

Attention is drawn to the
order prohibiting publication
of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 64
5411132

BETWEEN VANESSA KENNEDY
Applicant

A N D ADVANCED HAIR STUDIO
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Jeff Goldstein, Counsel for Applicant
Anneke Reid, Counsel for Respondent

Investigation Meeting: 24 and 25 March 2014 at Christchurch

Submissions Received: 25 March and 4 April 2014 from Applicant
25 March and 4 April 2014 from Respondent

Date of Determination: 22 April 2014

DETERMINATION OF THE AUTHORITY

- A. The Applicant was unjustifiably dismissed.**
- B. Costs are reserved**

Prohibition from publication

[1] I prohibit from publication any details identifying the names of clients of the respondent, including the gentleman who gave evidence to the Authority pursuant to a witness summons, who shall be identified in the determination as JW.

Employment relationship problem

[2] Ms Kennedy complains that she was unjustifiably dismissed by the respondent, Advanced Hair Studio Limited (AHS), on 14 January 2013 and seeks lost



wages from that date until the date of the investigation meeting, together with compensation for humiliation, loss of dignity and injury to her feelings. She also seeks a penalty to be imposed upon the respondent for a breach of good faith and a failure to provide wages and time records.

[3] The respondent denies that Ms Kennedy was unjustifiably dismissed. It originally counterclaimed against Ms Kennedy, seeking damages for the loss of four clients, and further sums in respect of two hairpieces allegedly stolen by Ms Kennedy and sold privately to the respondent's clients, but withdrew that counterclaim at the start of the second day of the Authority's investigation meeting. The respondent seeks a penalty to be imposed against Ms Kennedy for breaching her duty of good faith owed to the respondent during her employment.

Brief account of events leading to the dismissal

[4] The respondent is a worldwide business providing hair loss services, such as hair replacement and hair regeneration services to the general public. The New Zealand based studios are administered by an office in Australia. Ms Kennedy is a hairstylist who commenced working in the Christchurch branch of the respondent in 2005.

[5] Ms Kennedy was originally employed pursuant to an employment agreement that she signed on 22 August 2005. On the same date she also signed a document entitled *Deed of Agreement Confidentiality, Intellectual Property Ownership and Restraint*.

[6] On 2 November 2011, Ms Kennedy resigned, and her last day of full time employment was 24 December 2011. Ms Kennedy subsequently entered into a new arrangement with the respondent pursuant to which she commenced part-time employment with it with effect from 11 January 2012, working 10 hours per week.

[7] Although Ms Kennedy confirmed by email on 29 December 2011 that she would sign and scan back her new letter of offer, employment agreement and deed of confidentiality, she did not do so. It is her evidence that she refused to sign the employment agreement *because of the onerous clauses relating to the restrictions on my future employment*.

[8] It is the respondent's evidence that, on 10 December 2012, a member of staff working in the Christchurch studio contacted a Melbourne based security advisor,

Mr Tully, a contractor to the respondent company, to report information that she said a client (JW) had told her. This information was that Ms Kennedy had sold him a hairpiece for \$1,500 cash around 12 months previously. The hairpiece had belonged to another client, who had returned it, and Ms Kennedy had told JW that he was not to mention the sale to the studio manager. The staff member told Mr Tully that JW had also told her that Ms Kennedy had offered to perform refusions for him privately, for \$50 each. A refusion is the process of cleaning a hair piece, trimming the client's own hair and reattaching the hair piece. Refusions occur every 4 to 6 weeks and, at that time, the respondent had been charging \$74.95 for the service.

[9] The staff member also told Mr Tully that the studio manager had previously caught Ms Kennedy taking adhesive products, used to attach a hair system to a client's head, from the Christchurch studio. Mr Tully's evidence was that the manager at the time had not advised him or anyone else at the respondent's head office about this, as far as he was aware.

[10] The respondent carried out an internal analysis on the basis of this information and, while finding that the Christchurch studio's purchases of adhesive products had increased slightly, between April and December 2012 the revenue for refusions had dropped by approximately \$6,000 compared to the previous year, and the income from the sale of accessories had decreased by \$3,300. The respondent estimates that this pointed to the possibility that Ms Kennedy was performing refusions on approximately 12 AHS clients outside of the Christchurch studio.

[11] The respondent also checked the transaction records for JW and found that there was no record of \$1,500 being paid into the respondent company's accounts from JW at around the time when the transaction was alleged to have occurred.

[12] As a result of this information, Mr Tully contacted the Christchurch branch of the New Zealand Police on 11 December 2012, and prepared a formal written statement.

[13] The client JW then wrote a letter at the staff member's request which confirmed that he had given \$1,500 to Ms Kennedy for a hair piece belonging to another client although, in his oral evidence to the Authority, JW said it had been \$1,200. JW complained in the letter that, around three months after buying the hair piece, the hair started coming out but he was told by Ms Kennedy that he could not

get it fixed under warranty as he had not paid the full amount. The respondent's evidence to the Authority was unclear as to whether the letter was available to the respondent prior to it reporting the matter to the police or afterwards, although I infer it was afterwards, given that Mr Tully reported the matter to the police the day after he says he learned of the concerns from the staff member.

[14] Mr Tully discussed with the CEO of the respondent, Stephen Jeffery, the information he had been given and they decided that Mr Tully should meet with Ms Kennedy *with a view to terminating her employment due to our suspicions*. Mr Tully's evidence is that he and Mr Jeffrey decided they would not mention JW's name to Ms Kennedy and that, instead, Mr Tully would tell her that he had been told that she had been selling AHS products to clients for cash and performing refusions on clients for cash outside of the Christchurch studio, failing to process the sales through the AHS finance system and keeping the cash for her own personal gain.

[15] Mr Tully flew to Christchurch on Sunday 13 January, and interviewed JW, who agreed to make a statutory declaration confirming his evidence. On the morning of 14 January 2013 Mr Tully met with Ms Kennedy. Mr Tully's evidence is that he told Ms Kennedy that the respondent had been informed that she had been selling AHS products to clients for cash and performing refusions on clients outside the Christchurch studio, charging the clients cash and keeping the cash for herself. His evidence is that, in response, Ms Kennedy *admitted that she had taken some adhesives from the Christchurch studio and that she had serviced clients from her own home using those adhesives and had not put the sales through the Short Cuts [finance] system*.

[16] Mr Tully's evidence is that, as Ms Kennedy had admitted to stealing from AHS, he had no choice but to terminate her employment immediately. He handed her a pre-prepared letter advising her of her termination and then handed her a letter with the heading *Acknowledgement and Undertakings*. The wording of this document is as follows:

ACKNOWLEDGEMENT & UNDERTAKINGS

I, Vanessa Kennedy, have read and understand all the terms of the letter dated 14 January 2013 confirming the summary termination of my employment with Advanced Hair Studio Limited (AHS) and:

- (a) Confirm that I acknowledge my on-going obligations of confidentiality, nondisclosure, restraint and non-solicitation that I owe to AHS and which survive the*

termination of my employment, contained both within the Deed of Agreement of Confidentiality, intellectual Property Ownership and Restraint and at common law. I undertake that I will comply with the same.

- (b) *Confirm and undertake that I have returned all AHS property that was in my possession, custody or control, and that I no longer hold in my possession, custody or control any such property.*
- (c) *Undertake that I will not have any contact with AHS clients, including current and former AHS clients, and in particular, that I will neither accept phone calls from AHS clients, nor make phone calls to AHS clients, nor will I reply to or initiate text message conversations with AHS clients.*
- (d) *Undertake that the list of current and former AHS clients below is a complete list of all AHS clients who I have provided services to where AHS has not financially gained from such services, or who I have, without any authority, giving away AHS products to or sold AHS products to and kept the proceeds of those products for my own personal gain.*

[17] Under this text were two columns headed *Client Name* and *Client Contact*. Under the column *Client Name* Ms Kennedy had written the names of four clients of the respondent, not including JW's name. She then printed her name, signed the document and dated it 14 January 2013.

[18] Mr Tully also gave Ms Kennedy a trespass notice, banning her from the premises of the Christchurch studio. They then went off together to a café, and spoke for around 90 minutes.

[19] Mr Tully's evidence was that the discussion with Ms Kennedy was amicable and civil, and that she appeared to fully understand and accept the respondent's reasons for dismissing her.

[20] Ms Kennedy's evidence of the meeting is that she felt ambushed but that she *did agree that over the 7.5 years I had been asked to help four clients in emergency cases outside of work hours. These were all approved by the manager and I was not paid by either the client or the company.* Ms Kennedy's oral evidence to the Authority was that she did not admit she had taken adhesives, and that Mr Tully had never mentioned adhesives to her.

[21] Ms Kennedy says that she quickly read the documents that Mr Tully gave to her and that one of the documents consisted of around five to six pages which contained a list of accusations. She says she crossed lines through the paragraphs in that document that she did not agree with. This is denied by Mr Tully, who says he did not give her such a document and that she did not cross anything out in his presence.

[22] It appears that the document Ms Kennedy refers to may have been a script prepared by the respondent's lawyers for Mr Tully, which would have contained legally privileged information, unless the respondent waived privilege in it by disclosing it to Ms Kennedy during the meeting. In my view, it is likely that Ms Kennedy is mistaken about seeing this document during the meeting with Mr Tully, as I accept the evidence of the respondent that it did not wish to put specific accusations to Ms Kennedy, but wanted to *keep the allegations more general and see if she admitted to anything*. To have shown her a five page document consisting of accusations would have been inconsistent with that approach. It is likely that she saw this document after her dismissal, perhaps during the mediation process.

[23] Ms Kennedy's explanation in relation to the allegation by JW is that she simply brokered a deal between JW and another client (Michael) who wanted to sell his hair piece. She said that JW paid \$800 cash directly to Michael on 10 April 2010. This is denied by JW, who gave evidence to the Authority, and who says that he saw no one else in the studio when he handed Ms Kennedy the cash.

[24] On 14 January 2014 JW swore the statutory declaration that he had agreed to make, stating that Ms Kennedy had told him that he could purchase the hair piece for \$1,500 and that he would have to pay the cash to her directly. He said that he did not receive any AHS paperwork from her nor did she issue him with a receipt. In the statutory declaration JW also states that, prior to purchasing the hair piece from Ms Kennedy, she had talked to him on several occasions about working from her or her girlfriend's home address and servicing AHS clients. He stated that Ms Kennedy had talked about *getting enough AHS clients to the point where she could work from home earning a steady income*. He states that she also offered him the opportunity to have the refusions conducted at her place for \$50 per visit. His evidence to the Authority was that he did not take Ms Kennedy up on this offer.

[25] After her dismissal, Ms Kennedy was arrested by the Christchurch police and charges brought against her for theft as a servant and attempting to pervert the course of justice. This latter charge related to an allegation that, after her dismissal, she had telephoned JW and attempted to persuade him to change his story.

[26] In June 2013 the Crown decided that it was not in the interests of justice overall to proceed to filing an indictment against Ms Kennedy as, although they assessed the matter as *marginally satisfying the test for evidential sufficiency*, the offending alleged was at a very low level in terms of value and culpability, any penalty imposed was likely to be very small or nominal and it was not an appropriate use of limited resources.

The key issue to be determined

[27] The respondent's case is that Ms Kennedy admitted taking and servicing clients at her home without passing on the income from those jobs to the respondent. They say that such an admission gave them the right to terminate her employment without having to adhere to the usual disciplinary process.

[28] Whether or not Ms Kennedy made any such admission, then it is clear, without any further inquiry, that the respondent failed to follow a fair process prior to dismissal, even on its own evidence. Specifically, the respondent did not :

- a. warn Ms Kennedy of the concerns which it wished to discuss with her in advance of the meeting with Mr Tully;
- b. specify the concerns at the investigatory meeting;
- c. show Ms Kennedy any documents or other materials which it was relying on, which supported those concerns;
- d. disclose to Ms Kennedy the source of its concerns (the staff member and JW);
- e. warn Ms Kennedy in advance that the investigatory meeting could result in her dismissal;
- f. inform Ms Kennedy of the right to have a support person or representative at the meeting; or

- g. give Ms Kennedy an opportunity to comment on the proposed termination of employment prior to it being carried out.

[29] Such fundamental flaws would render the dismissal unjustifiable, all other things being equal.

[30] In *Murphy and Routhan t/a Enzo's Pizza v. van Beek* [1998] 2 ERNZ 607, the Employment Court held that:

....if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy.

[31] The issue to determine in this matter is whether Ms Kennedy did freely admit conduct amounting to misconduct during her employment and, if so, whether that admission gave the respondent the right to summarily dismiss her despite the procedural flaws in its investigation process.

Was there an admission by Ms Kennedy of conduct amounting to misconduct?

[32] Mr Jeffery said in evidence that even what Ms Kennedy now admits doing, namely servicing four clients as an emergency and not charging them, was an admission that she had stolen from the company as such work should have been done in the studio and paid for. By doing what she had done, she had deprived the company of income. The trouble with this analysis is that Ms Kennedy said that she had done this emergency work with the knowledge of her managers. Also, she said that she had not been paid for it, either by the company or the clients; in such a case, that can hardly be seen as stealing. At best it would be depriving the company of the opportunity for earning income.

[33] When questioned by the Authority, Ms Kennedy says she had trimmed the hair of one of the four clients she had listed, and that he was an acquaintance. It would appear that this work, at least, was not carried out on the orders, or with the knowledge of a manager.

[34] If I were to accept Ms Kennedy's evidence, that she had admitted to nothing more than servicing four clients as an emergency without charging them, on the orders (in three cases) of her manager of the time, I would not be prepared to find that

such admitted conduct amounted to conduct that would satisfy the test set out in s.103A(2) of the Employment Relations Act 2000 (the Act):

(2) The test is 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.

[35] Largely, this is because Ms Kennedy says she was doing only what her managers told her to do. The one case where I believe she has since admitted she acted without such an instruction was trivial (trimming the hair of her acquaintance prior to a party).

[36] Ms Kennedy's evidence of what she admitted to is markedly at odds with what Mr Tully says she admitted to. However, when I examine the evidence of Mr Tully and Ms Kennedy, I find flaws and inconsistencies in both.

Mr Tully's evidence

[37] First, in respect of Mr Tully's evidence, his oral testimony to the Authority differed from that contained in his brief of evidence, in that he said orally that he had used the document headed *ACKNOWLEDGEMENT & UNDERTAKINGS* to record Ms Kennedy's confession, and then gave her the dismissal letter, whilst his written brief states that first Ms Kennedy admitted to taking adhesives and servicing clients from her own home, then he handed her the already written termination letter, and then asked her to sign the document headed *ACKNOWLEDGEMENT & UNDERTAKINGS*. This discrepancy in his evidence may simply be because of the passage of time, but it casts doubt on its reliability.

[38] The second area of doubt about Mr Tully's evidence derives from the fact that he says that he did not take any notes of the meeting, or of the details of the confession, or of the meeting that took place in the café afterwards. The only notes that were produced to the Authority were taken by Mr Jeffery of his conversation with Mr Tully afterwards. Given that Mr Tully had been a police officer for 20 years, and had been a security advisor for around 11 years, it is surprising that he took no notes of such an important matter. Mr Tully was assiduous in detailing his internal investigations in emails to a member of the Christchurch police, and it seems unlikely that he would not have produced notes of his conversations with Ms Kennedy, if only

to pass on to the police. On his evidence, she had made a confession of wrongdoing, which the police would probably have been very interested in.

[39] Even if I take the evidence of Mr Tully at face value, the wording of the undertaking document Ms Kennedy annotated with four client names, and then signed, does not make clear what it is she is confessing to. The relevant passage states:

I, Vanessa Kennedy,Undertake that the list of current and former AHS clients below is a complete list of all AHS clients who I have provided services to where AHS has not financially gained from such services, or who I have, without any authority, giving away AHS products to or sold AHS products to and kept the proceeds of those products for my own personal gain.

[40] For a confession to be relied upon by an employer to justify a dismissal, it must be clear what conduct is being admitted. This wording does not do so as it addresses three different scenarios. The wording was pre-prepared by the lawyers of the respondent, and so it is not surprising that it does not capture what was said by Ms Kennedy, given that they cannot see into the future.

[41] Another aspect of Mr Tully's conduct towards Ms Kennedy that indirectly calls into question his evidence is an email from him to the Christchurch police detective dated 21 January 2013 in which he wrote *I informed Mrs. Kennedy I would report all my findings back to our Chairman & CEO and they would decide if the matter was reported to police.* However, it is clear that Mr Tully had reported the matter to the police on 11 December at the latest, as is evidenced by an email to the detective from Mr Tully of that date. This shows that Mr Tully either misled the detective in his email of 21 January, or misled Ms Kennedy. I suspect it is the latter. Possibly he did this to protect the integrity of the police investigation, but it shows bad faith towards Ms Kennedy (although no duty of good faith was owed to her by the respondent after the employment was terminated).

Ms Kennedy's evidence

[42] Despite my doubts about Mr Tully's evidence, I also have doubts about Ms Kennedy's innocent explanation of what she admitted to. This is, firstly, because she went willingly to a coffee shop with Mr Tully immediately after her employment was terminated by him. Her evidence to the Authority was that she gave Mr Tully a lot of information about what had been taking place over seven and a half years. She said this was because she had nothing to hide. However, in her written evidence

Ms Kennedy says, of her meeting with Mr Tully, that she *was feeling confused and ambushed and very threatened*. She also stated *Mark Tully certainly knew how to intimidate me*.

[43] It seems unlikely that someone who had just been dismissed out of the blue for acts of dishonesty, when she had apparently not admitted to anything that could be construed as dishonest, would then willingly spend time alone with Mr Tully telling him about the Christchurch salon.

[44] Secondly, it seems unlikely that Ms Kennedy would have simply signed the undertaking document and added four client names to it when the text immediately above the names she wrote amounted to an admission of wrong doing. I do not accept that she simply did not read the text or did not understand it. Her own evidence is that she crossed out several paragraphs of accusations, although it is uncertain what document she is referring to. Ms Kennedy is certainly a literate and intelligent person who does not appear to be someone who would lose their head and act recklessly by admitting to something she did not do.

[45] Thirdly, there is also the evidence of JW, who confirmed his evidence to the Authority in person. Although the main thrust of his evidence was that Ms Kennedy had sold him a hair piece, for which Ms Kennedy was ostensibly not dismissed, JW also confirmed that Ms Kennedy had offered to carry out private work for him. Although JW was required to give evidence to the Authority pursuant to a witness summons, he gave his evidence willingly and there is no obvious reason why he would lie to the Authority.

My conclusions

[46] When I try to reconcile the various conflicts and discrepancies in the evidence of Mr Tully and Ms Kennedy, I believe, on balance, that the most likely course of events was as follows. Having received a tip off of possible dishonest conduct by Ms Kennedy, Mr Tully immediately informed the Christchurch police on behalf of the respondent. Mr Tully and Mr Jeffery did not want to jeopardise the police investigation by commencing an internal disciplinary investigation, so did not tell Ms Kennedy of the behind the scenes investigations.

[47] However, I believe that, at some point between 7 and 14 January 2013, the Chairman of the respondent, Mr Howell, instructed Mr Jeffrey and/or Mr Tully to

effect the dismissal of Ms Kennedy, possibly because the police investigation was taking too long for him. I reach this conclusion because of three emails disclosed to the Authority. The first is an email sent by Mr Howell to a company HR adviser on 5 December 2012, which read:

I presume Vanessa is "casual"? Only 10 hours a week? So we can let her go at any time?

[48] The Australian based HR adviser replied saying it was *not that easy under the NZ Employment Act*, and then setting out options for dismissal involving a misconduct related, or a redundancy related dismissal. Mr Howell's email shows an inclination to dismiss Ms Kennedy, even before the company learned of the allegations against her.

[49] The second email is dated 7 January 2013 from Mr Tully to a colleague of the police detective with whom Mr Tully had been dealing. In this, it is clear that the police detective was away on leave and that the colleague's name had been given to Mr Tully in his absence. In his email, Mr Tully summarises his suspicions about Ms Kennedy and then states that Mr Howell is concerned that Ms Kennedy was *continuing to commit these alleged offences impacting on AHS. It is important to AHS if our employee is committing these offences she is investigated and if deemed appropriate prosecuted.*

[50] The third email is one dated 20 January 2013, from Mr Tully to the police detective, who had by then clearly returned from his leave. Mr Tully states *while you were away our hand was forced in relation to the issues we had with Vanessa Kennedy.* Mr Tully confirmed in evidence that this statement referred to an instruction from Mr Howell to terminate Ms Kennedy's employment.

[51] In my view, this instruction from Mr Howell created a tension for Mr Tully, whose sole concern appears to have been to facilitate the police investigation rather than to deal with Ms Kennedy in accordance with her employment law rights. This is why he and Mr Jeffrey agreed that Mr Tully would not tell Ms Kennedy anything about the details of the allegations, but hope she would make a confession, so as not to jeopardise the police investigation. It also explains why he told Ms Kennedy after her dismissal that the company would decide whether to involve the police, even though he had already done so.

[52] When Mr Tully said to Ms Kennedy, in her words, *that he had proof that I had stolen from the company*, it is my belief that she understood him to mean taking adhesive tapes to service clients in her own home, and I believe that this is what she confessed to.

[53] It is not entirely clear why Mr Tully did not produce any notes of the meeting to the Authority, although this may be because they would not show his methods in a good light from an employment law point of view.

[54] In conclusion, I believe that Ms Kennedy did admit to conduct (taking adhesive and servicing clients in her home) in her meeting with Mr Tully.

Did this admission justify Ms Kennedy's dismissal?

[55] I asked the parties' representatives to give me their submissions about the effect of *Enzo's Pizza* on any admission by Ms Kennedy. Mr Goldstein first submits that there was no confession as such, although I dismiss that assertion on balance as explained above. Mr Goldstein also submits that *Enzo's Pizza* cannot continue to be good law in light of the obligations set out in ss4 and 103A of the Act, which have come into effect after *Enzo's Pizza* was decided.

[56] Finally, Mr Goldstein distinguishes *Enzo's Pizza* on the basis that it refers to the employer being presented with the truth, *in the course of carrying out the procedure*. He makes the point that there was no procedure in the current case, let alone a fair and reasonable one.

[57] Ms Reid essentially submits that Ms Kennedy did make a confession of serious misconduct and that the need for any further investigation was therefore obviated.

[58] In my view, Mr Goldstein is correct to distinguish the facts of *Enzo's Pizza* from the current case. The duties imposed by ss 4 and 103A of the Act upon an employer when investigating a disciplinary matter are fundamental duties intended to protect an employee from unfairness resulting in material prejudice. The admission made by Ms Kennedy was made in a situation of ambush. For the respondent to have been able to fairly rely upon the confession to terminate Ms Kennedy's employment, the confession needed to have occurred in an environment where she clearly knew in

advance what the allegations were and what the consequences of the allegations (and any confession) could be.

[59] In my view, His Honour Chief Judge Goddard did not contemplate that a confession obviates the need for a fair process to be followed when the confession has been obtained in circumstances where the employee had no idea what specific concerns the employer held, nor what sanction the employer intended to impose. This is made clear from the wording of the passage cited above, which refers to the confession being made *in the course of carrying out the procedure*, and the corollary of the confession meaning that *it does not matter that no further attempt was made afterwards to follow the procedure*.

[60] As the confession did not occur in the course of carrying out a procedure (other than the procedure designed to aid the police investigation) *Enzo's Pizza* does not assist the parties and, accordingly, the respondent's dismissal of Ms Kennedy was not the action that a fair and reasonable employer could have taken in all the circumstances at the time the dismissal occurred. The dismissal was, therefore, unjustified.

Remedies

[61] Having established that Ms Kennedy was unjustifiably dismissed, I must now consider what remedies she is entitled to. She claims loss of wages from the date of her dismissal, to date, together with interest. She also seeks compensation pursuant to s.123(1)(c)(i) of the Act in the sum of *at least \$20,000*, and the imposition of a penalty, to be paid to her in its entirety, in the sum of \$20,000.

Loss of wages

[62] Section 123(1)(b) of the Act provides that the Authority may provide the reimbursement of a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that, subject to s. 123(3) and s. 124, the Authority must, whether or not it provides for any other remedies, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. Section 123(3) provides that, despite subsection (2), the Authority may, in its discretion, order the employer to pay a sum greater than provided in subsection (2).

[63] Ms Kennedy's oral evidence to the Authority was that she has not worked at all since she was dismissed by the respondent. She said she had *talked to people looking for stuff* (i.e., jobs) but that she got the impression that they knew why she was not working for AHS. She said that she *can't apply for jobs when she was going to be asked why* [she no longer worked for AHS] and she also said *I need to put this* [the proceedings before the Authority] *to rest before I can find a new job*.

[64] In her written evidence Ms Kennedy said that she was too unwell to do any work for about six months after her dismissal. The Authority heard evidence from Ms Kennedy's doctor that she first saw Ms Kennedy after she had been arrested, and that she was very upset. The doctor said, understandably perhaps, that she was unable to distinguish between the upset felt by Ms Kennedy caused by the dismissal and that caused by the arrest. The doctor prescribed sleeping pills and, later, anti anxiety medication. The doctor confirmed that she had not told Ms Kennedy not to work.

[65] It is of concern that Ms Kennedy has said that she cannot look for work until after the Authority's proceedings had been finalised. Ms Kennedy, like anyone seeking reimbursement for lost wages following an unjustified dismissal, is obliged to take steps to mitigate her losses. Her statement that she is waiting for the proceedings to be over, indicate that she is not taking those steps.

[66] Accordingly, I am not prepared to award Ms Kennedy lost wages for the period from the date of dismissal to the date of the investigation meeting, or later. Furthermore, whilst I accept that Ms Kennedy was very upset after the dismissal, I attribute at least an equal part of that upset to her arrest, and the fear of a criminal conviction. I also do not find that the respondent acted in bad faith in reporting their concerns to the police, as they had received information which suggested that Ms Kennedy had engaged in dishonesty. Therefore, the respondent cannot be held responsible for a loss of wages arising from sickness caused by anxiety about arrest and a possible criminal conviction.

[67] Ms Kennedy said she was too sick to work for six months. Whilst it is possible that this was because of the impending criminal action, it is impossible and quite unrealistic to try to untangle how much upset was caused by the dismissal and how much by the fear of conviction, as they would be completely intertwined. I am prepared to give Ms Kennedy the benefit of the doubt and assume that she was unable to find work for six months because of that sickness, and that it was at least partly due

to her dismissal. Therefore, I am also prepared to award to Ms Kennedy lost wages at the rate of \$24 an hour, for 10 hours per week, for a maximum period of six months. This produces a total gross sum of \$5,760.

[68] Turning to s.123(1)(c)(i) of the Act, I accept that Ms Kennedy suffered humiliation, loss of dignity and injury to her feelings as a result of being unjustifiably dismissed from the employment of the respondent. The difficulty in assessing that effect is, as observed above, that she almost certainly suffered effects arising from both her dismissal and her arrest. As also observed above, I believe that the effects of her arrest would have been at least equal to those of her dismissal. Ms Kennedy seeks \$20,000 in compensation. I do not accept that that is a reasonable sum, even accepting her evidence of the effects of her dismissal. I believe that an appropriate sum of compensation under s.123(1)(c)(i) of the Act would be \$7,500.

[69] Turning to s. 124 of the Act, I must consider whether the remedies awarded should be reduced to reflect the extent to which Ms Kennedy's actions contributed towards the situation that gave rise to the personal grievance. If they did, her actions must be blameworthy for a reduction to be made.

[70] I have found that Ms Kennedy did admit to taking adhesives and servicing at least four clients of the respondent from her home. An analysis of the transactions for the Christchurch salon in relation to the four clients in question was inconclusive as, although some of them ceased to be a client, it was not known why. It is axiomatic that Ms Kennedy's actions in doing private work for these four clients did contribute to the situation giving rise to the personal grievance as her admission of having done so led directly to her dismissal. It is also the case that doing such work was blameworthy, as it amounted to a breach of her duty of good faith and her duty of fidelity owed to her employer. However, the adverse effects upon the respondent are unknown, and could be trivial.

[71] In respect of JW, whilst I accept his evidence, it is not clear whether Ms Kennedy selling a used hair piece to him was an act of misconduct, given that the respondent could not have done anything with the used hair piece and that it was unlikely that JW would have bought a new hair piece from the respondent at that time, given his evidence that he could not afford to. Her soliciting his private work was a breach of duty, but it led to no loss to the respondent. However, her action in doing so

did also contribute to the situation giving rise to the grievance, as JW's allegations were the catalyst for the respondent's actions, and was blameworthy.

[72] Accordingly, I find that it is appropriate to reduce the remedies awarded to Ms Kennedy. I do not believe that the reduction should be significant, and so reduce the remedies by 20%.

[73] Ms Kennedy also seeks a penalty be imposed upon the respondent for failing to act in good faith towards her, contrary to s.4 of the Act. Section 4(1) of the Act provides as follows:

The parties to an employment relationship specified in subsection (2)—
(a) must deal with each other in good faith; and
(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
(i) to mislead or deceive each other; or
(ii) that is likely to mislead or deceive each other.

[74] Section 4A provides that:

4A Penalty for certain breaches of duty of good faith
A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—
(a) the failure was deliberate, serious, and sustained; or
(b) the failure was intended to undermine—
(i) bargaining for an individual employment agreement or a collective agreement; or
(ii) an individual employment agreement or a collective agreement; or
(iii) an employment relationship; or
(c) the failure was a breach of section 59B or section 59C.

[75] I find that there was a deliberate act of deception by the respondent, in that it failed to advise Ms Kennedy what its concerns were, and effectively hoped to entice her into admitting wrongdoing without warning her what the consequences of doing so would be. Such an act was also serious, in that it amounted to a fundamental breach of duty towards her as an employee. Finally, I find that it was sustained, as the respondent was aware from 11 December 2012 of the allegations against Ms Kennedy, but failed to advise her of the full extent of them, even by 14 January 2013, the date of her dismissal.

[76] Accordingly, I find that the grounds are made out for the award of a penalty against the respondent. That penalty is the sum of \$1,000 and is to be paid to Ms Kennedy in its entirety.

Penalty claim against Ms Kennedy

[77] The respondent also seeks a penalty to be imposed upon Ms Kennedy for the acts that they say she admitted to. I find that Ms Kennedy did both attempt to solicit away clients from the business of the respondent, and also carried out private work for them. Such acts amount to a breach of good faith by Ms Kennedy.

[78] It is clear that Ms Kennedy's acts of solicitation of clients were deliberate. Furthermore, an act of competing with one's employer to the detriment of its interests is serious, as it goes to the heart of the duty of trust and confidence owed by an employee to an employer. Trust and confidence form part of the duty of good faith. Finally, although it is not clear how long such acts were taking place, they do not appear to have been one off acts, if only because four clients were involved. Accordingly, such acts were sustained.

[79] It follows that it is also appropriate for a penalty to be imposed upon Ms Kennedy. Ms Kennedy's acts do not appear to have had a serious effect, if any, upon the respondent, and so I fix the penalty at \$500. It is to be paid into the Authority, and will then be paid by the Authority into a Crown Bank Account.

Orders

[80] I order the respondent to pay to Ms Kennedy the following:

- a. The gross sum of \$4,608 in lost wages, together with interest at the rate of 5%, to run from 14 July 2013 (six months from the date of dismissal) until the date of payment;
- b. The sum of \$6,000 pursuant to s. 123(1)(c)(i) of the Act; and
- c. The sum of \$1,000, pursuant to s.136(2) of the Act.

[81] I order Ms Kennedy to pay into the Authority the sum of \$500 by way of a penalty payment, pursuant to s.136(1) of the Act.

Costs

[82] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if the parties have failed to do so after the expiry of the period of 28 days from the date of this determination, any party seeking a contribution to its costs may serve and lodge a memorandum of counsel within a further 14 days, and any reply must be served and lodged within a further 14 days of receipt.



David Appleton
Member of the Employment Relations Authority

