjustifiably dismissed.

[65] Ms Smith gave little evidence about the effect on her of receiving the 2014 written warning, although she said that it was very frustrating that she had received the warning for the actions of others. Although her evidence was scant on the effects, I accept that she did suffer humiliation, loss of dignity and injury to her feelings as a result of receiving the warning. I am unable to say that, if a fair process had been followed, she would have still received the warning as, had she been prepared for the meeting, she would have been in a better position to have put forward her side of the events. That may, in turn, have persuaded Mr Kerr that it was not appropriate to have issued a written warning.

[66] Therefore, I find that it is appropriate for Ms Smith to be awarded a sum in respect of the humiliation, loss of dignity and injury to her feelings that she suffered at

[2] See for example *Carter Holt Harvey Ltd v Yukich*, [2005] ERNZ 300

having received the warning, which amounted to an unjustified disadvantage in her employment.

[67] I assess the appropriate amount of that award to be $2,500.

[68] Ms Smith gave no evidence in respect of the effect on her of being suspended. I am not able to assess what compensation she may be due for that unjustified disadvantage therefore. In any event, it is closely bound up with the dismissal and is best considered together with the effects of that action.

[69] In respect of the dismissal, Ms Smith said that she found the experience traumatising, given that she had been employed for five years and had formed a stable relationship with X during that time. She says she was passionate about the care she provided, and that she felt she had lost a family member.

[70] Ms Smith says that she was emotionally distraught at the way she was terminated, and it took her a couple of weeks to *get her head around what had happened.* Ms Smith also said during the Authority's investigation meeting that she had felt deflated, and was not sure if she could go back into caring because of her loss of confidence.

[71] It is also clear that the loss of trust that Ms Smith felt, causing her to conclude that she did not wish to work for the respondent anymore, arose out of the unfair process that had been followed. This loss of trust, and associated feelings, fall under the aegis of humiliation, loss of dignity and injury to her feelings.

[72] I conclude that Ms Smith suffered a reasonably high level of humiliation, loss of dignity and injury to her feelings arising from the manner of her dismissal and from the fact of it. Ms Smith has sought $15,000 from the respondent company under s.123(1)(c)(i) of the Act. In the Employment Court case of *Hall v Dionex Pty Ltd*[3] Her Honour Judge Ingles assessed the appropriate upper level of compensation, once inflation has been applied, at $33,000. I believe, therefore, given the effects upon Ms Smith of the dismissal that the sum sought of $15,000 is an appropriate amount to award.

[73] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be

[3] [2014] NZEmpC 29, at [87]

provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[74] I believe that Ms Smith did contribute towards her dismissal, in two respects. First, her refusing to significantly engage with Ms Langford on 22 March 2014 on the basis that she was threatened with instant dismissal *for talking out of turn to staff and others* was either a disingenuous or an emotionally immature response. Notwithstanding her reasonable objection to the 2014 written warning, it did not preclude her from being basically civil to Ms Langford.

[75] Secondly, Ms Smith obviously reacted emotionally at the meeting on 24 March 2014. Whilst this may be understandable to an extent, her reaction obviously disrupted the proceedings. This in turn led Mr Kerr to suspend her and abandon the meeting. Mr Kerr must take the bulk of the responsibility for those actions, but Ms Smith shares the blame.

[76] All in all, I believe that a reduction of 30% in the award of compensation arising from the unjustified dismissal is warranted. I do not believe that any reduction in the award for the unjustified disadvantage is warranted.

Has the respondent breached the provisions of the Minimum Wage Act 1983 in relation to Ms Smith's pay during her sleepover duty?

[77] Section 6 of the Minimum Wages Act provides as follows:

> ***6. Payment of minimum wages***
> *Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.*

[78] The adult minimum wage rates for the material years in question were as follows:

a. 1 April 2012 to 31 March 2013, $13.50 per hour[4];

[4] Clause 4 of the Minimum Wage Order 2012 (SR 2012/13)

b. 1 April 2013 to 31 March 2014, $13.75 an hour.[5]

[79] Ms Smith carried out sleepover duties in her employment at the respondent company. She says that she was rostered to work a regular two-week cycle, as follows:

a. Week one:

Monday: 3pm to 7pm and 7pm to 9am on Tuesday. Paid for 10 hours actual time worked plus a $95 sleepover allowance.

Tuesday: 9am to 5.30 pm; paid 8.5 hours

Wednesday: 9am to 3.30 pm, paid 6.5 hours

Saturday: 9am to 5.30 pm paid 8.5 hours

Sunday: 1pm to 7pm, paid 6 hours, 7pm to 9am Monday, paid 6 hours plus a $95 sleepover allowance.

This amounts to 45.5 paid hours and a $190 sleepover allowance for two sleepovers.

b. Week 2:

Tuesday: 9am to 1.30 pm, paid 4.5 hours

Wednesday 9am to 5.30 pm, paid 8.5 hours

Sunday: 5pm to 9am Monday, paid 8 hours plus a $95 sleepover allowance.

This amounts to a total of 21 paid hours and one sleepover payment of $95.

Did Ms Smith's sleepover shifts constitute work for the purposes of the Minimum Wage Act?

[5] Clause 4 of the Minimum Wage Order 2013 (SR 2013/29)

[80] The respondent contested the evidence of both the hours worked, and the basis of payment. Mr Kerr says that Ms Smith did not work such a regular roster, varying considerably depending on a number of factors. However, no detailed time and wage records have been adduced to support this assertion.

[81] Mr Malone submits that insufficient evidence has been adduced to enable the Authority to determine that all hours over the entire period of employment that the claim is made, constituted work. He refers to the fact that, on occasion, Ms Smith had her partner and son stay over at X's house while she was working sleepovers, suggesting that this was not, therefore, work.

[82] It is correct that detailed evidence was not given about the work that Ms Smith did over the two years she worked for the respondent. However, in the first Employment Court judgement of *Idea Services v Dickson*[6] the Court identified three key considerations to decide whether a sleepover constituted work for the purposes of the Minimum Wage Act. These were[7]:

a. Constraints on the employee;

b. Responsibilities of the employee; and

c. Benefit to the employer.

[83] Applying these tests, there is no reason to believe that Ms Smith's sleepover experience was anything other than a typical sleepover. Ms Smith was sleeping over because she was in sole care during that period of a physically and mentally disabled individual who, according to Mr Kerr's evidence, could be extremely angry and aggressive. I infer that Ms Smith's duties were to be available during the night in case X needed her. I infer further that this need imposed significant constraints upon her freedom, and significant responsibilities, which were to the great benefit of the respondent.

[84] Apart from his evidence that Ms Smith had her partner and child stay overnight on occasions, no evidence was presented by the respondent to suggest that the characteristics of Ms Smith's sleepovers were anything other than those of typical sleepovers in the caring professions. Indeed, the fact that Ms Smith had her partner

[6] [2009] ERNZ 116
[7] Paragraph [64]

and child stay overnight on occasions suggests strongly that this was because of the constraints she was under.

[85] Furthermore, Mr Kerr gave evidence that the overnight payments he made to Ms Smith were determined by the ACC. This also suggests strongly that the purpose of the sleepovers was to be present in case care needed to be provided during those hours.

[86] I am therefore satisfied on a balance of probabilities that Ms Smith's sleepover duties were *work* for the purposes of the Minimum Wages Act.

Did the respondent comply with its requirements under the Minimum Wage Act in respect of Ms Smith's sleepovers?

[87] Mr Kerr's evidence regarding the basis of payment was that there was no assumption that any specific hours were worked that would be paid for, with a balance sum for the other hours. Instead, the arrangement was that staff members were paid a sum equivalent to six hours at their hourly rate, plus $95. The payment was the same no matter how many or few hours Ms Smith worked. The respondent's position, therefore, is that Ms Smith would be paid $207.50 [8]for each overnight shift she worked from 2 September 2013, for example. However, what is important is that Ms Smith was entitled to be paid at least the applicable minimum wage rate for each hour that she actually worked, and that included each hour she was on her sleepover shift.

[88] The respective representatives for Ms Smith and the respondent disagreed on how Ms Smith's pay for sleepovers should be assessed. I will not repeat their respective methodologies in detail, but I believe that Mr Malone's method is the correct one. He has divided the relevant period into four, so as to reflect the changes over time in the amounts of the adult minimum wage rates in force, the hourly pay rates Ms Smith received and the overnight allowances she was paid.

[89] Mr Malone has also calculated how much Ms Smith was actually paid for each sleepover shift worked (combining the sum of her hourly rate multiplied by six, and her overnight allowance) and compared that with the amount she should have received had she been paid at the correct hourly rate for each hour of the sleepover shift. In doing this calculation he has assumed each overnight shift lasted 14 hours. I

[8] (6 x $18.75 = $112.50 + $95)

believe that this creates an accurate assessment. I also agree with Mr Malone that, during the fourth period, from the records provided, Ms Smith worked 47 sleepover shifts as opposed to 53 as submitted by Ms Boyce and Mr Murray.

[90] The easiest way of representing this assessment is by way of a comparative table similar to the one that Mr Malone provided, as follows:

Period	**Minimum wage rate per hour**	**Sleepover shifts worked**	**Minimum entitlement per 14 hour shift**	**Actual pay rate**	**Overnight allowance**	**Total paid per shift**	**Shortfall per shift**	**Total owed for the period**
9/7/12 to 31/3/13	$13.50	72	$189	$16.75	$77.50	$178	$11	$792
1/4/13 to 31/5/13	$13.75	17	$192.50	$16.75	$77.50	$178	$14.50	$246.50
1/6/13 to 1/9/13	$13.75	25	$192.50	$17.75	$90	$196.50	None	None
2/9/13 to 31/3/13	$13.75	47	$192.50	$18.75	$95	$207.50	None	None
Total owed								$1,038.50

[91] This table shows that Ms Smith is owed a total of $1,038.50 gross by reference to the prevailing relevant minimum wage rates in force in the respective periods.

Has the respondent breached the terms of Ms Smith employment agreement in respect of her pay during her sleepover shifts?

[92] This claim was not specifically pleaded in the statement of problem, and was first articulated in submissions. However, I shall address the issue as Mr Malone did not object to this allegation being raised late, and he did address the allegation in his submissions in reply.

[93] The terms of Ms Smith's employment agreement state that she would be paid at the rate of $13 per hour *for all hours worked, unless mutually agreed otherwise.* There is no clause in the employment agreement excepting her work carrying out sleepover shifts.

[94] Clearly, the terms of the employment agreement were varied by mutual agreement each time that Ms Smith hourly rate was increased. I believe that there was also a mutually agreed variation to this clause in respect of the payments to be received during her sleepover shifts. At no time did Ms Smith complain about the arrangements in relation to her pay during sleepovers during her employment.

[95] Whilst this sleepover shift variation was not in writing, there is no requirement in the employment agreement for such variations to be recorded in writing; nor is there an entire agreement clause.

[96] I therefore conclude that there was no breach of the employment agreement in terms of the pay Ms Smith received for sleepover duties during her employment.

Should a penalty be imposed for a breach of s.4 of the Employment Relations Act 2000?

[97] Section 4A of the Act provides as follows:

> ***4A Penalty for certain breaches of duty of good faith***
> *A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—*
> *(a) the failure was deliberate, serious, and sustained; or*
> *(b) the failure was intended to undermine—*
> *(i) bargaining for an individual employment agreement or a collective agreement; or*
> *(ii) an individual employment agreement or a collective agreement; or*
> *(iii) an employment relationship; or*
> *(c) the failure was a breach of section 59B or section 59C.*

[98] Ms Boyce and Mr Murray argue that penalties should be imposed in respect of the following breaches of good faith:

a. The respondent continuing to argue that it was not in breach of the minimum wage legislation by relying on an averaging argument which it knew was not supported by case law;

b. That the respondent did not comply with the terms of the employment agreement;

c. That the respondent did not disclose statements in the disciplinary process; and

d. That the respondent failed to produce all the time and wage records so that Ms Smith was unable to properly quantify her losses.

[99] I do not accept that it is appropriate to impose on a respondent a penalty for pursuing an argument in defending claims against it, even if it knows that those arguments are not legally sustainable. The correct approach to deal with such a matter is through the costs regime, if relevant.

[100] Additionally, whilst I have found that the respondent did not adhere to the terms of the employment agreement in respect of the suspension process, I do not accept that such a failure was *deliberate, serious, and sustained.* A penalty is available to be imposed for a breach of an employment agreement, under section 134 of the Act, but that has not been sought.

[101] I have already found that the failure to disclose statements in the disciplinary process contributed significantly to the dismissal being unjustified. A substantial award of compensation has already been given for that and it would not be just to impose a penalty as well. In any event, I do not accept that such the failure was *deliberate, serious, and sustained.*

[102] Whilst I am aware that not all time and wage records were produced initially, they were by the time of the investigation meeting. The records produced have enabled me to assess Ms Smith's rights under the minimum wage legislation. I therefore do not believe that it would be just to impose a penalty. In any event, again, I am not convinced that the failure was *deliberate, serious, and sustained.*

Orders

[103] The respondent is ordered to make the following payments to Ms Smith:

a. The gross sum of $1,038.50 in respect of the breach of the Minimum Wage Act;

b. Compensation in the sum of $2,500 in respect of humiliation, loss of dignity and injury to her feelings arising from the unjustified disadvantage in respect of the 2014 written warning; and

c. Further compensation in the sum of $10,500[9] in respect of humiliation, loss of dignity and injury to her feelings arising from the unjustified dismissal.

Costs

[104] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if no such agreement has been reached within 21 days of the date of this determination, any party seeking a contribution towards their costs should serve and lodge a memorandum within a further 14 days, and any response must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority

[9] $15,000 less 30%