

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 73
5624771

BETWEEN JOANNA WEIR
 Applicant

AND KINLOCH LODGE
 HOLDINGS LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Danny Jacobson for Applicant
 Matthew McGoldrick for Respondent

Investigation Meeting: 23 November 2016 at Hamilton

Submissions Received: 7 and 23 December 2016 from Applicant
 21 December 2016 from Respondent

Determination: 20 March 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. One or more conditions of Ms Weir’s employment were not affected to her disadvantage by an unjustified action by Kinloch Lodge Holdings Limited.**
- B. Ms Weir was unjustifiably dismissed by reason of redundancy and Kinloch Lodge Holdings Limited is ordered to pay to Ms Weir the following sums within 28 days of the date of this determination:**
- a) lost remuneration of \$25,691.66 gross under section 123(1)(b) of the Employment Relations Act 2000 plus interest; and**

b) \$20,000 under section 123(1)(c)(i) of the Employment Relations Act 2000.

C. Kinloch Lodge Holdings Limited is ordered to reimburse Ms Weir the following expenses incurred in the proper exercise of her duties within 28 days of the date of this determination:

a) \$626.40 for mileage expenses;

b) \$183.40 for accommodation and meal expenses;

c) \$482.55 for office related expenses;

d) \$410 for expenses related to the repair of Ms Weir's laptop.

D. Kinloch Lodge Holdings Limited breached the Holidays Act 2003. Ms Weir's application to be reimbursed holiday pay is declined.

E. The application for penalties for breaches of the employment agreement and the statutory obligations of good faith is declined.

F. The counter-claim is declined.

G. Costs are reserved.

Employment relationship problem

[1] Ms Joanna Weir claims one or more conditions of her employment were affected to her disadvantage by an unjustifiable action of Kinloch Lodge Holdings Limited (Kinloch Holdings) and that she was unjustifiably dismissed by reason of redundancy. Ms Weir also claims Kinloch Holdings breached the Holidays Act 2003, her employment agreement and its obligations of good faith.

[2] Kinloch Holdings denies all Ms Weir's claims and counter-claims against Ms Weir for a breach of the employment agreement.

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

Background

[4] In July 2015 Ms Weir applied for the role of Sales Manager for two entities, Treetops Lodge and Estates (Treetops) and The Kinloch Club (Kinloch Club). Both entities are luxury resort Lodges located in Taupo and Rotorua respectively and are operated by Kinloch Holdings.

[5] The Treetops Lodge has been operating since 2002, but the Kinloch Club was a new enterprise and at the time Ms Weir applied for the role of Sales Manager it was still under construction and had experienced some significant delays in the official opening date.

[6] Ms Weir was interviewed initially in person by Mr Peter White, General Manager of Treetops, in September 2015 and then by telephone by Mr John Sax, a director of Kinloch Holdings, on 12 October 2015.

[7] Ms Weir was formally offered the position by email on 16 October 2015. The emailed offer differed to the position originally advertised in that it included responsibilities for Marketing, Sales and Reservations instead of just sales.

[8] The offer of employment included reimbursement of company related out of pocket expenses and that initially Ms Weir would work part time on a ¼ daily rate of \$340.00 per day moving to full time after 8 November 2015. It was agreed that some work from home was acceptable but that travel to and from Treetops or Kinloch Club to Ms Weir's home would be her responsibility. Mr Sax confirmed in an email on 16 October 2015 that travel costs from Treetops or Kinloch to Auckland or other destinations would be covered by Kinloch Holdings. Ms Weir was advised that there was generally a company vehicle available for this purpose.

[9] The terms of Ms Weir's employment were set out in a written employment agreement signed by Ms Weir on 29 October 2015. The written agreement was not

signed by Kinloch Holdings until after Ms Weir's employment had ended. There is no dispute that as far as the terms set out in the written agreement were performed by both parties the intended terms of employment were those set out in the employment agreement signed by Ms Weir on 29 October 2015. At the time the actions giving rise to Ms Weir's grievance, there was no enforceable employment agreement in place as the agreement had not been fully executed by the parties.

[10] In accordance with the agreement reached with Mr Sax, Ms Weir started working on a part time basis from her home in Tauranga on 19 October 2015 and commenced working full time on 9 November 2015.

[11] Ms Weir worked mainly from her home in Tauranga until she moved to working at the Kinloch Club on 11 January 2016 as the lodge was nearing the end of its construction. The Kinloch Club was formally opened for business on 23 January 2016.

[12] On 24 February 2016 Mr Sax emailed Ms Weir proposing to disestablish her position. The proposed restructuring was discussed during a meeting held via FaceTime on 22 March 2016 and was followed on 29 March 2016 with confirmation that Ms Weir's position would be disestablished and her employment would end by reason of redundancy.

Issues

[13] The issues for determination are:

- a) whether one or more conditions of Ms Weir's employment were affected to her disadvantage and if so, what if any remedies should be awarded;
- b) whether Ms Weir was unjustifiably dismissed and if so, what if any remedies should be awarded;
- c) whether Kinloch Holdings breached the Holidays Act 2003 and if so, what if any award should be made;
- d) whether Ms Weir is entitled to unpaid expenses;

- e) whether Kinloch Holdings breached the employment agreement between it and Ms Weir and if so what if any penalties should be awarded;
- f) whether Kinloch Holdings breached its obligations of good faith and if so what if any penalties should be awarded; and
- g) Kinloch Holdings' counter-claim against Ms Weir.

Disadvantage claim

[14] Ms Weir claims one or more conditions of her employment were affected to her disadvantage by the unjustifiable actions of Kinloch Holdings when it allowed Ms Weir to be bullied by a consultant engaged by Kinloch Holdings.

[15] Ms Weir bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Weir discharges that onus then the burden of proof moves to Kinloch Holdings to establish on the balance of probabilities that any disadvantage Ms Weir may have suffered was justified.

[16] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Kinloch Holdings' actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[17] Prior to commencing work Ms Weir emailed Mr Sax and requested clarification between her role and the role undertaken by an external consultant engaged by Mr Sax. Mr Sax advised Ms Weir that the consultant was engaged under a contract to provide services which did not involve direct sales and marketing. Mr Sax advised Ms Weir that the consultant did not undertake local marketing and the work undertaken by the consultant was different to the specific targeted marketing objectives set down for Ms Weir to achieve and in particular the consultant had no marketing representation for the Kinloch Club defined in the contract.

[18] Ms Weir told me that she raised concerns about the contractor's role because of the potential for workplace conflict. Ms Weir did not raise this as a concern with Mr Sax when seeking clarification from him on 16 October 2015.

[19] From the evidence produced during my investigation into Ms Weir's claims I have concluded there was overlap in the responsibilities between the contractor and Ms Weir. Despite Mr Sax advising Ms Weir that the contractor had no responsibilities to market the Kinloch Club, promotional activities were discussed and apparently agreed to between Mr Sax and the consultant which were then passed on to Ms Weir. This was the cause of some frustration on Ms Weir's part who raised a concern about this with Mr White. Ms Weir did not raise the same concerns with Mr Sax.

[20] Ms Weir says the following conduct by the contractor was bullying in nature and had the effect of undermining her in her role:

- a) Ms Weir was excluded from email communications from the consultant to the temporary general manager at the Kinloch Club and Mr Sax regarding plans for the Kinloch Club;
- b) The contractor promoted herself as being in charge of marketing for both Lodges;
- c) The contractor named herself as the Marketing Manager for the Kinloch Club and referred to Ms Weir as the Sales Manager while also misspelling Ms Weir's name;
- d) The contractor treated Ms Weir as if Ms Weir reported to her by requiring Ms Weir to copy the contractor in on all communications regarding sales initiatives and giving Ms Weir instructions as to work tasks to be completed;
- e) The contractor criticised Ms Weir for removing advertising of non-existent amenities from the website. Ms Weir was concerned that the advertising of the amenities was misleading and deceptive.

[21] It is clear from the evidence that Ms Weir found her working relationship with the contractor to be unpleasant. However, Ms Weir did not raise any issues with Mr Sax and so Kinloch Holdings was unable to take any action to resolve her issues. Ms Weir did discuss concerns with Mr Sax's personal assistant but I find this was done in a general way and with no specific examples of the type of behaviour Ms Weir found unpleasant.

[22] Ms Weir acknowledged that the information she provided in her evidence was never set out for Mr Sax during her employment, however, she did raise issues during their discussion about the restructuring proposal. I am satisfied Ms Weir raised her concerns in the context of attempting to persuade Mr Sax that Ms Weir had been hindered by the consultant in achieving targets and not in the context of a complaint that Ms Weir had been bullied in her employment.

[23] Ms Weir had an obligation to raise her specific concerns with Mr Sax and communicate to him her actual dissatisfaction with the consultant during her employment. Had she done so, and in the event that no action was taken by Kinloch Holdings, then she may have established a personal grievance. However, that is not the case and I find Ms Weir has failed to establish that one or more conditions of her employment were affected to her disadvantage by any actions of Kinloch Holdings in relation to her claims that she was subjected to bullying behaviour by the consultant.

The Dismissal

[24] Ms Weir claims her dismissal by reason of redundancy was unjustified. As set out earlier in this determination the test of justification for dismissal is set out in section 103A of the Act. The test requires the Authority to assess whether Kinloch Holdings' actions and the way it acted was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[25] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.¹ That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on

¹ [2014] NZCA 541.

business requirements.² This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[26] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before a decision is made.

[27] On 9 November 2015 when Ms Weir moved from working part time into her full time role, Mr Sax emailed Ms Weir and set out the work priorities and key challenges for Ms Weir going forward. The priorities included:

- a) improvements in all communications, sales, follow-ups, including from agents to assist in improving sales conversion rates;
- b) increasing the average nights' stay from one to three;
- c) provide a list of recommended actions/activities going forward;
- d) monitor the accuracy and currency of the guest records;
- e) ensure the agent database is complete and that communications with all agents are completed;
- f) develop a list of key messages to assist in developing the high tourism numbers (Mr Sax made a number of suggestions for Ms Weir's consideration);
- g) review who is working for the Lodges and who isn't and why/why not;
- h) longer term objectives detailed out for initiating/implementation.

² *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

[28] In his email Mr Sax advised Ms Weir that she should be working towards achieving sales of about 380 room nights a month. Ms Weir was asked to provide a comprehensive weekly review of all sales/marketing efforts.

[29] In response that same day Ms Weir raised concerns with respect to the quality of, and access to, the information Mr Sax had referred to in his email and she passed on to Mr Sax negative feedback about Treetops that she had received from agents.

[30] On 10 December 2015 Mr Sax raised concerns with Ms Weir and Mr White regarding the forward booking rates for January, February and March 2016. This message was reinforced on 11 December 2015 when Mr Sax emailed the contractor and Ms Weir and asked Ms Weir to focus on selling room nights for December 2015 and January 2016 in Treetops. Mr Sax acknowledged in his email that bookings for the Kinloch Club were not being taken at that stage but would be taken from 15 January 2016 onwards.

[31] On 17 December 2015 Ms Weir set out suggested marketing initiatives she and the acting manager for the Kinloch Club had discussed to increase sales for the Kinloch Club on opening. The suggestions included:

- a) develop a number of positive testimonials from guests to be published on the website;
- b) develop positive reviews on international travel sites;
- c) provide an added value option to guests to guarantee an upgrade at no cost (this would also help drive positive guest feedback).

[32] Ms Weir proposed running the upgrade campaign for all bookings made before 30 January 2016 and for stays completed by 31 March 2016.

[33] On 21 December 2015 Mr Sax emailed Ms Weir and reiterated his concerns about the lack of reservations for Treetops and responded to Ms Weir's marketing suggestions for Kinloch Club advising her they would not be proceeded with as he was of the view that they would fail. Mr Sax preferred Ms Weir to consider working with agents to sell and cross sell the properties by increasing commission rates to the agents.

[34] Mr Sax requested Ms Weir to provide him with a month by month sales plan for the ensuing 12 month period. Mr Sax advised Ms Weir that in the New Year they would have a few hours review session and agree the plan for 2016. Mr Sax did not advise Ms Weir that earlier in December he had requested the contractor to provide a sales and marketing budget for the same period. Despite advising Ms Weir on 11 December 2015 that bookings for the Kinloch Club would not open until 15 January 2016 Mr Sax directed Ms Weir to open all reservations for all rooms at the Kinloch Club from that day (21 December 2015).

[35] By 19 January 2016 the occupancy rates for both Treetops and the Kinloch Club remained low. Mr Sax emailed Ms Weir and the general managers of the two Lodges requesting them to collectively brainstorm strategies and recommendations on how they would implement a sales/marketing programme. Mr Sax set out the forward bookings and the loss of potential revenue if bookings were not increased.

[36] Mr Sax advised Ms Weir and the general managers that Kinloch Holdings was “...*fortunate in that [it] had no fiscal constraints...*” but noted that fiscal prudence was necessary to ensure expenditure delivered results. Mr Sax requested the three managers to bullet point their recommendations and he would review/sign off those actions identified for immediate implementation. The three managers were asked to identify any additional resources needed and an estimated budget.

[37] On 25 January 2016 Ms Weir emailed Mr Sax responding to his request for recommendations. The three managers were of the view that rather than a complex commission system it would be better to provide a percentage rebate system based on the number of room nights booked by an agent which could be calculated and paid at the end of the season.

[38] Ms Weir provided feedback she had received from inbound agents regarding bookings for the Kinloch Club. That feedback included a reluctance to book the Kinloch Club due to the number of changes to the published opening dates. Agents had indicated that they wished to be sure the lodge was up and running before putting any bookings through. To overcome this resistance, the recommendation was for the previously suggested incentive package of the free upgrades to be promoted directly to the market.

[39] Other recommendations included maintaining membership of the Tourism Export Council, and attendance at a number of trade shows to promote the Lodges.

[40] Despite the recommendations made on 25 January 2016, on 29 January 2016 the contractor notified Ms Weir and Mr White of marketing initiatives that had been approved by Mr Sax. These initiatives had not been discussed with Ms Weir and she was surprised when she was notified that Mr Sax had signed off on the proposals put forward by the contractor.

[41] On 22 February 2016 the contractor emailed Ms Weir and advised her that Mr Sax had referred her (the contractor) to two sales meetings to discuss the use of both Lodges as conference venues. Ms Weir was concerned about this as she understood that sales calls were within her role responsibilities.

[42] On 24 February 2016 Mr Sax emailed Ms Weir and advised her that he had undertaken a "...*detailed review*..." of her role and had determined that due to a lack of forward bookings for both Treetops and the Kinloch Club retaining her position was not economical and it was proposed that the position be disestablished.

[43] Ms Weir commenced a period of sick leave and on 1 March 2016, after receiving legal advice, Ms Weir's representative wrote to Mr Sax requesting information about the proposal in relation to the restructuring process. Mr Sax did not respond to this request for further information.

[44] Ms Weir returned to work on 22 March 2016. Mr Sax emailed Ms Weir that day and suggested they meet the following day via video conference to discuss the restructuring proposal. In his email Mr Sax advised Ms Weir that reservations were virtually non-existent and pointed out that this was never Ms Weir's role anyway other than reviewing sales opportunities. Mr Sax also asked Ms Weir to give consideration to suggestions she may have for a sales role domiciled in Tauranga/Kinloch.

[45] Ms Weir requested clarification on some of the points set out in Mr Sax's email including:

- a) The position to be made redundant;

- b) Whether Mr Sax was asking for her opinion or whether the decision had already been made;
- c) The position Mr Sax was proposing Ms Weir could hold in Tauranga; and
- d) What role the contractor would have under the new structure.

[46] Mr Sax answered only the first of Ms Weir's questions which was that the proposal was to disestablish the sales and marketing manager role. Mr Sax requested Ms Weir to advise him of a time that same day that she could talk via Skype or FaceTime to discuss the review.

[47] Ms Weir advised Mr Sax that she was uncomfortable having the discussion by phone and requested answers to all of her questions prior to the discussions taking place. In response Mr Sax told Ms Weir her questions had been replied to and that he would call her shortly.

[48] Ms Weir advised Mr Sax she was not satisfied she had seen the answers she had asked for and that she would prefer to schedule the call for 5.30pm so that she could return to her accommodation and not have to take the call while at the Kinloch Club.

[49] The FaceTime call went ahead at 5.25pm while Ms Weir was still at the Kinloch Club. Other staff were present and could hear both sides of the conversation. I have had the benefit of a transcript of the meeting which shows that Ms Weir raised with Mr Sax her concerns that, given the Kinloch Club had been open only one month, it was premature to consider disestablishing her role.

[50] Mr Sax advised Ms Weir that it was a cost issue and invited Ms Weir to provide him with suggestions for him to consider and asked Ms Weir to focus on that.

[51] Ms Weir pointed out that in the short period of her employment she had managed to increase the occupancy rates for Treetops for each month of December 2015 and for January and February 2016. Ms Weir was concerned that she had made a number of suggestions to improve both occupancy and forward bookings that had been ignored or rejected by Mr Sax and offered to provide him with a condensed

version of her suggestions. Mr Sax invited Ms Weir to provide him with the condensed list and undertook to thoroughly consider her suggestions and give Ms Weir a considered response as soon as he could.

[52] Ms Weir requested Mr Sax to put the redundancy proposal in writing and to set out the financial considerations for disestablishing her position so quickly after establishing it. In response, Mr Sax told Ms Weir that he had thoroughly reviewed her first 90 days of employment with respect to her performance.

[53] The discussion then focussed on what steps Ms Weir could take to increase further sales for the Lodges. Mr Sax advised Ms Weir that her sales ability was not being questioned but he was looking at cost justification and the extraordinary low forward bookings and that it was a fiscal consideration.

[54] The call ended with Mr Sax confirming that Ms Weir would summarise her suggestions for moving forward and reiterating that he would consider those suggestions carefully.

[55] On 23 March 2016 Ms Weir set out in an email the sales and marketing initiatives she had put forward since taking on the role in October 2015 and added some new ones. Ms Weir pointed out that despite requesting approvals to implement a large number of the initiatives Mr Sax had failed to respond to her.

[56] Ms Weir also highlighted that the Kinloch Club opening had been delayed a year and was critical of the decision to open the Kinloch Club with full high season pricing when the property was still incomplete. Ms Weir reiterated what she had told Mr Sax during their FaceTime discussion that the occupancy rates for Treetops had increased in the months of December, January and February.

[57] Before Ms Weir sent her email to Mr Sax, on 23 March 2016 the contractor sent an email to a number of staff setting out various tasks relating to sales and marketing initiatives and confirming attendance at a number of trade shows. A large number of the items set out in the email relate to work that Ms Weir should have been responsible for. Ms Weir was not copied on this email despite it containing information relevant to her position. Ms Weir viewed this as confirmation that other employees were aware she was being made redundant even before she had had the opportunity to have further discussions with Mr Sax.

[58] Mr Sax advised Ms Weir on 29 March 2016 that he had made a decision to disestablish her role of sales and marketing manager. Mr Sax told Ms Weir that he was happy for Ms Weir to work through her notice period, providing paid time off for her to attend any job interviews and advised her he would provide a list of duties for her to complete until the end of her employment.

[59] In response Ms Weir raised concerns about her role already being shared among other staff members before a decision had been made about whether her role was to be disestablished. On 30 March 2016 Mr Sax denied Ms Weir's role had been shared with other staff. Mr Sax told Ms Weir he would provide her with a list of tasks to be completed during the remainder of her employment.

Conclusions

[60] For the following reasons I am not satisfied the decision to dismiss Ms Weir by reason of redundancy was a decision an employer acting fairly and reasonably could make in all the circumstances.

[61] In his email of 24 February 2016 Mr Sax says he had undertaken a detailed review of the full time sales role. Mr Sax has never provided a copy of his review and when asked at the investigation meeting about the review he told me that the review had taken a couple of weeks and had been undertaken by himself with the assistance of the two general managers and his personal assistant. Mr Sax told me he did not make any notes of any discussions he held with the general managers or his assistant and neither did he have any discussions with Ms Weir as part of this review.

[62] During the 22 March 2016 FaceTime discussion Mr Sax refers to undertaking a review of Ms Weir's performance during the first 90 days of her employment. He had no discussions with Ms Weir during this review and Ms Weir was not aware of the review of her performance until Mr Sax mentioned it on 22 March 2016.

[63] In breach of his obligations under section 4 of the Act and despite Ms Weir requesting answers to her questions at least twice, Mr Sax did not answer them nor did he provide any information to Ms Weir detailing the financial considerations relating to the restructuring. At the investigation meeting Mr Sax confirmed that he never discussed the company's financial situation with Ms Weir.

[64] Mr Sax undertook to thoroughly consider the suggestions Ms Weir put forward on 23 March 2016 and to provide her with a considered response. In his written evidence to the Authority Mr Sax addresses each of Ms Weir's suggestions. However, the information provided to the Authority was never provided to Ms Weir prior to the decision being made to dismiss her and she never had the opportunity to address Mr Sax's view of why the suggestions would not work.

[65] In answer to questions at the investigation meeting Mr Sax told me that all of Ms Weir's suggestions had been looked at previously and there were no viable propositions. I find that evidence to be inconsistent with a promotion advertised on the website for the Kinloch Club at the time of the investigation meeting which offers a free upgrade from a junior suite to a one bedroom villa. This was one of the suggestions made by Ms Weir on 17 December 2015 and which Mr Sax rejected on the basis that it would fail.

[66] Mr Sax acknowledged that he did not consider whether options other than dismissal were available to retain Ms Weir's services. One such option was to disengage the contracting firm and continue with Ms Weir's employment.

[67] Mr Sax denied he relied heavily on the contractor although he did tell me that the contractor was an important contributor as a consultant. I have not accepted this evidence as being an accurate portrayal of the impact the contractor had in the business.

[68] The evidence shows that the lines between the services provided by the contractor and Ms Weir's responsibilities were often blurred. By way of example, on 22 February 2016 Ms Weir requested approval to set up a voucher system which would be used to sell vouchers online. The request had to be run past the contractor because she was considered to be the "...*marketing oracle*." Further, the contractor appeared to operate with Mr Sax's implied authority. For example Mr Sax told me that the contractor would not have discussed the communication she sent out to staff on 23 March 2016 where she allocated various tasks to other employees despite a significant number of the tasks being within Ms Weir's responsibilities (Ms Weir had returned from sick leave the previous day). Further, Mr Sax told me he was not concerned about the contractor directing staff and allowed her to send things out to staff as she saw fit.

[69] I find it is more likely than not that Mr Sax made the decision to disestablish Ms Weir's role due to concerns he held about her performance in not achieving his targets on occupancy and that the redundancy was not for genuine business reasons.

[70] Mr Sax has not taken into account the information Ms Weir shared with him about the affect his contractor was having on Ms Weir's ability to perform her role. Discussing performance concerns with Ms Weir before embarking on a restructuring process would have provided Ms Weir with the opportunity to have her concerns about the blurred lines between her role and the contractor's role addressed in a more constructive manner.

[71] I am not satisfied that Mr Sax properly considered the increased occupancy rates achieved by Ms Weir through her sales and marketing initiatives for Treetops which were up 60% on previous years. Mr Sax had formed the incorrect view that the occupancy rates for Treetops were at their lowest ever. Further, Mr Sax did not take into consideration that at the time he embarked on his restructuring process bookings for the Kinloch Club had only been available since 15 January 2016.

[72] I have received no evidence from Kinloch Holdings to show that its financial situation had deteriorated in the period of Ms Weir's employment. In fact Mr Sax had made it clear to his managers on 19 January 2016 that there were no fiscal constraints.

[73] Ms Weir was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

Lost remuneration

[74] Ms Weir seeks reimbursement for lost remuneration for the period of eight months from the date of her dismissal until the date of the investigation meeting. Ms Weir was paid until 30 April 2016 which means her lost remuneration covers a period of seven months.

[75] Ms Weir gave evidence that she applied for 29 jobs and had her name listed with several employment agencies in an effort to mitigate her loss. No challenge has been made by Kinloch Holdings to the steps taken by Ms Weir to mitigate her loss.

[76] Section 128(3) of the Act provides me with the discretion to order a sum of compensation for lost remuneration greater than the three month period. I am satisfied that this is an appropriate case to exercise my discretion to award a sum greater than the three months.

[77] In September 2016 Ms Weir stopped looking for paid employment and entered into a franchise type arrangement with a marketing company. Any remuneration lost from September onwards was not as result of her personal grievance but is attributable to her decision to enter into the franchising arrangement. Ms Weir is entitled to be reimbursed four months lost remuneration from 30 April to 31 August 2016.

[78] Ms Weir has provided me with evidence of earnings she received working as a consultant from time to time since the end of her employment. I have calculated that between 30 April and 31 August 2016 Ms Weir received payments totalling \$975.00 exclusive of GST.

[79] Ms Weir was on a salary of \$80,000. Four month's salary equates to \$26,666.66 gross. Taking into account the earnings Ms Weir made as a consultant I have calculated her total loss as \$25,691.66 gross.

[80] Kinloch Holdings is ordered to pay to Ms Weir lost remuneration of \$25,691.66 under section 123(1)(b) of the Act within 28 days of the date of this determination.

Compensation

[81] Ms Weir claims compensation in the sum of \$30,000 for humiliation and distress caused to her by the unjustified dismissal.

[82] Ms Weir gave compelling evidence of the impact the dismissal had on her. Ms Weir told me that she had suffered a loss of reputation and credibility in the tourist industry. Ms Weir has attributed the loss of credibility to the poor quality of the Lodges she was selling within the tourism industry. I am not satisfied this is a compensable loss as it is not attributable to the dismissal.

[83] Other evidence is more compelling such as the evidence of her embarrassment of having to advise key agents with whom she had established a good reputation, that

four months after proudly announcing her new position she was seeking their assistance in finding a new role in the industry. Ms Weir was embarrassed to have to admit her unemployed status.

[84] Ms Weir told me that the treatment of her by Mr Sax was not only hurtful but undermined her self-confidence. Ms Weir was proud of her employment history which included jobs that had lasted for many years. When her employment was terminated she experienced many emotions including humiliation, hurt, shock and misery. Ms Weir also told me that she found it humiliating to have to apply for a jobseekers benefit and suffered from nightmares which caused her to feel anxious and upset. Ms Weir continues to take prescription medication for depression and cannot afford the psychological assistance that could help her deal with her situation.

[85] Contributing to Ms Weir's situation is that her husband is housebound and due to his illness she is the main income earner in the household.

[86] I find an appropriate level of compensation in all the circumstances of this case is \$20,000.

[87] Kinloch Holdings is ordered to pay Ms Weir the sum of \$20,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contribution

[88] Section 124 of the Act requires me to consider the extent to which Ms Weir's actions contributed towards the situation that gave rise to the personal grievance. I am satisfied Ms Weir's conduct was not a factor in the decision by Kinloch Holdings to dismiss her by reason of redundancy.

[89] Mr Sax linked the low occupancy rates with deterioration in the financial situation of the Kinloch Club. In doing this Mr Sax failed to take into account that the Kinloch Club had only been taking reservations since 15 January 2016 and the occupancy rates for Treetops had actually increased during Ms Weir's employment. His stance was also inconsistent with his notification to all three of his managers in January 2016 that there were no fiscal constraints.

[90] Ms Weir did not contribute in any blameworthy way to her unjustified dismissal and her remedies will not be reduced.

Interest

[91] Ms Weir seeks interest on the amounts awarded to her for the unjustified dismissal. It is not appropriate to award interest on the compensatory payment, but I consider it appropriate for interest to be paid at the current rate of 5%³ on the sum for lost remuneration. Interest is to be calculated from 30 April 2016 until the lost remuneration is paid in full.

Breach of the Holidays Act 2003

[92] Ms Weir claims Kinloch Holdings breached the Holidays Act 2003 (the Holidays Act) by unlawfully deducting annual leave to cover a period of sick leave.

[93] Ms Weir worked for Kinloch Holdings from 19 October 2015 until 30 April 2016 (taking into account payment made in lieu of her working her notice period).

[94] When Ms Weir took one month's sick leave on her doctor's instructions in late February 2016 Kinloch Holdings paid her by utilising annual leave in advance of her entitlement falling due. For the foregoing reasons I find this action on the part of Kinloch Holdings to be a breach of the Holidays Act.

[95] The Holidays Act 2003 allows for annual leave to be used where an employee has exhausted his or her entitlement to sick leave.⁴ For this provision of the Holidays Act to apply to Ms Weir, she firstly had to have exhausted her sick leave entitlement. Ms Weir had not worked for more than the statutory minimum of six months when she became ill and so did not have any entitlement to sick leave.

[96] The Holidays Act states that an employer must not require an employee to take the leave as annual holidays but may agree, if requested by the employee, to the leave being taken as annual holidays to which the employee is entitled.⁵

[97] Ms Weir was not entitled to annual holidays because she had not worked for Kinloch Holdings for twelve months. Further, Ms Weir did not request Kinloch Holdings to take the leave as annual holidays. This was confirmed by Ms Weir in an email to Mr Sax on 5 April 2016.

³ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.

⁴ Holidays Act 2003, section 39(1).

⁵ Holidays Act 2003, section 39(2).

[98] Ms Weir has asked to be reimbursed the holiday pay incorrectly paid to her. I have declined her application because Ms Weir had the benefit of receiving the money when she was not entitled to it. If the money had not been paid to her when she was on unpaid sick leave she would have received the payment at the end of her employment as outstanding holiday pay. An order reimbursing Ms Weir would result in an unjust enrichment and Kinloch Holdings would be required to pay twice.

Reimbursement of expenses and breach of the employment agreement

[99] Ms Weir claims expenses which she says were incurred in the proper exercise of her duties. Ms Weir also claims Kinloch Holdings has breached clause 2 of the employment agreement when it failed to reimburse those expenses.

[100] Ms Weir claims reimbursement of expenses for travel, purchase of software and office equipment and for repairs to her personal laptop and the imposition of a penalty against Kinloch Holdings under section 134 of the Act for the alleged breach of the employment agreement.

[101] As I have already stated earlier in this determination the employment agreement was not fully executed by the parties and is therefore not enforceable. The agreement does however, set out the terms which were intended to apply to Ms Weir and so I have referred to the relevant terms set out in the agreement.

[102] Clause 2 of the employment agreement shows Kinloch Holdings intention to reimburse Ms Weir for all reasonable travel, accommodation and other expenses properly incurred in the exercise of her duties.

[103] Attached as schedule 2 to the employment agreement is a job description setting out Ms Weir's key responsibilities. The job description records an intention that Ms Weir to spend time off site. Schedule 2 states that all expenses need to be pre-agreed by each general manager prior to any undertaking of accommodation, flights, car rental, gratuities and daily costs.

Travel expenses

[104] There are two limbs to Ms Weir's claim for travel expenses. The first limb is mileage allowance for travel undertaken in her own vehicle during her employment

and the second limb is for overnight accommodation and meals in Auckland in December 2015.

[105] Ms Weir has established only part of her total claim for the first limb of her travel expenses to my satisfaction. Ms Weir is claiming reimbursement of mileage totalling \$1,713.60. This equates to a total of 2,380.00 kilometres (km) at \$0.72 cents per km.

[106] In November 2015 Ms Weir made a formal claim for 1,510 kms at the rate of \$0.77 cents per km. Of the 1,510 kms claimed, 1,113 kms were for travel undertaken by Ms Weir from her home in Tauranga to her place of work at the Kinloch Club or Treetops. The claim was declined by Mr Sax at the time who reminded Ms Weir that it was her responsibility to get to and from her place of work.

[107] I find the claim for mileage associated with Ms Weir's travel from her home to Treetops and the Kinloch Club to undertake her duties is not established. The location of Ms Weir's work was Treetops and the Kinloch Club. The cost associated with travelling from her home to her work location was Ms Weir's responsibility. In her oral evidence at the investigation meeting Ms Weir confirmed that she was offered and accepted a higher salary than was advertised in recognition of the requirement for Ms Weir to be based at the Kinloch Club and that she was anticipating renting accommodation each week.

[108] Further, in an email to Ms Weir dated 16 October 2015 Mr Sax clarified that travel costs from Kinloch Club or Treetops to her place of residence was at her own expense and that travel costs from Treetops or Kinloch Club to Auckland or other destinations would be met by Kinloch Holdings. Mr Sax advised Ms Weir that a Lodge vehicle would be provided to her for this purpose.

[109] I find the claim for mileage from Ms Weir's home to Auckland for meetings with Mr Sax and others during November and December 2015 is established to my satisfaction. While Ms Weir had the option of utilising a Lodge vehicle for this travel her evidence was that she enquired of Mr White as to whether she could use the Lodge vehicle and was told it had to be available at the Lodge. I find Ms Weir has established to my satisfaction that the following mileage was properly incurred in the exercise of her duties:

20 November 2015	396 kms @ \$0.72 cents per km	\$285.12
9 December 2015	474 kms @\$0.72 cents per km	\$341.28

[110] Kinloch Holdings is ordered to reimburse Ms Weir \$626.40 for mileage expenses within 28 days of the date of this determination.

[111] The second limb of Ms Weir's travel claim relates to accommodation costs associated with staying overnight in Auckland on 8 December to complete sales calls and for lunch on 9 December 2015.

[112] I am satisfied Ms Weir was in Auckland undertaking sales calls with Mr White on 8 and 9 December 2015. Ms Weir has established to my satisfaction that the accommodation and meals expenses were incurred by Ms Weir in the proper exercise of her duties.

[113] Kinloch Holdings is ordered to reimburse Ms Weir \$183.40 for accommodation and meal expenses within 28 days of the date of this determination.

Purchase of software and office equipment

[114] Ms Weir claims she had to purchase an upgrade to the Dropbox application as the free version was unable to accommodate Treetops and Kinloch data, had to personally pay for a keyboard and mouse for the Kinloch Club office use and had purchased a Zoho Campaign upgrade as the free version only sent information to 2,000 contacts.

[115] Ms Weir confirmed that she had no authority to purchase the upgrade to DropBox, however, I am satisfied the upgrade was purchased for genuine business purposes.

[116] Ms Weir told me that the keyboard and mouse were necessary to undertake her role and that when she purchased them she was advised the Kinloch Holdings account was not active and so she put the purchases on her personal credit card.

[117] Ms Weir told me that she had received verbal approval from Mr Sax to purchase the Zoho upgrade and subscriptions. I am satisfied the purchase was an approved business expense.

[118] I find the expenses associated with the DropBox upgrade, keyboard and mouse, and the Zoho upgrade and subscriptions were all properly incurred by Ms Weir in exercising her duties. Even though the DropBox upgrade was not approved Kinloch Holdings had the ongoing benefit of the purchase.

[119] Kinloch Holdings is ordered to reimburse to Ms Weir the sum of \$482.55 for expenses properly incurred in the proper exercise of her duties, within 28 days of the date of this determination.

Laptop repairs

[120] Ms Weir claims reimbursement of expenses totalling \$410.00 for repairs to her laptop. Ms Weir told me that her laptop failed when a technical contractor was installing external monitor drivers at Kinloch Club on 3 February 2016. After being assessed by a different technician, the problem with Ms Weir's laptop was diagnosed as being a problem related to the laptop being dropped on 20 November 2015.

[121] The difficulties with the laptop were not noted until February 2016. This is nearly three months after Ms Weir says she dropped the laptop in Mr Sax's office. It was common ground that Ms Weir used her personal laptop to undertake her duties due to not having access to a suitable computer. I find it is more likely than not that the problem with the laptop came about due to a contractor to Kinloch Holdings installing the external monitor drivers onto Ms Weir's laptop.

[122] Ms Weir's uncontested evidence is that Mr White approved the repairs to the laptop and approved her making a claim for the insurance excess. I am satisfied that the expenses associated with the repairs to the laptop were properly incurred by Ms Weir in exercising her duties.

[123] Kinloch Holdings is ordered to reimburse Ms Weir \$410, being expenses related to the repair of her laptop, within 28 days of the date of this determination.

Penalty

[124] Ms Weir seeks the imposition of a penalty against Kinloch Holdings for the breach of the employment agreement when it failed to pay expenses properly incurred in the exercise of her duties.

[125] There was considerable dispute about the claims made by Ms Weir which has necessitated a determination of the matters which has resulted in Ms Weir achieving partial success. Given the dispute over the claims and the lack of a properly executed written employment agreement at the time the employment relationship ended I am not satisfied that this is an appropriate case in which to impose a penalty.

Breach of good faith

[126] Ms Weir claims Kinloch Holdings breached its statutory duty of good faith when it failed to provide information relied on by Kinloch Holdings when making its decision to disestablish her position and then to terminate her employment by reason of redundancy. Ms Weir asks the Authority to impose a penalty for the breach and that any penalty be paid to her pursuant to section 136 of the Act.

[127] I have found earlier that the dismissal of Ms Weir by reason of redundancy was unjustified. Included in the reasons for that finding was that Kinloch Holdings had failed to provide all of the information it relied on when making its decision to dismiss.

[128] The Employment Court has held that where remedies have been awarded for a successful grievance claim then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.⁶

[129] The breach of the statutory good faith obligations, whilst serious, was one of the factors which formed part of Ms Weir's dismissal grievance. Separate remedies have been awarded to compensate her for her grievance, so the imposition of penalties on Kinloch Holdings would amount to double dipping.

[130] The application for the imposition of penalties is declined.

Counter-claim

[131] Kinloch Holdings claims Ms Weir breached the employment agreement when she refused to work out her notice period.

⁶ *Xu v McIntosh* [2004] ERNZ 448.

[132] Mr Sax gave Ms Weir inconsistent advice about whether she was expected to work during her notice period. Mr Sax told me he told Ms Weir of duties that she could perform during her notice period, but he also told me that he had advised Ms Weir on 22 March 2016 that there was no need for her to travel to work as there was no work for her to do.

[133] I have taken the one month's pay paid to Ms Weir at the end of her employment into account when I have dealt with her claim for lost wages incurred as a result of her unjustified dismissal.

[134] At the time Ms Weir's employment was terminated there was no fully executed written employment agreement. Given Mr Sax's inconsistent advice to Ms Weir and the lack of a fully executed employment agreement Kinloch Holdings counter-claim is declined.

Costs

[135] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Weir shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Kinloch Holdings shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[136] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority