

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 653
3132135

BETWEEN	JACQUELINE FURNISS Applicant
AND	WAIKANAE BEACH MOTEL LIMITED First Respondent
AND	NICOLA EVANS Second Respondent
AND	RICK CIROLLI Third Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Matt Belesky, counsel for the Applicant Anthony Drake and Rosie Judd, counsel for the Respondent
Investigation Meeting:	7 and 8 July 2022
Submissions received:	26 and 27 July 2022 from Applicant 18 and 26 July 2022 from Respondent
Determination:	9 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jacqueline Furniss had been the motel manager at Waikanae Beach Motel from 17 September 2018. She was employed by new owners Waikanae Beach Motel Limited (WBML) for a short period from 2 October 2020 to 2 February 2021 when she was dismissed. Nicola Evans, managing director and co-owner of WBML, had discovered a Word document written

by Ms Furniss on the motel's computer. The Word document contained content that was offensive and personal to Ms Evans and Ms Furniss accepted that she should not have created the document but also said it was never intended to be seen by anyone.

[2] Ms Furniss says termination of her employment was however unjustified for a number of reasons, good faith obligations towards her were not met, a fair process was not followed, and she was disadvantaged by the actions of WBML and the directors. She seeks compensation and lost wages and wage arrears because she was not paid in accordance with the Minimum Wage Act 1983 (MWA).

[3] WBML says it had genuine concerns about the Word document and followed a fair and reasonable process after discovering it on the work computer. The content alluded to harm being caused to Ms Evans and WBML, and its directors say the decision to end the employment relationship was reasonable because of the key role the motel manager played in the business. Good faith breaches, breach of contract and claims of disadvantage are also denied but WBML accepted some liability for wage arrears under the MWA.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Ms Furniss, and her friends and support people, Rosemary Thum, and James and Lynda Blackburne and her sister Sandra Dobbie. Nicola Evans and Rick Cirolli, co-directors and owners of WBML both gave evidence on their own account and on behalf of WBML. All witnesses answered questions under oath or affirmation from me and the parties' representatives.

[5] Written submissions were timetabled after the investigation meeting and oral submissions were heard by Zoom on 26 July 2022.

[6] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has been considered.

[7] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Employment Relations Act 2000.

WBML and Ms Furniss

[8] Ms Furniss was initially employed by the previous motel owner. WBML took ownership of the motel on 2 October 2020. The sale and purchase agreement required all employees be offered employment on similar terms and conditions to their existing contracts. Ms Furniss was not offered new employment by WBML and continued working under the existing employment agreement. WBML were working towards an offer of employment to Ms Furniss with new terms and conditions but negotiations about terms and conditions quickly became difficult and were never concluded.

[9] No written employment agreement for the role existed until the previous owner asked Ms Furniss to draft one March 2020 when sale of the business was contemplated. It provided for living on site, having set office hours, and working 7 days per week with three days off consecutively in every 21-day period. It also had problematic provisions requiring Ms Furniss to make herself available after hours to deal with enquires and included the following:

- (a) reporting to the owners a salary of \$60,000.00 per annum.
- (b) office hours of work were 84 per week, to be performed between the hours of 7am to 9pm Monday to Sunday.
- (c) Ms Furniss's availability to answer the phone and the doorbell or be responsible for arranging a replacement if on days off or on leave.
- (d) availability to answer the phone and doorbell and be at reception to check in guests or meet guests' needs outside of office hours.
- (e) ability to leave the premises for up to 12 hours per week for her own personal time.
- (f) three days off consecutively in every 21-day period. During that time, she was to vacate the accommodation for the motel relief manager.
- (g) all the necessary training and supervision, support and resources and the standards required to be advised at performance review meetings.
- (h) the employment agreement could be varied with the agreement of both parties and any variation must be recorded in writing.

[10] Before they took over the motel Ms Evans and Mr Cirolli met with Ms Furniss. They were looking forward to having her assist them because they had heard good things about her work from the agent and she came highly recommended by the previous owner. They say they told her they wanted to make changes to all the employment agreements but would deal with the cleaners' contracts first.

[11] After taking ownership they took advice from an HR consultant and were advised a new proposed agreement for the motel manager position would take a little longer, presumably because of the complexities around availability to do after hours work. When the new contract was ready Ms Evans sent it to Ms Furniss in an email and asked to meet with her the next day. Ms Furniss says she was completely taken aback when she received that email. She said it was only in mid-October, and out of the blue, when Ms Evans told her they were looking at putting in place a new employment contract for her and all the staff.

[12] There were discussions about fatigue and Ms Furniss also talked to Ms Evans about needing more time off during the week for personal time, for example, to attend the gym. Ms Furniss had had a previous arrangement for cover during the week, but it came to an end just after WBML took over the business.

[13] Both parties accepted fatigue was an issue with the way the role was structured. Ms Evans said they were very concerned about that, and the new agreement was designed to reduce fatigue. WBML proposed a six-day working week where Ms Furniss only had to make herself available to work from 8:00am to 8:00pm instead of the previous the office hours of 7:00am to 9:00pm. There was an expectation she be available to deal with out of hours emergencies 24 hours a day during the work week. The following was also included:

- (a) the ability to be off site so long as the motel phone was forwarded to a cell phone.
- (b) the day off each week was by mutual agreement but could not be on a weekend or a public holiday and days off were not able to be banked.
- (c) flexibility to allow personal time and to run errands for the motel within business hours provided she was available at the busy times (check in and check out times) and available by phone and able to return quickly.
- (d) accommodation was provided which must be used.

- (e) a restraint of trade clause.
- (f) compensation for flexibility was included in the salary package which included the accommodation.

[14] The first meeting to discuss Ms Evan's proposed new employment agreement was postponed and Ms Furniss sent her feedback and comments via email. Ms Furniss wanted a pay rise and a five-day working week, with one of her days off on a weekend day, and the ability to bank her days off so she could take them in a block of three days. This was essentially what the existing arrangement had been. She was happy to live in the accommodation and be available on call, and she suggested they keep the longer office hours, rather than reducing them.

[15] They eventually met on 9 November to discuss Ms Furniss' feedback. The sticking point for Ms Furniss was the ability to take her days off in a block including one or more weekend days. This suited her best and it was what she really wanted so that she could spend time with family and have a restorative break. Her feedback again included her wish to reduce her workdays to five days a week, having at least one day off on a weekend day, banking her days off, having Christmas off on alternate years and an increase in salary from \$60,000 to \$75,000 per annum.

[16] Ms Furniss also asked for the restraint of trade clause to be removed and suggested changes to the job description because there had been a reduction in the number of tasks.

[17] None of these suggestions were acceptable to WBML and by this time, Ms Evans said she was becoming frustrated with Ms Furniss and concerned they were not on the same page. Ms Evans emailed Ms Furniss recording the content of their discussions, noting they had discussed the reasons for the proposals several times including why she should have a day off each week. Working 18 days without a day off was not acceptable to WBML. Ms Evans recorded the timeline of events, explained the health and safety risk of banking days off was unacceptable and reiterated a key box had been installed (so late check ins no longer required the manager to be present).

[18] This was an active step taken by WBML to reduce the demand on Ms Furniss outside of the 12-hour workday and was taken to address the concerns Ms Furniss had raised about fatigue. WBML also offered a pay increase to another employee to cover the office for 12

hours per week so Ms Furniss could have some time away from the motel. WBML notes that this was a cost that was not apparent to it when it purchased the business.

[19] Ms Evans attached the final version of the proposal to her email and stated that if Ms Furniss decided not to accept that offer, then employment had ended by way of resignation. Ms Furniss would be required to work out her six-week notice period and her accrued annual leave would be paid to her in her final pay.

[20] Ms Furniss was shocked at the approach in the email because she thought they were in the midst of negotiations. Nonetheless she applied for mediation and recorded her willingness to work with WBML and the co-directors to resolve the issues and reminded them she was working under the previous contract.

[21] Then shortly after, on 7 December, seven disciplinary allegations were emailed to Ms Furniss. The allegations related to operational matters, plus a failure by Ms Furniss to follow instructions from Ms Evans about emergency housing at the motel, and a concern she had been unable to account for approximately \$50.00 per week in coins from the washing machines and dryers.

[22] Ms Furniss had also reported to a local newspaper that the Waikanae Beach Motel liked to support emergency housing despite Ms Evans telling Ms Furniss they wished to discontinue emergency housing. There was also an allegation about not using the accommodation booking software correctly.

[23] The mediation date was vacated because of the conduct allegations, and nothing further happened other than communications between the parties representatives until 22 December when Ms Evans issued an instruction to Ms Furniss to work only six days per week, 12 hours per day between the hours of 8.00am and 8.00pm and take her day off on a weekday.

[24] On the same day, Ms Evans sent a separate email proposing to hold the disciplinary meeting on 6 January 2021 to receive Ms Furniss's responses to the conduct allegations. It was also conveyed in clear terms that the matters were serious, and Ms Furniss should appreciate that her employment could be in jeopardy.

[25] Ms Furniss became unwell and was medically unfit for work from 23 December to 11 January 2021. There was some confusion despite both parties having legal representation that

led Ms Furniss to send an email directly to Mr Drake (who was by that time acting for the respondents) on 6 January, saying she was on sick leave but if the disciplinary meeting was to proceed, she was attending under duress.

[26] Ms Furniss remained unwell and further medical certificates were provided. Sick leave was discussed between the representatives and then on 20 January 2021, Ms Furniss sent a text to Ms Evans saying although her medical certificate said she was unfit to attend work until 2 February, she intended to return on 25 January.

[27] Ms Evans responded immediately saying return to work was to be on 2 February in accordance with the medical certificate. She said she had hired a person to provide cover until 2 February and altered her own holiday plans and added:

Also during your absence, I carried out your duties so I now have a good working understanding of the actual demands of the role over the busiest time of the year. I have found a number of discrepancies in the hours of your work (and actual availability) and accounts. In addition, there are questions about compliance with instructions and non-listing of available rooms. These will be detailed shortly and will be matters that I will want to discuss with you when we meet. Now that I know of your availability, I will send out a formal invitation to a disciplinary meeting.

[28] The representatives corresponded about several issues and Ms Furniss's representative conveyed Ms Furniss would respond in writing to the allegations because a meeting to discuss these was unnecessary in his view. He sought confirmation of the additional concerns Ms Evans referred to in her email on 20 January 2021.

[29] Then on 22 January a further concern was raised about a completely new issue. A Word document had been found in WBML's computer system and WBML said the content of the document showed Ms Furniss harboured deep seated views against Ms Evans and wished her harm. It was considered by WBML to be an extremely serious situation which undermined the employment relationship.

[30] The email concluded:

Our client seeks Ms Furniss's urgent reply to this new allegation by no later than the close of business on Monday 25 January 2021. She can provide a written explanation through you. Ms Furniss needs to appreciate if this allegation is substantiated, then it may amount to grounds for summary termination of her employment.

[31] Ms Furniss responded by email through her lawyer. In evidence Ms Furniss described the note she wrote on the computer as “venting” and a way to deal with the stress and pressure she was feeling. She never intended for anyone to read it. The submissions on her behalf described it as a metaphor and alleged a breach of privacy by WBML by accessing that folder on the work computer.

[32] WBML replied saying it did not accept Ms Furniss’s explanation and it considered the allegation to be proven. By way of explanation WBML said it was irrelevant whether any actual harm was intended. What was more important was the remarks were unguarded and showed animosity towards Ms Evans and it had undermined the essential element of trust and confidence necessary in the employment relationship.

[33] WBML denied a breach of privacy because the document was saved on the work computer and in a folder with the word “contract” in the name. Ms Furniss was given an opportunity to respond by 28 January to the proposed outcome that she be dismissed. Return to work on 2 February was now subject to the outcome of the Word document matter, and the other matters were paused.

[34] In the few days before Ms Furniss was due back at work no formal outcome regarding the Word document was sent to her although there was correspondence between the representatives. She went to work on the 2 February but was met by Ms Evans who told her to speak to her lawyer. Later the same day she received a notice of termination and a separate letter setting out the findings in relation to the seven disciplinary allegations.

[35] The notice of termination simply recorded that WBML had come to the finding that the allegation was proven and having considered her response to the proposed outcome, her employment was terminated. The basis for termination was that her role was a key role in the business and required the utmost trust and confidence.

[36] Ms Furniss raised a personal grievance on 4 February 2021.

Dismissal for misconduct

[37] The Authority is asked to determine whether WBML was justified in the decision it made and the actions it took to dismiss Ms Furniss. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test, the Authority does not determine justification by considering what it may have done in the circumstances. It is required under

the test to consider on an objective basis whether the actions of WBML and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[38] This includes whether the allegations against Ms Furniss were sufficiently investigated, the concerns raised with her, whether she had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered by WBML before dismissal.

[39] Ms Furniss said the decision to dismiss her because of the content of the Word document was unfair and unreasonable because the document was never sent, it was a metaphor, and as such she did not genuinely intend harm be caused to Ms Evans. It was borne out of frustration and stress arising from the way in which the contract negotiations had broken down and fear about losing her job.

[40] On the other hand, WBML says the fact it was created shows unguarded animosity towards one of WBML's co-directors and because the motel manager role is key to the running of the business, all necessary trust and confidence in Ms Furniss and the employment relationship was gone.

What was the misconduct and was dismissal warranted in all the circumstances?

[41] The misconduct Ms Furniss was dismissed for was limited to the Word document on the WBML's computer. Although not in the letter of termination correspondence between the parties explained that Ms Furniss was dismissed because she left a communication on WBML's computer.

[42] Normally dismissals are preceded by a warning unless the misconduct is so serious that dismissal can be justified by one incident. While on its face, the reference to drowning in the note written by Ms Furniss did elevate the seriousness, the fact the document had not been sent, and was described by Ms Furniss as "venting" and a way to deal with the stress and pressure she was feeling as a result of how the contract negotiations were proceeding, was also relevant. These factors could have been balanced against the seriousness of the content of the note and would likely have lessened the seriousness of the conduct had they been taken into account.

[43] By this stage, WBML had indicated the seven disciplinary allegations against her were considered to be serious, new allegations were proposed and dismissal was a possibility so it cannot be disputed Ms Furniss was under significant pressure at the time she wrote the note.

[44] WBML provided very little detail about why it did not accept Ms Furniss' explanation about the note other than to explain the importance of the role in the business and that the content severely undermined trust and confidence in the employment relationship.

[45] Under s103A of the Act, WBML was required to genuinely consider the employee's explanation but with no reasons provided for discounting Ms Furniss' explanation it has the appearance of failing to properly consider her explanation. I accept that on their face the words could be taken to have a sinister meaning and can easily be taken personally, but the context was relevant. Taking into account that acknowledging and addressing the inherent inequality of power in employment relationships is an object of the Act,¹ WBML could have been expected to provide reasons as to why it did not accept or had discounted any of the things Ms Furniss put forward. It was particularly relevant that the document was not sent, and that it be considered against the background which was that Ms Furniss' employment and accommodation were on the line.

The other disciplinary allegations

[46] WBML described the other disciplinary allegations as concerns regarding management of the motel and failure to follow lawful instructions.

[47] Ms Evans had set about making significant changes and as Ms Furniss had been autonomously running the motel in accordance with a high trust model adopted by the previous owner, it would have been reasonable to allow more time for the parties to work through some of the issues before characterising failure to follow instructions as disciplinary matters.

[48] Failure to follow instructions does not necessarily justify dismissal and even less likely if they occur over a short period of new ownership. The theft allegation and Ms Furniss speaking to the media would appear to be more serious from WBML's perspective. While I can understand concern about the media statement, Ms Furniss' evidence was she was unaware

¹ Employment Relations Act 2000, s 3.

of the change in direction and had spoken to the media previously given she had almost complete autonomy.

Failing to account for the coins

[49] With regard to theft allegation regarding the coins from the washing machines, the evidence at the investigation meeting from the co-directors clearly indicated they believed there had been dishonesty despite the matter being reported to Police and no further action being taken by Police. Ms Furniss had not been able to account for the missing coins and in the absence of an explanation they believed she was responsible and it is likely this played a role in the decision to dismiss Ms Furniss. That is in essence an allegation of theft.

[50] The discovery of the Word document was the final straw for WBML as the transition to ownership was not tracking smoothly and there was increasing frustration with Ms Furniss, including the theft allegation. The ultimatum in WBML's email to Ms Furniss requiring her to agree to the new offer of employment as proposed by WBML, the noticeable change in tone in Ms Evans' email to Ms Furniss on 24 November 2020 and the fact there was an unresolved theft allegation were all evidence of an increasingly jaundiced view that was building about Ms Furniss.

[51] Although the termination was only in relation to the Word document, I am satisfied other matters were taken into account and considered by WBML at the time it made the decision to terminate Ms Furniss's employment. This means WBML did not act as a fair and reasonable employer, in that it considered matters additional to those it said it was considering. It also did not genuinely consider or provide reasons for not accepting Ms Furniss's responses and had it done so WBML might have reached a different conclusion that dismissal was not warranted in all the circumstances.

Procedure

[52] Overall the procedure followed by WBML when it investigated the Word document complied with the requirements of s 103A of the Act, other than acting hastily. Given the nature of the concern about the Word document there was no need for further investigation but there was a requirement to genuinely consider Ms Furniss' explanation, particularly because it was the only reason given for her dismissal but I have already considered that in terms of the substantive decision making.

[53] In these circumstances, the dismissal for misconduct in relation to the Word document is not justified.

Disadvantage and breach of contract

[54] A disadvantage was claimed relating to the ultimatum email on 24 November 2020 but I consider this to have been so connected to the dismissal, because it was part of the factual picture that led to the breakdown in negotiations about the employment agreement, it has not been addressed as a separate problem. A second disadvantage was claimed for refusing to allow Ms Furniss to return to work or to pay her from 21 January to 2 February 2021, has been partially resolved by way of payment for sick leave.

[55] To the extent Ms Furniss was disadvantaged by not being allowed to return to work, the fact a medical certificate stated Ms Furniss was unfit to for work until the 2 February 2021 means WBML actions were justified.

[56] Breach of contract was listed as a problem in the statement of problem but it is not referred to in the final submissions on behalf of Ms Furniss so I have not considered it separately.

Good faith breaches

[57] A fair and reasonable employer would not have sharply brought contract negotiations to a halt with an email setting out the next steps as being if you do not agree, then your resignation is implied. In the course of attempting to reach agreement as to a better way to structure the role, sending such an email fails to meet the requirement to be active and constructive in establishing and maintaining a productive employment relationship and to be responsive and communicative.

[58] However, WBLM was alive to potential and real issues for both parties caused by the long working hours from the way in which the role had been structured. Ms Furniss raised fatigue as an issue of concern to her, but then resisted WBML's attempts to make changes to address her concerns. In these circumstances I do not find a breach of good faith by WBML and note the breakdown in the relationship has been addressed in my finding that there has been an unjustified dismissal.

Minimum wage claim

[59] Ms Furniss says she was not paid at least the applicable minimum wage for all the hours she worked and calculates she is owed \$19,467.00 in wage arrears for breaches of the Minimum Wage Act 1983 (MWA) on the basis that she was working 24 hours a day.

[60] WBML accepts it has some liability in this regard but denies that Ms Furniss is owed that amount. WBML proposed three separate ways of calculating what might be owed. The first was based on zero hours worked after hours, the second two hours of work after hours and the third, one hour. Based on an hour of work afterhours, WBML says it owes Ms Furniss \$1,902.45 in wage arrears.

[61] The first point to note is that some of WBML's calculations are based on a 10-hour working day proposed in the new terms and conditions of employment that were never agreed to. Ms Furniss worked for the first four weeks in accordance with the original agreement, and then she trialled aspects of the new proposal such as having 12 hours off per week for four weeks before stating she was reverting to the terms and conditions in the original employment agreement. Her email setting this out and was not responded to by WBML until WBML issued an instruction that she was to work 8.00am to 8.00pm, 6 days per week and take one day off at the weekend with 12 hours off per week for personal time but that was not until 22 December and Ms Furniss was on sick leave after that date.

[62] Despite the issues with an employer's unilateral decision to change the hours of work and days off and in the midst of contract negotiations, both parties agreed there were fatigue issues because of how the role had been structured. This would have placed obligations on WBML under the Health and Safety at Work Act 2015, particularly because Ms Furniss had raised those issues with Ms Evans which means it is arguable that directive was lawful.

[63] The second point to note is that accommodation was provided to Ms Furniss and this was not included in the parties wage arrears calculations. In the absence of any further information the MWA provides for no more than 15 per-cent reductions in wages for board² and I consider it is appropriate the accommodation is taken into account for the purposes of calculating any wage arrears resulting from failure to pay the minimum wage.

² Minimum Wage Act, s7.

How many hours did Ms Furniss work?

[64] In terms of afterhours work, under new ownership once the lockbox was installed and check in information was updated the only requirement was to attend to emergencies or extraordinary matters. It is agreed this constituted work but the question is how many hours of work did it add to the contracted hours she was providing.

[65] Ms Furniss lived at the motel but there were no set tasks that had to be undertaken outside of office hours. The requirement was to be available should a guest require attention but the tasks were administrative and centred around checking in and out and answering general questions if someone came to the office or the phone rang. The evidence was that late check ins, while they had been a feature of out of hours work with the previous owner, were not a feature under the new ownership and it is likely that the new check in information would have reduced after hours questions.

[66] With reference to the guidance in *Idea Services v Dickson*³ Ms Furniss lived on site and was able to leave the motel afterhours. Her time was her own unless she had to deal with an incident. She could and did have visitors and treated the motel like her home. Evidence of that was having her family stay with her at the motel.

[67] The tasks she had to be available for were transactional in nature. Motel guests can be differentiated from some of the cases involving sleep overs and night shifts in health care or residential care settings, because motel guests are not reliant on the motel to provide health care or assist in their tasks of daily living. This case can be further distinguished from other cases involving motel and campground managers⁴ because there were no set tasks required to be completed after hours and the changes made by WBML had redirected routine matters to opening hours leaving only a handful of extraordinary incidents for Ms Furniss to be available to attend to. There is no doubt the employer benefited from Ms Furniss's availability.

[68] In light of that and in the absence of any accurate records I do not consider it would be correct to characterise that Ms Furniss was at work for 24 hour each day of work. There was one occasion where there was a fight in the car park requiring a response from Ms Furniss and the diary was not an accurate record of all work undertaken after hours but it shows a handful

³ *Idea Services v Dickson* [2011] NZCA 14.

⁴ *Jenny Christall v KLJ Limited* [2019] NZERA 674 and *Keith Hill v Peter Shand* [2014] NZERA 66.

of routine check in queries for example when someone had not read the information about the lock box and an occasion where someone could not tune in their TV.

[69] WBML accepts some work was undertaken outside of the opening hours and agrees it benefitted from Ms Furniss's availability but WBML's best estimate is that there was one hour of work per day outside of the opening hours.

[70] If I take the most favourable construction of two hours of afterhours work each day, and deduct 15 per-cent for board, the amount Ms Furniss was paid is above the applicable Minimum Wage Rate of \$18.90. Between 2 October and 23 December 2020 there are eleven weeks and five days. Ms Furniss worked 86 hours (84 + 2) for the first 4 weeks, and 62 hours (60 + 2) for the next 4 weeks while she was trialling WBML's proposal of six 10-hour days. I have not deducted the 12 hours a week personal time away from work or any leave.

Period of employment	Wages due at applicable Minimum Wage Rate (\$18.90)	Less 15% board	Total
86 hours for 4 weeks	\$1,625.40 x 4 = \$6501.60	less \$975.24	\$5,526.36
62 hours for 4 weeks	\$1,171.80 x 4 = \$4,687.20	less \$703.08	\$3,984.12
86 hours for 2 weeks	\$1,625.40 x 2 = \$3,250.80	less \$487.62	\$2,763.18
			\$12,273.86

[71] Ms Furniss's gross weekly wage was \$1,153.85 with some slight unexplained variations at the end of a dollar or two. For the period 2 October to 23 December, Ms Furniss received \$13,8651.10 in wages (gross) which means there are no issues with Ms Furniss being paid below the applicable Minimum Wage Rate.

Remedies

[72] Ms Furniss has been successful in bringing her claim for unjustified dismissal and is entitled an assessment of remedies for her personal grievance.

Compensation for humiliation, loss of dignity and injury to feelings

[73] Ms Furniss' evidence established she suffered injury to her feelings from the breakdown in contract negotiations and this was particularly acute after receiving Ms Evan's email bringing the contract negotiations to a halt and the later unilateral instruction to change her work hours and days off. Ms Furniss, her sister and her friends gave evidence of the distress Ms Furniss was feeling. Her sister's evidence about what she saw and observed in Ms Furniss on 23 December and how that led her to arrange an urgent medical appointment for Ms Furniss means I accept the situation impacted on Ms Furniss' health. Her general practitioner issued more than one medical certificate for work related stress.

[74] Considering the distress experienced by Ms Furniss and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act was \$20,000.00. This is the amount WBML must pay Ms Furniss within 28 days of this determination as compensation for humiliation, loss of dignity and injury to her feelings.

Lost wages

[75] The Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance.

[76] Reimbursement of lost wages are sought, and I accept that reimbursement is appropriate in circumstances where there has been an unjustified dismissal. Ms Furniss was able to secure new employment but earned less than what she would have been paid at WBML. The amount she would have earned at WBML was \$15,000.00 (gross). Deducting her gross earnings from the YMCA (\$2,782.00) and at her cleaning job (\$354.75), lost wages over a three-month period amount to \$11,864.00. I therefore consider reimbursement in the amount of \$11,864.00 would be appropriate.⁵

⁵ Employment Relations Act 2000, s 123(1)(b) and s 128(2).

Contributory conduct

[77] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

[78] In this case three aspects of Ms Furniss' conduct contributed to the situation. Firstly, her approach to the contract negotiations failed to recognise her employer was acting reasonably in seeking to remedy the amount of time she was expected to be at "work" (however this was characterised) and a key part of this was the number of hours in a day and days in a row a motel manager could safely and reasonably work. The failure to reach agreement quickly, in part lies with both parties, and the issues that arose because of this were not an entirely one-sided story but WBML's expectation of the timeframe in which this could be achieved was also mistaken.

[79] Secondly, the Word document was inappropriate. Ms Evans and Mr Cirolli were right to be concerned and offended about the content of the Word document. It was taken personally and on reading the content, it is easy to understand why that is so.

[80] WBML also had concerns about Ms Furniss not following instructions which in essence came about because Ms Furniss was slow to realise the change in ownership meant there was a change in the amount of autonomy she previously had in her role. However, I was satisfied after hearing Ms Furniss' responses this was also not a one-sided conversation and I consider the relationship breakdown to have been unfortunate because it was unlikely these were necessarily unsurmountable issues on their own and could have been worked through with more time and some reflection from both parties. Because of that it would not be fair to ascribe all responsibility for the concerns about operational matters and failures to follow Ms Evans' instructions to Ms Furniss.

[81] However, the creation of the Word document is a matter that was causative of the outcome and sufficiently blameworthy to require a reduction of the remedies awarded for her grievance. Accordingly, a reduction in remedies is required of twenty-five per-cent.⁶

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Orders

[82] Waikanae Beach Motel Limited is ordered to make the following payments to Jacqueline Furniss:

- (a) Lost wages amounting to \$11,864.00 under s 123(1)(b) of the Act; and
- (b) The sum of \$15,000.00⁷ under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Ms Furniss because of her unjustified dismissal.

Costs

[83] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Furniss may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the Respondents 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.

[84] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Sarah Kennedy
Member of the Employment Relations Authority

⁷ \$20,000.00 less 25 per-cent

⁸ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1