

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 143
5522403

BETWEEN	AMANDA VAN DEN TILLAART Applicant
A N D	MBS (2008) LIMITED t/a NELSON BEAUTY THERAPY Respondent
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A N D	AMANDA VAN DEN TILLAART Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Ms Tillaart
Kevin Murray and Shayne Boyce, Advocates for MBS
(2008) Limited

Investigation Meeting: 8 and 9 March and 18 August 2016 at Nelson

Submissions Received: 18 August 2016 for Applicant
18 August 2016 for Respondent

Date of Determination: 25 August 2016

DETERMINATION OF THE AUTHORITY

- A. I decline to investigate a personal grievance for unjustified constructive dismissal for the reasons given.**
- B. Ms Tillaart suffered unjustified disadvantage in her employment. The respondent breached Ms Tillaart's employment agreement,**

and failed to comply with the Holidays Act 2003.

- C. The respondent is ordered to pay remedies to Ms Tillaart, including outstanding holiday pay, and penalties are imposed upon it.**
- D. The respondent's counterclaims are dismissed.**
- E. Costs are reserved.**

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Prohibition from publication order

[1] The Authority heard evidence concerning a number of customers of MBS (2008) Limited (MBS), of the treatments they received at MBS' salon and the products they purchased. None of these individuals gave evidence before the Authority and it was not appropriate to disclose their identities. At the request of the parties, I therefore prohibit publication of the names of these customers.

[2] I also prohibit publication of the nature of Mrs Shepherd's illness, which prevented her from giving evidence before the Authority.

Employment relationship problem

[3] Ms Tillaart claims that she is owed 14 hours pay amounting to \$322 gross, together with holiday pay which has been partially withheld by MBS to recompense it for expenditure incurred in training and other items. Ms Tillaart also claims that she has suffered unjustified disadvantage in her employment in relation to her working

conditions. Ms Tillaart also claims that the respondent has breached her employment agreement in several respects.

[4] At the start of her submissions on 18 August 2016, Ms Sharma said that Ms Tillaart had also raised a claim for unjustified constructive dismissal in her amended statement of problem lodged with the Authority on 7 November 2014. The respondent objected to this on the grounds that Ms Sharma had said at the start of the investigation meeting on 8 March 2016 that Ms Tillaart did not pursue such a claim. I address this below.

[5] Although Ms Tillaart had resigned, and was then dismissed during her notice period, she does not claim ordinary unjustified dismissal. This is presumably because her representative of the time did not raise a personal grievance on her behalf, and Ms Tillaart did not apply for leave to raise her grievance outside of the statutory 90 day limit.

[6] In its statement in reply, MBS denied these claims, initially saying that it was entitled to withhold the sum of \$1,724.67 from Ms Tillaart's holiday pay and that there is no evidence that she worked the 14 hours that she claims for. During the investigation meeting, however, MBS conceded that it was not entitled to withhold much of the \$1,724.67 from Ms Tillaart's holiday pay that it had withheld up to that point.

[7] MBS also denies that a valid personal grievance was raised by Ms Tillaart in respect of her working conditions and denies that it has breached Ms Tillaart's employment agreement.

[8] The respondent¹ has counterclaimed against Ms Tillaart, claiming first that she breached her duty of fidelity during her employment by falsely claiming commission on the sale of treatments and products in various ways. It also claims that Ms Tillaart either stole or held back products which customers had paid for. In addition, MBS claims that Ms Tillaart deliberately caused the business to deteriorate during the absence of its manager, Bedelia Shepherd, for three months.

[9] Finally, MBS claims that Ms Tillaart acted in breach of the restraint of trade clauses in her employment agreement by soliciting the customers of MBS through

¹ Although the Authority is also considering a counterclaim, in this determination the word "respondent" refers consistently to MBS (2008) Limited.

advertisements placed in *The Nelson Leader*, disclosing confidential information to the supplier of MBS' main product range and causing that supplier to cease trading with MBS.

[10] Ms Tillaart denies all of these allegations.

The history of these proceedings

[11] This matter was delayed coming to an investigation meeting by nearly a year because of a complaint to the Police that had been made by MBS in August 2014 about its suspicions about Ms Tillaart's alleged activities. This delay was caused partly by the concerns of the Authority that Ms Tillaart, who was unrepresented at the time, may have incriminated herself if she gave evidence to the Authority prior to any criminal trial.² In addition, the Police had requested that the Authority's proceedings be delayed while they investigated matters. The Police then later withdrew that request in late 2015 on the basis, as I understand it, of the delay that had ensued in being given cogent evidence to support the suspicions. By then, Ms Tillaart was represented by Ms Sharma, and the Authority took the view that there was less risk to Ms Tillaart of inadvertent self-incrimination.

[12] As at the date of the Authority's first stage of the investigation in March 2016, the Police had still not decided whether to prosecute Ms Tillaart. They had concluded that there was not enough evidence to prosecute her for fraud but were apparently continuing to consider whether they should prosecute her for theft³.

[13] Furthermore, Mrs Shepherd was not available during the Authority's investigation meeting on 8 and 9 March 2016 due to a medical issue which prevented her from giving evidence. Mrs Shepherd's inability to give evidence was only made known to the Authority on 4 March 2016, even though she had apparently been suffering from the condition, or its aftereffects, for several months. Mrs Shepherd's husband, Mr Stephen Shepherd, the director and shareholder of MBS, was able to give evidence, but his knowledge of the day-to-day running of the salon was limited. Therefore, as he was unable to answer certain questions in relation to the detail behind MBS' allegations against Ms Tillaart, I decided that it was necessary to reconvene the

² See s.60 of the Evidence Act 2006.

³ According to Ms Sharma, as at 18 August 2016, the Police had still not instigated any formal proceedings against Ms Tillaart, but equally, had not closed their investigations.

investigation for a further two days to give Mrs Shepherd the opportunity to give evidence once she was properly recovered⁴.

[14] Unfortunately, shortly before the reconvened investigation meeting on 18 August 2016, it was made known to the Authority that there was a possibility that Mrs Shepherd would still not be well enough to give evidence. As so much time had already elapsed since Ms Tillaart had first lodged her statement of problem (on 9 October 2014) I consulted with the parties, and it was decided that no further evidence would be heard, and that I would hear submissions on the first day of the reconvened investigation meeting.

[15] Finally, a significant amount of documentation was placed before the Authority by MBS in support of its counterclaim against Ms Tillaart, some of which was not produced until 7 March 2016, the day before the investigation meeting started. Furthermore, despite briefs having earlier been served and lodged, a detailed explanation of the respondent's suspicions about Ms Tillaart was not made known to the Authority, Ms Tillaart and Ms Sharma until the day of the investigation, when Mr Shepherd gave his evidence. This necessitated Ms Sharma having to spend some time with Ms Tillaart afterwards, taking instructions from her in respect of the evidence that was given. Fortunately, Ms Tillaart was able to give evidence in response without a significant delay to the process.

Brief account of the events leading to Ms Tillaart's resignation

[16] Ms Tillaart commenced employment with MBS on 13 February 2012. She worked as a senior beauty therapist and appears to have got on well with Mr and Mrs Shepherd for most of her employment, and was appreciated by them.

[17] MBS made its revenue from the selling of certain treatments, such as facials and waxes, and the sale to customers of products. The vast majority of these products at the material time were Dermalogica products which MBS obtained from a company called Pristina Holdings Limited, trading as Skin Health Experts (SHE).

[18] Ms Tillaart complains that, by February 2014, she was experiencing unfair working conditions including being double-booked, working long hours, receiving no

⁴ A 100 paragraph statement of evidence of Mrs Shepherd had been served and lodged by the respondent, although it was unsigned. Where I refer to Mrs Shepherd's evidence, I refer to the contents of this statement.

breaks, not being paid for attending staff meetings or marketing events, not being paid on time or in one lump sum, and being paid in cash. Ms Tillaart says that she raised her concerns with Mrs Shepherd in a meeting in February 2014. The Authority saw a copy of some handwritten notes which Ms Tillaart says that she prepared in advance of the meeting. These notes record the following:

Pay rise (date keeps changing).
 Cash paid properly (keeps changing).
 Some early days (i.e. before 4pm).
 Days off in a row.
 Needed op. Didn't wanna let you down.
 Thought I'd do it in winter.
 ACC 80% wages can't do it cause of cash in hand.
 Not receiving⁵ products clients need.
 Lying to clients why it's not here.
 Changing people's appt times to make it look like they [??] in computer but not telling them.
 Leaving when I'm busy after changing things around.
 Need to train girls properly to take over some reception duties.
 Giving out free \$50 vouchers makes more paper work then they don't get products for ages anyway.
 All these things upset the clients & you not here to deal with them when they come to complain.
 End up giving free treatments which defeats the purpose of taking on more treatments anyway.
 9-10 hr days 6x days per week.
 Double booked & squeezing in appts shifting my clients to fit in Julie's.
 No time to do my best job.
 Having to do reception as well on top.
 No product to do proper treatments.
 19/20 hrs a day five days a week 4 to 5 hours free. Up to 8 on Sats.
 16/17 hours on the 6th day sleeping, getting ready, working or travelling with no breaks, nothing open when I'm off.
 No time to get life errands run or to do anything else. E.g. no life outside of work.
 Saturdays too long 8.30 to 4.30.

[19] Ms Tillaart says that she also wrote a letter to Mr and Mrs Shepherd around June 2014 which articulated in more detail the concerns set out in her handwritten note. Of particular relevance in this letter was the following statement, as it goes to one of the allegations made against Ms Tillaart by MBS that she was withholding or stealing products. Ms Tillaart wrote in her letter:

I want to be able to give my clients a service/treatment that is of a standard that I am proud of. To achieve this I need:

- The correct product to perform the treatments my clients are expecting and paying for.

⁵ This word may be "reordering"

- Product to sell that they will receive, if not readily available, in a timely manner that they are happy with so they can follow my advice at home and achieve the results that they are expecting and I have promised.

[20] Mr Shepherd said in his evidence that he did not recall ever having received this letter. In Mrs Shepherd's statement of evidence, she says that she had no knowledge of the meeting that Ms Tillaart says took place in February 2014 and also that no meeting took place with her in June or July 2014.

[21] In May 2014 Mrs Shepherd had to absent herself from the business because of the illness of both of her parents. Up to then she had been in the salon every day, if not all day and had been taking an active part in the business. Although, it seems, Mrs Shepherd gradually took more of a part in the business again during June and July 2014, it is uncontested that Ms Tillaart had to take on more duties as a result of Mrs Shepherd's absence.

[22] It was also in May 2014 that Ms Tillaart and the Shepherds entered into negotiations about Ms Tillaart buying the business. These negotiations eventually came to nothing because they could not agree on a price. However, confidential information had been made available to Ms Tillaart during the negotiations, and Ms Tillaart had signed a simple confidentiality agreement in respect of it. Ms Tillaart says that she handed back the information when the negotiations stalled, whereas Mr Shepherd believes that she may not have done, and may have utilised the information to compete against MBS later in the year.

[23] On 27 and 28 July 2014, Ms Tillaart and Mrs Shepherd attended a Dermalogica training trip in Auckland. Mrs Shepherd accuses Ms Tillaart of having bought a significant amount of Dermalogica stock at this event, implying she was intending to use it to set up in competition. Ms Tillaart says that she only bought five items, all for the personal use of her and her family.

[24] On 11 August 2014, Ms Tillaart resigned by writing a letter to Mr and Mrs Shepherd in the following terms:

To Bedelia and Steve,

Please accept this letter as four weeks notice of my resignation.

I have enjoyed working with you for the previous 2½ yrs and have learnt a great deal. I truly appreciate everything you have done for me I [sic] all that I have learnt during my time with you.

I have decided that I need to take a little time for me and decide what the next stage of my life will be. With this in mind I would appreciate the opportunity to only work 4 days a week for the remaining time I have here. When I have worked my notice I am very lucky to be able to work very part time from my home in Wakefield and enjoy lots of free time to rest and improve my health. I wish you both personally, and your businesses the very best and I am sure you will only do well in whatever direction you decide to move in next.

I will be sad to say goodbye to you both and will miss looking after the lovely customers I have met during my time here.

Again, I wish you well for the future and hope we can stay in touch.

Kind regards,
Amanda Tillaart

[25] Mrs Shepherd responded to Ms Tillaart by way of a letter dated 12 August 2014 in which she said that, under her employment agreement, Ms Tillaart was required to give two weeks' notice, not four, and that her last day of employment would be 23 August 2014. She stated that Ms Tillaart's normal weekly pay would be paid into her bank account on 29 August 2014 and that her final pay would include her holiday pay and would be paid on 5 September 2014.

[26] Mrs Shepherd then referred in her letter to the company's Training and Overseas Seminar Policy and stated that, although the policy stated that resignation within six months of attending a programme or seminar required repayment of 75% of the costs, "in respect of your exemplary contribution to our business and our clients we will only require repayment of 50% of the cost, which is \$401.00 for the registration accommodation and travel".

[27] Mrs Shepherd reminded Ms Tillaart of her obligations in her employment agreement and, in particular, the confidential information, privacy obligations, non-competition and non-solicitation clauses. She also asked Ms Tillaart to return to the company any confidential information that she had, as well as material or property belonging to the company or which was its responsibility and all copies of materials which were under her control.

[28] Mrs Shepherd dismissed Ms Tillaart after she had worked two days of her notice, without giving any reason. Ms Tillaart received part payments of back pay

(resulting from an earlier pay rise), her outstanding notice pay and a portion of her holiday pay in several instalments on 26 November 2014, 4 and 8 December 2015 and 18 December 2015.

The issues

[29] The following are the issues that need to be determined by the Authority:

- a. Can Ms Tillaart pursue a claim of unjustified constructive dismissal in the Authority?
- b. Did Ms Tillaart raise a valid personal grievance in respect of the unjustified disadvantage claims she has brought?
- c. If so, did Ms Tillaart suffer an unjustified disadvantage in her employment?
- d. Is Ms Tillaart owed \$322 in respect of her notice period?
- e. Is Ms Tillaart owed holiday pay?
- f. Did the respondent breach Ms Tillaart's employment agreement?
- g. Should penalties be imposed upon the respondent?
- h. Did Ms Tillaart breach her duty of fidelity by:
 - i. falsely claiming commission and
 - ii. deliberately causing MBS's business to run down during Mrs Shepherd's absence?
- i. Did Ms Tillaart breach the restraint of trade clauses in her employment agreement?

Can Ms Tillaart pursue a claim of unjustified constructive dismissal in the Authority?

[30] At the start of the Authority's reconvened investigation meeting on 18 August 2016 Ms Sharma submitted that, when one reads Ms Tillaart's revised statement of

problem which had been lodged with the Authority on 7 November 2014⁶, it sufficiently specified a personal grievance of unjustified constructive dismissal. There may be some merit to this argument.

[31] However, at the start of the Authority's investigation meeting on 8 March 2016, because there was no express pleading of unjustified dismissal or unjustified constructive dismissal in any of the three statements of problem, I specifically asked Ms Sharma whether Ms Tillaart was pursuing either potential claim, given the factual matrix which lent itself to such a possibility. My notes clearly indicate that Ms Sharma stated that Ms Tillaart was not pursuing either. Ms Boyce confirmed that her notes indicated the same.

[32] Ms Sharma replied that she did not recall saying that, but that, in any event, the Authority could (and should) still consider the unjustified constructive dismissal claim, as it had allowed claims to be argued in the past at submission stage.

[33] I must disagree. It is one thing to put a label at the submission stage on evidence which has been heard during the course of an investigation meeting, and treat it as a separate grievance. It is quite another thing to expressly disavow a specific claim at the start of an investigation meeting, before any evidence has been heard, and then do a volte-face at submission stage, several months later, after all the evidence has been heard.

[34] To allow the claim of unjustified constructive dismissal to proceed now would be manifestly unjust to the respondent. In considering a claim of unjustified constructive dismissal, the Authority has to consider a number of issues, including which of the three categories of constructive dismissal are relevant (as enunciated in *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*⁷), whether there was a course of conduct amounting to a repudiation, as well as issues of foreseeability and affirmation. These matters require careful questioning of the applicant.

[35] By Ms Sharma having stated expressly at the start of the investigation meeting that no claim of unjustified constructive dismissal was being pursued, the Authority and the respondent's representatives did not address themselves to these issues, nor ask necessary questions.

⁶ Three statements of problem were lodged. Two by Ms Tillaart personally (lodged on 9 October and 7 November 2014 respectively) and a third by Ms Sharma on Ms Tillaart's behalf on 8 June 2015.

⁷ [1985] 2 NZLR 372 (CA) at 374-375

[36] I therefore disallow this claim of unjustified constructive dismissal on the basis of the express disavowal of such a claim by Ms Sharma on behalf of her client on 8 March 2016.

Disadvantage allegations

[37] These have been alleged in two of the three statements of problem lodged with the Authority, but in different terms.

[38] In her statement of problem lodged on 7 November 2014, Ms Tillaart complained of the following:

- a. Unfair working conditions;
- b. Being double booked, short staffed, and an unrealistic amount of work;
- c. Having no breaks all day causing exhaustion;
- d. Working long hours at an overworked pace;
- e. Not being paid for extra hours worked; e.g., at staff meetings and marketing events;
- f. Not being paid on time or being paid in one lump sum;
- g. High stress affecting my health;
- h. Defamation of my character, skills and experience;
- i. Financial hardship;
- j. False allegations of theft causing high stress, and feelings of humiliation, degradation, etc.

[39] When these complaints are analysed, there are some overlaps, and some are not complaints of unjustified actions during employment. Breaking them down, I find the following:

- a. “Unfair working conditions “ is an unspecified generic complaint, and not a specific complaint about an action.

- b. I treat being double booked, short staffed, “an unrealistic amount of work”, “no breaks causing exhaustion” and “long hours at an overworked pace” all as the same category of complaint.
- c. I treat not being paid for extra hours worked as a separate complaint.
- d. I treat not being paid on time, or in one lump sum, as a separate complaint.
- e. I treat “high stress affecting my health” and “financial hardship” as the effects of alleged unjustified actions by the respondent, not as alleged unjustified actions themselves.
- f. I treat “defamation of character, skills and experience” and “false allegations of theft” as separate allegations of unjustified action.

[40] Ms Tillaart conceded in her evidence that she had never complained about having to do marketing at client entertainment events without being paid. I therefore dismiss complaint (c) as no grievance was ever raised within the required 90 day time limit. With regard to the complaints about “defamation” and “false allegations of theft” these relate to allegations raised with Ms Tillaart by the respondent after the employment ended, and so there is no jurisdiction to consider them as there was no employment relationship in place at the time the allegations were made to Ms Tillaart. In any event, the Authority has no jurisdiction to investigate defamation claims in the legal sense of that term.

[41] Therefore, there are two categories of unjustified action referred to in the statement of problem lodged on 7 November 2014 which the Authority has to consider (summarised in paragraph 39 (b) and (d) above).

[42] In the amended statement of problem lodged with the Authority on 8 June 2015, the following actions were cited as disadvantages:

- a. “Work overload issues”
- b. No opportunity for the applicant to have a life outside of work due to the demands made on her by the respondent;
- c. No work breaks;

- d. Fielding complaints from clients who had paid for product orders not being ordered and Mrs Shepherd misrepresenting the truth;
- e. Fielding complaints from customers relating to free \$50 vouchers, and the time taken to receive gifts on offer;
- f. Lack of stock to work with;
- g. Changing client appointment times, without prior notification;
- h. Mrs Shepherd leaving early while the applicant was left to deal with client appointments on her own;
- i. An expectation that the applicant undertake reception duties over and above her beauty therapy duties;
- j. Pay rise issues had not been addressed;
- k. Concerns about being paid in cash rather than receiving wages in her bank account.

[43] Analysing these complaints, I treat them as follows:

- a. I treat complaints (a) to (c), (g) and (h) as the same as the other workload issues referred to in the November 2014 statement of problem.
- b. I treat the two “fielding complaints” issues as a single separate complaint.
- c. I treat “lack of stock” as a separate complaint.
- d. I treat an expectation that the applicant undertake reception duties as a separate complaint.
- e. I treat pay rise issues as a separate complaint.
- f. I treat being paid in cash as a separate complaint.

[44] In total, therefore, there are seven allegations of unjustified actions giving rise to unjustified disadvantage in employment that the Authority must investigate,

provided that a personal grievance in respect of each was raised within the statutory time limit.

Did Ms Tillaart raise a valid personal grievance in respect of the alleged disadvantage in her employment?

[45] With respect to her complaining about her working conditions, Ms Tillaart says that she complained on at least three occasions about this. The first was at the beginning of 2014 when she was working late and Mrs Shepherd called her up to inquire about a customer. She says that she lost her temper and shouted at Mrs Shepherd which caused Mrs Shepherd to agree to have a meeting with her. Ms Tillaart said that she raised at that meeting all the points that were recorded in her notes, referred to above in paragraph 18.

[46] With respect to the later meeting in June 2014, Ms Tillaart said that it was Mrs Shepherd who had asked her to write down all her concerns, which she did, in a letter addressed to both Mr and Mrs Shepherd and which she gave to Mrs Shepherd a few days later. She says that she recalls that Mrs Shepherd just laughed when she saw it which made Ms Tillaart feel silly.

[47] The respondent says that these meetings never took place and that the letter was never received.

[48] Section 114 of the Act sets out the requirements of the raising of a personal grievance. Sub-sections 114(1) and (2) state as follows:

114 Raising personal grievance

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[49] In relation to s 114(2), the Court said in *Creedy v Commissioner of Police*⁸

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[50] I am satisfied, on a balance of probabilities, that there was a meeting between Mrs Shepherd and Ms Tillaart in February 2014, as I find it unlikely that Ms Tillaart would have lied about this, and would have fabricated the notes that she relies on. The notes are too detailed to be likely to have been invented after the event. By the same token, by reference to the notes, I find that Ms Tillaart did discuss at that meeting her concerns which make up six of the seven separate complaints referred to above.

[51] It is impossible to know exactly when each alleged action and omission occurred, as insufficient evidence was led about each action and omission complained of to enable me to make such findings. However, given that Ms Tillaart felt moved to complain about each issue in February 2014, I find, on balance, that each action had occurred or re-occurred within 90 days of her doing so, as each issue is very likely to have been on-going. This does not mean that specific actions or omissions that occurred prior to the period of 90 days ending in the February 2014 meeting can be said to have had valid personal grievances raised in respect of them⁹. However, I find, on balance, that Ms Tillaart raised her personal grievance within 90 days of the last occurrence of each alleged action or omission.

[52] There is one concern about which I do not believe a personal grievance was raised in time. That is the non-implementation of a pay rise promised by Mrs Shepherd on 1 May 2014. No grievance was raised about this in the June 2014

⁸ [2006] ERNZ 517 (EmpC)

⁹ See the Employment Court case of *Anna Ale v Kids at Home Limited* [2015] NZEmpC 209 [25] et seq. for an examination of the status of acts occurring in a continuum in the context of s114 of the Act.

letter, and no evidence was given that a grievance was raised about it at any other time. I therefore decline to consider that issue as the Authority has no jurisdiction to do so.

Did Ms Tillaart suffer an unjustified disadvantage in her employment?

[53] Section 103A of the Act sets out the test of justification that the Authority must consider when considering a personal grievance for unjustified disadvantage. This is 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.

[54] It is necessary to examine each of the remaining six alleged unjustified actions separately to determine which, if any, constituted unjustified disadvantage in Ms Tillaart's employment.

Overwork

[55] The strong impression I got from the evidence of Ms Tillaart was that the running of the salon was somewhat chaotic at times. It appears that Ms Tillaart often effectively ran the salon for parts of the day and that this responsibility increased significantly when Mrs Shepherd had to attend to her aged parents.

[56] Ms Tillaart's employment agreement provided for her to be flexible. No set hours of work were stipulated in the agreement. Her job description required her to carry out a large number and a wide range of duties. Ms Tillaart acknowledges her need to be flexible in her letter to Mr and Mrs Shepherd. She does, however, make clear in that letter that her workload was unmanageable. Objectively speaking, assuming what she wrote was accurate, and I accept that it is, it would appear that the workload she was having to cope with was not sustainable in the long term. I am satisfied that Ms Tillaart was caused a disadvantage in her employment as a result of her workload.

[57] The respondent suggests that Ms Tillaart acquiesced to her workload. However, it is not usually easy for an employee to simply walk out, or refuse to carry out the work expected of them. Ms Tillaart clearly complained more than once about her workload, and I do not agree she acquiesced.

[58] It was the responsibility of the respondent to ensure that Ms Tillaart was able to manage her workload in such a way that she did not become burned out. I am satisfied that this was not the case because of the way that the rosters and client appointments were managed. I find that no fair and reasonable employer could have failed, in the way that the respondent did, to have instituted a work and client management system that protected Ms Tillaart from the effects of sustained overwork.

[59] I therefore find that Ms Tillaart did suffer an unjustified disadvantage in her employment as a result of her workload.

Not being paid on time or in one lump sum

[60] Ms Tillaart produced in evidence a copy of her bank statement which indicated payments of salary and commission which had been received after the date she expected them to have been paid. Typically, when this happened, the payments

appear to have been made between three and five days late. This evidence was not contested by the respondent.

[61] There is little doubt that most employees on modest remuneration, as Ms Tillaart was, will suffer disadvantage in their employment if they do not receive their pay when it is expected, as it creates difficulties with cash flow. I accept that Ms Tillaart did.

[62] The respondent had entered into an employment agreement with Ms Tillaart which obliged the respondent to pay her each Friday. It failed to do so. No fair and reasonable employer could have failed to have paid Ms Tillaart in accordance with the employment agreement.

[63] I therefore find that Ms Tillaart did suffer an unjustified disadvantage in her employment as a result of not receiving her pay on time.

Fielding complaints from customers

[64] I examine below, in the section relating to the counter claim, some of the practices of the respondent which resulted in complaints from customers. I am satisfied that some of these practices were not ideal, although in the absence of evidence from Mrs Shepherd, I am reluctant to draw conclusions about whether the complaints resulted from deliberately underhand practices, or just mismanagement.

[65] It was Ms Tillaart's job, in part, to deal with customers, including fielding complaints. Whilst she was no doubt frustrated by avoidable problems which put her in the firing line from time to time, I am reluctant to conclude that there were any actions of the respondent related to the complaints which caused Ms Tillaart an unjustified disadvantage in her employment, separate from those which relate to workload issues in general. This is because I cannot be satisfied, on a balance of probabilities, that the respondent did anything in relation to the matters giving rise to the customer complaints that no fair and reasonable employer could have done.

[66] I therefore decline to find that Ms Tillaart suffered an unjustified disadvantage in her employment in this respect.

Lack of adequate stock to work with.

[67] I examine this issue below, in the section relating to the counter claim. Again, I am unable to determine whether the lack of stock was caused by mismanagement or a deliberate policy undertaken by the respondent.¹⁰ Again, I cannot be satisfied, on a balance of probabilities, that the respondent did anything in relation to the lack of adequate stock that no fair and reasonable employer could have done.

[68] I therefore decline to find that Ms Tillaart suffered an unjustified disadvantage in her employment in this respect.

An expectation that the applicant undertake reception duties

[69] Whilst this could be seen as part of the workload issue, I address it separately because I do not accept that this is an unjustified disadvantage in Ms Tillaart's employment, given that reception duties were clearly part and parcel of her everyday role.

Being paid in cash

[70] Ms Tillaart's employment agreement provided that "The Employee's pay shall be paid weekly on Friday into a bank account nominated by the Employee".

[71] Ms Tillaart's evidence was that Mr and Mrs Shepherd decided to pay her and another employee by cash as it assisted them, having received a tax bill from the IRD.

[72] Mr Shepherd's evidence was that another employee, referred to as Julie, had requested that she be paid her commissions in cash as she was about to go travelling, and that the same option was offered to Ms Tillaart, which she accepted. Mr Shepherd says that the arrangement was expressly done so that the other employee could receive her commissions without deduction of tax.

[73] I must say that Mr Shepherd's version appears to be unlikely. Mr Shepherd is an experienced businessman who would have known that his business could get into trouble with the Inland Revenue Department if he paid cash to employees without deduction of PAYE. Commission is clearly an emolument derived from the employment, and so would be liable to deduction of tax, which would then have to be

¹⁰ As I explain below, I do not find that the shortage of adequate stock was caused by Ms Tillaart's actions.

accounted for to the IRD. I do not believe that Mr Shepherd would have simply agreed to put his business at risk of penalties simply to accommodate the wishes of an employee who was leaving. It is much more likely that Ms Tillaart's version is the correct one.

[74] This is especially the case given that Ms Tillaart complained that getting her commission paid in cash meant that her declared income was lower than it should have been, which impacted upon the ACC compensation she was to receive for a planned operation, and also impacted her ability to obtain a mortgage.

[75] This situation therefore did create a disadvantage in Ms Tillaart's employment and, as no fair and reasonable employer could have failed to have complied with its contractual obligation to make payments into Ms Tillaart's bank account (or, indeed, to have accounted for PAYE to the IRD) I find that this disadvantage was unjustified.

Is Ms Tillaart owed \$322 in respect of her notice period?

[76] With respect to her claim for an extra 14 hours of work, Ms Tillaart said that this related to the fact that she was not allowed to work her two weeks notice. She said that, if she had worked her notice, she would have been paid commission and would have worked more than a straight 40 hours. She therefore averaged out how much she had been paid over the preceding six months and then worked out the difference between what she had been paid for two weeks and what she would have expected to have been paid. This equated to 14 hours at \$322¹¹.

[77] Ms Tillaart's employment agreement contained the following clause:

13. **Termination of Employment**

...

13.2 **General Termination**

The Employer may terminate this agreement for cause, by providing **weeksnotice**¹² in writing to the Employee. Likewise the Employee is required to give **weeksnotice** of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[78] I do not accept that Ms Tillaart is entitled to this extra pay in relation to her notice period. The notice provision in the employment agreement gives MBS the

¹¹ Based on Ms Tillaart's hourly rate of \$23.

¹² The number 2 had been handwritten in, together with a question mark, and then what appears to be Mrs Shepherd's initial. It is assumed that the question mark was written in prior to the number 2 being completed by Mrs Shepherd.

right, at its discretion, to pay Ms Tillaart in lieu of notice. Therefore, MBS had no obligation to allow her to work her notice, and to earn commission by doing so. In addition, the employment agreement does not guarantee any minimum hours of work would be provided. Therefore, MBS did not breach the employment agreement by paying Ms Tillaart in lieu of notice a sum equivalent to 40 hours' work done.

Is Ms Tillaart owed any holiday pay?

[79] There is no argument between the parties that, when her employment ended, Ms Tillaart was owed \$5,774.60. The respondent has deducted \$1,724.67 in respect of training costs, and Ms Sharma submits that the respondent should have paid the holiday pay sum in full.

[80] The employment agreement contains the following provision relating to the right to make deductions:

15.3 Deductions from Salary/Wages

Where requested by the Employee, the Employer shall deduct from their salary/wages any agreed amount for matters such as superannuation, a staff social club or union fees and pay the amount to the organisation specified by the employee. The Employer shall also be entitled to deduct from any salary payment payable upon termination of employment any overpayment made to the Employee for leave taken in advance.

[81] MBS also had a Training and Overseas Seminar Policy which stated as follows:

Nelson Beauty Therapy is committed to working with its employees to update their skills. We are active in providing training and opportunities to attend seminars both in New Zealand and overseas.

While providing these opportunities we do need to protect the investments made by the company and the costs associated with these programmes.

In order to clarify the responsibilities of the company and our employees when training and attendance at seminars is provided, we will be introducing the following policies and procedures:

1. Attendance at any training programme or seminar by a particular employee will be at the discretion of the company.
2. Prior to any firm commitment being made to attend any offsite training or seminar, the company will meet with the employee and agree on which costs will be met by the company and which costs will be met by the employee.

3. Once an agreement has been reached, the employee and the company will confirm this in writing. The written confirmation will include an acknowledgment by the employee that they have read and understood this policy document.
4. If the employee elects to resign from their position within the specified period, the company will require them to repay a portion of the costs associated with attending the training programme or seminar. These costs will include travel, accommodation and enrolment costs associated with the programme. The amounts to be repaid are as follows:
 5. - Resignation within 12 months of attending any international training including:
 - Conference in Malaysia will require 100% of the cost to be paid in full, including airfares, hotel and conference-related costs.
 - Resignation within 6 months of attending the programme or seminar will require repayment of 75% of the costs.
 - Resignation within 1 year of attending the programme or seminar will require repayment of 50% of the costs.
6. If you have any questions or concerns in regard to this new company policy, please do not hesitate to discuss this with your Manager.

[82] This agreement was signed by Ms Tillaart on 20 March 2013 and countersigned by Mrs Shepherd.

[83] The letter sent to Ms Tillaart after she had given Mrs Shepherd her resignation letter stated that Mrs Shepherd would withhold \$401 from her pay, in accordance with the Training Policy, but using a deduction of 50% instead of 75%.

[84] In her submissions, Ms Sharma submits that the respondent cannot rely on the training policy or the employment agreement because of the repudiation by the respondent of Ms Tillaart's contract, by its actions. I cannot find that there was such a repudiation of contract, however, as no claim for constructive dismissal was pursued before the Authority until after all the evidence had been heard. The evidence I did hear did not cogently show a repudiation by the respondent. I therefore reject this argument.

[85] Ms Sharma also argues that there has been a miscalculation of the PAYE taken from Ms Tillaart's holiday pay. However, I heard insufficient evidence to be able to conclude this point one way or another. I direct the parties to co-operate with one another in resolving that issue.

[86] Section 6 of the Holidays Act 2003 provides:

6 Relationship between Act and employment agreements

(1) Each entitlement provided to an employee by this Act is a minimum entitlement.

(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

[87] Ms Tillaart's right to holiday pay was restricted to that set out in the Holidays Act 2003. Her employment agreement did not afford her any enhancements.

[88] I find that the respondent was not entitled to deduct from Ms Tillaart's final holiday pay entitlement any sum not expressly provided for in the Holidays Act. This is because it does not have an express right to deduct from holiday pay (or even salary). The Training and Overseas Seminar Policy refers to "repayment". In addition, clause 15.3 of the employment agreement does not expressly give a right to deduct from salary sums due under the Policy. Indeed, the clause refers to a right to deduct from any salary payment payable upon termination (as final holiday pay is) any overpayment made to the employee for leave taken in advance. The sum to be repaid under the Policy does not fall into this category.

[89] Therefore, whilst the respondent was clearly entitled to require Ms Tillaart to repay a sum in respect of her resigning shortly after attending a training course, it was not entitled to recover that sum by withholding a sum from her statutory final holiday pay¹³. The respondent is therefore to pay to Ms Tillaart the balance of the holiday pay owed. The parties are to co-operate with one another in seeking to agree what that balance is. In the absence of an agreement within four weeks of the date of this determination, the parties may make an application to the Authority for a determination.

[90] Mrs Shepherd calculated that Ms Tillaart was to pay \$401 in respect of the training. During the investigation meeting, Mr Shepherd recalculated that the correct

¹³ For the avoidance of doubt, an employer may make deductions from final statutory holiday pay in accordance with an express contractual right to do so, pursuant to s.5 of the Wages Protection Act 1983, and s.86 of the Holidays Act, which treats holiday and leave pay as salary or wages and subject to deductions that an employer is required, or entitled to make.

amount that was \$301.77. However, the respondent's counterclaim does not extend to any sum due to the respondent as a result of Ms Tillaart resigning shortly after receiving training. I cannot, therefore, order Ms Tillaart to pay this sum to the respondent.

Did the respondent breach Ms Tillaart's employment agreement?

[91] Ms Tillaart alleges that MBS breached her employment agreement in the following ways:

- a. By paying her in cash, instead of into her nominated bank account;
- b. By not giving notice of a change in roster;
- c. By not carrying out an annual performance review;
- d. By not setting employee objectives on an annual basis; and
- e. By not providing Ms Tillaart with a job description.

Payment of cash

[92] I have already found that the respondent breached its contractual obligation to pay Ms Tillaart into her bank account. This allegation is therefore made out.

Not giving notice of a change in roster

[93] Ms Tillaart's employment agreement provided as follows:

6. **Hours of work**
 - 6.1 **Rostered Hours with no minimum hours of work to be provided**

The parties agree that the Employee's hours of work shall be set by the Employer in advance in accordance with a roster. Unless there are exceptional circumstances, the Employee shall be given at least 7 days' notice of a new roster. In setting the roster the Employer shall provide the Employee with **insert number** consecutive days off within a reasonable period.

[94] I understand Ms Tillaart's evidence to be that the rosters would routinely be changed without seven days' notice being given. I accept that Ms Tillaart had to be flexible in her hours, because of the nature of the business in which she worked. Customers would arrive late, or would take longer than was planned, and phone calls

and casual visits cannot be pre-planned. However, a roster deals with a broader work pattern, and Ms Tillaart was entitled to expect the obligation set out in the agreement, which was after all provided by the respondent, to be adhered to. Unexpected roster changes undoubtedly caused Ms Tillaart disruption.

[95] No contradictory evidence was given by the respondent about roster changes. I find that there was a breach of contract in this respect.

Not carrying out an annual performance review

[96] Ms Tillaart's employment agreement provided as follows:

2.5 Performance reviews

The Employer shall conduct a performance review of the Employee on at least an annual basis. This review shall be taken into account in any salary reviews.

[97] I believe that it is accepted by the respondent that it did not conduct an annual performance review, but argues that it should be excused this as the respondent is a small employer. I reject this argument. The employment agreement was supplied by the respondent. It cannot pick and choose which contractual obligations it complies with. If Mr and Mrs Shepherd did not feel able to comply with the obligation, they should not have included it in the respondent's employment agreement.

[98] This claim is made out.

Not setting employee objectives on an annual basis

[99] Ms Tillaart's employment agreement provided as follows:

2.4 Performance Objectives

The Employer shall, in consultation with the Employee, set the Employee objectives at least on an annual basis. These objectives shall be taken into account by the Employer when assessing the Employee's performance.

[100] The respondent argues that an ongoing measurement was applied throughout the employment of the applicant, that being the measurement of clients' re-bookings, and this was reviewed on a regular basis. However, with respect, that is not the setting of objectives; or if it involves the setting of an objective, it is not, in my view, likely to be what was envisaged by the parties when this clause was agreed. The term "objectives" clearly refers to more than one objective.

[101] I find this claim made out.

Not providing Ms Tillaart with a job description

[102] Ms Tillaart's employment agreement provided as follows:

2.2 **Duties as set out in the job description which may be modified from time to time by the Employer**

The Employee shall perform the duties set out in the Job Description attached to this agreement. These duties may be modified and updated by the Employer from time to time following agreement with the Employee. The Employee also agrees to perform all other reasonable duties and comply with reasonable instructions issued by the Employer.

[103] The respondent produced a job description for Ms Tillaart during the Authority's investigation. It was not signed, but I accept that it formed part of Ms Tillaart's agreement. This claim is therefore not made out.

Should penalties be imposed upon the respondent?

[104] Ms Sharma submits that penalties should be imposed in respect of the respondent's breaches of the employment agreement and the Holidays Act.

Breaches of the employment agreement

[105] All but one of the allegations relating to breaches of the employment agreement have been made out. Section 134 of the Act provides that every party to an employment agreement who breaches that agreement is liable to a penalty.

[106] The Employment Court has given guidance as to what factors are relevant when considering penalty issues. In *Xu v. McIntosh*¹⁴ Chief Judge Goddard said the following:

[47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

¹⁴ [2004] 2 ERNZ 448

[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. Here, the defendant was harmed to a significant degree by the withholding of her pay and she was disadvantaged by the breach of s 164 which the first plaintiff later used to obstruct her pursuit of justice. At the time, however, the breach of s 164 of the Employment Relations Act 2000 was more inadvertent than malicious. The deduction from wages was deliberate but, while such actions are to be discouraged, it did comparatively little harm as the amount deducted was only \$80. Generally, employers are punctilious to comply with the Wages Protection Act 1983 and the first plaintiff will be sufficiently deterred by the totality of the remedies against him.

[107] In *Tan v. Yang & Xhang*¹⁵ Judge Inglis suggested that the following non-exhaustive list of factors could be relevant when considering penalty issues:

- The seriousness of the breach;
- Whether the breach is one off or repeated;
- The impact, if any, on the employee/prospective employee;
- The vulnerability of the employee/prospective employee;
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

[108] The most serious breaches, I believe, were the paying of Ms Tillaart in cash, instead of via her bank account, and the changing of rosters without seven days' notice being given. This is because they caused her material disadvantage, as highlighted above. In respect of the other breaches, it is less clear what adverse effects ensued.

[109] I am satisfied that a penalty should be imposed, as the respondent cannot capriciously pick and choose which elements of its agreement to adhere to, characterising them as minor or technical. It is therefore appropriate to signal the Authority's disapprobation for the purposes of deterrence. However, I do not believe that these breaches merit a significant penalty being imposed, as the respondent is a small employer and I do not believe the breaches were wilful. I therefore impose a penalty of \$4,000, being 20% of the total penalty available to be imposed.

[110] I do not agree that the penalty should be paid to Ms Tillaart as she is to be awarded remedies for the disadvantage she has suffered for unjustified actions which

¹⁵ [2014] NZEmpC 65 at [32]

overlap with the breaches which have attracted the penalty. The total penalty is therefore to be paid to the Crown.

Holidays Act 2003

[111] Section 75 of the Holidays Act provides for the imposition of a penalty for breaches of several provisions of the Holidays Act, including for sections 21 to 28, which relate to the payment of holiday pay, including at termination.

[112] I accept that it was permissible for the respondent to have withheld an element of holiday pay owed which related to commission which it believed was questionable. However, it withheld significantly more than can be attributed to unverified commission. Indeed, whilst it also withheld a sum relating to the Auckland training costs, it was only at the Authority's investigation meeting that Mr Shepherd calculated what was actually owed, being considerably less than had been originally withheld.

[113] In addition, the respondent made payments to Ms Tillaart in a piecemeal fashion, without explaining what the payments were for, so she had to assume part payment of holiday pay had been made.

[114] The obligation to pay holiday pay is clear, and it is unacceptable for the respondent to have sat on its hands, pending the Authority's investigation meeting, before calculating what it believed it was entitled to withhold. Furthermore, the respondent has never satisfactorily explained the basis of the withholdings, or piecemeal partial payments. Finally, it did not have an entitlement to make deductions of holiday pay in relation to Ms Tillaart's attendance at the training event in Auckland as its contractual right did not extend that far.

[115] I am satisfied that it is appropriate to impose a penalty for a breach of the Holidays Act. I accept that the breach was not wilful, but the respondent was negligent, and Ms Tillaart suffered as a result. I impose a penalty of \$2,000, all of which is to be paid to Ms Tillaart.

Remedies

[116] 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:

[117] Ms Sharma submits that Ms Tillaart is entitled to remedies for being unjustifiably constructively dismissed. However, I decline to make a finding on that claim, for the reasons set out above.

[118] Ms Tillaart is entitled to be considered for an award in respect of the unjustified disadvantage in her employment. Ms Tillaart's evidence was that her workplace concerns were not addressed, and that she decided to resign because her health was becoming seriously affected. She gave evidence of consulting her general practitioner three times during July 2014, and disclosed a letter from her GP which referred to Ms Tillaart suffering from rash, skin sensitivity, myalgias, severe headaches and general malaise. It also refers to her being tearful during the consultations and that her stress at work was "felt to be a major contributing factor".

[119] I am satisfied that the unjustified disadvantage in her employment that I have found occurred caused Ms Tillaart humiliation, loss of dignity, and injury to her feelings, and that she should be entitled to receive compensation under s 123(1)(c)(i) of the Act. I believe that the adverse effects suffered were moderately severe, and that they merit an award of \$15,000.

Interest

[120] Ms Tillaart claims interest in respect of the late payment to her of the payrise.

[121] Clause 11 of schedule 2 of the Act provides as follows:

11 Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of **interest**, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of **interest**, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

(3) Subclause (1) does not authorise the giving of **interest** upon **interest**.

[122] This makes clear that the Authority cannot award interest on a sum for which judgement by the Authority has not been made. The pay rise was made by the respondent without any judgement having been given. I therefore cannot award interest on the late payment of the pay rise as requested.

[123] Ms Tillaart also claims interest on the whole amount of \$5,774.60 holiday pay from 5 September 2014 until payment is made in full.

[124] Section 84 of the Holidays Act provides:

84 Power to award interest on unpaid holiday pay or leave pay

(1) Subsection (2) applies if—

(a) the Authority gives judgment for an employee in an action to recover holiday pay or leave pay; or

(b) the Authority makes a determination under section 226 of the Employment Relations Act 2000 in favour of the employee.

(2) The Authority may include, in the sum for which judgment is given or the determination is made, interest for the whole or any part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment or determination.

(3) Interest included in a judgment or determination must not exceed interest at the rate calculated under clause 11 of Schedule 2 of the Employment Relations Act 2000.

(4) This section does not authorise the giving of interest upon interest.

[125] I accept that interest should be paid by the respondent in respect of the unpaid and late paid holiday pay, but not on the entire amount of \$5,774.60 from 5 September 2014 until payment is made in full. This is because part of this sum has already been paid. Interest should be calculated by reference to the outstanding balances until payment is paid in full. By way of illustration only, if \$1,000 had been

paid immediately, then a further \$3,774.60 paid on 31 December 2014, so that \$1,000 remains outstanding, interest would be due as follows:

- a. On \$4,774.50 at 5% between 5 September 2014 until 31 December 2014;
- b. On \$1,000 at 5% between 5 September 2014 until payment is made in full.

[126] The Authority is uncertain as to when partial payments of the holiday pay instalments were made, as it is not clear what some of the instalment payments related to. Therefore, the parties are to co-operate with one another in seeking to agree what interest is due, calculated by reference to the principle above. In the absence of an agreement within four weeks of the date of this determination, the parties may make an application to the Authority for a determination.

Kiwisaver owing

[127] It appears that incorrect Kiwisaver contributions have been made by the respondent to Ms Tillaart. However, the Authority is not in a position to determine what is owed and the respondent did not address the issue in submissions.

[128] The parties are to co-operate with one another in seeking to agree what further Kiwisaver contributions are due, if any. In the absence of an agreement within four weeks of the date of this determination, the parties may make an application to the Authority for a determination.

Did Ms Tillaart breach her duty of fidelity?¹⁶

[129] Mrs Shepherd's statement of evidence says that, shortly after receiving Ms Tillaart's letter of resignation, she began to feel worried about Ms Tillaart's intentions, and contacted SHE to check whether Ms Tillaart had been in contact with it. Mrs Shepherd says that she was assured that Ms Tillaart had not been in contact with SHE and that the relationship between SHE and MBS was *solid*.

¹⁶ In their submissions, Ms Boyce and Mr Murray referred to Ms Tillaart's fiduciary duty. This is not the same as a duty of fidelity, and is generally seen as a more onerous duty owed by directors. I assume that Ms Boyce and Mr Murray meant the duty of fidelity.

[130] However, Mrs Shepherd also disclosed to the Authority a copy of an email from the managing director of SHE, Natasha Gee, dated 10 July 2014 in which Ms Gee expressed some concerns about MBS' cashflow as it had come to her attention that MBS was selling retail products to clients and making them wait for many weeks to receive the goods. In this email, Ms Gee stated that SHE had had three separate clients of MBS call them directly to complain about the situation. Based on those events, Ms Gee stated that she was not happy to continue with a \$2,000 credit limit that had recently been extended to MBS. SHE scaled back the order for Dermalogica products that it had received from MBS.

[131] On Monday, 1 September 2014, Ms Tillaart and SHE entered into an agreement under which SHE agreed to provide Dermalogica products to Ms Tillaart's new business which she was operating from her home in Wakefield. The commencement date of the arrangement was 8 September 2014.

[132] On 2 September 2014, the solicitors for SHE wrote to Mrs Shepherd advising her that SHE was terminating the arrangements between itself and MBS with effect from 2 October 2014.

[133] The problems between MBS and SHE referred to in Ms Gee's email appeared to have commenced from May 2014, when Mrs Shepherd had to absent herself from the day-to-day running of the salon due to significant ill health being suffered by both of her parents. During this period, according to Ms Tillaart, customers would be buying Dermalogica products from MBS which were not in stock. Mrs Shepherd was solely responsible, even during her absence, for reordering products from SHE and Ms Tillaart says that she was having to make excuses to customers as to why products were not in stock and were taking several weeks to be delivered.

[134] Mr Shepherd, on the other hand, says that there is evidence to show that stock was continuing to be delivered from SHE throughout Mrs Shepherd's absence and that there should have been enough stock for the customers to receive products that they had paid for either immediately or shortly afterwards. Mr Shepherd suggests that Ms Tillaart was therefore deliberately holding back Dermalogica products in order to create dissatisfaction with customers so as to damage MBS' business, or stealing products. Ms Tillaart says in reply that, although there were fairly frequent (but irregular) deliveries of stock, there was not enough stock to give to all of the customers who had prepaid for it, and who had been waiting some time.

[135] Shortly after Ms Tillaart's resignation, the Shepherds found out that she had started her own business at her home in Wakefield, providing beauty treatments to customers and selling Dermalogica products. The Shepherds therefore started to investigate the sale of products as customers had also been complaining about them not being available and this investigation led them to conclude that Ms Tillaart had been systematically falsely claiming commission on products and treatments sold to customers. This in turn led them to inform the Police of their suspicions.

[136] It would appear that it took the Shepherds several months to piece together the evidence that they eventually presented to the Authority, and they used the services of a forensic accountant to assist them. The Authority saw a copy of the accountant's report, which had been prepared primarily for the Police investigation. This report concluded essentially that the strongest evidence of commissions being falsely claimed relied upon statements from three customers who denied that products had been sold to them by Ms Tillaart on specified days. This had resulted in a total of \$19.35 commission being, apparently, falsely claimed.

[137] However, Mr Shepherd gave evidence to the Authority of other examples of discrepancies in the data created by Ms Tillaart during her employment which pointed, he said, to possible further false claims of commission and the withholding or theft of Dermalogica products.

[138] Before setting out the detail of these examples, it would be helpful to explain the way commission was claimed by staff at the material time¹⁷.

The claiming of commission and the point of sales process

[139] Essentially, at the material time, staff would receive a commission of 10% of the cost of treatments sold to customers by that particular staff member after GST had been deducted. They received 5% of the GST-exclusive retail price of all products they sold to customers.

[140] The business operated a point-of-sale system called Kitomba, which recorded the details of treatments given and products sold. When a customer purchased a treatment or product, the sales person would generate a tax invoice/receipt which typically described the treatment or product being sold, their cost, and how the

¹⁷ Mr Shepherd said in evidence that the business no longer pays commission to staff.

treatments and/or items were paid for. Only the senior therapists and Mrs Shepherd were allowed to operate the till.

[141] At the end of each day, or sometimes at the end of each week, Ms Tillaart and her co-workers would print out a Daily Sheet which showed all the sales generated on any given day by them, with each customer named. Each day the staff would also complete a timesheet, which covered the week starting on a Monday, with their hours for the day in question. At the end of each week, they would attach the week's Daily Sheets to the timesheet, and both would be used by Mr Shepherd to calculate how much pay, and commission the staff member was to be paid.

[142] The picture was complicated, however, because, according to Mr Shepherd, customers were regularly given vouchers by the business which entitled the customer to money off products. Mr Shepherd claimed that staff were not entitled to claim commission on any products sold which were paid for by vouchers, or to the extent of the value of the voucher where products were paid for partly in cash and partly by voucher.

[143] It was Ms Tillaart's evidence, however, that for every \$50 voucher that was redeemed by a client when buying a Dermalogica product, MBS got \$30 back from SHE. Therefore, Ms Tillaart and the other staff would be able to claim \$30 out of \$50 when a product was paid for or part-paid for by a voucher. This evidence was supported by the fact that several of Ms Tillaart's Daily Sheets were annotated by hand to show a reduction of \$20 from the cost of certain items, showing that she was not claiming commission on that \$20. I accept Ms Tillaart's evidence on this.

[144] The other complication related to a membership scheme operated by the business. This scheme enabled a customer to pay a specific sum of money (say \$500) which was essentially matched by MBS so that the customer, having paid \$500, would get \$1,000 worth of treatment. Mr Shepherd said that the rule was that commissions were available on the sale of treatments up to the value of the amount actually paid by the customer, but not beyond that point. Therefore, in the example given above, if a customer had \$1,000 worth of treatments, commission would only be available on \$500 because that is what the customer had paid. Ms Tillaart agreed with this evidence.

[145] Several invoices showed entries which kept track of the membership as customers spent it and topped it up, as well as what was left for commission purposes. These figures were entered manually, and it is not surprising that mistakes were sometimes made.

Discrepancies found by the Shepherds

[146] Mr and Mrs Shepherd's investigations disclosed a number of situations which they believe showed false claims for commission by Ms Tillaart. Rather than explain each in detail, it would be more illuminative to describe the different categories of discrepancy that they found. Some examples fall into more than one category. The categories are as follows:

- a. Apparent sales of products which customers later stated in writing that they had not purchased. There were three examples of this. Hence, the allegation is that they were fictitious sales of product upon which commission was falsely claimed.
- b. Apparent sales of treatments which customers later stated they had not purchased. Hence, the allegation is that they were fictitious sales of treatments upon which commission was falsely claimed.
- c. Commission apparently claimed on an incorrect amount. For example, an EFTPOS transaction exists for a lesser amount than was claimed in commission.
- d. Invoices record that payments were made by EFTPOS when there were no corresponding EFTPOS transactions in the debit transaction journals for the days in question.
- e. One invoice records that payment was made by MasterCard when there was no corresponding MasterCard transaction in the debit transaction journal for the day in question.
- f. SHE delivery notes show 11 units of Pure Night product were delivered to MBS between May to July 2014, with only five sold in the same period, two of which customers later disputed had been received by them. Yet, several customers complained that they had to wait an

inordinate length of time to get these items over this period, which they had prepaid for.

- g. A sale appears on an invoice which does not appear on the corresponding daily sheet.
- h. A customer appears to have been charged \$500 for six treatments but commission charged on all six as if they had sold for \$600.
- i. Commission was charged on the sale of a treatment which was paid for by membership when no more commission was due on that membership.

[147] MBS has not stated what the total of the commission that it asserts was incorrectly claimed amounts to, but based on its evidence it appears to be in the region of \$130 between May and July 2014.

Ms Tillaart's explanations

[148] Ms Tillaart gave the Authority her explanations for the discrepancies which Mr Shepherd had explained in his evidence. In most cases, she said that the explanations for the apparent discrepancies were almost certainly inputting errors.

[149] Ms Tillaart explained the way a sale was recorded. For each sale, an invoice/receipt was created using the Kitomba system. This invoice would typically show the treatment and/or products purchased, the salesperson who sold the treatment or product, and the method of payment.

[150] Of the several examples of discrepancies that Mr Shepherd had brought to the attention of the Authority, Ms Tillaart was able to give a plausible explanation suggesting that, on a balance of probabilities, she had not over claimed commission save in one case. In that case, she admitted that it appeared that she had over-claimed on commission in respect of a product which should have been treated as \$55 instead of \$85. This means that she over-claimed commission to the tune of \$1.50.

[151] Another error that Ms Tillaart had spotted was that she had apparently overcharged a client by \$30, which explained the mismatch between the amount shown on the invoice and the amount shown in the journal. However, this was clearly to the benefit of the business. In another example, Ms Tillaart was able to show that

she had actually under claimed commission in error. She also showed that Mr Shepherd had made mistaken assumptions in some cases, such as the example in which he says that she claimed commission on \$600 instead of \$500. It appears that she had only ever claimed commission on \$500.

EFTPOS discrepancies

[152] Ms Tillaart said that, where an invoice showed that an EFTPOS payment had been made but there was no corresponding EFTPOS transaction in the debit transaction journal for the time and day in question, this was probably because of an inputting error, where she had recorded a cash payment as an EFTPOS payment. This is because EFTPOS was set up on the system as a default method of payment. Whilst there was a drop down menu which she could use to select the payment method, merely pressing *enter* produced a record of an EFTPOS payment. As the company did not do cash reconciliations, it was not important to record a cash receipt, and so she and her co-workers would be sloppy and just press enter. This included Mrs Shepherd she said.

[153] Ms Tillaart said that many customers would pay for items and treatments by cash or part-pay by cash, voucher, EFTPOS, credit card and/or a deduction from their membership. Ms Tillaart said that MBS did not reconcile its cash takings at the end of each day although the Kitomba software was capable of doing so. She said that usually Mr Shepherd would come into the salon each day and take the cash away to bank.

[154] I accept the evidence of Ms Tillaart that many customers would pay in cash or part-cash, as this would be quite normal, and note also that almost none, if any, of the invoices produced by MBS showed any cash receipts. Ms Tillaart's explanation seems plausible, especially given that production of invoices was a separate process from any EFTPOS transaction that was carried out¹⁸. In addition, Ms Tillaart said that it was very rare to give an invoice to a customer, which suggests that they would not notice errors in payment descriptions themselves.

¹⁸ In other words, indicating an EFTPOS transaction on an invoice did not cause an EFTPOS transaction to be made, and vice versa.

Vouchers

[155] Ms Tillaart said that the ability to claim back only \$30 of every \$50 spent when a voucher was redeemed explained all but one of the examples given by Mr Shepherd of product prices on the daily sheets being reduced by multiples of \$20.

[156] Ms Tillaart said that SHE would provide books of vouchers to Mrs Shepherd which were in the form of a cheque book, with a unique number on each voucher and a corresponding number on the stub. These stubs would be kept by Mrs Shepherd. It is noted that none of these stubs were made available for inspection to the Authority.

[157] Ms Tillaart also explained that SHE would only allow a voucher to be given to a customer once they had purchased \$250 worth of Dermalogica products over a period of six months. SHE would pay back to MBS \$30 for each voucher redeemed only when it received proof from MBS that the customer in question had indeed purchased \$250 worth of Dermalogica products in the preceding six months.

[158] However, Ms Tillaart said that Mrs Shepherd started to give vouchers to customers who had not purchased \$250 worth of product. Then, in order to receive the \$30 redemption from SHE, she required Ms Tillaart to produce fictional invoices which would make it appear that the clients had spent \$250. Ms Tillaart explained that this could account for some items being shown on the invoices which did not match the daily sheets. This is because Ms Tillaart was often required to create a fictional invoice retrospectively, which would result in the daily sheet retrospectively changing on the system but, of course, the daily sheet that Ms Tillaart had already printed out would not have changed. The Daily Sheets which the Authority was shown were all ones printed out at the time of original creation, as they had all been annotated by Ms Tillaart and/or Mr Shepherd.

[159] Ms Tillaart also said that she never claimed commission in relation to a fictitious invoice.

Some invoices not created by Ms Tillaart

[160] Ms Tillaart also stated that she had not always created the invoices that MBS was now relying on. She said that, when Mrs Shepherd was in the salon (and she was in there every day if not all day, except during May to July 2014), she would like to show customers out, which meant that she would prepare the invoice and take the

money. Therefore, Ms Tillaart said, many of the discrepancies between an invoice and the EFTPOS transactions journal could have been caused by Mrs Shepherd rather than Ms Tillaart, even ones in June and July, when Mrs Shepherd started to return to the salon.

Customers claiming not to have purchased products

[161] With respect to the examples where MBS had produced a statement or letter from a customer saying that they had not received a product on a particular date, Ms Tillaart pointed out that, in at least one case, the product appears to have been paid for by EFTPOS, which meant that she would have had to have been handed the card at the point-of-sale by the customer. She would therefore have expected the customer to have noticed if they had been charged for a product they were not receiving.

[162] It is to be noted that MBS was relying on written statements from three customers, none of whom appeared before the Authority to give evidence, to support its contention that Ms Tillaart made up purchases of product in order to claim commission falsely. One, LP, wrote a note to Mrs Shepherd on 28 October 2014 saying she had not purchased a product on 11 June 2014. A second, MR, wrote a note on 18 December 2014 saying she had not purchased a product on 7 July 2014. A third, RT, wrote a note on 1 November 2014 saying she did not purchase a product on 13 June 2014. No explanation was given as to the circumstances in which these statements had been obtained, or how the customers had checked what they had bought or not bought on a specific day several months before.

[163] Ms Tillaart also said that she had noticed that customers often underestimated how quickly they got through products, and suggested that these customers had simply forgotten their purchases.

[164] In the absence of evidence from the customers in question, I accept that Ms Tillaart's explanation is to be preferred.

Capability for data to be changed retrospectively

[165] Ms Tillaart said that Kitomba also enabled any aspect of the data recorded on it to be changed retrospectively. Therefore, given that Mrs Shepherd had created fictitious invoices in order to mislead SHE, she did not trust MBS not to have changed

some of these invoices and daily sheets at a later date in order to shore up its case against her. I make no finding in respect of this suggestion, as it is supposition only.

Withholding or stealing of product

[166] One of the allegations made by MBS is that Ms Tillaart was deliberately withholding product from customers, or stealing it, its evidence to support this being the fact that 11 items of the same kind were purchased by MBS between May and July 2014 but only five appear to have been sold in that period. Furthermore, two out of those sales were denied by the customers.

[167] It is Ms Tillaart's evidence that, by May 2014, the ordering of stock had become so out of sync with the needs of the customers that she and her co-workers were having to allocate all newly delivered products to customers who had pre-paid for them and that, even then, there were not enough Dermalogica products to satisfy all of those customers. Therefore, they were getting more and more behind.

[168] Furthermore, Ms Tillaart said that Mrs Shepherd would sometimes take a product out of a bag waiting collection by a customer who had pre-paid for it and sell it to another customer. This meant that, when the customer came in to collect their bag of pre-paid items, Ms Tillaart and her co-workers had to make excuses, pretending that they had made a mistake and that the item had not been delivered at all. This also created confusion in the order book.

[169] Ms Tillaart makes the point that, only looking at a snapshot of deliveries of a certain product during May to July 2014 and comparing those deliveries during that period with sales made during that same period gives a misleading picture because of the pre-ordering by customers for items. Mr Shepherd had, indeed, stated in his evidence that it was the practice of the business to run stock low between each order in order to maintain cashflow. He also said that, occasionally, he had to reduce an order because there was not enough available cash to pay for it.

[170] I therefore accept Ms Tillaart's assertion that the snapshot of deliveries presented by Mr Shepherd does not give a full or accurate picture, and that a comparison of deliveries against sales would have to be undertaken for the entire period in which Dermalogica products were sold by MBS. The respondent did not provide that evidence.

Conclusion

[171] Having considered the several examples of discrepancies given by Mr Shepherd, and heard Ms Tillaart's explanations, I conclude that, on a balance of probabilities, the discrepancies have innocent explanations. Some of the discrepancies had clear but innocent causes, whereas the causes of others could only be speculated upon.

[172] The allegations being levelled against Ms Tillaart of theft and fraud, and deliberately causing damage to MBS, are serious, and the Authority is entitled to see cogent evidence before it is persuaded that the allegations are more likely than not to be accurate. However, the evidence presented by Mr Shepherd was partially based on misunderstandings (such as how the voucher system worked), partially on speculation (that Ms Tillaart deliberately withheld products from customers, for example), partially on unsworn evidence (from the customers LP, MR and RT, for example), and partially on snapshots of data taken over a misleadingly short period of time.

[173] Where straightforward discrepancies were presented, such as mismatches between invoices and debit journals in respect of apparent EFTPOS transactions MBS' position is undermined by the failure of the business to run a cash reconciliation each day.

[174] Therefore, I conclude that Ms Tillaart did not breach her duty of fidelity to MBS by deliberately claiming commission she knew she was not entitled to, nor by stealing stock, nor by deliberately seeking to damage the business of MBS by creating dissatisfaction amongst its customers. In any event, this latter allegation is inherently unlikely given that Ms Tillaart set up her business 25 kilometres away from that of MBS, where she would be unlikely to be competing for the same customers as MBS.

Did Ms Tillaart breach the restraint of trade clauses in her employment agreement?

[175] The employment agreement between Ms Tillaart and MBS contained the following relevant clauses:

4.2 Obligations of the Employee

The Employee shall:

- (i) Comply with all reasonable and lawful instructions provided to them by the Employer;

- (ii) Perform their duties with all reasonable skill and diligence;
- (iii) Conduct their duties in the best interests of the Employer and the employment relationship;
- (iv) Deal with the Employer in good faith in all aspects of the employment relationship;
- (v) Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time; and
- (vi) Take all practicable steps to perform the job in a way that is safe and healthy to themselves and their fellow employees.

11. **Other Employment Obligations**

11.1 **Confidential Information**

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.

11.6 **Non-Competition**

The Employee agrees that for a period of **6 months** following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, carry on business in competition with the Employer within a radius of **10km** kilometres from the Employer's premises.

11.7 **Non-Solicitation of Clients**

The Employee agrees that for a period of **6 months** following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.

...

11.9 **Severability**

In the event any portion of this clause is viewed as unenforceable by any Authority or Court with jurisdiction to consider such clauses, the clause shall apply as modified by the Authority or the Court, or in the event that it is not modified by the Authority or Court, the remainder of this clause and agreement shall continue to be enforceable by the parties.

[176] MBS alleges that Ms Tillaart breached the terms of the confidentiality, customer solicitation and "interference with suppliers" clauses. It does not say that she was in breach of the non-competition clause as Ms Tillaart's new business was set up more than 10 kilometres from that of MBS.

Confidentiality

[177] It is understood that MBS is saying that Ms Tillaart disclosed to SHE confidential information about its financial situation to SHE, thereby causing it to stop trading with MBS.

[178] I accept, first, that financial information about MBS constitutes confidential information which was protected under the terms of the express confidentiality clause in the employment agreement. I also accept that Ms Tillaart had been given access to such information when she was negotiating with the Shepherds about buying their business. She would also have had access to other information relevant to SHE, such as the difficulties MBS was having in fulfilling customers' orders for SHE's products. That would arguably also be confidential information, although, equally arguably, SHE may have had a right to know such information under the terms of the agreement between SHE and MBS, which the Authority did not see.

[179] It appears, however, that there is no cogent evidence of any disclosure of either category of information to SHE by Ms Tillaart in any event. MBS apparently relies on an email from Natasha Gee of SHE which states she would call Ms Tillaart about prioritising an order. That, however, does not prove that Ms Tillaart told Ms Gee anything she was not entitled to know.

[180] Ms Tillaart said that she had only ever had one conversation with SHE during her employment about the financial situation of MBS, and this was when Ms Gee from SHE had called her to say that MBS needed to reduce the amount of its order of Dermalogica products. She said that she simply agreed that she would do that. She believed that she had been asked to scale it back to \$5,000. I accept that this was the only conversation Ms Tillaart had with SHE about MBS's financial situation.

[181] I therefore reject this claim against Ms Tillaart.

Customer solicitation

[182] MBS relies upon the fact that Ms Tillaart placed advertisements in the *Nelson Leader*, which Ms Tillaart knew would be delivered to the area in which MBS operated. MBS also says that Ms Tillaart sent soliciting texts to customers.

[183] The Authority and the courts of New Zealand have examined the meaning of solicitation and I respectfully cite the following passages from an Authority determination, *Equico Equipment Finance Ltd v Enright*¹⁹ which were referred to with approval by the High Court in *Baldwins (Ashby) Limited v Andrew John Maidstone*²⁰ (case references omitted):

[27] It is also submitted that if solicit means to entice, then appropriate synonymous for entice include "tempt", "lure", "persuade", and "inveigle". I accept that solicit should be interpreted similarly.

[28] In *Sweeney v Astle*, Stout J noted that 'solicit' was a common English word, and in its simplified form meant 'to ask' and that its other meanings included 'to call for', 'to make request', 'to petition', 'to entreat', 'to persuade'.

[29] The Employment Court in *Deloitte & Touche Group-ICS Ltd v Halsall* referred to *Sweeney* and also the Shorter Oxford Dictionary definition "to seek assiduously to obtain", "to ask earnestly or persistently for" and 'request' or 'invite'. More recently, the High Court in *TAP (New Zealand) Pty Ltd v Origin Energy Resources NZ Ltd* considered that solicit in its ordinary use "has connotations of impropriety or persistence" and then cited the definition from the Shorter Oxford Dictionary that had also been referred to in *Deloitte*.

[31] It matters not who initiates the contact. The question of whether solicitation occurs depends upon the substance of what passes between parties once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so.

[32] In my view, "canvass" is synonymous with soliciting. Both words involve an approach to customers with a view to appropriating the customer's business or custom. I consider a degree of "influence" is required. There must be an active component and a positive intention.

[184] In *Baldwins (Ashby) Limited* the High Court cited the following tests derived from legal commentary²¹:

- a. Does the conduct evidence a specific purpose and intention to obtain orders from customers?
- b. The customer approach must involve some direct or targeted behaviour.

¹⁹ ERA Auckland AA241/09, 17 July 2009

²⁰ [2011] EWHC B12 (QB)

²¹ Paras [23] and [24].

[185] On general advertisements, the Court noted at paragraph [26]:

A general advertisement to the world about availability for custom at a new firm or a specific notification to a client of departure from one firm to another does not cross the borderline; any activity or behaviour beyond would.

[186] I do not accept that merely placing an advertisement in a widely circulated newspaper (as opposed to a trade journal, say, aimed at a specific subset of the public which includes the prohibited customers) that is delivered to the general area in which MBS operates constitutes solicitation of MBS's customers, just because those customers may or may not fall within a subset of readers of the newspaper²². Otherwise, in many parts of New Zealand former employees would be prevented from advertising their new businesses for several months, which would be against the general principle that no business can generally prevent other businesses from competing with it.

[187] Whilst the *Nelson Leader* was available in the salon of MBS, that was the choice of MBS. They could have cut out or blanked out the advertisement before the customers read it if they had wished to.

[188] In any event, I do not accept that Ms Tillaart's business competed with MBS. A business such as that run by MBS is essentially a local business, with most customers living in the local area. Whilst a small number of MBS's customers who were loyal to Ms Tillaart may have chosen to have taken their custom to Ms Tillaart, Ms Tillaart's business was 25 kilometres away, and was likely to have attracted different customers.

[189] There is no evidence that Ms Tillaart directly targeted the customers of MBS. Although Mr and Mrs Shepherd believe that Ms Tillaart texted former customers, they have no proof of this, by their own admission.

Interference with MBS' supplier

[190] There is no clause in Ms Tillaart's employment agreement preventing her from interfering with MBS's relationship with SHE. However, if Ms Tillaart had taken steps to deliberately undermine the relationship between MBS and SHE during her employment, that would constitute a breach of her duty of fidelity to her employer.

²² No evidence was adduced to show that the customers of the respondent actually read the *Nelson Leader*. It was just assumed that they would.

[191] However, as I have found above, I do not find that Ms Tillaart disclosed confidential financial information to SHE. I also do not find that she interfered with the relationship between SHE and MBS in any material way. The evidence presented by MBS itself shows that SHE was concerned about customer complaints and MBS' cash flow. There is no convincing evidence that Ms Tillaart systematically set about instigating customer complaints, deliberately making customers wait for products nor that she did anything to damage MBS's cash flow.

[192] Whist it is the case that Ms Tillaart started to stock Dermalogica products herself within two weeks of leaving the employment of MBS, I accept her evidence that she had been telephoned by Ms Gee when Ms Gee found out from Mrs Shepherd that Ms Tillaart had left the employment of MBS, and had asked Ms Tillaart herself if she intended to set up on her own. I also accept that Ms Gee told her that she could stock Dermalogica products and that there was no exclusive arrangement between SHE and MBS.²³

[193] It is inherently unlikely in any event that SHE would have chosen to stop supplying products to MBS because of anything that Ms Tillaart could have said, without having checked such information with Mrs Shepherd first. It is also inherently unlikely that SHE would have simply preferred to have done business with Ms Tillaart, who was operating in Wakefield in a sole capacity from her home, instead of with MBS when MBS had been SHE's biggest purchaser of Dermalogica products in the whole of New Zealand, according to Mr Shepherd, in March, April, June and August 2014.

Conclusion

[194] In conclusion, I find that Ms Tillaart did not breach either her duty of fidelity, nor the express restraint of trade clauses when she left the employment of MBS.

Orders

[195] I order the respondent to make the following payments:

- a. To Ms Tillaart, outstanding holiday pay, and interest on unpaid and late paid holiday pay, as directed in this determination above;

²³ Mr Murray submitted that there was a sole distributorship agreement between MBS and SHE, but the agreement between them was never produced to the Authority to evidence this.

- b. To Ms Tillaart , compensation pursuant to s.123(1)(c)(i) of the Act in the sum of \$15,000;
- c. To Ms Tillaart, a penalty in the sum of \$2,000;
- d. To Ms Tillaart, a sum comprising such Kiwisaver contributions that are due, as directed in this determination above; and
- e. To the Crown, a penalty in the sum of \$4,000. This penalty is to be paid into the Authority by the respondent, and will then be paid by the Authority into a Crown bank account.

Costs

[196] I reserve costs. If Ms Tillaart seeks a contribution towards her legal costs she should first seek to agree those costs with the respondent. If they are unable to reach agreement within 14 days of the date of this determination, then Ms Sharma may, within a further 14 days, lodge and serve a memorandum of counsel setting out the contribution towards costs that Ms Tillaart seeks. The respondent will then have a further 14 days within which to lodge and serve a reply.

David Appleton
Member of the Employment Relations Authority