**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI**
**TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 230
3139701

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| | BETWEEN | ANNELISA LUMMIS<br>Applicant |
| | AND | THE SHAWZ GROUP 2019 LIMITED<br>Respondent |

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| Member of Authority: | Claire English |
| Representatives: | Ira White, advocate for the Applicant<br>Dan and Tracy Shaw for the Respondent |
| Investigation Meeting: | 10 March 2022 at Wellington |
| Submissions received: | 21 March 2022 from Applicant<br>28 March 2022 from Respondent |
| Determination: | 1 June 2022 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Annelisa Lummis, was employed by the respondent to work in its supermarket. Ms Lummis dyed her hair blue. She was asked to permanently wear a hat. Ms Lummis believed this was not required by the terms of her employment agreement, or the relevant house rules, and that other staff who had dyed hair had not been asked to wear a hat.

[2] After a disciplinary process, Ms Lummis was summarily dismissed for serious misconduct. The respondent states that Ms Lummis was dismissed for divisive behaviour and refusal to comply with its house rules.

[3] Ms Lummis raises claims of unjustifiable dismissal, and seeks remedies of lost remuneration, compensation for hurt and humiliation, penalties, and costs.

**The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged on behalf of the applicant from Ms Lummis herself, Ms Michelle Briant, and Ms Raewyn Lummis. Mr Dan Shaw, the director of the respondent, gave evidence for the respondent, together with Ms Tracy Shaw, Ms Joanne Willis, and Ms Amy Voice. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave written closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

**The issues**

[6] The issues requiring investigation and determination were:

(a) Was Ms Lummis unjustifiably dismissed?

(b) If the respondent's actions were not justified (in respect of dismissal), what remedies should be awarded?

(c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct that contributed to the situation giving rise to the personal grievance?

(d) Should penalties be awarded?

(e) Should either party contribute to the costs of representation of the other party?

**Background**

[7] Ms Lummis was employed at Stokes Valley New World. Ms Lummis commenced employment at Stokes Valley New World in August 2018. She signed an individual employment agreement, and a comprehensive set of house rules. Ms Lummis was 18 years old, a student, and worked part time hours. This was her first job.

[8] In 2019, the then owners of the Stokes Valley New World business decided to sell that business. The business was sold to the respondent company, The Shawz Group 2019 Limited. Mr Dan Shaw is the sole director of the Shawz Group 2019 Limited. He had previously been working at Stokes Valley New World as a manager, and after purchasing the business, he continued to operate it under the same name, and continued to work in the business as an owner-operator. Mrs Tracy Shaw is a shareholder in the respondent company. She is not involved in the day-to-day running of the respondent's business, but she does provide human resources support to Mr Shaw, and was involved in the respondent's processes throughout.

[9] As part of the purchase of the business of Stokes Valley New World, The Shawz Group 2019 Limited entered into new employment agreements with existing staff. Ms Lummis signed an employment agreement with The Shawz Group 2019 Limited on 11 November 2019. The existing house rules, which she had signed previously, were not replaced, and continued to apply.

[10] Around 20 November 2020, Ms Lummis dyed her hair partially blue. She explained that she did not think much of it, because other staff also had dyed hair.

[11] On 20 November 2020, she arrived at work for her normally scheduled shift, and shortly after starting work, saw Mr Shaw. She asked him if he liked her hair. Mr Shaw asked her to put a hat on for the remainder of her shift. He explained that branded baseball caps were part of the uniform available to staff, although for many positions, wearing the cap was not compulsory.

[12] Ms Shaw agreed to wear a cap for the remainder of her shift. She explained at the investigation meeting that she was not expecting this request, and felt unsure of her response, especially as she felt she could not challenge Mr Shaw in a public area of the store, so she agreed to wear the cap for that afternoon.

[13] Ms Lummis went to spend some time at her mother's house. When she returned to work for her next scheduled shift on 22 November 2020, she forgot her cap. She explained that she did not normally wear a cap, so she had forgotten it and didn't think much about it. She signed in and started work.

[14] The Grocery Manager, Ms Amy Voice, asked Ms Lummis why she wasn't wearing a hat. Ms Lummis advised that she had forgotten her hat, and in any case, the house rules didn't require her to wear a hat.

[15] Ms Voice telephoned Mr Shaw to advise him of this. Mrs Shaw then called Ms Voice back on Ms Voice's mobile phone. On Mrs Shaw's instructions, Ms Voice put Mrs Shaw on speakerphone. She then asked Ms Lummis to join her to speak with Mrs Shaw. Ms Lummis asked to have a support person (a colleague) with her. Ms Lummis and her support person followed Ms Voice out of the publicly accessible area of the store and ended up standing outside the store in the loading dock. Mrs Shaw, via speakerphone, then required Ms Lummis' support person to leave despite Ms Lummis and her support person objecting.

[16] After Ms Lummis' support person had left, Mrs Shaw then advised Ms Lummis that refusing to wear a hat was serious misconduct and could result in disciplinary action or even dismissal. Mrs Shaw then said that Ms Lummis had a choice of wearing a hat or not, but choosing not too would lead to disciplinary action. Ms Lummis recalls that she was shocked by this, and also that it was hard to hear through the speaker phone, as it was windy outside and other staff walked past during this conversation.

[17] After this conversation, Ms Lummis asked if she could have the rest of the day off. Ms Voice agreed to this. Ms Voice's own notes record that she saw Ms Lummis sitting on the ground crying with another staff member trying to comfort her. Mrs Shaw then instructed Ms Voice to text Ms Lummis to ask if Ms Lummis wanted this time to be unpaid, or to use annual leave.

[18] Ms Lummis' mother then hired an employment consultant to assist Ms Lummis, and asked for her time to be paid.

[19] Following various text conversations, on 25 November 2020 Mr Shaw emailed Ms Lummis a copy of the house rules. These were the rules that Ms Lummis had signed when she was first employed at Stokes Valley New World, by the previous owners (the 2018 rules). At the investigation meeting, there was some discussion about new house rules, which were being developed by Mr and Mrs Shaw in 2020, and which had not been signed by Ms Lummis (the 2020 rules). Neither the 2018 rules, nor the 2020 rules, nor Ms Lummis' employment agreement, prohibited dyed hair, or specifically required the wearing of caps or a hat once hair had been dyed certain colours, and this was

acknowledged by the Shaws at the investigation meeting[1]. Instead, both Mr and Mrs Shaw said that it was "commonly understood" in the store that if a staff member dyed their hair an unnatural colour, then they needed to wear a uniform cap. There was also some discussion about what an "unnatural colour" was. Mrs Shaw explained that this was not a prohibition on dyed hair per say, and there would be no concern if staff dyed their hair colours such as red, black, brown, and blonde, but that particularly bright colours like blue, pink, and green were not acceptable, and would need to be covered by a hat.

[20] On 25 November, Mr and Mrs Shaw asked to meet with Ms Lummis again in an office upstairs. Ms Lummis had her representative present with her on mobile phone. Mrs Shaw again asked Ms Lummis to wear a hat, saying it was part of the uniform.

[21] Ms Lummis replied that it was not part of her uniform, the cap was only required for staff in designated high-risk areas, such as fresh food and deli[2]. Mrs Shaw replied that Ms Lummis' attitude was disrespectful. At the conclusion of this meeting, Ms Lummis was suspended on pay.

[22] Ms Lummis was then invited to a formal investigation meeting on 8 December 2020. The meeting was not constructive, as both parties disagreed about the procedure to be followed.

[23] On 14 December 2020, Mr Shaw wrote to Ms Lummis, headed "Notice of Disciplinary Meeting". The letter stated:

> We have now concluded our investigations. Based on the information available to me, I am satisfied that by refusing to wear a hat, which is part of the uniform for the store, your behaviour could be deemed as insubordinate and in breach of the terms and conditions of employment.
>
> The Company has formed a preliminary view that your conduct may be a matter of serious misconduct, which may result in disciplinary action up to and including dismissal. Based on the information available to me, it is my preliminary view that you should be issued with a final warning, or that your employment should be terminated….
>
> I would like to meet with you…to seek your response to the preliminary view that by refusing to wear a hat, which is part of the company uniform, when

[1] In the end, the respondent produced a separate document headed "Dress and Personal Standards Policy", which was created in 2020, which stated that "if your hair is coloured in such a way that is deemed to be unnatural, a disposable hair net and cap must be worn at all times…". Ms Lummis had not signed this policy.

[2] The uniform requirements set out in the house rules are consistent with Ms Lummis' description.

> requested, you have been insubordinate and engaged in an act of serious misconduct…

[24] On 15 December 2020, Ms Lummis' representative wrote to Mr and Mrs Shaw, setting out what was described as a "full" response to the allegations raised. Ms Lummis again stated that the house rules did not state that she could not dye her hair, or that she had to wear a hat if she did so. She also repeated that other staff had dyed their hair and had not been required to wear hats.

[25] On 15 December 2020, Mr Shaw wrote inviting Ms Lummis to a meeting on Friday 18 December. The letter concluded by saying:

> You have been requested to wear a hat to ensure we can maintain a professional image within the store as is our discretion to do so.

[26] On 18 December 2020, Ms Lummis attended a disciplinary meeting. The meeting notes record that at this meeting, Ms Lummis was asked:

> Could you please confirm you are not prepared to abide by the rules of the store and wear a hat as requested going forwards?

[27] The meeting notes record that Ms Lummis responded:

> Well, I don't believe that they are the rules of the store, that's why I'm arguing the way I am.

[28] Mr and Mrs Shaw then went on to say:

> The Management team has the discretion to decide what is and is not appropriate work wear if your choices are considered controversial. We maintain that you were aware that blue hair could be considered controversial...

[29] On 20 December 2020, Mr Shaw wrote to Ms Lummis with the outcome of the disciplinary process. The letter stated:

> The purpose of the meeting was to discuss the company's concerns regarding the allegations that were put to you, specifically whether you are prepared to act in good faith going forward, comply with the terms and conditions of your employment and the house rules and whether we can have trust and confidence in you to achieve this…however from a business perspective, hair colours that do not fall within the natural colour spectrum are considered controversial, and

> therefore there is a requirement for you to wear a hat, which is part of the store uniform….
>
> During our meeting, you advised that you were not prepared to wear a hat at any stage going forward, even if specifically requested by me….
>
> Your behaviour was divisive in the extreme, and undermined the employment relationship to the point that we do not believe it would be possible to continue our employment relationship.
>
> Taking all factors into account the outcome of the disciplinary investigation is to summarily dismiss you for serious misconduct effective as of Saturday 19 December 2020.

[30] Ms Lummis then raised a personal grievance for unjustified dismissal.

**Findings**

[31] In considering whether Ms Lummis was unjustifiably dismissed, I must consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred, as set out in section 103A of the Act.

[32] Ms Lummis was summarily dismissed for serious misconduct, as stated in Mr Shaw's letter dated 20 December 2020. Serious misconduct has been defined as the:

> Kind of misconduct [that] will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.[3]

[33] Common examples of types of behaviour that have amounted to serious misconduct include: physical violence by the employee against others; an open and deliberate refusal to obey a lawful and reasonable instruction; intoxication while working; possession of illegal substances; unauthorized possession of employer property or wilful damage of employer property. These examples serve to demonstrate that there is a high threshold for acts amounting to serious misconduct.

[34] The correspondence clearly states why Ms Lummis was dismissed, and is best summed up by the key question put to Ms Lummis in the letter dated 18 December, which was: "Could you please confirm you are not prepared to abide by the rules of

[3] *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319.

the store and wear a hat as requested going forwards?" This is reiterated in the termination letter of 20 December 2020, which stated that: "you advised that you were not prepared to wear a hat at any stage going forward, even if specifically requested…". In short, Ms Lummis was dismissed for failing to wear a hat in accordance with what the respondent maintained were the rules of the store.

[35] While failing to obey a lawful and reasonable order can amount to an action justifying disciplinary action by the employer, an employer will need to be able to demonstrate that it has properly promulgated a lawful and reasonable order.

[36] In *Wellington etc Clerical etc IUOW v College Group Ltd*[4], the Arbitration Court defined a "lawful and reasonable order". Orders were lawful and reasonable if they:

> (1) did not require the servant to perform any act contrary to law;
> (2) were within the scope of the servant's contractual obligations; and
> (3) did not demand the performance of any impossible or dangerous task.

[37] There is no doubt that Ms Lummis was asked by Mr and Mrs Shaw, to wear a hat. This is an order. It is not contrary to law, impossible, or dangerous. It is equally clear that Ms Lummis repeatedly responded to this order to wear a hat by saying that she did not believe she was required – by the terms of her employment agreement, or by the house rules – to wear a hat. This response raises a question as to whether the order was lawful and reasonable, in that it puts in question whether the order was in fact within the scope of Ms Lummis' contractual obligations.

[38] The correspondence shows that Mr and Mrs Shaw did not fully engage with this Ms Lummis on this point. The correspondence referenced clause 11 of the 2018 rules, which states: "It is essential that your hair, jewellery, and presentation be in keeping with the professional image of the store. The Management team has the discretion to decide what is and is not appropriate work wear if your choices are considered controversial."

[39] At the investigation meeting, Mr Shaw accepted (correctly) that there was no provision, in Ms Lummis' employment agreement, or in either version of the house rules, requiring staff who had dyed hair to wear a hat. Rather, he relied entirely on what

[4] [1984] ACJ 315

he said was "common knowledge" that coloured hair had to be covered by a hat. Mr Shaw accepted that this was not recorded anywhere, but said it was "commonly known" by staff.

[40] Ms Lummis denied being aware of such "common knowledge", and said she did not know this. Mr Shaw accepted that he had not taken any prior steps to make Ms Lummis aware of what he said was this common knowledge. In this regard, he relied entirely on the interaction between himself and Ms Lummis when she first appeared in store with dyed hair, on 20 November 2020, and said that she had in essence asked him what she should do about her hair, thus demonstrating she was aware of the "common knowledge" that coloured hair had to be covered by a hat. Ms Lummis said that she asked Mr Shaw if he liked her hair, or words to this effect, and nothing more.

[41] This disputed and brief interaction is simply not enough for the respondent to establish that there was any contractual requirement for Ms Lummis to wear a hat once she had dyed her hair a certain colour.

[42] In this regard, the court has said:

> Where an employer investigates an employee's failure to adhere to a policy or code of conduct, it has to assess whether the employee's failure to comply was because of inadvertence, oversight, or negligence or whether it was done deliberately in the knowledge that it was wrong. If the employee did not have knowledge of the relevant policy or rule, a fair and reasonable employer should find out whether that was the fault of the employee for ignoring or failing to take proper care to be familiar with the policy, or whether there was genuine room for misunderstanding as to what the policy meant….it is bound to investigate fully to establish why it occurred[5].

[43] In this instance, the respondent has not established that the policy in question existed or that it bound Ms Lummis. The next question is whether the respondent fairly investigated what it said was Ms Lummis' failure to comply, including whether there was room for mis-understanding as to what the policy in question meant.

[44] In this regard, I can see no evidence that the respondent, through Mr and Mrs Shaw, ever properly communicated with Ms Lummis about her position. Mr and Mrs Shaw began by simply telling Ms Lummis that she was required to wear a hat. They never explained the origin of this requirement. When Ms Lummis responded that she didn't believe there was such a requirement, Mr and Mrs Shaw did not engage with her

[5] *Angel v Fonterra Co-operative Group*, [2006] ERNZ 1080, at [81].

to discuss why they believed such a requirement existed, and where that requirement stemmed from. They did not explain to Ms Lummis prior to her dismissal what they explained at the investigation meeting, that they believed it was "common knowledge" that such an unwritten and unrecorded requirement existed, and they wished her to abide by it even though it did not form part of Ms Lummis' employment agreement or the 2018 rules that she had signed.

[45] At the investigation meeting, Mrs Shaw in particular took a dim view of Ms Lummis' response. Mrs Shaw expressed the view that dismissal was the only option available because Ms Lummis would not accept the respondent's orders.

[46] Mr and Mrs Shaw held to their pre-existing view that this was an order they were entitled to give, and Ms Lummis was bound to obey it. This is shown by references in the correspondence to Ms Lummis' behaviour as being "divisive", and by references to managerial discretion, i.e. "to ensure we can maintain a professional image within the store as is our discretion to do so."

[47] The difficulty here is that there was no such requirement on Ms Lummis. And, when Ms Lummis asked her employer to explain to her why the employer believed she was contractually obliged to act in a certain why, the employer chose not to engage. The references by the employer to clause 11 of the 2018 rules did not assist, as this did not require staff to wear a hat if they dyed their hair certain colours. Instead, the employer elevated Ms Lummis' refusal to simply obey to the status of serious misconduct, which the employer then said required summary dismissal.

[48] In considering whether Ms Lummis' summary dismissal was justifiable[6], I must consider:

a. Whether the employer sufficiently investigated the allegations against Ms Lummis;
b. Whether the employer raised the concerns it had with Ms Lummis;
c. Whether Ms Lummis was given a reasonable opportunity to respond;
d. Whether the employer genuinely considered Ms Lummis' explanation; and
e. Any other factors I think appropriate.

[6] Section 103A(1).

[49] Looking at these tests in order, Mr and Mrs Shaw did not sufficiently investigate the allegations against Ms Lummis. The allegation that there existed a binding contractual requirement to wear at hat if hair was dyed a certain colour was assumed, and never explored. Ms Lummis knowledge of this supposed "common understanding" was also assumed, based entirely on Mr Shaw's interpretation of a single impromptu conversation he had with Ms Lummis, which he continued to hold against her in more formal settings.

[50] In light of the approach taken by Mr and Mrs Shaw, it can not fairly be said that they raised the concerns they had with Ms Lummis, because they did not explain to her that the position they were taking was based, not on the terms of Ms Lummis' employment agreement or the house rules, but a belief that they had formed that there existed a "commonly understood" but unwritten and unrecorded requirement regarding the wearing of a hat in certain circumstances.

[51] Ms Lummis was provided with the opportunity to respond, and to her credit, she did engage with the process, and responded by consistently explaining that she did not believe or understand that she was subject to any requirement to wear a hat. This is a meaningful and substantive response, that opened avenues for further investigation and discussion. However, this was never explored.

[52] Ms Lummis' position was not genuinely considered. Instead, the correspondence shows that when Ms Lummis held to her position that she was not required to act as Mr and Mrs Shaw wished, their position shifted somewhat to focus on Ms Lummis' refusal to accept the Shaw's interpretation of the house rules, (as well as the failure to wear a hat) as being an additional ground justifying dismissal.

[53] In this respect, the court has said that:

> The genuineness of the employee's behaviour, which is central to the character of the act of disobedience, is to be judged objectively in the light of all the circumstances, including the way in which the resolution of the dispute is approached.[7]

[7] *Sky Network Television v Duncan* [1998] 3 ERNZ 917 (CA), at page 923.

[54] Ms Lummis' provided a specific reason as to why she acted as she did. Her belief that there was no contractual requirement on her to wear a hat was entirely reasonable in the circumstances[8].

[55] The court has found that:

> When…employees explained they acted as they did because they believed they were entitled to, [this] should have given [the employer] pause to consider whether the employees should bear full responsibility for the breach of the [relevant policy].[9]

[56] This is far more so in circumstances where the policy or requirement the employer was relying on did not in fact exist. However, Ms Lummis' response did not give the respondent pause to consider if it had correctly interpreted its own documents. Instead, the respondent "doubled down" and began to consider Ms Lummis' refusal to agree with the Shaws' interpretation of the rules as being an additional reason for dismissal.

[57] Various cases that have found that even acts of fighting and violence in the workplace have fallen short of serious misconduct, and have not been considered by the Authority and court to justify dismissal[10]. Disciplinary action has also been found to be unjustified where instructions from the employer were not obeyed in circumstances where those instructions did not align with the relevant employment agreement[11].

[58] Standing back and considering the situation, the question becomes was it fair and reasonable for the employer to summarily dismiss a student worker for not wearing a hat, when there were no rules requiring her to wear a hat? The answer must be "no". Dismissal was not an action that a fair and reasonable employer could have taken in all the circumstances at the time, particularly given the procedural flaws in the process followed by the respondent.

[59] I also need to consider that Ms Lummis was subject to summary dismissal and was not paid any notice. The letter advising of the summary termination of her

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[8] I note that the separate "Dress and Personal Standards Policy" created sometime in 2020 was never put to Ms Lummis, was not signed by her, and was not relied upon by the respondent to justify the dismissal.
[9] Ibid, at para [95].
[10] See Westlaw commentary on section 103, at ER107.07.
[11] See *O'Donnell v Ports of Auckland Ltd* ERA Auckland AA469/05, 8 December 2005.

employment was dated Sunday 20 December 2020, and provided that Ms Lummis's employment would end as of 19 December 2020. This was not a mistake. Mr Shaw advised that he felt that he could have terminated Ms Lummis' employment as of 19 December, but that he did not have time to prepare the letter advising her of this until late in the following day on the 20th, so he back-dated her termination. This is manifestly unfair, particularly in light of the fact that this was a summary termination, thus depriving Ms Lummis of employment rights before she was aware that this had happened. In addition, notice of termination cannot, by definition, be effective prior to it being issued.

[60] The payslips show that, in the week ending 20 December 2020 (which is also the date of the termination letter) Ms Lummis was only paid up to 18 December 2020, and only received pay for 3.5 hours in her final week of employment, rather than her usual 10 hours. She has been paid 6.5 hours less than she would have expected to receive.

[61] Summary dismissal without notice and without paying out the week, was an action out of all proportion to the seriousness of what had occurred. I find that Ms Lummis was unjustifiably dismissed, and is entitled to remedies.

**Remedies**

[62] Ms Lummis has claimed for lost income of 13 weeks, with her weekly income being $189 per week. This is a total claim of $2,457.00 gross. She gave evidence that she applied for multiple jobs but was simply unsuccessful.

[63] Section 128 of the Act provides that where the employee has a personal grievance, and has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of either the remuneration actually lost, or 3 months' ordinary time remuneration.

[64] I have found that Ms Lummis has a personal grievance for being unjustifiably dismissed, and has lost remuneration as a result. I award her 6.5 hours of short pay at her hourly rate of $18.90, to account for the fact that her employment was terminated by letter dated 20 December 2020, but she was only paid up to 18 December 2020. At her hourly rate of $18.90, this equates to $122.85 gross. Holiday pay is payable on this

at the rate of 8%, being $9.83 gross. The respondent is ordered to pay Ms Lummis the sum of $122.85 gross in short pay, plus holiday pay of $9.83 gross.

[65] I also award her the sum of $2,457.00 gross in lost remuneration.

[66] Holiday pay is also payable on this sum, calculated at the rate of 8%. Ms Lummis is awarded holiday pay in the sum of $196.56 gross.

[67] Ms Lummis has claimed for compensation for hurt and humiliation, in the sum of $7,000. She gave evidence that she felt embarrassed by having her co-workers witness the first meetings with Mr Shaw and Mrs Shaw on the phone which took place in the open, and being required to attend the office in the middle of her shift (requiring her to walk through the shop in front of her co-workers). She says that as a result of the entire process, she became depressed and anxious. I also note the meeting notes created by Ms Voice, who saw her crying in the public car park immediately after the meeting with Mrs Shaw on the telephone, where Mrs Shaw had refused to allow Ms Lummis to have a support person with her, and then began texting Ms Lummis about recording Ms Lummis' time away from work as annual leave.

[68] I accept that Ms Lummis suffered hurt and humiliation, and note that it would have been possible for the various parts of the process to have been carried out in a less confrontational and more sensitive manner.

[69] The respondent filed a document entitled "Further Submission" on 7 February 2020 prior to the investigation meeting, in which it stated that if there are any grounds for remedies (which were denied), then these remedies should be reduced under section 124 of the Act for blameworthy conduct by Ms Lummis that contributed to the situation giving rise to her grievance. The document goes on to say that on 29 April 2020, a proposed copy of the 2020 house rules was given to all managers for review and feedback. After feedback was received from those managers, the document was revised, and the 2020 house rules were "handed out to each manager" and "implemented in the business" following the May 2020 meetings.

[70] Ms Lummis was not a manager, and did not receive a copy of the 2020 rules via this process. The respondent was unable to demonstrate that Ms Lummis was aware of the 2020 rules, or that she had signed them. Instead, Ms Lummis said she had signed

the 2018 rules, and when she asked Mr Shaw for a copy of the house rules applying to her, he emailed her a copy of the 2018 rules on 25 November 2020.

[71] There is no fault on the part of Ms Lummis in accepting that she signed the version of the house rules that was in force when she commenced employment, and stating that she did not sign a subsequent version which the employer thought had been "sent out" to her in hard copy form, but could not demonstrate she had received or signed. This is not an action on the part of Ms Lummis that contributed to the situation giving rise to her personal grievance. In the event, Mr Shaw's own correspondence to Ms Lummis shows that he believed the applicable rules to be the 2018 rules. And, as I have already found, neither version of the rules stated that hats had to be worn when hair was dyed. At the investigation meeting, Mrs Shaw clarified that there was a separate and additional "Dress and Personal Standards Policy", which was implemented sometime during or after May 2020, which stated that "if your hair is coloured in such a way that is deemed to be unnatural, a disposable hair net and cap must be worn at all times…". There respondent was not able to show that Ms Lummis had seen or signed this policy either, and given that both Mr Shaw and Mrs Shaw were clear in their written and verbal evidence that they were relying on what they believed to be an unrecorded "common understanding" instead, it does not impact matters.

[72] None of these events show that Ms Lummis contributed to the situation giving rise to her personal grievance. Ms Lummis' claim for $7,000 in compensation for hurt and humiliation is reasonable, and is below the average range of such awards. I consider there is no reason she should be punished by any reduction of the amount she has claimed. Accordingly, I award Ms Lummis the sum of $7,000 in compensation for hurt and humiliation, to be paid without deduction.

[73] Ms Lummis has also claimed in her statement of problem for penalties to be awarded for breaches of the Act, and askes that a portion of these penalties be paid to her. The statement of problem does not state which section/s of the Act Ms Lummis says have been breached by the respondent. In terms of identifying the actions of the respondent which Ms Lummis says are in breach of the Act, Ms Lummis refers to the telephone meeting with Mrs Shaw, and says at paragraph 2(f)(3) of the statement of problem that she "was not provided with any prior warning to attend that meeting, what the meeting would be about and had her support person sent away."

[74] An award of penalties is different in character to an award of reimbursement. Penalties are punitive, and are designed to deter and punish. Penalties are only available where it has been demonstrated to a sufficient standard that a party has breached a statutory provision which provides for an award of penalties in respect of its breach. Without knowing what statutory provisions Ms Lummis says have been breached, I cannot assess either if a breach of statute occurred, or if penalties are an available remedy in respect of that breach. Equally importantly, it is not possible for the respondent to be fully and fairly informed of the claim against it, and the possible consequences of that claim, so that it may respond appropriately.

[75] In submissions filed after the investigation meeting, Ms Lummis' advocate identified that penalties were claimed in respect of what were said to be breaches of section 4 of the Act and section 103 of the Act.

[76] In respect of the claims for an award of penalties for breaches of section 103 of the Act, section 103 of the Act does not provide for penalty payments, so these claims must fail.

[77] In respect of the claims for an award of penalties for breaches of section 4 of the Act, the actions of the respondent that were said to be in breach of section 4 of the Act were:

a. An attempt to mislead Ms Lummis into believing she had signed a document that stated a specific rule regarding hair colours;
b. An attempt to claim that the house rules had been updated in 2020;
c. The claim by the respondent that there was a known understanding among staff that they could not dye their hair.

[78] I do not agree that these submissions fairly characterise the respondent's position. Mr Shaw did initially believe Ms Lummis had signed the 2020 house rules, but then realised there were no documents showing this. The respondent did update its house rules in 2020, even though it may not have fully promulgated them. And the respondent did not prohibit staff dying their hair. These are not actions in breach of the duty of good faith as that duty is defined in section 4 of the Act, but serve to illustrate the differences of opinion between the parties as to what occurred. It would also be unfair to allow an expansion of the applicant's pleadings after the investigation meeting had occurred. For these reasons, these claims must also fail.

[79] Accordingly, no penalties can be awarded in respect of this matter.

**Orders**

[80] The Shawz Group 2019 Limited is ordered to pay to Annelisa Lummis:

a. $122.85 gross in short pay;
b. $9.83 gross in holiday pay on this sum;
c. $2,457.00 gross in lost remuneration;
d. $196.56 gross in holiday pay on this sum;
e. $7,000 without deduction in compensation for hurt and humiliation.

**Costs**

[81] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[82] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[83] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[12]

Claire English
Member of the Employment Relations Authority

[12] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].