

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

[2019] NZERA 349  
3030192

BETWEEN                      TANIA MILLER  
Applicant

AND                              KIWI ELDERLY CARE LIMITED t/a  
Kimberley Rest Home  
Respondent

Member of Authority:        Helen Doyle

Representatives:              Jock Lawrie, Counsel for Applicant  
Jagan Goud, Advocate for Respondent

Investigation Meeting:        13 March 2019 at Dunedin

Submissions:                    On the day

Determination:                 13 June 2019

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**DETERMINATION OF THE AUTHORITY**

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- A      Tania Miller was unjustifiably dismissed from her employment.**
- B      Kiwi Elderly Care Limited is ordered to pay to Tania Miller:**
- (i)      The sum of \$3,993.30 being reimbursement of wages under s 123 (1)(b) of the Employment Relations Act 2000.**
  - (ii)     The sum of \$12,750 being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C      Costs are reserved and a timetable set for an exchange of submissions.**

## **Employment Relationship Problem**

[1] Ms Tania Miller was employed as a permanent care giver from in or about 25 June 2015 at the Kimberley Rest Home in Palmerston in East Otago. The facility provides rest home and dementia care.

[2] In April 2016, Kimberley Rest Home was bought by Kiwi Elderly Care Limited, a duly incorporated company having its registered office in Auckland. Its sole director is Jagan Goud. I will refer to Kiwi Elderly Care Limited from now on as Kimberley.

[3] Ms Miller entered into a new employment agreement with Kimberley dated 27 October 2016. She worked regular rostered hours, being a three on and three off night shift cycle between 11pm and 7am and additional shifts as required. The focus for the Authority in resolving the employment relationship problem will be on the night shift that Ms Miller undertook on 5/6 April 2017.

[4] At the end of her shift on 6 April 2017 Ms Miller returned home to Karitane where she lives. Karitane is about 20 kilometres from Palmerston. Shortly after her return home she received a call on her cell phone from Mr Goud. What was said is in dispute. Mr Goud said that he wanted Ms Miller to return to work for a disciplinary meeting. He said that she refused to do so and hung up on him. Ms Miller understood that Mr Goud wanted her to return to work immediately for what she described in her evidence as “disciplinary action”. She said that she advised she was tired. She asked if it was about another employee called S. Ms Miller said that Mr Goud then started yelling at her and she could not understand what he said. She said she hung up the phone and went to bed.

[5] On checking her cell phone when she woke up that afternoon, Ms Miller saw a text from the Facility Manager at Kimberley. The text said:

Jagan contacted me earlier today. Please do not come into work from today onwards. A letter explaining this decision has been mailed to you.

[6] On or about 13 April 2017 Ms Miller received a letter from Kimberley dated 10 April 2017 confirming that she had been dismissed as of the end of her night shift 5/6 April 2017.

[7] Ms Miller contacted the NZNO to represent her and a personal grievance was raised. Some discussions took place between Union organiser Simone Montgomery and Mr Goud in or about August with a view to resolving the matter.

[8] Mr Goud says that those discussions concluded in a full and final settlement and that Ms Miller is not able therefore to pursue a personal grievance.

[9] Ms Miller does not accept that there was a full and final settlement constituting accord and satisfaction and says that she is able to pursue her grievance for unjustified dismissal.

[10] She says her dismissal was substantively unjustified and procedurally unfair. Ms Miller seeks reimbursement of lost wages between 6 April 2017 and 26 June 2017 when she secured alternative employment, and \$15,000 for compensation for hurt, humiliation and loss of dignity together with costs.

[11] Kimberley does not accept that the dismissal was unjustified and says that there was serious misconduct on the part of Ms Miller and that she refused to attend a disciplinary meeting.

### **The issues**

[12] The Authority needs to determine the following issues in this case:

- (a) Did the parties enter into a full and final settlement that prevents Ms Miller from pursuing her personal grievance?
- (b) If not, what were the reasons for Ms Miller's dismissal?
- (c) Did Kimberly carry out a full and fair investigation at the end of which a fair and reasonable employer could conclude that there was serious misconduct on the part of Ms Miller?
- (d) Could a fair and reasonable employer have reached the decision to dismiss?
- (e) If the dismissal was unjustified, then what remedies should follow and are there issues of contribution and mitigation?

**Is Ms Miller prevented from pursuing her personal grievance because there was a full and final settlement?**

*21 August 2017*

[13] On 21 August 2017 Ms Montgomery met with Mr Goud at the NZNO Dunedin office to discuss whether there could be a resolution of the personal grievance claim of unjustified dismissal that Ms Montgomery had raised on behalf of Ms Miller on 21 May 2017. The meeting was not “off the record.”

[14] Ms Montgomery said that she had a record of settlement form under s 149 of the Act that she had used for a separate NZNO matter. She intended to show the record of settlement form to Mr Goud if a proposed settlement was reached. Only the first page of the record of settlement was retained and is blank.<sup>1</sup>

[15] There was discussion about settling the matter. Ms Montgomery said in her evidence that she thought she may have contacted Ms Miller by phone at one point. Mr Goud also called his accountants.

[16] A proposed settlement was reached. I prohibit the detail of the proposed settlement from publication except to the extent referred to in this determination. The proposed settlement comprised an amount to be paid and a letter that was to be signed. Ms Montgomery recalled discussing with Mr Goud whether the proposed amount would be paid under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Mr Goud had concerns that a payment made under that section would be an admission the dismissal was unjustified and it was proposed the amount would be paid in lieu of notice and taxed.

[17] Ms Montgomery handwrote the outline of the proposed settlement on the back of the front page of the record of settlement form which was blank. These notes were provided to the Authority.

[18] The evidence supports that Mr Goud understood that Ms Montgomery would write up the proposed settlement as the record of settlement and that once it had been signed by him and Ms Miller it would be sent to an MBIE mediator for sign-off.

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<sup>1</sup> Applicant’s bundle of documents at 9.

[19] Mr Goud agreed under questioning at the Authority investigation meeting that he had seen the draft record of settlement and that there had been discussion about the need for signing of the record of settlement by Ms Miller and Mr Goud and the form would then be sent to a Ministry of Business, Innovation and Employment (MBIE) mediator for the mediator to sign off. Ms Montgomery said that she explained the mediator would contact Mr Goud to confirm the proposed record of settlement before they signed off. Mr Goud also agreed under questioning that he was told the proposed settlement was legally binding and enforceable once the mediator signed it off.

[20] Ms Montgomery explained that it is the practice when dealing with NZNO members' personal grievance claims to send any proposed settlement to MBIE for sign-off by an MBIE mediator. After the meeting, Ms Montgomery had contact with Ms Miller and explained the process to her as she had to Mr Goud. She recalled that Ms Miller agreed with the process and she arranged to call her again in the morning to discuss it further.

*22 August 2017*

[21] On 22 August 2017, Ms Montgomery contacted Ms Miller as arranged. Ms Miller's evidence is that she was concerned with whether or not the sum agreed to be paid was going to be taxed and was not happy with that part of the proposal. Ms Montgomery advised she would post Ms Miller a copy of the proposed record of settlement and another letter that had been agreed to accompany that and if Ms Miller was happy with both, she could sign and return them.

[22] On 22 August 2017, Ms Montgomery sent an email to Mr Goud, attaching the proposed record of settlement and the letter. The email invited Mr Goud to either accept the proposed record of settlement or to comment via track changes if there were matters that Mr Goud wanted her to consider. The email referred to the proposed record of settlement being sent to an MBIE mediator.

[23] At 5:14pm on 22 August 2017, Mr Goud sent an email to Ms Montgomery attaching the proposed record of settlement, unsigned, and with some proposed corrections relating to the issue of tax.

*23 August 2017*

[24] On 23 August 2017 Ms Montgomery sent an email to Mr Goud by iPhone, attempting to clarify taxation issues and indicating that Mr Goud would have an opportunity to discuss matters with the MBIE mediator.

[25] Mr Goud acknowledged the email later that day by saying “Okay thank you” but did not return a signed copy of the proposed record of settlement.

*24 August 2017*

[26] On 24 August 2017 before she had received a copy of the proposed record of settlement in the post Ms Miller said that she had a change of heart and sent a text message to Ms Montgomery that provided:

“Hi simone, I hve thought about this an have decided to take it to further ... to court. I hve nothing to loose ... I am an honest employee ... i have orientated many people an never had a problem, we wil fight this with yr help .. nothn is signed. Tania.

*29 August 2017*

[27] Ms Miller subsequently confirmed in a telephone discussion with Ms Montgomery on 29 August 2017 that she did not want to settle but wanted to continue to mediation. Ms Montgomery said in her evidence that she then called Mr Goud on 29 August 2017 and advised that Ms Miller had changed her mind and did not agree to the proposed record of settlement. It is common ground that a settlement agreement was not signed by either party, no payment was made and the letter proposed as part of the settlement was never signed. Mr Goud agreed to go to mediation which was held on 30 November 2017.

*Conclusion on whether there was a full and final settlement*

[28] The legal term when parties reach agreement to resolve litigation is accord and satisfaction. The Authority needs to firstly consider in determining whether accord and satisfaction has been reached if there is a genuine dispute between the parties. That aspect is satisfied in this case.

[29] The focus is then on whether the facts support accord and satisfaction has been reached and that there was a meeting of the minds of the parties.<sup>2</sup>

[30] The parties were in discussions over a brief period in August 2017. Having heard the evidence and considered the relevant documents I am satisfied that it was intended to use the process under s 149 of the Act. Ms Montgomery explained this process to Mr Goud including that once the proposed record of settlement had been signed by both Mr Goud and Ms Miller it would be sent to an MBIE mediator who would contact Mr Goud and Ms Miller before final sign off. Mr Goud understood that once there had been the mediator sign off the agreement would be binding and legally enforceable.

[31] I find that the parties agreed in this case from the outset that there would be no binding accord or agreement until two things had occurred.

[32] The first was that they needed to sign a record of settlement. Neither party signed a record of settlement. Ms Miller, before she had received a copy of the proposed record of the terms of settlement, advised Ms Montgomery that she wished to pursue her claim and would not sign any settlement. Ms Montgomery advised Mr Goud of that.

[33] The second was that the record of settlement signed by both parties would then be submitted to the mediation service for a mediator to sign off. That aspect is strengthened by the inclusion in the proposed settlement of the time for payment of the monetary sum “within 7 days of the date of mediator’s sign off.” Mediator sign off did not occur.

[34] I do not find that there was binding accord as a result. A process had been intended by the parties before they reached a binding agreement. It was not completed. The parties did not sign the proposed terms of settlement and they were not signed by the mediator. There was no fulfilment of the terms of the proposed settlement by Kimberley.

[35] Ms Miller is entitled to pursue her claim for unjustified dismissal.

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<sup>2</sup> *Graham v Cressline Pty Ltd* [2006] ERNZ 848 at 3 at [49] and [50]

## **What were the reasons for dismissal?**

[36] Ms Miller did not participate in a disciplinary process before her dismissal and more will follow about that shortly.

[37] The reasons for dismissal however were set out in a detailed letter sent to Ms Miller by the Facility Manager dated 10 April 2017 including some details of the incident on 6 April 2017.

*Detail set out in the 10 April 2017 letter of the incident on 6 April 2017*

[38] I will start with setting out some of the detail that is in the letter and then the conclusions that were reached. The time of the incident is recorded in the letter as 7am on 6 April 2017. There is reference to a handover when Ms Miller was updating about residents to the next shift staff. Another staff member it is stated said “Yeah,” during the handover during this update and it is recorded that Ms Miller immediately became angry and told S to “shut up while I am talking,” by pointing a finger at her and the staff member was shocked to hear this as there were other staff members present.

[39] It was also set out that later in the meeting Ms Miller continued to harass and said to S “I’ve checked your timesheet. You did 190 hours” and continued to argue about it and said, “Don’t bother coming back” and hit the dining table in an aggressive tone. There was reference to S crying and reporting the incident to Mr Goud.

[40] The letter set out that Mr Goud called Ms Miller and asked her to come in for a disciplinary meeting but she refused and hung up the phone.

[41] There was also reference to S complaining that Ms Miller did not allow her to take breaks during her shift and that Ms Miller had always bullied and harassed S when she worked with her. There was reference in the letter to S not feeling safe and being frightened to work with Ms Miller.

[42] There was also reference to a discussion between Ms Miller and Mr Goud earlier on 5 April 2017 around 11pm when Ms Miller said that S was doing too many hours and that Mr Goud had clarified it was not fair to blame S as she was only working hours other staff members did not want or were unable to do.

[43] There was reference to further investigation and obtaining of witness statements although it was stated that whilst witnesses had confirmed the incident on 6 April 2017 their details were not going to be shared as there was concern about how Ms Miller had spoken to one of the witnesses on the telephone after 6 April 2017.

#### *Conclusions reached*

[44] The conclusion reached was that Ms Miller's actions towards S constituted bullying/harassment of a work colleague.

[45] The actions were stated to include but were not limited to inappropriately checking another staff member's timesheet, falsely alleging a staff member to have done 190 hours, rudely asking a staff member to shut up by pointing a finger at her, hitting the dining table and ordering a staff member not to come back to work in an aggressive tone, not allowing staff member(s) to take their entitled breaks when they worked with Ms Miller, inappropriately discussing a staff member's hours with other staff, and despite the owner's clarification, Ms Miller bringing this up again at the handover meeting. It was stated that these actions are repeated, persistent, offensive and intimidating which caused fear and distress to a staff member who is fairly new to Kimberley.

[46] It stated that Ms Miller had caused a serious and imminent risk to the health and safety of the staff member.

[47] It was stated that her actions amounted to disobedience and failure to follow a reasonable instruction as a direction to attend a disciplinary meeting was disobeyed.

[48] It stated that the actions had destroyed the trust and confidence Kimberley needed to have in Ms Miller and that the dismissal was effective immediately and her final day of employment was the day that she last worked on the night shift, 5 April 2017.

#### **The test for justification**

[49] The Authority is asked with the above reasons for dismissal in mind to consider whether Ms Miller was justifiably dismissed. In doing so, it is required to apply the justification test set out in s 103A of the Act. In determining justification, the Authority does not consider what it may have done in the circumstances but is required to consider on an

objective basis whether the actions of Kimberley and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

[50] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Ms Miller were sufficiently investigated, whether the concerns were raised with her, whether she had a reasonable opportunity to respond to them, and whether such explanations were considered genuinely by Kimberley before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Miller being treated unfairly.

[51] Kimberley could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[52] I am going to start my assessment with the telephone call on 6 April 2017 and the sufficiency of investigation.

**Did Kimberley carry out a full and fair investigation at the end of which a fair and reasonable employer could conclude that there was serious misconduct on the part of Ms Miller?**

[53] Mr Goud was required to investigate S's concerns on receipt of her complaint. There can be no criticism of him for doing so particularly with the increased focus on the health and safety of employees.

[54] The Authority must consider when assessing justification the requirement in s 103A of the Act for procedural fairness. One of the most fundamental elements of fairness is that an employee should be entitled to respond to concerns before a decision is made about a disciplinary outcome and have that taken into account.

[55] It was concluded by Kimberley that Ms Miller refused to attend a disciplinary meeting after the telephone discussion on 6 April 2017 and her account/explanation to the issues of concern was never obtained. I turn now to that telephone call.

[56] It is common ground that the telephone call to Ms Miller on the morning of 6 April 2017 was short being perhaps a minute in duration. Ms Miller declined to attend a disciplinary meeting. Her understanding as she explained in her evidence was that Mr Goud

wanted her to return that day to attend a meeting and she was tired. She said that Mr Goud started to yell at her and she hung up the phone. Mr Goud's evidence was that Ms Miller did not say she was too tired and simply hung up. He did not accept that he yelled or was angry. His evidence was that a time for the disciplinary meeting was not discussed but was referred to in a general way and that Ms Miller did not ask for more time.

[57] Given the passage of time between April 2017 and March 2019 when the Authority investigated the matter I have had regard to whether there is any information produced closer to the material period of time that may support either parties evidence.

[58] I have already referred to the letter of 10 April 2017 that states Ms Miller refused to attend a disciplinary meeting. There is also the letter raising the personal grievance of 21 May 2017 which was written closer to the time by Ms Montgomery. That letter referred to the telephone conversation on 6 April and Mr Goud advising that he had received a complaint of bullying and that he asked Ms Miller to come back to Kimberley urgently to attend a disciplinary meeting to discuss this. It then set out that Ms Miller said she was unable to attend the meeting as she was tired and that Mr Goud was very angry and the conversation ended abruptly. Although the response from Kimberley disputed in a general way what was said in that letter it did not specifically address the telephone call.

[59] There is evidence to support that Ms Miller believed rightly or wrongly from what Mr Goud said that she was being asked to return immediately to her workplace. She lived some distance from the workplace and had just finished her shift.

[60] Good faith obligations I find required a fair and reasonable employer to have communicated further with Ms Miller after the telephone call on 6 April 2017. She should have been told about the specific nature of the concerns, given an opportunity to provide her account to her employer with knowledge of the potential consequences of her not attending a meeting and/or providing her account in writing.

[61] The facilities manager sent a text to Ms Miller later on 6 April 2017 but that was confined to a statement that she not come into work from that day onward and that a letter explaining that had been sent to her. Ms Miller said that she concluded on receipt of that text that she had been dismissed and she called a work colleague and said she thought she had just been fired because of what she said to S. Following that conversation she said that her view she had been dismissed was strengthened.

[62] Kimberley attached a letter dated 6 April 2017 to the statement in reply lodged with the Authority. Ms Miller says she never received this letter. She said that the first she knew of the nature of the complaint was when she received the 10 April letter that provided notice of termination. I find that the letter of 10 April contained notice of the termination decision however it was effective from 6 April.

[63] The 6 April 2017 letter is brief. It states that since Ms Miller has firmly refused to attend a disciplinary meeting an investigation would be carried out and she would be informed as to the outcome of the investigation. It stated that the staff member who raised the complaint is frightened and feels unsafe to work with her and that poses a risk to health and safety of the staff members and may compromise the investigation. Ms Miller was requested not to return to work.

[64] I accept Mr Lawrie's submission that Ms Miller did not have a clear account of concerns even if she had received that letter of 6 April which would have taken about 3-5 days to be delivered by post.

[65] Even having regard to the fact that Kimberly is a small employer with limited resources I do not find the very brief telephone call could absolve it of the requirement to take further steps to obtain Ms Miller's account in undertaking its investigation. The investigation was insufficient.

[66] The matters of concern were not clearly put. Ms Miller concluded from the telephone call the concern was about what was said to S after the night shift of 5/6 April 2017 but there was no specificity given about the concerns which subsequently formed the reasons for dismissal. She was unable to respond adequately and have that response considered by Kimberly.

[67] Another aspect of procedural fairness is that Ms Miller was not provided with a copy of S's complaint or any of the statements Mr Goud had obtained from other employees which were attached to the statement in reply to respond to.

[68] For all these reasons the investigation into the concerns was not full and fair. It was not in accordance with the procedural fairness factors set out in s 103A(3) of the Act.

*Serious misconduct*

[69] In the main the matters concluded to be serious misconduct arose from the night shift on 5/6 April 2017.

[70] Ms Miller in her evidence had a different account about what had occurred. Had she provided her account and that had been investigated then findings as to the seriousness of the concluded conduct may have been different.

[71] Ms Miller denied for example that she had bullied and harassed S. She said that she had orientated her and corrected her when she did things wrong. She denied that she told S she had checked her timesheet although said she may have said "I have seen your timesheet" because she said another caregiver showed her S's time sheet. She did not accept that she stopped S from taking breaks and said that she had told her when she started that she was entitled to half an hour for lunch and two ten minute breaks. She did agree that she told S to shut up and hit her hand on the table whilst doing so at the handover pointing a finger because she said S interrupted the handover. Ms Miller says that the context of her telling S not to come back to work that day was that S had been unwell during the night and had told Ms Miller she was only getting 3-4 hours of sleep. Ms Miller said that she said "*Don't come into work tonight for your three hour shift. Stay at home and get some rest.*" She agreed that she did state how many hours S had undertaken over the fortnight but was corrected as to the amount by another employee.

[72] I do not find that a fair and reasonable employer could have concluded in the absence of a fair process that Ms Miller's failure to follow an instruction to return to work for a disciplinary meeting to be serious misconduct. I agree with Mr Lawrie's submission that the employment agreement defines repeated failure to follow a reasonable instruction as serious misconduct.

[73] The procedural unfairness found in this matter overlaps with the findings of serious misconduct to such a degree that I do not a fair and reasonable employer could conclude serious misconduct on the part of Ms Miller.

**Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss?**

[74] I have found that there was serious procedural unfairness in that Ms Miller was not heard as part of the investigation process, not provided with a clear account of the allegations and not provided with the letter of complaint and statements from other employees.

[75] I have found that the procedural unfairness overlaps to such a degree that a fair and reasonable employer could not have concluded serious misconduct on the part of Ms Miller.

[76] Ms Miller has made out her personal grievance that she was unjustifiably dismissed and is entitled to consideration of remedies.

**Remedies**

*Lost wages*

[77] Ms Miller obtained new employment on 26 June 2017 and was paid up to the night shift 5/6 April 2017. The period between 6 April and 26 June 2017 is 11 weeks.

[78] Ms Miller said that prior to obtaining her new role she had applied for other roles and she also undertook about two hours of casual gardening a week for which she was paid \$25 per hour.

[79] Ms Miller clarified in her evidence that she did not turn down some casual work at a service station but rather she had been called about this work after she had obtained her new role.

[80] I am satisfied that Ms Miller tried to obtain further employment and in that way mitigate her loss.

[81] Lost wages are calculated on the basis of payment for a 3 nights on and 3 nights off roster 11pm – 7.30am with a half hour unpaid break at \$16 per hour to be \$5,248 gross. I find it is fair from that amount that \$550 for the gardening at \$50 per week be deducted.

[82] Subject to any issue of contribution Ms Miller is entitled to reimbursement of lost wage in the sum of \$4698.00 gross.

### *Compensation*

[83] The evidence from Ms Miller about the impact of the dismissal was quite compelling. She said that she loved her role at Kimberley and had worked there for many years. She said that she was proud of her work as a caregiver and that she had always been regarded as honest, hardworking, helpful and enthusiastic. She felt on receipt of the test message on 6 April 2017 that she was treated “like a criminal” and had no right or chance to answer the allegations.

[84] She felt frustrated that she did not know what the allegations were until she received the letter of 10 April on 13 April 2017. Ms Miller felt that she was not able to provide her views to Kimberley and that if she had been spoken to then Kimberley would have seen that there was no harassment or risk to staff health and safety.

[85] She said that she started having mood swings and they impacted on her sleeping. Her relationship with her partner started to deteriorate and not long after the dismissal they broke up. Ms Miller started to withdraw from social events and described a significant loss of confidence. She also had to borrow money from her family to meet outgoings.

[86] She felt as though her future at Katitane where she had a section was in jeopardy. Her new employment was not in a caregiver role and she did not feel part of the community at Karitane in the same way. In early 2018 she sold her section and returned to Nelson.

[87] Ms Miller seeks the sum of \$15,000 for compensation and I find that to be a suitable award subject to any finding as to contribution.

### *Contribution*

[88] The Authority is required to determine where it finds a personal grievance in deciding the nature and the extent of the remedies whether the actions of the employee contributed towards the situation that gave rise to the personal grievance.

[89] It is not until this point that the Authority is required on the balance of probabilities to make its own decision about the actions of Ms Miller. I agree with Mr Lawrie that the significant procedural flaws make it difficult to reach a conclusion on some actions. For example one of the more serious allegations was that Ms Miller ordered S not to come back to work in an aggressive manner. Ms Miller said that statement was made in a context of

concern and not aggressively. The failure to investigate that at the time and the fact that I did not hear from S means I am unable to reach a conclusion about that matter when considering contribution.

[90] There is insufficient evidence to conclude that the actions were repeated in the nature of bullying beyond the events of 5/6 April.

[91] I do however accept that S was clearly impacted by what was said to her by Ms Miller on 6 April 2017 and Mr Goud's evidence was that she was crying. I could not safely conclude to the extent that Ms Miller caused a serious and imminent risk to the health and safety of S but there was, I accept, distress on the part of S. Telling S to "shut up" when hitting the dining table was not polite even if it could not be classified as swearing or abuse. Ms Miller could have told S not to interrupt in a more polite manner without getting agitated to the point of striking the table. There is some contribution on that basis to the grievance.

[92] I also find that there was contribution in the raising of the hours that S had undertaken. Mr Goud had advised Ms Miller earlier on 5 April 2017 it was a matter for him and S and did not involve Ms Miller. Bringing her hours up clearly caused some distress to S even if Ms Miller said that there was some concern about S behind doing so. I find on the balance of probabilities that Ms Miller did not feel she could leave S's hours without making some comment. I am unable to reach a clear conclusion about whether Ms Miller was shown or looked herself at S's timesheet or whether she did not allow S to take breaks. There clearly however had been some discussion amongst the staff about S's hours. I am not able to conclude with any certainty that Ms Miller was the only protagonist in those discussions.

[93] I find on the balance of probabilities that Mr Goud did become angry during the telephone call on 6 April but Ms Miller simply hanging up the phone with no clear pathway forward was not constructive and I find some limited contribution on that basis.

[94] I found that the remedies for lost wages and compensation should be reduced by 15%.

## **Orders**

[95] Taking contribution into account I order Kiwi Elderly Care Limited to pay to Tania Miller lost wages under s 123(1)(b) of the Act in the sum of \$3,993.30 gross.

[96] Taking contribution into account I order Kiwi Elderly Care Limited to pay to Tania Miller compensation under s123(1)(c)(i) of the Act in the sum of \$12,750 without deduction.

### **Costs**

[97] I reserve the issue of costs. Mr Lawrie has until 27 June 2019 to lodge and serve submissions as to costs and Mr Goud has until 11 July to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority