IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 133
5471268

	BETWEEN	AYSHA CLARK Applicant
	AND	ANGARD INVESTMENTS LIMITED T/A HAIR & BEAUTY BY DESIGN Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Stan Austin, Advocate for Applicant Heather Tucker, Counsel for Respondent
Investigation Meeting:	29 April 2015 at Tauranga
Submissions received:	29 April 2015 from the Applicant and from the Respondent
Determination:	11 May 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Aysha Clark, claims that she was unjustifiably dismissed for failing to attend for work on her rostered day by letter dated 7 May 2014 from the Respondent, Angard Investments Limited t/a Hair & Beauty by Design (Angard).

[2] Angard denies that Ms Clark was dismissed and claims that she was given time off work to recover her health.

Issues

[3] The issues for determination are whether or not Ms Clark was:

- a permanent or casual employee whilst she worked for Angard during the period 10 April 2013 to 7 June 2014
- unjustifiably dismissed by Angard.

Background Facts

[4] Ms Angela Patterson is the sole director and manager of Angard which trades as Hair & Beauty by Design, a salon offering hair dressing and other beauty related services (the Salon).

[5] Employees at the Salon worked in accordance with an agreed working week and a roster. Prior to the end of 2012 an appointment book was kept in which the employees were rostered to work in accordance with client bookings, but following the end of 2012, the rosters were completed on the computerised system by Ms Patterson and placed on a staff noticeboard located in the staff room. In order to change the roster, Ms Patterson said that ideally her permission was required but she acknowledged that frequently employees would exchange shifts with each other without consulting her.

[6] Ms Clark, who suffered from dyslexia which contributed to her leaving school at age 15, commenced employment at the Salon in 2005 on work experience under a transition into work programme. Ms Clark said she had enjoyed her work at the Salon, and that she had a good relationship with Ms Patterson.

[7] Ms Patterson said that she had become very fond of Ms Clark who had been liked by the other employees and clients of the Salon, and she had wanted to support her and provide her with an opportunity to build her skills and confidence. Accordingly the Salon had supported Ms Clark in a 3 year Apprenticeship programme in which she enrolled with the Wairaki Institute of Hairdressing on a course to qualify for a National Certificate (NZQA) in Hair Dressing (Professional Stylist) by continuing to pay Ms Clark's her wages on the days when she attended the course programme rather than working at the Salon.

[8] Ms Patterson said that the Salon had also offered support by funding a reader/writer to assist Ms Clark with the written theory part of the course.

[9] Ms Clark had worked at the Salon on a part-time basis subject to a written employment agreement until she left on maternity leave in 2011. At her time of leaving the employment of the Salon, Ms Clark said that she had completed two years of the NZQA course.

[10] Ms Patterson said that during her maternity leave period, Ms Clark would call into the Salon and she always asked her when she would be returning to work.

[11] Ms Patterson said Ms Clark contacted her in early 2013 regarding further employment. However as she had no permanent position available at that time, she had offered to employ Ms Clark on a casual basis, which had been agreed to by Ms Clark.

[12] The arrangement was that Ms Clark would work when the Salon workload dictated that an additional employee was required on Thursdays between 4.00 p.m. to 7.00 p.m. and on Saturdays between 9.00 a.m. to 2.00 p.m. Ms Patterson said the hourly rate of pay had been set at $18.00 per hour to compensate for the fact that there were no guaranteed hours of work.

[13] There was no written employment agreement and initially Ms Clark, who had been receiving a government funded benefit at the time, had been paid in part by cash and in part by services such as hairdressing being provided as 'payment in kind'. However the arrangement had been regularised and pay records indicate that Ms Clark was paid weekly with effect from week ending 10 April 2013.

[14] Ms Patterson said that on or about September 2013 she had wanted to reduce her own working week from 6 days to 5 days, and she had asked Ms Clark if she was prepared to work on a Wednesday each week between 9.00 a.m. to 3.00 p.m. if there were sufficient bookings, to which Ms Clark had agreed.

[15] On or about October 2013 Ms Clark had asked if, instead of working on a Saturday, she could work on the following Monday on occasion. This had occurred on 6 occasions during the period October 2013 to 20 February 2014.

[16] Ms Clark said that her understanding had been that initially she had been guaranteed set hours of work on Saturdays and she would also work additional shifts from time to time when asked to do so, including on a Monday. This was noted by her putting her name on the roster for the following week.

[17] In December 2013 Ms Clark moved from her home into a flat and was unavailable to work in early January 2014 for two weeks due to her being on holiday. During this period she had received payment for her annual leave entitlement.

[18] Ms Patterson said that in March 2014 Ms Clark had asked if she could work full-time at the Salon. Before responding to the request, Ms Patterson had asked Ms Clark to obtain her NZQA report from Ms Paulette Brown of the Wairaki Institute of Hairdressing.

[19] This had shown that Ms Clark had an outstanding total of 17 unit standards which remained to be completed to a satisfactory standard in respect of the two first years' of the

NZQA course. This contradicted Ms Clark's assertion that there were only 6 or 7 units to be completed.

[20] Ms Patterson said she had subsequently been telephoned by Ms Brown who advised that Ms Clark had told her that the Salon would cover the cost of her re-sitting the outstanding NZQA course papers. Ms Patterson said she had been shocked at the news of how many units Ms Clark would have to re-sit and advised Ms Brown that the Salon would not pay for her to re-sit the units.

[21] On this basis Ms Patterson said she was prepared to offer Ms Clark permanent part-time employment only, working Wednesdays, 9.00 a.m. to 3.00 p.m., Thursdays 4.00 p.m. to 7.00 p.m., and Saturdays 9.00 a.m. to 2.00 p.m.

[22] A draft individual employment agreement (the Employment Agreement) had been drafted and provided to Ms Clark. Ms Patterson said the hourly rate in the Employment Agreement was $16.00 per hour, which was less that the $18.00 per hour she had been earning, recognising the fact that she was being offered guaranteed hours rather than casual hours.

[23] Ms Patterson had not discussed the Employment Agreement with Ms Clark, but she had signed it on behalf of Angard, and advised Ms Clark to take it home and obtain independent advice.. However it appeared that Ms Clark had not taken it away from the Salon and she had concluded that she had not sought independent advice.

[24] As Ms Clark did not sign the Employment Agreement, Ms Patterson's understanding had been that Ms Clark had decided not to accept the offer of permanent part-time employment, and she had therefore continued to be paid at the hourly rate of $18.00.

[25] Ms Clark said that she had not wanted to sign the Employment Agreement as she could not afford to accept a decrease in her hourly rate, however she had not discussed her reasons for not signing the Employment Agreement with Ms Patterson.

[26] Ms Clark conceded that her attendance record at the Salon had not been ideal due to either sickness absenteeism or her inability to access childcare on occasion. However she or her mother had always advised the Salon of her absence, either by calling colleagues or by telephoning the Salon. She confirmed that Ms Patterson had accepted her non-attendance at the Salon and no formal issue had been raised with her, nor had she been advised on any occasion that it was not acceptable.

[27] Ms Patterson explained that she had advised Ms Clark, and the other employees, that they must contact her personally by 7.00 a.m. if they could not attend work. However Ms

Clark would text another colleague rather than contact her personally, and that the only time she recalled Ms Clark contacting her personally to advise she was unwell and would not be attending for work was on Saturday 22 March 2014.

[28] On that occasion she had not received Ms Clark's message until she checked the answer phone at the Salon at 8.27 a.m. As there was a wedding party booked in for hair appointments, she had been very concerned and had telephoned another employee who agreed to attend the Salon in place of Ms Clark.

[29] The employee, Ms Tina Howard, said that when she had left the Salon, she had passed Ms Clark who was in the process of moving furniture and had been surprised that she was able to move furniture when she claimed that she was too unwell to attend for work.

[30] Over the period March to April 2014 Ms Clark had needed to take some time off work due to health concerns, which included a week when she was in hospital.

[31] Ms Patterson said she had been telephoned by Mrs Clark, Ms Clark's mother on Thursday 27 March 2014 who advised her that Ms Clark had been hospitalised and that she should be taken off the roster until she was well enough to return to work.

[32] Mrs Clark denied that she had told Ms Patterson to take Ms Clark off the roster and said that she had advised her that Ms Clark had been admitted to hospital and could be away from work for a week, however she would return to work as soon as she was fit to do so.

[33] Ms Patterson said that Ms Clark had attended for work on 2 April 2014, however as she had been unaware that Ms Clark was intending to return that day her name had not been entered on to the roster.

[34] Ms Patterson said that Ms Clark had telephoned her as soon as she had noticed she had not been rostered to work. Ms Patterson asked her if she was well enough to attend work, and upon her confirmation that that was the case, told her that she could stay and work at the Salon until 1.00 p.m. to which Ms Clark had agreed. As Ms Clark said she was much better and keen to return to work, she (Ms Patterson) entered her to work on the roster for the following week

[35] Ms Patterson said that during the week following 9 April 2014 Ms Clark had been rostered to work on three days, but had not attended the Salon, and had not advised anyone that she would not be attending for work on those days.

[36] On Tuesday 29 April 2014 Ms Patterson said she had checked the roster for the following few days and noticed that Ms Clark was rostered to work on Saturday 3 May 2014.

On Thursday 1 May 2014 she had again checked the roster and noticed that Ms Clark was no longer rostered to work on that Saturday.

[37] As she and the other employees understood that Ms Clark would be working on the Saturday, Ms Patterson concluded that Ms Clark's name had been removed in error, and re-entered her name on the roster.

[38] The following day she had noticed that Ms Clark's name had again been removed from the roster to work on Saturday 3 May 2014, and asked another employee if she knew why this had happened. The employee told her that Ms Clark had said she would not be able to work on the Saturday.

[39] .Checking the roster again she had noticed that Ms Clark was rostered to work on Monday 5 May 2014 when she was scheduled to colour the hair of two customers, however Ms Clark had not attended for work that day. Ms Patterson had asked an employee to text message Ms Clark to ask where she was, however there was no response to the text message.

[40] She had therefore telephoned Ms Clark and left a message to the effect that since she had not attended for work again, she should take time from work to recover her health in order to avoid letting customers down.

[41] Ms Clark said that the telephone message from Ms Patterson had said:

> *Listen, I don't know how to get in touch. I don't know where you are heading so I will take you off the books. You need to put in 100% into clients, staff. I certainly don't know where I am alrighty?*

[42] Ms Clark said she had texted an employee at the Salon and informed her that she had not been rostered to work on the Monday due to a doctor's appointment, stating in the text: "*hey whats up just looked at my phone. I looked late last nite. I was not marked on cuz I had a doc appointment on Monday and today."*

[43] Ms Clark said she had been confused by Ms Patterson's telephone message as she recalled having looked at the roster on Thursday 1 May 2014 and she was not rostered on until Wednesday 7 May 2014 because she had arranged some time earlier to have the Saturday off for personal reasons. She had arranged this in the usual way by taking her name off the computer roster.

[44] Ms Patterson said she had received no response to her telephone message so she had drafted a letter reiterating what she had said in the telephone message and asked an employee to type it up as she did not know how to use the computer.

[45] The letter was typed up and placed on her desk. Ms Patterson had completed a cheque addressed to Ms Clark in the amount equivalent to two weeks' wages, and placed it in the envelope. The letter stated:

Aysha Clark

> *Aysha with much sadness I wish to confirm in writing the mssage I left on your phone 7/5/2014. As you did not turn up to work again on Monday 6/5/14 as was your rostered day of work, I feel that you are not in the right space at the moment to work within a team.*
>
> *We as a team rely on each other and when that doesn't happen you let everyone down.*
>
> *Maybe in the future when you're sorted your health and home life we may look at starting again.*
>
> *I hope this letter helps you in the future.*

[46] Ms Clark said she had arrived at work on Wednesday 7 May 2014 and a colleague had given her the envelope containing both the cheque and the letter from Ms Patterson. She had collected her belongings from the Salon and had left.

[47] When she read the letter Ms Clark said it confirmed for her what she had understood from Ms Patterson's telephone message, that she was "*off the books*" and her employment was terminated.

[48] Ms Patterson said she had heard nothing further from Ms Clark until the Queen's Birthday weekend on 2 June 2014 when Ms Clark had left a message on her telephone answer machine requesting a reference. Ms Patterson said she had wondered why Ms Clark was requesting a reference when she could return to work at the Salon.

[49] Ms Clark said she had received no response from Ms Patterson to her request for a reference, and after an unfruitful job search during which she claimed she had approached many businesses, in November 2014 she relocated to Tauranga, however she has still not been successful in obtaining employment.

[50] On 25 July 2014 Ms Clark filed a Statement of Problem with the Authority, the parties subsequently attended mediation, but this was not successful in resolving the issues between them.

Determination

Was Miss Clark a casual employee or a permanent part-time employee when employed at the Salon during the period 10 April 2013 to 7 June 2014?

Intention of the parties

[51] In deciding whether a person is employed under a contract of service the Authority must consider all relevant matters which include the intention of the parties.[1]

[52] The parties do not dispute that Ms Clark was employed at the Salon on a full time basis until she left to have a baby in 2011, and a period of 2 years elapsed prior to Ms Clark contacting Ms Patterson to enquire as to whether any work was available at the Salon.

[53] Ms Patterson claims that Ms Clark was a casual employee from the date she commenced working at the Salon on 10 April 2013. Ms Clark claims that she was a permanent part-time employee

[54] There is no written employment agreement between the parties, although there is a written employment agreement which was provided to Ms Clark and signed by Ms Patterson on 10 April 2014, but it was not counter-signed as accepted by Ms Clark. In this situation I find the Employment Agreement is not determinative of the real nature of the employment relationship between the parties.

[55] When determining the real nature of an employment relationship His Honour Judge Couch in *Jinkinson v Oceania Gold (NZ)*[2] said:

> *All relevant matters must be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative.*

[1] S6 Employment Relations Act 2000
[2] CC/09, 13 August 2009 at para [37]

Analysis of the distinction between casual and on-going employment

[56] The Employment Court judgment of *Jinkinson v Oceania Gold (NZ)*[3] contains a helpful examination and analysis of the distinction between casual employment and ongoing employment.

[57] In this judgment, His Honour Judge Couch analysed in detail the lines of authority derived from other jurisdictions, these being English, Australian and Canadian, in addition to that of New Zealand. These common law principles are complemented by the statutory framework in New Zealand, in particular that of the Employment Relations Act 2000.

[58] The judgment highlights that a major determinant of the distinction between casual and ongoing employment is the extent to which there exist between the parties "*mutual employment related obligations between periods of work"*[4] The essence of casual work lies in a series of engagements which are complete in themselves, whilst ongoing employment contemplates a continuing pattern of regular and continuous work.

[59] Judge Couch quoted with approval a decision of the Canada Labour Relations Board in which the Board said[5]

> *In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable only part-time work is automatically created: the employee is not a casual worker but a part-time one.*

[60] A list of factors designed to assist in the analysis of an employment relationship originated from the Australian authorities to which Judge Couch referred and these are outlined in the judgment. These include:

a. The numbers of hours worked each week

b. Whether work is allocated in advance by a roster

c. Whether there is a regular pattern of work

---

[3] *Jinkinson v Oceania Gold (NZ)* CC/09. 13 August 2009
[4] Ibid at para [40]

[5] *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044

d. Whether there is a mutual expectation of continuity of employment

e. Whether the employer requires notice before an employee is absent or on leave

f. Whether the employee works to consistent starting and finishing times.

[61] I have therefore proceeded to analyse the employment relationship between Ms Clark and Angard against those factors.

i. The number of hours worked each week

[62] The hours that Ms Clark said she was expected to be available were Thursdays between 4.00 p.m. to 7.00 p.m. and on Saturdays between 9.00 a.m. to 2.00 p.m. and with effect from September 2013, Wednesday each week between 9.00 a.m. to 3.00 p.m.

[63] Whilst Angard agreed with this expectation, it stated that the requirement for work availability was based upon a sufficient number of client bookings having been generated.

[64] I note from the documentation supplied that the hours worked by Ms Clark between the period 10 April 2013 until 7 May 2014 varied significantly each week between a minimum of 0 (on 8 occasions) and a maximum (on one occasion) of 30.75 hours

[65] The days also vary, although I observe that the most frequent days worked were Wednesdays, Thursdays and Saturdays. Even taking into consideration Ms Clark's evidence that she was not available on some of these days due to ill health or childcare unavailability, I find that there is still a significant variance in the hours worked each week which would appear to indicate that the hours worked each week by Ms Clark were dependent upon client bookings.

ii. Whether work was allocated in advance by a roster

[66] The days and subsequently the hours Ms Clark worked were allocated in advance by a roster rather than by the Salon contacting her on each occasion to ascertain her availability to work on each occasion she was required to work.

[67] The rosters were available in advance of the hours being worked, but Angard stated that they were subject to client bookings and if these were insufficient Ms Clark would be advised not to come into work.

[68] Ms Clark denied that this situation had ever arisen since there were sufficient 'walk-ins' i.e. clients without bookings who arrived at the Salon unannounced requesting an appointment. Ms Patterson confirmed that 'walk-ins' constituted 25% of all client bookings.

[69] I find that the requirement to work was allocated in advance by a computerised roster system.

iii. Whether there was a regular pattern of work

[70] Although there is a significant variance in the number of hours worked each week, there is a pattern that the most frequent days Ms Clark worked were Wednesdays, Thursdays and Saturdays. Extra hours were worked from time to time on other days, when there was a requirement for Ms Clark to do so and she was available, however the expectation was that Ms Clark would work regularly on Wednesdays, Thursdays and Saturdays.

[71] I find that there was a regular pattern of working, particularly during the period from 7 August 2013 to 7 May 2014.

iv. *Whether there was a mutual expectation of continuity of employment*

[72] Ms Clark had an expectation that she would be rostered for shifts and attended for work on 7 May 2015 on her understanding that she had been rostered to attend.

[73] Ms Patterson's evidence was to the effect that had Ms Clark continued to attend for work when rostered to do so, the employment relationship would have continued. Further that she had expected Ms Clark to return to work when she was well enough to do so after 7 May 2015.

[74] I find that there was a mutual expectation of continuity of employment.

v. *Whether the employer requires notice before an employee is absent or on leave*

[75] Ms Patterson's evidence was that her expectation, made clear to all employees including Ms Clark, was that she should be advised by 7.00 a.m. if an employee was unable to attend for work as set down in the roster.

[76] Ms Clark did not adhere to the expectation of Ms Patterson in respect of making contact by advising her personally of her intentions, rather (i) sending text messages via another employee, (ii) having her mother make contact on her behalf, or (iii) leaving a telephone message on the Salon answer phone.

[77] However it is clear from the evidence that Ms Clark knew that she was required to provide notice of absence, and did so, albeit not strictly in accordance with Ms Patterson's expectations.

[78] As regards holiday leave, I note that Ms Clark did not seek permission to take leave, but advised when she would not be available for work, and she was not rostered on those dates, which is more indicative of a casual relationship.

[79] On balance however I find that in respect of absences from the shifts which had been rostered, Ms Clark was required to provide notice and she did so.

vi. Whether the employee works to consistent start or finish times

[80] Examining the wage records provided I find that there were not consistent start and finish times. Although Ms Clark was advised that work would be available if client bookings merited it between certain hours, these hours were not worked on a consistent basis. They varied in accordance with client demand.

[81] I do not find that Ms Clark worked to consistent start and finish times.

Payment in respect of leave taken

[82] Finally I take into consideration the situation regarding payment for annual and statutory leave, noting that the parties agree that any such payments due have been paid to Ms Clark.

[83] In accordance with s.28 Holidays Act 2003 the employer may regularly pay holiday pay with the employee's pay to two categories of employee. Casual employees fall into the second category of employee (s28 (1)(ii)) as being those employees who work for the employer on such intermittent or irregular basis that it is impracticable for the employer to provide them with four weeks' annual holidays. I also note that the use of the word "*may*" indicates that this is not a mandatory requirement under the Holidays Act 2003.

[84] Ms Patterson stated at the Investigation Meeting that the hourly rate of $18.00 paid to Ms Clark included the 'pay-as-you-go' holiday entitlement. However this is at variance with the facts that firstly according to the pay records submitted, on 15 January 2013 Ms Clark received a "*Hol* pay" payment when she took leave during the course of her employment at Angard, and secondly, on 7 May 2014 Ms Clark received a payment for accrued holiday pay at the time of the termination of her employment.

[85] In addition I note that Ms Clark was paid on some statutory holidays, including Christmas Day and Boxing Day 2013, and 1 and 2 January 2014 although she did not work on these days.

[86] Examining the indications of a real employment relationship, I find that, whilst there are contending factors, there are several indicators that the employment of Ms Clark was more consistent with a continuous or permanent employment arrangement than with a casual arrangement.

[87] In light of these indicia, I conclude that Ms Clark was a permanent part-time employee with Angard.

Was Ms Clark unjustifiably dismissed by Angard?

[88] This is an unusual case in that Ms Patterson's belief, albeit mistaken, was that Ms Clark was a casual employee and her actions in leaving the message on Ms Clark's answer phone and in writing the letter dated 7 May 2014 were in accordance with that belief.

[89] I find that this is supported by:

a. The fact that Angard took no disciplinary action against Ms Clark in respect of her absenteeism which Ms Clark acknowledged had been unsatisfactory: "*I do acknowledge that my sick leave record was not the best:";*

b. the statement in the letter from Ms Patterson dated 7 May 2014 that: "*Maybe in the future when you're sorted your health and home life we may look at starting again;,* and

c. by the evidence of Ms Patterson that a decision by Ms Clark to resume work at the Salon would be welcomed.

[90] However I have found that Ms Clark was not a casual employee but a permanent employee and as such the actions of Angard constitute a sending away, or dismissal.

[91] The decision to dismiss Ms Clark must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

i. *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).*

ii. *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.*

[92] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Angard must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time

[93] There is no substantive reason for dismissing Ms Clark as Angard had followed no disciplinary process in regard to her absenteeism, she had not been advised that this was not acceptable, or that failing improvement, her continued employment could be in jeopardy.

[94] There was no satisfactory procedure followed, in particular there was no consultation with Ms Angard prior to the decision having been taken to terminate her employment.

[95] I determine that Ms Clark was unjustifiably dismissed by Angard.

Remedies

Reimbursement for Lost Wages

[96] Ms Clark claims that she has been unable to obtain alternative employment in either Whakatane or Tauranga. Whilst I accept the argument to some extent that that in Whakatane her job search which consisted solely of 'door knocking' was appropriate in a small town, Tauranga is a much larger location and there are other avenues of job search available, however there was no evidence that these had been explored.

[97] Employees are under a duty to mitigate their loss and in this case there was insufficient evidence presented to the Authority to support the fact that Ms Clark had made a real effort to mitigate her loss. As Chief Judge Colgan made clear in *Allen* v *Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")*[6]:

> *... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require,*

[6] (2009) 6 NZELR 530, par 78

in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[98] Ms Clark claimed that her lack of a written reference limited her chances of success in finding alternative employment; however she did not produce any evidence to substantiate this statement. I observe that this factor alone does not reduce the obligation on Ms Clark to try to mitigate their loss.

[99] I also note that the initial telephone message left on Ms Patterson's telephone requesting a reference was not followed up by Ms Clark when her request was unanswered. Moreover whilst not ideal, the lack of a written reference would not have prevented Ms Clark from providing referee details to prospective employers, particularly in circumstances in which the parties had enjoyed an harmonious relationship.

[100] Ms Clark is to be reimbursed for lost earnings for a period of 13 weeks pursuant to s 128(2) of the Act.

[101] I order that Angard pay Ms Clark the sum of $2,216.00 gross (calculated as $18.00 per hour x 9.47 hours being an average working week over the period 1 January 2014 to 7 May 2014 x 13 weeks) pursuant to s. 128 (2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[102] Ms Clark claims that as a result of the loss of her employment she had suffered significant stress and anxiety as outlined in her written witness statement, although she provided no supporting medical evidence and very little oral evidence of this during the Investigation Meeting.

[103] However I accept that most employees suffer some degree of hurt and humiliation when unjustifiably dismissed, and Ms Clark's inability to meet her family needs following her dismissal is relevant to an award of compensation.

[104] I order Angard to pay Ms Clark the sum of $4,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[105] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[106] I observe that whilst Angard failed in its duty of good faith to consult with Ms Clark prior to 7 May 2014, the duty of good faith pursuant to s 4 of the Act is a mutual obligation which imposes upon both parties the obligation to be: "*... active and constructive in establishing and maintaining a productive employment relationship in which the parties are ....responsive and communicative".*

[107] Ms Clark had a positive working relationship with Ms Patterson and enjoyed working at the Salon; Angard had been financially supportive during the initial two years of her undertaking the NZQA course and understanding in relation to her health issues.

[108] Whilst I have found that Angard failed in its good faith duty towards Ms Clark by not consulting with her prior to making the decision to terminate her employment, I also find that Ms Clark failed in the reciprocal duty of good faith by not communicating with Ms Patterson after receiving the telephone message on 5 May 2014, or after receiving the letter dated 7 May 2014. Had she done so, the situation may well have been clarified and any resulting confusion dissipated.

[109] On that basis I find Ms Clark to have contributed to the situation in which she found herself.

[110] I find that the remedies must reflect what I have found to be contributory fault on the part of Ms Clark and I therefore reduce the amount awarded by way of compensation by 20%.

Costs

[111] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority