

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 21
5613302

BETWEEN ROXANE MILLER
Applicant

AND THE FREE RANGE EGG &
POULTRY CO. LIMITED
Respondent

5634207

BETWEEN THE FREE RANGE EGG &
POULTRY CO. LIMITED
Applicant

AND ROXANE MILLER
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Ms Miller
Dave Jaques for The Free Range Egg & Poultry Co.
Limited

Investigation Meeting: 18 November 2016

Submissions Received: 2 and 20 December 2016 from Applicant/Respondent
16 December 2016 from Respondent/Applicant

Determination: 23 January 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Miller was unjustifiably dismissed. The Free Range Egg and Poultry Co. Ltd is ordered to pay to Ms Miller the following remedies within 28 days of the date of this determination:**

i) \$19,687.50 under section 123(1)(b) of the Employment Relations Act 2000 plus interest of 5% on that sum; and

ii) \$5,625 under section 123(1)(c)(i) of the Employment Relations Act 2000.

B. Ms Miller did not breach any fiduciary duty or confidentiality obligations owed to The Free Range Egg and Poultry Co. Ltd.

C. Ms Miller has wrongly caused invoices to be paid by The Free Range Egg and Poultry Co. Ltd and has used or allowed the company fuel card to be used without authorisation. Ms Miller is ordered to reimburse The Free Range Egg and Poultry Co. Ltd the following sums within 28 days of the date of this determination:

i) \$2,145.66 as reimbursement of invoices incorrectly paid by The Free Range Egg and Poultry Co. Ltd; and

ii) \$448.60 being the personal use of the company fuel card for the periods she was overseas and on sick leave.

D. Ms Miller is ordered to reimburse The Free Range Egg and Poultry Co. Ltd the sum of \$238.00 for accommodation costs within 28 days of the date of this determination.

E. Costs are reserved.

Employment relationship problem

[1] Ms Roxane Miller claims she was unjustifiably dismissed from her employment with The Free Range Egg & Poultry Co Limited (FRENZ) and claims remedies.

[2] FRENZ denies the claims and makes counter-claims against Ms Miller alleging breaches of her fiduciary and confidentiality obligations for which it seeks recompense and damages.

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

Background

[4] Ms Miller started working for FRENZ as a consultant in December 2012. On 1 October 2013 Ms Miller was offered and accepted the employed position of Business Manager – Projects. The terms and conditions of Ms Miller’s employment were set out in an employment agreement dated 1 October 2013 and signed by the parties on 24 January 2014 (the 2013 agreement).

[5] At Ms Miller’s performance review meeting on 6 August 2015 discussions around the future structure of the business occurred. Mr Rob Darby, Company Director set out four Department Head positions that would be established in the new company structure including:

- Head of Agriculture and Egg Farming;
- Head of Financial Administration and Control;
- Head of Egg Processing, Packaging and Despatch; and
- Head of Sales and Marketing.

[6] Ms Miller told Mr Darby that she believed the best role for her was the Head of Sales and Marketing although she felt she could also lead the Agriculture and Egg Farming division. Mr Darby confirmed the thinking of the Board that given her abilities and skill set she could make the best contribution in the Sales and Marketing division.

[7] The proposed structure was confirmed and a new employment agreement and job description for the Sales and Marketing Manager role were provided to Ms Miller by email on 30 October 2015.

[8] At a meeting on 2 December 2015 Mr Darby discussed with Ms Miller the new role and the terms and conditions which would attach to the role. After the meeting Ms Miller printed off a copy of the 1 December 2015 agreement (the 2015 agreement), signed it and provided a copy to Ms Michelle Williamson, Financial and Administration Manager, for filing in the personnel files.

[9] Ms Miller then sent a broadcast email announcing her new appointment to the position of Sales and Marketing Manager. In her email Ms Miller advised the recipients that Mr Darby would be responsible for Strategic & Change Management and Audit Control.

[10] On 3 December 2015 Mr Darby advised Ms Miller of his surprise that she had sent out such an email without first consulting with him. Later that same day he emailed Ms Miller and set out the topics they had discussed the previous day and expressed his view that both he and Ms Miller had come away from the meeting with different understandings. Mr Darby had the view that they had not formalised the contractual arrangements on 2 December 2015 and suggested a meeting with the assistance of a facilitator to ensure there were no further misunderstandings.

[11] Ms Miller had arranged an appointment with her doctor for the following day, 4 December 2015. As events transpired the original purpose for the appointment was changed when Ms Miller became unwell. Ms Miller commenced a period of sick leave on 4 December 2015. Consecutive medical certificates declared Ms Miller as being unfit to work until 8 January 2016.

[12] During Ms Miller's absence on sick leave Mr Darby had discovered conduct by Ms Miller which he considered may amount to serious misconduct. The allegations were set out in writing to Ms Miller on 11, 16 and 21 December 2015.

[13] In his letter to her dated 21 December 2015 Mr Darby advised Ms Miller that a disciplinary meeting would take place on 23 December 2015 and that if she was unable to meet with him in person, she must provide written responses to the allegations or have a representative attend on her behalf.

[14] Ms Miller was still under the care of her doctor on 23 December 2015 and did not attend the meeting, did not provide a written explanation and did not arrange for a representative to attend on her behalf.

[15] On 23 December 2015 FRENZ notified Ms Miller of the decision to terminate her employment.

[16] There was no dispute by FRENZ at the investigation meeting that the applicable employment agreement at the time of Ms Miller's dismissal was the employment agreement dated 1 December 2015 and signed by Ms Miller on 2 December 2015 after meeting with Mr Darby.

Issues

[17] The issues for determination are whether:

- a) Ms Miller was unjustifiably dismissed and if so what, if any, remedies should be awarded; and
- b) FRENZ should succeed in its counter-claims and if so what, if any, damages should be awarded.

Unjustified dismissal

[18] Ms Miller claims her dismissal on 23 December 2015 was unjustified. There is no dispute that Ms Miller was dismissed. This means FRENZ is required to establish that its decision to dismiss Ms Miller was justified.

[19] The statutory test of justification is contained in section 103A of the Act. I am required to determine the question of whether an action was justifiable on an objective basis, having regard to 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 action occurred.

[20] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(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.

[21] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because of defects in the process as long as those defects were minor and did not result in the employee being treated unfairly.¹

[22] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[23] As a full Court observed in *Angus v Ports of Auckland Ltd*²

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

Events prior to sick leave

[24] As set out earlier, in August 2015 FRENZ restructured its business and established four new Head of Department roles including one for Sales and Marketing. On 30 October 2015 Mr Darby emailed Ms Miller and Ms Williamson attaching the job descriptions and proposed employment agreements for the new roles.

¹ Employment Relations Act 2000 (the Act), section 103A(5).

² [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

[25] In his email Mr Darby advises Ms Miller that the new agreements reflect the new job descriptions but otherwise keep the same privileges which he records as being the salary, phone, fuel card and 25 days annual leave.

[26] Ms Williamson accepted the offer of appointment to the position of Finance and Administration Manager and was working in that new role by at least 9 November 2015. Ms Miller was in Vietnam during November and returned to her office on or about 26 November 2015. During this period she was exchanging emails with Mr Darby regarding the new role. In an email to Mr Darby on 10 November 2015 Ms Miller confirmed that she had accepted the new role following the discussions in August 2015. Ms Miller was unable to recall the date but was clear she had accepted the role.

[27] Ms Miller had previously loaned FRENZ a sum of money which, by agreement, was to be paid out on the date her employment terminated. The loan agreement coincided with the offer of employment in 2013. On 9 November 2015 Mr Darby had confirmed that arrangements had been made to pay down the entire loan including the agreed interest at the end of November 2015. Ms Miller told Mr Darby that once the loan was fully repaid she would commence in her new role.

[28] As stated earlier, Mr Darby met with Ms Miller on 2 December 2015 where they discussed the 2015 agreement. Both Mr Darby and Ms Miller came away with different views of what had transpired at that meeting. Mr Darby believed he and Ms Miller were still negotiating the terms of the agreement, in particular the way in which Ms Miller would be paid. Mr Darby wanted to pay a lower base salary with bonuses on performance. Ms Miller believed they had reached agreement on all terms including that she would be paid a salary of \$105,000.

[29] Ms Miller left the meeting, signed her copy of the 2015 agreement, copied it and provided a copy to Ms Williamson. A significant change between the 2013 agreement and the 2015 agreement is that on acceptance of the agreement Ms Miller no longer reported directly to the Board, but instead now reported to the General Manager, Mr Darby.

[30] Later that day, Ms Miller sent a broadcast email to suppliers and customers of FRENZ announcing the company restructure and her appointment as Sales and

Marketing Manager. Mr Darby was surprised to see this email as Ms Miller had not consulted with him about the email.

[31] On 3 December 2015 Mr Darby told Ms Miller of his surprise at her sending the email without first consulting him and was surprised at the role she had attributed to him. Mr Darby was concerned that they had both come away from the meeting with different perspectives.

Allegations of serious misconduct

[32] Ms Miller commenced a period of sick leave on 4 December 2015. That day Mr Darby emailed Ms Miller expressing concerns about her email activity to customers which had resulted in calls being made to the office.

[33] Ms Miller emailed Mr Darby on 6 December 2015, with a copy to another Board member Mr Tom Dawson, telling him she was concerned that her email account had been diverted to Mr Darby. Ms Miller advised Mr Darby that she had sorted the problem on Friday but noted that it had happened again. Ms Miller told Mr Darby that he was to “...*cease and desist immediately...*” and told him he had impeded her ability to work within her role. The tone of this email, in my view, is inappropriate given that Mr Darby was Ms Miller’s direct manager and Ms Miller was on sick leave, at that stage for 10 days. Mr Darby told Ms Miller she was mistaken and they would discuss it when she returned to work the following week.

[34] Ms Miller then wrote to Mr Darby on 11 December 2015 and told him that the interruption to her email account had undermined trust and confidence in the employment relationship between herself and FRENZ. Ms Miller advised Mr Darby that unless she received a clear response to her concerns she would have little alternative but to consider herself dismissed.

[35] Ms Miller told Mr Darby that as he did not wish to continue with her employment, she was open to discussing an orderly exit from the company by way of an agreed exit package or attendance at mediation.

[36] Mr Darby was surprised to receive this letter from Ms Miller and responded to that effect. By this time Mr Darby had discovered Ms Miller had been claiming expenses relating to her private vehicle maintenance since July 2014 which Mr Darby

considered had been done without approval. Mr Darby pointed out that the terms of Ms Miller's employment entitled her to the reasonable use of a company fuel card to fill her vehicle but not the payment of maintenance expenses. Mr Darby also raised concerns about Ms Miller's use of the company fuel card. He identified fuel charges at times when Ms Miller had been overseas.

[37] Mr Darby attached a copy of the summary of the vehicle claims and fuel usage referred to in his response. Ms Miller was invited to attend a disciplinary meeting on 16 December 2015, was encouraged to bring a support person or representative with her to the meeting and told that in the absence of an acceptable explanation her actions may constitute serious misconduct.

[38] Ms Miller was unable to attend the 16 December 2015 meeting due to her continued absence on sick leave. The disciplinary meeting was postponed and reorganised for 23 December 2015.

[39] On 21 December 2015 Mr Darby wrote again to Ms Miller setting out further allegations of misconduct. This was two days before the proposed disciplinary meeting scheduled for 23 December 2016. The allegations of misconduct were:

- a) Allocating payments to herself for her personal vehicle costs without authorisation;
- b) Misuse of the company fuel card, by providing the PIN and card to a person who is not an employee for their own personal use;
- c) Correspondence sent to the company making insinuations that unless Ms Miller received what she wanted then she would be a witness for a plaintiff in proposed litigation proceedings and threatening the company with unjustified dismissal action.

[40] Ms Miller was advised that if she was unable to attend the meeting on 23 December 2015 in person she must either send written submissions answering the allegations and setting out relevant mitigating factors or send a representative to the meeting with authorisation to act on her behalf.

[41] Ms Miller sought legal advice after receiving the 21 December 2015 letter and, through her lawyer, advised FRENZ that due to her being on continued sick leave she would be unable to participate in any work activities which included the disciplinary meeting. This notification was consistent with the medical certificate Ms Miller had provided FRENZ dated 15 December 2015 that certified Ms Miller as being unfit to attend work or any work related meetings. Ms Miller requested that the meeting be rescheduled. FRENZ declined to reschedule the meeting and confirmed the meeting would occur as scheduled on 23 December 2015.

[42] Ms Miller did not attend the meeting on 23 December 2015 and in her absence FRENZ determined that the allegations of misconduct and serious misconduct had been proven to the satisfaction of the Board and Mr Darby made the decision to terminate Ms Miller's employment.

[43] The decision to terminate Ms Miller's employment without notice was set out in a letter dated 23 December 2015. The letter sets out the reasons for the decision to dismiss, which were [verbatim]:

1. You gave your Company fuel card and disclosed the PIN to person who is not an employee of the company to purchase fuel for their personal use which you were not entitled to do;
2. Your excessive personal use of your company fuel card whilst you were on Sick Leave;
3. Allocating and authorising payments to yourself for personal vehicle costs without justification or proper company authorisation; and
4. Correspondence sent to the company making insinuations that unless you received what you wanted then you would be a witness for a plaintiff in litigation proceedings and threatening the company with unjustified dismissal action.

[44] The item at paragraph 2. of the stated reasons for dismissal was never raised with Ms Miller in any of the letters setting out the allegations of misconduct.

[45] There are some obvious difficulties with the way Mr Darby handled the disciplinary process, not least of which was proceeding with terminating Ms Miller's employment without providing her with an opportunity to provide her explanations to the allegations. Ms Miller had provided notification from her doctor that she was not well enough to attend work or any work related meetings. Ms Miller had advised FRENZ through her lawyer that she could not attend the meeting on 23 December 2015.

[46] There was no evidence that FRENZ believed Ms Miller was not genuinely sick and this was certainly never raised with her. Mr Darby should not have

proceeded to terminate Ms Miller's employment in circumstances where she had advised she was not in a position to attend the meeting and had provided medical certificates attesting to this.

[47] Other aspects of FRENZ's process that gives cause for concern are that the reasons for dismissal included Ms Miller's alleged overuse of the Fuel Card while she had been on sick leave. This allegation had not been put to her prior to the letter confirming her dismissal.

[48] Further, Mr Darby took into account information he had received which included a video recording of a person other than Ms Miller using the fuel card issued to her. A copy of the video was never made available to Ms Miller. It is possible that Mr Darby intended showing the video to Ms Miller at the disciplinary meeting but of course that did not happen.

[49] As s 103A(5) of the Act makes clear, a dismissal must not be found to be unjustifiable solely because of defects in the process followed by the employer if those defects were minor and did not result in being treated unfairly. That is not the situation here. The company's actions and how it acted were not what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred. The decision to dismiss was unjustifiable.

Remedies

[50] In her statement of problem Ms Miller sought remedies of reinstatement, lost wages and compensation for hurt and humiliation. The claim for reinstatement was withdrawn during the investigation meeting.

Lost wages

[51] Ms Miller seeks reimbursement of lost wages from the date of her dismissal to 9 April 2016 when she suffered an accident and was unable to work. Having established that she was unjustifiably dismissed, Ms Miller is entitled to a minimum of three months' remuneration which was lost as a consequence of her dismissal or, if her actual loss was more, the lesser of these two figures.³ The Authority has the discretion to award greater compensation for remuneration lost than three month's equivalent.⁴

³ Employment Relations Act 2000, section 128(2).

⁴ Ibid sections 123(1)(b) and 128.

[52] The period of lost remuneration was just over three months. If I extend the award of lost remuneration I must have regard to any counterfactual analysis and whether, but for the unjustified dismissal, Ms Miller would have retained her position as Sales and Marketing Manager for FRENZ.

[53] I am satisfied that given the nature of the allegations against Ms Miller it is possible but not probable that Ms Miller could have been dismissed for serious misconduct had the disciplinary process continued in a fair manner.

[54] Subject to my findings on contribution I consider it appropriate to order the reimbursement of three months' lost remuneration to Ms Miller which I have calculated as \$26,250.00 (being 1/4th of the annual salary of \$105,000). Interest was claimed on the amount of reimbursement and I order that interest is paid on the lost remuneration at the rate of 5% per annum from 23 December 2015 until the date of payment.

Compensation

[55] Ms Miller seeks an award of compensation in the amount of \$15,000. In considering an award under section 123(1)(c)(i) of the Act, evidence of hurt and humiliation is required. An employee who seeks relief must lay an evidential foundation for an award in their favour. Simply establishing a basis for a personal grievance does not suffice.

[56] Ms Miller's evidence was that she suffered total confusion about why she had been dismissed and was at times in utter disbelief, was tearful and upset. Added to this on 24 March 2016 Mr Darby laid a formal complaint with the Police making allegations of theft against Ms Miller although no action was taken against Ms Miller by the Police.

[57] The assessment of a monetary sum to compensate for the consequences on Ms Miller of her unjustified dismissal is not an exact science. Subject to my findings on contribution and in all the circumstances of this case I am satisfied that an award of \$7,500 is appropriate.

Contribution

[58] Section 124 of the Act requires me to consider the extent to which Ms Miller's actions contributed towards the situation that gave rise to the unjustified dismissal. The situation that gave rise to Ms Miller's unjustified dismissal included that FRENZ was seeking explanations from Ms Miller regarding the payment of invoices without proper authorisation and Ms Miller's use of the company fuel card. I have found later on in this determination that Ms Miller did cause invoices to be paid and used or allowed the use of the company fuel card without authorisation.

[59] I find Ms Miller's actions in causing the payment of invoices and in the way she used her fuel card and allowed the fuel card to be used by others is blameworthy conduct that should attract a reduction which I have assessed at 25%.

[60] The Free Range Egg & Poultry Company Limited is ordered to pay to Ms Miller the following sums within 28 days of the date of this determination:

- a) \$19,687.50 under section 123(1)(b) of the Act plus interest; and
- b) \$5,625 under section 123(1)(c)(i) of the Act.

Counter-claims by FRENZ

[61] FRENZ claims Ms Miller has breached her fiduciary obligations and her duty of confidentiality. FRENZ seeks the payment of compensation for the breaches and reimbursement of the unauthorised expenses.

Breach of fiduciary and confidentiality obligations

[62] FRENZ claims that when Ms Miller instructed Ms Williamson to pay vehicle maintenance invoices she was acting in breach of her fiduciary duty. Further, Ms Miller as part of the Senior Management Team was in special position of trust as she became aware of all the confidential inner workings of the company, issues and opportunities and that when she sent out the broadcast email she used confidential information and accordingly breached her confidentiality obligations to FRENZ.

Breach of fiduciary duty

[63] FRENZ claims it relied heavily on the special skills and experience Ms Miller brought to her employment from October 2013. Ms Miller was taken on to address things that no one else in the company had the ability to do. In particular Ms Miller

was relied upon to put in place systems and processes to ensure only legitimate invoices were paid and that when Ms Miller authorised payment of the invoices for vehicle maintenance expenses she was in breach of her fiduciary duty.

[64] The employment relationship is not fiduciary in the classic sense. The Privy Council in *Arklow Investments Ltd v Maclean*⁵ in a matter on appeal from the Court of Appeal, adopted the following formulation in relation to fiduciary relationships in employment:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances, which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. ...⁶

[65] A breach of the duty is determined by conduct which, viewed objectively, undermines the relationship of trust and confidence between an employee and employer.⁷

[66] Ms Miller was not a director or shareholder of the company but had made a substantial loan to the company which was subject to a separate agreement. For the period between October 2013 and December 2015 Ms Miller was clearly a senior manager of the company and reported directly to the Board.

[67] I have been provided with the documents setting out the proposed key performance indicators (KPI's) for Ms Miller's initial employment. The KPI's included management accounts and financial reporting. The documents also disclose Mr Darby's very close association with the management of the company and close working relationship and supervision of Ms Miller. This supervisory role by Mr Darby was carried through into the new structure where he became the General Manager and Ms Miller officially (as noted in the 2015 agreement) reported to him.

[68] The evidence about Ms Miller's role, responsibilities and the information she had access to as an employee, albeit a very senior manager, did not indicate that her relationship included or generated any obligations of a fiduciary nature. Accordingly, she cannot have breached such obligation.

⁵ [2000] 2 NZLR 1 (PC).

⁶ *Ibid* at [10].

⁷ *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 (CA).

Breach of confidentiality obligations

[69] FRENZ claims the email sent by Ms Miller on 2 December 2015 to an undisclosed recipient list put the company at risk. FRENZ says that Ms Miller was only aware of the intentions of the Board with respect to the internal restructure as a result of the special position she held on the Senior Management Team. FRENZ says it was a function of the Board to determine how changes were communicated and to whom.

[70] Further, FRENZ says that on 4 December 2015 Ms Miller sent a further email to every person that had emailed her in the previous six months advising them she was away on sick leave and that they should contact the office if their matter was urgent.

[71] The broadcast email sent by Ms Miller on 2 December 2015 advised recipients of the fact that she had been appointed to a new position of Sales and Marketing Manager. This information was correct and was sent after Ms Miller had accepted the position and signed the 2015 agreement.

[72] Having reviewed the email I am satisfied Ms Miller was advising the recipients of a change in contact information as a result of her appointment to the new position. This was a task Ms Miller had completed in the past without consultation with Mr Darby or the Board. Ms Williamson had also taken on a new role in the restructure and, as was common, Ms Miller had requested Ms Williamson to review the email before she sent it out.

[73] Ms Miller never took a moment to consider that her position in the company was now at a different level. Whereas previously she had acted independently, she was now in a direct reporting relationship with Mr Darby who had been appointed as General Manager. In that position, Ms Miller ought to have discussed her intentions with Mr Darby, as it was possible that he or the Board would have wanted the opportunity to use the new appointments as a marketing tool.

[74] FRENZ say that the information about the restructuring was confidential to the Board and that Ms Miller only had access to it due to her position. I do not accept that was the case. Other members of the management team had been appointed to

new positions and the evidence shows that all staff had been advised of the new structure in November 2015.

Conclusions

[75] For the foregoing reasons I am not satisfied FRENZ has established to my satisfaction that Ms Miller has breached either her fiduciary or confidentiality obligations to it.

[76] I observe, however, that while I have found no breach of duty or obligations owed to FRENZ on Ms Miller's part, as set out below I find that Ms Miller has caused invoices to be paid and has used her company fuel card or allowed it to be used without authorisation. I find on balance that these actions on Ms Miller's part were as a result of her misapprehension of her entitlements.

Unauthorised reimbursement

[77] FRENZ seeks the reimbursement of the following amounts for expenses claimed by Ms Miller that were not authorised. The expenses relate to:

- a) Vehicle servicing costs;
- b) Fuel purchases; and
- c) Accommodation purchase.

Vehicle servicing costs

[78] On her appointment in 2013 Ms Miller used her own vehicle for work purposes and was provided with a fuel card for the purchase of petrol. Ms Miller says that prior to her employment she always invoiced FRENZ for 75% of all of her vehicle expenses including maintenance etc. Ms Miller says that her understanding was that the agreement to invoice 75% of her expenses would continue.

[79] FRENZ claims Ms Miller was not entitled to claim any costs associated with the servicing, cleaning or tyres for her personal vehicle and seeks reimbursement of the following amounts:

Date	Item	Amount Invoiced	Amount reimbursed
14 July 2014	Service	\$242.00	\$242.00
2 March 2015	Tyre and wheel alignment	\$338.00	\$253.50
20 May 2015	Car Valet	\$147.00	\$110.25
5 June 2015	2 Tyres and wheel alignment	\$660.00	\$495.00
23 June 2015	New steering arms and wheel alignment	\$714.54	\$535.91
25 June 2015	15" mag wheel	\$480.00	\$360.00
5 October 2015	Service	\$199.00	\$149.00
Total			\$2,145.66

[80] Ms Miller told me that the claiming of the 75% of vehicle maintenance expenses was a continuation of the arrangement she had had as a contractor. I have been provided with a number of invoices issued to FRENZ by Ms Miller in her capacity as an independent contractor. The invoices show that while Ms Miller was engaged as a contractor she did not routinely charge 75% of her vehicle costs, but rather claimed the mileage rate of 0.77 cents per kilometre travelled undertaking work on behalf of FRENZ.

[81] The 2013 agreement does not make provision for the claiming of vehicle maintenance expenses. There is no evidence that the claiming of vehicle maintenance expenses was ever discussed and agreed with Mr Darby, or the Board as Ms Miller's employer, either at the time of her employment in October 2013 or after.

[82] Ms Miller had responsibility for the financial performance of the company during the period October 2013 to December 2015. Ms Williamson acted on instructions from Ms Miller and I am satisfied that Ms Miller provided Ms Williamson with invoices together with an instruction to pay 75% of the invoice. The spreadsheet provided by Ms Williamson showing the amount paid by FRENZ in relation to each of the invoices shows that for servicing costs Ms Miller had instructed Ms Williamson to pay 100% of the invoice.

[83] It seems logical to me that given the financial state of the company at the time it employed Ms Miller in 2013 (a situation Ms Miller was fully aware of) that the

Board viewed the provision of a fuel card as a more economical investment rather than the provision of a company vehicle which would have attracted the payment of registration and servicing and maintenance costs, costs the company could ill afford.

[84] I find on balance that it is more likely than not that Ms Miller was not entitled to claim vehicle maintenance costs from FRENZ and the invoices Ms Miller instructed Ms Williamson to pay was done without authorisation from the Board. I am supported in my conclusions by the note in Mr Darby's email to Ms Miller on 30 October 2015 when he noted the benefits that would continue to apply to Ms Miller if she accepted the new position. While Mr Darby included the fuel card, he made no mention at all of payment for vehicle maintenance expenses.

[85] Ms Miller is ordered to pay to FRENZ the sum of \$2,145.66 as reimbursement of invoices incorrectly paid by FRENZ. The payment is to be made within 28 days of the date of this determination.

Fuel purchases

[86] FRENZ claims Ms Miller provided her company fuel card and its associated PIN to another person in November 2015 and that in doing so she allowed an unauthorised person to access fuel paid for by FRENZ.

[87] Ms Miller travelled to Hong Kong and Vietnam for work on 5 November 2015 and returned to New Zealand at or about 5.00pm on 25 November 2015. During this period the following purchases were made using the fuel card allocated to Ms Miller:

Date	Time	Place of purchase	Amount
9 November 2015	3.18pm	Z Huntly	\$85.10
18 November 2015	11.37am	Z Five Crossroads	\$89.03
25 November 2015	10.34am	Z Pukekohe	\$92.48
Sub-total			\$266.61
Less 25% being Ms Miller's contribution			-44.42
Total			\$222.19

[88] In addition, FRENZ claims Ms Miller used the fuel card on three occasions when she was on sick leave and unable to attend work.

Date	Time	Place of purchase	Amount
8 December 2015	9.28am	Z Five Crossroads	\$92.95
19 December 2015	11.02am	Z Pukekohe	\$92.56
22 December 2015	15.21	Z Huntly	\$40.90
Total			\$226.41

[89] Ms Miller told me that she was entitled to use the fuel card to fill her car and use that fuel for personal use. Ms Miller told me she reimbursed FRENZ 25% of the fuel card purchases to account for the personal use. The evidence shows that Ms Miller was invoiced 25% of the costs invoiced on the fuel card in recognition from April 2015 but not prior. At the investigation meeting Ms Miller acknowledged that while she was overseas she gave her car and the fuel card to a friend to use.

[90] There were no policies in place which set out the rules around the use of the fuel card. Ms Miller accepted at the investigation meeting that between October 2013 and December 2015 it was her role to put policies in place.

[91] There was no provision in the 2013 agreement that Ms Miller pay any contribution to the fuel card charges to account for the personal use of her own vehicle. Until April 2015 FRENZ paid 100% of the fuel card charges.

[92] It was Ms Williamson's uncontested evidence that Ms Miller had instructed her to start charging Ms Miller 25% of the fuel card charges in April 2015. No satisfactory explanation has been provided by Ms Miller about the reasons for that change.

[93] I am satisfied it is more likely than not that Ms Miller was not entitled to use the fuel card for personal use of her vehicle during times when she was on leave, including sick leave and annual leave. Neither was there any authorisation for Ms Miller to share the PIN for the fuel card with friends. The fact that no policy was drafted to cover the usage of the fuel card is a failure on Ms Miller's part and she (or her friends) should not be entitled to benefit from that failure.

[94] Ms Miller is ordered to reimburse FRENZ the sum of \$448.60 being the personal use of the company fuel card for the periods she was overseas and on sick leave. Reimbursement is to be made within 28 days of the date of this determination.

Accommodation purchase

[95] FRENZ claims Ms Miller purchased accommodation in Wellington using Mr Darby's company credit card and was then reimbursed for the payment. The value of the reimbursement was \$238.00. Ms Miller accepts the claim was an error and has agreed to reimburse the company.

[96] Ms Miller is ordered to reimburse FRENZ the sum of \$238.00 within 28 days of the date of this determination.

Costs

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

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

Vicki Campbell
Member of the Employment Relations Authority