IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 215
5454127

	BETWEEN	KARLA BOTTING Applicant
	A N D	NOMIS PAINTERS AND DECORATORS LIMITED First Respondent
		SIMON JOHANNIS Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Robert Thompson, Advocate for the Applicant No appearance on behalf of either the first or second Respondents	
Investigation Meeting:	2 December 2014 at Christchurch	
Submissions Received:	On the day of the investigation meeting from the Applicant	
Date of Determination:	22 December 2014	

DETERMINATION OF THE AUTHORITY

A **Karla Botting was unjustifiably disadvantaged by the warning issued to her on 11 December 2013 by Nomis Painters and Decorators Limited.**

B **Karla Botting was unjustifiably dismissed from her employment with Nomis Painters and Decorators Limited.**

C Nomis Painters and Decorators Limited is ordered to pay to Karla Botting:

(i) Lost wages under s 123 (1)(b) of the Employment Relations Act 2000 in the sum of $1980 gross.

(ii) Compensation under s 123 (1)(c)(i) in the sum of $10,000 without deduction.

(iii) Costs in the sum of $1750 together with reimbursement of the filing fee of $71.56.

D There is no award of a penalty against Simon Johannis.

Employment relationship problem

[1] Karla Botting commenced employment on or about 19 March 2013 as a paint hand with the first respondent, Nomis Painters and Decorators Limited (Nomis). She entered into an employment agreement (the employment agreement) dated 19 March 2013 with Nomis. Her employment agreement required her to report to the second respondent, Simon Johannis who is the sole director of Nomis.

[2] Ms Botting says that she was unjustifiably disadvantaged in her employment when she was given, without process and/or good reason written warnings on 11 December 2013 and 16 January 2014.

[3] Ms Botting says that on 16 December 2013 without consultation she was notified that her employment was to end for reason of redundancy. Ms Botting was told that she would be given a letter.

[4] The following day, on 17 December 2013, Ms Botting was given a letter dated 15 December 2013. The letter was about termination of Ms Botting's employment by reason of redundancy. It provided the reason for the redundancy and the termination date of the employment as below:

Dear Karla,

Termination of your employment by reason of redundancy

The purpose of this letter is to confirm the outcome of a recent review by Nomis Painters and Decorators Ltd of its operational requirements, and what this means for you.

As a result of the recent downturn of workload and our company unable to secure enough work, the painting position no longer needed. Regrettably this means your employment will terminate. This decision is not a reflection on your performance.

Based on your length of service your notice is four weeks. Therefore your employment will end on fifteenth January 2014.

[5] Ms Botting says that her redundancy was not genuine but related to earlier discussions with, and text messages sent to, Mr Johannis. The discussion and messages concerned Ms Botting's concerns that whilst student loan repayments and PAYE had been deducted from her wages, they had not been paid to the Inland Revenue Department. The messages also disclose a view on the part of Mr Johannis that Ms Botting was not entitled to holiday pay because she had not worked a full 12 months.

[6] Ms Botting worked through her notice period and her last day of employment was 15 January 2014. The second warning was received after this date.

[7] Ms Botting seeks the following:

- Reimbursement of lost wages for a three week period until she obtained further employment.
- Compensation.
- Penalties to be awarded against Mr Johannis for aiding and abetting breaches of the individual employment agreement. Mr Thompson clarified that although there was a claim in the statement of problem for aiding and abetting a breach of the Wages Protection Act 1987 that was not pursued.
- Costs.

[8] The parties attended mediation before the statement of problem was lodged with the Authority but the matter was not resolved.

[9] When the statement of problem was served on the first and second respondent there was communication between Mr Johannis and a support officer from the Authority on 26 August 2014. Mr Johannis asked that the support officer ring the accountant of the first respondent, John Mathewson. He advised the accountant would respond on behalf of both the respondents.

[10] The support officer following that advice attended to service of the statement of problem on Mr Mathewson and advised that the statement in reply was, at that point, overdue.

[11] The first and second respondents lodged a very brief statement in reply that stated:

> *Already paid in full and PAYE paid.*

[12] Following the lodging of a statement in reply on 2 September 2014, an email was received from Mr Mathewson advising that he was not available for a further hearing on behalf of the company which was insolvent and would shortly be subject to a member's winding up. He advised in his email that wages had been paid for time worked and PAYE has now been paid, but there are no funds available for any other payments.

[13] The Authority set the matter down for a telephone conference on 19 September 2014. Both Mr Mathewson and Mr Johannis were advised of the time and date of that telephone conference on 18 September 2014 at 10.30am. The Support Officer set out in an email dated 4 September 2014 the cell phone numbers Mr Mathewson and Mr Johannis would be contacted on.

[14] Mr Mathewson confirmed by email that he would not be representing the company on the telephone conference and therefore an attempt was made on 19 September 2014 to contact Mr Johannis direct. The call was not answered but a voice message was left advising Mr Johannis that a telephone conference was taking place and he should contact a support officer at the Authority. No further communication was received from Mr Johannis.

[15] The telephone conference was attended by the Authority, a support officer and Mr Thompson. The Authority set the matter down for an investigation meeting during the telephone conference and timetabled for the lodging and serving of statements of evidence from the applicant and the first and second respondent.

[16] I am satisfied that the notice of direction and notice of the investigation meeting was served on the first and second respondents at the email address for service they provided in the statement in reply. Mr Mathewson was also emailed the documents.

[17] There was no further communication on behalf of the first or second respondents. Ms Botting lodged and served a statement of evidence in accordance with the timetable set by the Authority. There was no statement of evidence received on behalf of the first and second respondents.

[18] There was no appearance on behalf of either the first or the second respondent at the investigation meeting on 2 December 2014. The Authority delayed the commencement of the meeting in case of the reason for the non-appearance being lateness. In the absence of any good reason advanced as to why there was no appearance on behalf of Nomis or by Mr Johannis, the Authority proceeded under clause 12 of the second schedule to the Employment Relations Act 2000 (the Act) and heard evidence from Ms Botting.

The issues

[19] The issues for determination are as follows:

(a) Were the two warnings justified and if they were not justified, then did they disadvantage Ms Botting in her employment?

(b) Was the dismissal for redundancy justified? This will require consideration of both the genuineness of the redundancy and whether the procedure was fair.

(c) Should there be a penalty awarded for Mr Johannis' actions in relation to aiding and abetting alleged breaches of the individual employment agreement?

(d) If personal grievances are made out, what remedies should be payable and are there issues of contribution and mitigation?

(e) Costs

Test of justification in s 103A of the Act

[20] There is a test of justification in s 103A of the Act. The application of this test applies to both the warnings and the dismissal. The Authority must objectively determine whether the issuing of the warnings and the dismissal for redundancy and the process adopted was what a fair and reasonable employer could have done in all the circumstances at the time the warnings were issued and the dismissal occurred. The test has to be considered in light of the overarching duty of good faith provided for in s 4 of the Act.

[21] There are four factors relating to procedural fairness that the Authority must consider when it applies the test. It can also consider other factors where appropriate. If there are minor defects in the process which did not result in the employee being treated unfairly then the Authority must not determine a dismissal or warning to be unjustified solely on this basis.

Were the two warnings justified and if they were not justified, then did they disadvantage Ms Botting in her employment?

[22] The first warning that Ms Botting received was given to her on 11 December 2013. Prior to the warning Ms Botting had asked for a summary of her earnings because she had spoken to the IRD and been told tax had not been paid on her behalf by Nomis to IRD. No payments had been made towards her student loan.

[23] The warning was included with a summary of earnings. It stated that Mr Johannis was disappointed in Ms Botting's attitude towards him and he would like to see her improve her attitude and respect. Further that the *hours of work are 9am to 2.30. This means at work and leaving at 2.30!*

[24] Ms Botting said that she assumed in the absence of any discussion with Mr Johannis the warning related to a belief that she was late to work. Ms Botting said that she turned up to the work premises on time on 11 December 2013 but the

unloading of her car took a longer period. Mr Johannis shouted at her on that occasion.

[25] The second warning was placed in Ms Botting's mailbox on 16 January 2014 after her final day on 15 January 2014 and stated she needed to improve her attitude and be more diligent.

[26] Attitude and diligence are at least in part subjective assessments. I did not hear from Mr Johannis about why he reached the views he did. There was no process before the warnings were issued and the procedural requirements of s 103A (3) of the Act were not met. In the absence of a proper process I could not be satisfied that there were substantive reasons for the warnings. I do not find that the warnings were what a fair and reasonable employer could have done in all the circumstances at the time. The failure to comply with any fair process was not minor. It did result in Ms Botting being treated unfairly. The warnings I find were unjustified.

[27] Ms Botting could only speculate as to the substantive reason for the first warning. I am not satisfied having heard her evidence that the warning was substantively justified.

[28] The first warning I am satisfied disadvantaged Ms Botting in her employment as it made her feel less secure and she was not sure why it was issued. It came at a time when she was concerned payments deducted from her wages not been made to the IRD. The second warning was provided after the employment relationship had ended so although unjustified it could not disadvantage Ms Botting in her employment. I accept that she considered it an attempt to intimidate her.

[29] I find that Ms Botting has a personal grievance that she was unjustifiably disadvantaged in her employment by the issue of the warning on 11 December 2013. I do not find that the second warning disadvantaged Ms Botting because whilst it was unjustified the employment relationship had ended at the time she received it. Ms Botting is entitled to remedies in relation to the 11 December 2013 warning which I shall return to.

Was the dismissal for redundancy justified?

[30] There were a number of text messages sent between Ms Botting and Mr Johannis before Ms Botting was told she was being made redundant. Ms Botting

was unhappy that tax and student loan payments had not been paid to IRD. Ms Botting said that before she raised her concerns about these matters with Mr Johannis he was a *lovely person* to work for but after she raised the concerns he became rude to her and that caused her to become unhappy and stressed.

[31] On 11 December 2013 Ms Botting advised Mr Johannis by text that she was going to start looking for another job as she was no longer happy working for him. She said that he would need to know her gross earnings as well to calculate her holiday pay. Mr Johannis took that as a resignation and said in a text that he had drawn up an agreement of two weeks' notice and expected her resignation that day. Ms Botting then responded and advised that she was looking for a new job but had not handed her notice in. She asked Mr Johannis to confirm if he had *fired* her. There was some confusion about holiday pay.

[32] Ms Botting had 12 December off work because as she said in her text to Mr Johannis she felt stressed but returned to work on Friday 13 December 2013. It is clear from the text messages that Mr Johannis delayed providing information about wages and that IRD did not have the information Ms Botting needed regarding payments towards her student loan and tax payments because the payments had not been made by Nomis. Mr Johannis also had an incorrect but firm view on holiday pay and he was quick to seize on an email about Ms Botting looking for another job and treated it as a resignation.

[33] On Monday 16 December Ms Botting was advised she was being made redundant without any consultation. Ms Botting said that there was no real discussion with Mr Johannis at this time. She recalled essentially that there was advice a letter was to follow. The letter that she then received provided four weeks notice and the reasons for the redundancy. Although Ms Botting had been led to believe that she would get some leave over Christmas Mr Johannis advised she was not allowed to have the leave and was required to work her notice period out and she painted his parent's property. Ms Botting took some unpaid leave over Christmas and had to survive financially on the payments for statutory days over that period. Ms Botting who is a single parent with two young children had to make alternative child care arrangements then at short notice so she could carry on working.

Conclusions on genuineness of the redundancy and fairness of the process

[34] Ms Botting said that she believed she was made redundant because she raised concerns about the failure by Nomis to pay taxes, student loan and holiday pay with Mr Johannis. She said it is usual in the painting industry to slow down in December each year. This is because EQC closes up over the Christmas period and EQC funded repairs including painting are not undertaken over the Christmas period. Ms Botting said that Nomis had a contract with Housing Corporation to paint their houses and that she had been doing that for a while before Christmas but that Mr Johannis did not like doing the work because it required painting around household items such as furniture rather than items being removed from the room or property.

[35] Clause 12.5 of the employment agreement contains a redundancy process. It provides:

> *In the event the Employer considers that the Employee's position of employment could be effected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances consult with the employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.*

[36] There was no compliance by Nomis with the obligations in clause 12.5 of the employment agreement to consult and provide information. Given the notice period of four weeks given to Ms Botting this could not be said to be an exceptional circumstance. Although there was reference in the letter confirming termination of employment about unfruitful attempts to find an alternative position there was no discussion with Ms Botting about what those attempts may have been. Given that Ms Botting only took three weeks to find another job I could not be satisfied that those attempts were made.

[37] When I consider the significant procedural failings against the earlier series of text messages which seem to have annoyed Mr Johannis I am not satisfied that there was a genuine reason for the redundancy based on business requirements. I could not be satisfied that there was no work available for Ms Botting to do. Objectively assessed the evidence supports Mr Johannis became unhappy with Ms Botting at a

point which coincided with requests by her to disclose information about her gross wages so that she could identify deductions and payments that should have been made for taxes and her student loan. Ms Botting was of course entitled to that information upon request.

[38] I find on the balance of probabilities that Nomis has an ulterior reason for terminating its relationship with Ms Botting which was not a genuine redundancy.

[39] I do not find that Ms Botting's dismissal for redundancy and the failure to comply with the process in the employment agreement to consult was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal took place. The dismissal was unjustified.

[40] Ms Botting has a personal grievance that her dismissal for reason of redundancy was unjustified. She is entitled to remedies.

Remedies

Lost Wages

[41] Ms Botting was able to obtain employment after a period of three weeks and she seeks reimbursement of wages for the period of unemployment. I am satisfied that there was adequate mitigation. Ms Botting worked between 25–35 hours per week and I have calculated lost wages on the basis of 30 hours per week at Ms Botting's hourly wage of $22.00 per hour to be $660 gross per week. For three weeks that is the sum of $1980 gross.

[42] Nomis Painters and Decorators Limited is to pay Karla Botting the sum of $1980 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.

Compensation

[43] Ms Botting suffered distress about the warning that I have found unjustifiably disadvantaged her. It was issued at a time when Ms Botting was clearly concerned about the fact that the deductions made from her wages, in particular her student loan, had not been made and the warning added to the stress about that matter. Ms Botting said in her evidence that she thought her student loan would have been paid off and she raised this with Mr Johannis but there were difficulties in getting the records.

Ms Botting said that she thought about the warning all day and that in discussions with Mr Johannis about it he suggested that he could do what he wanted.

[44] Ms Botting said that when she was advised of her redundancy she had just purchased a new car and it was shortly before Christmas. Although she was already unhappy and wanted to look for another job she did not I accept intend to leave her employment before she had secured another position. The financial worry was such after she was advised of her redundancy that she had to visit her doctor to obtain sleeping pills and was very stressed over the whole situation. The payment of holiday pay would have alleviated some of that worry and concern but that was only paid after Ms Botting instructed Mr Thompson some months later. Payment of holiday pay was made on the basis of records that Mr Thompson described as inaccurate but for pragmatic purposes the holiday payment was accepted.

[45] Even after her employment ended Ms Botting had a warning placed in her letter box by Mr Johannis. Further she had to go to considerable effort to establish to IRD that she had worked for Nomis. This required printing out of ten months bank statements for IRD and time off work to talk to IRD. It also affected her *working for families'* payments. Ms Botting stated that an IRD investigator had now been assigned to look at the issue of why PAYE and student loan deductions had not been paid[1]. Ms Botting has been required to pay back interest and penalties in relation to the student loan. I take into account these matters as they contributed to the effect on Ms Botting of the termination of employment.

[46] In all the circumstances I am of the view that an appropriate global award for compensation for both grievances established is the sum of $10,000.

[47] Nomis Painters and Decorators Limited is to pay Karla Botting the sum of $10,000 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (b) of the Employment Relations Act 2000.

Contribution

[48] I do not find any contributing behaviour on the part of Ms Botting that requires a reduction in remedies.

[1] Ms Botting said IRD advised there had been one month PAYE paid for April 2013.

Penalties

[49] Ms Botting seeks an award of a penalty against Mr Johannis under s 134 (2) of the Act[2].

[50] Part of the penalty claimed relates to breaches I have found in relation to the issuing of warnings and the failure to comply with the redundancy process set out in the employment agreement. The Employment Court in *Xu v McIntosh*[3] referred to a risk of doubling up of penalties if they correspond exactly with the grounds of the grievance. It was stated in *Xu* that a penalty is not a mechanism for topping up the compensation and that there is a need to look at whether there are special facets of the breaches calling for punishment on top of compensation.

[51] In this case I do not find that there are special reasons for the breaches I have found to impose penalties in addition to the personal grievance remedies.

[52] The other part of the penalty claim relates to the failure to make payments to IRD after money had been deducted. I am not minded to award a penalty for two main reasons for that matter.

[53] Firstly where a penalty is claimed the basis of it should be clearly set out in the statement of problem. In the statement of problem the penalty was claimed under the Wages Protection Act 1987 for the failure to pass on the deducted sums to the IRD. Although I did not hear submissions on the point I could not find any basis to claim a penalty under the Wages Protection Act 1987 for aiding and abetting a breach. The penalty claim was modified by Mr Thompson at the investigation to a breach or breaches of the employment agreement. I could not be satisfied in those circumstances that Mr Johannis had proper notice of the basis of the penalty claim so as to properly answer it. Given the serious nature of a penalty proper notice is required.

[54] The second reason is that given there is now an IRD investigator involved the imposition of a penalty by the Authority could result in double jeopardy if there is also some action taken by IRD. Any consequence of a failure to make proper payments should in all the circumstances be left to IRD.

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[2] Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.
[3] [2004] 2 ERNZ 448 at [43 – [45]

Costs

[55] Mr Thompson wanted the Authority to address costs. He submitted that while the meeting only took just over one hour the costs were increased because the respondents failed to respond to requests for information and the information provided was inadequate. He asked for costs based on the full day tariff in the sum of $3500.

[56] I am not prepared to make an award for a full day but I do recognise that there should be some uplift and make an award on the basis of a half day tariff in the sum of $1750 together with reimbursement of the filing fee of $71.56.

Helen Doyle
Member of the Employment Relations Authority