

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 323  
3032351

BETWEEN	BIANCA VON KEISENBERG Applicant
A N D	ALEXANDER GROUP MEDIA LIMITED First Respondent
A N D	MEDIA LOGISTICS LIMITED – T/A MEDIA LOGISTICS Second Respondent

Member of Authority: T G Tetitaha

Representatives: M O'Brien, counsel for Applicant  
No appearance by Respondents

Investigation Meeting: 18 September 2018 at Auckland

Submissions Received: 18 September 2018 from Applicant  
from Respondent

Date of Determination: 17 October 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. Ms von Keisenberg was unjustifiably dismissed.**
- B. I order Alexander Group Media Limited to pay Ms von Keisenberg the following sums within 28 days of the date of this determination:**
- a) the sum of \$11,250 less PAYE in lost remuneration pursuant to ss 123, 124 and 128 of the Act;**
  - b) the sum of \$7,500 in compensation pursuant to ss 123 and 124 of the Act.**

**C. I order Alexander Group Media Limited to pay Ms von Keisenberg \$5,883.25 less PAYE being wages arrears and holiday pay pursuant to s131 Employment Relations Act 2000. Payment is to be made within 28 days of the date of this determination.**

**D. I order Media Logistics Limited to pay Ms von Keisenberg \$1,333 less PAYE being holiday pay pursuant to s131 Employment Relations Act 2000. Payment is to be made within 28 days of the date of this determination.**

**E. I order Alexander Group Media Limited to pay Ms von Keisenberg the sum of \$4,500 as a contribution towards her legal costs. Payment is to be made within 28 days of the date of this determination.**

**F. The applications for penalties are dismissed.**

### **Employment Relationship Problem**

[1] Ms von Keisenberg alleges she was unjustifiably disadvantaged and then unjustifiably dismissed on 22 June 2018. She also seeks wage arrears and penalties for non-payment of wages and holiday pay.

### **Relevant Facts**

[2] Ms von Keisenberg was employed as an account manager by Alexander Vale Limited (AVL) on 12 September 2016.

[3] AVL was owned by a third party. It was sold to Dean Alexander. Mr Alexander was at all material times, a director of the respondents.

[4] In December 2016 Mr Alexander approached Ms von Keisenberg about employment. At the time Mr Alexander was having difficulties with a third party over the purchase of AVL. He intended moving the clientele from AVL to another company he was to incorporate in January 2018. He wanted Ms von Keisenberg to work at his new company.

### ***AGML***

[5] On 8 January 2018 Alexander Group Media Limited (AGML) was incorporated. Mr Alexander is the sole director and shareholder.

[6] Ms von Keisenberg started her employment with AGML on 8 January 2018. Her role was chief financial controller and included invoicing clients, credit management, payroll, and accounts payable and receivable. Mr Alexander was her manager.

[7] No employment agreement was signed. There is evidence Ms von Keisenberg was to draft an employment agreement on 2 January 2018 but never did so.

[8] The purchase of AVL was completed and Mr Alexander became the sole shareholder and director of AVL on 19 February 2018. On 22 February 2018 AVL changed its name to Media Logistics Limited (MLL).

### *Issues at work*

[9] By March 2018 issues started arising in the work place. A work colleague SJ raised an issue about Ms von Keisenberg's attitude. She sought a meeting with Mr Alexander and other employees. Ms von Keisenberg was made aware of the issue by Mr Alexander however no formal disciplinary action resulted. Another work colleague EL provided assistance to Ms von Keisenberg to improve the relationship.

[10] In April 2018 it became apparent AGML had cashflow issues. By 5 April 2018, some employees' wages were not being paid. Ms von Keisenberg was in control of wage payments. She short paid SJ and did not pay herself at all.

[11] On 10 April 2018 Ms von Keisenberg became involved in a dispute with a client regarding unauthorised withdrawal of amounts from his credit card. Ms von Keisenberg had threatened the involvement of a debt collector. The client threatened to go to the Disputes Tribunal over the invoices. She sent an email to Mr Alexander complaining the client was a nightmare.

[12] On 13 April 2018 Ms von Keisenberg raised the issue of the non-payment of wages. Mr Alexander deposited \$2,000 into AGML's bank account. Ms von Keisenberg then paid SJ and herself all outstanding wages. SJ was unaware of the short payment. Ms von Keisenberg referred to her coming into her office and acting aggressively towards her.

[13] By May 2018 Ms von Keisenberg and SJ's relationship deteriorated further. On 29 May SJ sent an email asking Ms von Keisenberg to advise what services clients

had. This was an instruction from Mr Alexander. Ms von Keisenberg replied complaining she had already done this work for SJ in March. She wanted SJ to update her list. She also mentioned she didn't like the way SJ had "laid everything out".

[14] SJ emailed asking again on 30 May for the list stating Mr Alexander had requested it. Ms von Keisenberg complained again about SJ not updating the existing list and blamed her for not being organised. SJ advised by email she didn't have access to the server to see what services clients had and to do the updating. Ms von Keisenberg then sent an email stating she would do it if she got time during work hours. She then asked for an apology for the horrible behaviour the previous week, referring to SJ's aggressive behaviour in her office regarding non-payment of wages. SJ then complained to Mr Alexander but no further disciplinary action was taken.

[15] A new client MW met with Mr Alexander on 8 June 2018 to discuss options for payment for services rendered. Following the meeting MW received a call from Ms von Keisenberg demanding payment for four months fees in advance totalling \$15,000. He raised this issue with Mr Alexander. Mr Alexander noted in an email that he was unhappy with Ms von Keisenberg's behaviour and agreed to reduce the amounts paid up front to two months in advance.

[16] MW agreed to engage AGML on 11 June 2018 and sought invoices upon which payment would be made. No invoices were provided. MW followed up on 18 June. Mr Alexander sent an email to Ms von Keisenberg asking why this hadn't been done. Ms von Keisenberg sent the invoices on 19 June 2018 explaining she had forgotten to save them.

[17] By 14 June 2018, other staff began raising issues about Ms von Keisenberg. EL complained about Ms von Keisenberg's unreasonable requests regarding invoicing. She also stated she did not appreciate her "hostile up and down mood" and being "spoken to like I'm garbage". No further disciplinary action was taken about the complaint.

[18] An issue then arose on or about 19 June 2018 regarding another client who was advised that his account was suspended for non-payment of an invoice. The client complained to Mr Alexander. Ms von Keisenberg rectified the matter,

apologising and stating she needed to reconcile the accounts. No further action was taken on this matter.

### *Dismissal*

[19] Matters came to a head on 22 June 2018. Mr Alexander sent a June budget to Ms von Keisenberg with instructions to ensure accounts receivable were paid by the end of the month. It set out a payment plan and projected payments for the following month.

[20] Ms von Keisenberg questioned Mr Alexander's drawings. She was concerned about having sufficient funds to pay the staff wages. She was also concerned about the lack of sales. At that stage Mr Alexander was the only sales person. Mr Alexander dismissed her concerns, believing there was sufficient income to cover all of the outgoings, including his drawings. Ms von Keisenberg disagreed. She also noted it was the first time she had been paid on time since March 2018. She suggested Mr Alexander consider being put on a salary.

[21] Mr Alexander emailed requiring Ms von Keisenberg to recover debt by 29 June, as this was a minimum requirement of her employment. Ms von Keisenberg replied she was "*working on this*".

[22] Around this time Ms von Keisenberg began sending copies of emails between herself and Mr Alexander to her personal email address. The emails dealt with issues of non-payment of salary. The emails also contained extracts from employee contracts and Mr Alexander's decisions about the payroll and payments to external creditors.

[23] On 22 June 2018 Ms von Keisenberg and Mr Alexander had a disagreement again about his drawings. She was unhappy with the amount of the drawings he was taking and its impact upon wages due on 8 July 2018. The matter escalated with Mr Alexander telling her to "*get the fuck out*". When she walked away, he followed her then stopped saying "*You're fucking redundant. I'll do it myself*". Ms von Keisenberg retreated to her desk and cried. She collected her things with the assistance of others around her. She left and was driven home by a colleague. Ms von Keisenberg believed she had been dismissed.

[24] On or about 25 June 2018, Mr Alexander sent Ms von Keisenberg a letter to her personal email terminating her employment, effective immediately. It made a number of claims including breaches of her employment agreement, failure to carry out reasonable requests, engaging in behaviour that endangered the mental health and safety of employees, malicious complaints, breach of confidentiality, external transfer of confidential data and conduct that deeply impaired day-to-day running of the business. He believed these actions amounted to serious misconduct and her employment was terminated immediately, without notice. He sought the return of company property, including the mobile phone and company laptop. He also made reference to information that had been transferred to her email that was unauthorised.

[25] On 27 June 2018, Ms von Keisenberg raised a personal grievance. The personal grievances given were unjustified disadvantage and unjustified dismissal.

[26] The parties were directed to mediation. This did not occur as Mr Alexander did not attend.

#### **Non-appearance of Respondent at hearing**

[27] This matter was set down following a telephone conference involving Mr Alexander. Mr Alexander emailed the Authority on Sunday, 16 September 2018 with a photo of a wrist band on his arm from a hospital. He stated that he had been admitted to hospital that day and that he would not be well enough to attend the hearing the following Tuesday.

[28] The above email was received by the Authority on Monday 17 September. The hearing was set down to start on Tuesday 18 September. Mr Alexander was directed to file a medical certificate or the hearing would continue the following day.

[29] A previous hearing had been set down and then adjourned on the basis that Mr Alexander was unwell. He had also been directed to provide a medical certificate and did so.

[30] At the start of the hearing, no medical certificate from Mr Alexander has been provided. The hearing continued in his absence.

[31] On 20 September 2018 Mr Alexander sent an email complaining he was too ill to read his emails and that he would send a medical certificate. He sought a rehearing.

[32] The Authority then made directions for Mr Alexander to file any further information he wished in support of his case by **5 October 2018 3 pm**. I would then determine what was to occur next. He was also directed to file a medical certificate by 5 October 2018 3 pm.

[33] No further information or medical certificate has been filed by Mr Alexander or the respondents.

[34] The parties were advised on 8 October that Mr Alexander had not filed any further information and that in the circumstances I intended issuing my written determination on this matter through the Registry.

### **Issues**

[35] The issues for hearing were determined at an earlier telephone conference that both parties had attended. A Minute set out the issues as follows:<sup>1</sup>

- (a) Was Ms von Keisenberg unjustifiably dismissed?
- (b) Was Ms von Keisenberg disadvantaged by her employer's actions?
- (c) What wage arrears are owed, including holiday pay and final pay concluding her salary and by whom?
- (d) Should a penalty be issued for the following breaches:
  - (i) Non-payment of final holiday pay and wages pursuant to the Wages Protection Act 1983 and Holiday Act 2003 by Alexander Group Media Limited; and
  - (ii) Non-payment of holiday pay on transfer of employment by Media Logistics Limited pursuant to the Holiday Act 2003?

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<sup>1</sup> Minute dated 17 August 2018 and Minute dated 27 July 2018.

**No briefs hearing**

[36] Although the parties were not required to file any briefs in support of their statements of problem and reply, the applicant has provided sworn evidence from three people, including a doctor. Those witnesses evidence primarily dealt with the impact of the dismissal of Ms von Keisenberg.

[37] Ms von Keisenberg presented evidence together with two other supporting witnesses at hearing. This evidence was taken orally and under oath at hearing.

**Was Ms von Keisenberg unjustifiably dismissed?**

[38] Given the termination letter dated 25 June 2018 advising of the termination of employment, there is no doubt Ms von Keisenberg was dismissed by AGML.

[39] The onus falls upon AGML to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[40] The process leading to dismissal was defective. There is no evidence AGML investigated the allegations, raised the concerns with the employee, gave her a reasonable opportunity to respond or genuinely considered her explanation prior to dismissal. It has not met any of the mandatory considerations set out in s.103A(3). In effect the dismissal was immediate and abrupt.

[41] This was not the type of case where immediate dismissal should take place in lieu of meeting the legislative tests for justification. These defects were not minor and did result in Ms von Keisenberg being treated unfairly.<sup>2</sup> In the circumstances, I find that Ms von Keisenberg was unjustifiably dismissed.

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<sup>2</sup> Section 103A(5) of the Act.

**Was Ms von Keisenberg unjustifiably disadvantaged?**

[42] At hearing Mr O'Brien submitted that the disadvantage arose from Ms von Keisenberg not being paid on time, other employees also not being paid on time, and her student loan not being paid to IRD. He submitted these were unjustified because these were unlawful. This detail of the disadvantage was not set out in the original personal grievance.

[43] There are several difficulties with this alleged disadvantage grievance.

[44] The only missed payment Ms von Keisenberg gave direct evidence about was a payment due on 5 April that was subsequently paid on 13 April. She gave no evidence other than a generic statement about other late payments except to state that all others had been late. She has not provided me with copies of her bank accounts to show the difference between the due date and the actual date she was paid.

[45] From the evidence Ms von Keisenberg would tell Mr Alexander she had insufficient funds to pay her and another employee SJ's wages and he would rectify this by depositing funds. There was no evidence of a payroll budget or any provision for payment of wages being made.

[46] Ms von Keisenberg was the Chief Financial Controller. This is a senior management role. It would usually have included making provision or budgeting for payment of the payroll. She did not do this. This may have been due to her lack of skills in managing a company's finances including drawings, budgets and payroll. She had no formal qualifications in accounting or finance. Her background is in sales. My impression is that the role was beyond what she could do.

[47] Ms von Keisenberg blames Mr Alexander for her predicament stating he took excessive drawings. This should have been a matter that the Chief Financial Controller managed to prevent the situation that evolved.

[48] Her inexperience was also evidenced by her decision making about who was paid. Ms von Keisenberg stated she chose to pay others in advance of herself, but she also made the decision to not pay a colleague SJ. It is unsurprising that SJ was unhappy with being short-paid without any warning and took her grievances up with Ms von Keisenberg. This could have been disastrous for AGML resulting in penalties and personal grievances by SJ.

[49] She refers to stress from the non-payment of her PAYE and student loan. I have no evidence from Inland Revenue showing non-payment of her student loan or PAYE. There is evidence AGML entered into a payment plan with IRD. As the financial controller, Ms von Keisenberg should have deducted her PAYE and student loan repayments from her salary when preparing the payroll. AGML would then be liable at law to make the payment to IRD, not her.

[50] This issue appears to be one of lack of training and skill as opposed to an employer's action. In the circumstances I decline to find that there was any disadvantage to Ms von Keisenberg.

[51] I am not convinced on the balance of probabilities that Ms von Keisenberg was disadvantaged by AGML's actions. Non-payment of her salary arose as a result of Ms von Keisenberg's actions. This grievance is dismissed.

### **Remedies for personal grievance**

[52] Ms von Keisenberg has a proven grievance of unjustified dismissal. She seeks lost remuneration and damages for hurt and humiliation.

[53] Ms von Keisenberg seeks six months lost remuneration. Initially this had been set at \$50,000. However, Ms von Keisenberg gave evidence of having found employment on 1 August 2018. The job pays less than what she was previously earning. She now has an annual salary of \$60,000. She had been earning \$100,000.

[54] There is a period of just under one month when Ms von Keisenberg had no income from 5 July to 1 August. The amount of income she alleges was lost during this period would have been \$8,333.33 gross wages based upon her income of \$100,000. She seeks a 'top up' to her salary of \$60,000 for a further five months of \$16,666.67 gross wages being the difference between what she was earning and what she should have been earning if she had stayed with AGML. She now seeks a total of \$25,000 gross wages.

[55] There is an issue about whether there should be a remedy beyond the statutory cap of three months lost remuneration. Ms von Keisenberg did not wish to find another financial controller's job. She actively avoided applying for a similar position and has no intention of doing so in future. This infers there are no ongoing

losses and she is only entitled to lost remuneration of three months in the circumstances.

[56] Three months gross wages based on her \$100,000 salary would have been \$25,000. I intend deducting the amounts earned from her subsequent employment for two months of \$10,000. This leaves gross wages of \$15,000. This is subject to any reduction for contributory conduct.

### *Compensation*

[57] Ms von Keisenberg seeks \$35,000 compensation. A recent Employment Court decision has defined the steps in assessing compensation<sup>3</sup>, which have been applied here:

#### *Step 1: Harm*

[58] There was evidence of harm. Ms von Keisenberg's doctor has diagnosed reactive depression and mild anxiety disorder. Her work situation including the dismissal and the financial consequences was viewed as causative of these conditions.

#### *Step 2: Extent of Loss*

[59] The Applicant's evidence was:

- a) She is taking anti-anxiety medication;
- b) She did suffer from social anxiety at school;
- c) She had nightmares about the situation for some time after the event;
- d) She had been unwell for two weeks after the event;
- e) She was financially dependent upon her partner's salary;
- f) She had to use their savings for a holiday to meet their expenses until her paycheck from her new job.

[60] I would place her loss at the top of the lower end of the spectrum.

#### *Step 3: Where on the spectrum of cases does this case sit in terms of harm suffered?*

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<sup>3</sup> *Richora Group Limited v Chen* [2018] NZEmpC 113 at [41] ff.

[61] Relevant cases include:

- a) *Robinson v Pacific Seals (NZ) Ltd* [2013] NZERA Wellington 101 \$5000 distress on his family, effects on his health, his anxiety, suddenness of dismissal (upheld on appeal [2014] NZEmpC 99);
- b) *Curtis v RS Construction Ltd* [2013] NZERA Auckland 139 \$4,000 (reduced by 20% to \$3,200) suffered sleeplessness and anxiety due to losing job which continued even when C found new job two weeks later;
- c) *Waikato District Health Board v Archibald* [2017] NZEmpC 132 \$25,000 20 years employment and actions that have had a lingering negative impact;
- d) *Richora Group Limited v Chen* [2018] NZEmpC 113 \$20,000 losses suffered as a result of the plaintiff's breach were acute, and manifested in a dramatic decline in her physical and mental health, a suicide attempt on 9 March 2017 and medical intervention.

*Step 4: Where on the spectrum of cases does this case sit in terms of quantum?*

[62] I am mindful that the relevant Authority cases are historic and increased compensation awards have now been made.

[63] This case sits above the awards in the Authority but below the awards in the Court. In *Archibald* the actions occurred within a long standing employment relationship. The employment relationship in the matter before me had a duration of 6 months. In *Richora Group Limited* there was a more extreme reaction to the dismissal than is exhibited here.

[64] In my view an appropriate award is \$10,000.

*Step 5: What is a fair and just award in the present case?*

[65] I have considered the issue of contributory conduct. There was brief evidence from Ms von Keisenberg about the last meeting leading to dismissal. By June 2018 Ms von Keisenberg was the subject of several complaints from staff and clients. The complaint from EL on 14 June 2018 notes hostility towards her by Ms von Keisenberg and an "up and down mood". This complaint about her behaviour was similar to those of another staff member SJ in March and again on 30 May 2018.

Although Ms von Keisenberg gave evidence that she had resolved this with SJ and EL, her alleged behaviour on two occasions is illuminating in assessing her likely reaction and dealings with Mr Alexander around this time.

[66] The issue leading to the altercation over Mr Alexander's drawings started days prior. She had been sent a draft June budget. She replies by email "with respect to you" then questions the viability of his owner's drawings given income. He replies with figures and asks "why is this not viable?" She replies "I understand what you are saying Dean but this is what needs to happen moving forward" then lists several creditors for payment. She then states "again, I mean no disrespect but this is the first pay since March payrun that it has been on time." She then suggests he be put on a salary and no longer make drawings. There is a short and what I would describe as terse exchange between the two by email about her recovering more "good debt". There is a sense Ms von Keisenberg was very unhappy with Mr Alexander.

[67] When Ms von Keisenberg goes to meet with Mr Alexander to again raise the issue of the budget and his drawings, the meeting must have been tense given the previous days exchange. The statement in reply refers to her aggressive behaviour and yelling. Given SJ and EL's complaints, the evidence suggests it is possible she may have also become upset and acted inappropriately during the altercation with Mr Alexander before dismissal.

[68] This was conduct for which some deduction should be made but not a significant one. I have determined a deduction of 25% of all personal grievance remedies is appropriate.

### ***Orders***

[69] I order Alexander Group Media Limited to pay Ms von Keisenberg the following sums within 28 days of the date of this determination:

- a) the sum of \$11,250 less PAYE lost remuneration pursuant to ss 123, 124 and 128 of the Act;
- b) the sum of \$7,500 in compensation pursuant to ss 123 and 124 of the Act.

***What wage arrears are owed, including holiday pay and final pay concluding her salary and by whom?***

[70] I accept Ms von Keisenberg has not received her final pay of \$2,083.25 and holiday pay of \$3,800 being 8% of her gross wages of \$47,500. No wage or time records have been produced. There is no evidence disproving her claims.

[71] When she finished at AVL Ms von Keisenberg was not paid any holiday pay. She referred to Mr Alexander promising to give her extra leave while at AGML but this never eventuated.

[72] Her AVL employment contract provides for an annual salary of \$50,000 and annual leave of 4 weeks per year. She took some leave but believes she is owed a net balance of \$1,333. No wage or time records have been produced. There is no evidence disproving her claims. Given MLL is now the name of the company, orders shall be made against it.

[73] I order Alexander Group Media Limited to pay Ms von Keisenberg \$5,883.25 less PAYE being wages arrears and holiday pay pursuant to s131 Employment Relations Act 2000. Payment is to be made within 28 days of the date of this determination.

[74] I order Media Logistics Limited to pay Ms von Keisenberg \$1,333 less PAYE being holiday pay pursuant to s131 Employment Relations Act 2000. Payment is to be made within 28 days of the date of this determination.

[75] The applicant seeks interest. This is a discretionary matter. There is no basis for interest evidenced. I decline to award interest.

***Should a penalty be issued for non-payment of final holiday pay and wages pursuant to the Wages Protection Act 1983 and Holiday Act 2003 by AGML and/or AVL?***

[76] Ms von Keisenberg seeks penalties for non-payment of her wages and holiday pay due upon termination by both AVL and AGML.

[77] This matter was not well developed at hearing, in submissions or in the statement of problem. The statement of problem cited breaches by AGML of s13 of the Wages Protections Act 1983 “for its breaches of the WPA 2003, ss133-135 ERA2000”. Section 13 Wages Protections Act 1983 is a general penalty provision only. There is no WPA 2003. This may have been a mistake but it creates issues of

fairness to a respondent against whom a penalty of \$20,000 is sought. This is especially when the respondent is unrepresented.

[78] The breach was of s4 Wages Protections Act 1983 that requires “when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.” The fact AGML has failed to pay Ms von Keisenberg’s final pay including her holiday pay without deduction would be a breach of this section.

[79] A similar issue occurs in respect of the statement of problem and the breaches of the Holidays Act 2003 (HA2003). The statement of problem alleges a penalty claim “pursuant to ss75-76 HA2003 for its breaches of the HA2003”. The statement of problem at paragraph 2.22 refers to AVL failing to make holiday payments due “pursuant to sections 23-26 Holidays Act 2003.”

[80] The actual section breached is s27(2) of the Holidays Act 2003. This provides where employment ends “the employer must pay the annual holiday pay in the pay that relates to the employees final period of employment.” This has not been identified within the statement of problem at all.

[81] The submissions did not deal with any relevant law or applicable cases regarding the quantum of penalty. There was no evidence about why Ms von Keisenberg should receive the penalty as opposed to the Crown. The impression was this penalty action was added on but not vigorously pursued.

[82] Given the defective pleadings, the time taken to get to this point, further delay to amend the pleading, re-serve upon the respondent then possibly hear this matter again, the costs of doing so and need for finality I intend dismissing the action instead.

[83] If the wage arrears remain unpaid compliance orders together with penalties can be sought at that stage.

***Penalty for failure to provide Ms von Keisenberg with an employment agreement?***

[84] This was not identified earlier as an issue for hearing but is contained in Ms von Keisenberg’s statement of problem and was covered at hearing. For completeness I have decided to deal with this matter as well.

[85] Section 63A(2) of the Employment Relations Act 2000 (Act) provides that an employer must “provide the employee a copy of the intended agreement under discussion”. There is no written agreement between the applicant and AGML.

[86] There is a breach of s63A(2) by AGML’s failure to provide a written contract. In considering quantum I am required to consider s133A of the Act. I refer to the most relevant factors to this matter only.

[87] ***Nature and extent of breach:*** The nature and extent of the breach appears to have been that for a period of 6 months Ms von Keisenberg was without a written employment. Despite its absence she was aware of her role, salary and annual leave requirements. This breach was minimal because the oral terms of her contract were well known to her.

[88] ***Inadvertent, negligent or intentional breach:*** There is evidence the parties had agreed Ms von Keisenberg would draft the employment agreement. An email from Ms von Keisenberg to Mr Alexander dated 2 January 2018 confirmed she “will write up my contract and come in Thursday at about 11 am to go over the financial things”.

[89] She confirmed this in evidence but then felt at some later stage it was Mr Alexander’s responsibility to draft her agreement. All other employees were drafting their own contracts except her. She gave little detail about what she did about this change of mind other than stopping asking for a contract after March 2018. I am uncertain when and how she communicated this to her employer. I am also uncertain whether this was vigorously pursued or was overtaken by the other concerns that arose during the course of her employment. The breach appears inadvertent or negligent at best.

[90] ***Harm:*** A relevant factor when considering the possibility of imposition of a penalty is whether harm has been caused by the lack of a written employment agreement. If no loss is suffered, the Authority may decline to impose a penalty.<sup>4</sup> No loss has been suffered by Ms von Keisenberg. There appeared to be little dispute about her terms and conditions of employment. The lack of any employment

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<sup>4</sup> *Adams t/a Untouchable Hair & Skin v Brown* [2015] NZEmpC 77 at [165].

agreement did not hinder her employment in any way. Given the above finding this may have been inadvertent I decline to award any penalty.

[91] The applications for penalties are dismissed.

### **Costs**

[92] Ms von Keisenberg seeks costs at the daily tariff rate of \$4,500 per hearing day. This is appropriate for a one day hearing. There are no matters that require it to increase or decrease.

[93] There is an issue about who should contribute to it. In these circumstances given both respondent companies are under the auspices of AGML and the fact that most of the hearing was taken up by matters involving AGML, I intend making an award of costs against AGML. It may apportion any costs award to MLL as it thinks fit.

[94] I order Alexander Group Media Limited to pay Ms von Keisenberg the sum of \$4,500 total as a contribution towards her legal costs. Payment is to be made within 28 days of the date of this determination.

**T G Tetitaha**  
**Member of the Employment Relations Authority**