

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 541  
3050852

BETWEEN SHANE BICKNELL  
Applicant

AND RED STAG METAL  
FABRICATION LIMITED  
First Respondent

NICOLA WATKINS  
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Beverley Edwards, Counsel for the Applicant  
Nicola Watkins, Representing the First Respondent and  
Second Respondent

Investigation Meeting: 10 September 2019 at Tauranga

Submissions and additional information: 10, 11, 12 and 13 September 2019

Determination: 19 September 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Shane Bicknell, claims that he was constructively dismissed, unjustifiably disadvantaged, and sexually or otherwise harassed in his employment with the First Respondent, Red Stag Metal Fabrication Ltd (Red Stag). Mr Bicknell also claims that he is owed wages and holiday pay.

[2] Mr Bicknell further claims that the Second Respondent, Ms Nicola Watkins, aided and abetted the breach by the First Respondent of its employment obligations to Mr Bicknell.

[3] Red Stag denies that Mr Bicknell was constructively dismissed, unjustifiably disadvantaged or sexually or otherwise harassed and claims that Mr Bicknell voluntarily

resigned from his employment. Red Stag also deny that Mr Bicknell is owed wages or holiday pay.

[4] Ms Watkins denies that she aided or abetted any breach of employment obligations by Red Stag.

### **The Authority's investigation**

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

### **Issues**

[6] The issues requiring investigation and determination are whether or not :

- Mr Bicknell was constructively dismissed by Red Stag or whether he voluntarily resigned from his employment.
- Mr Bicknell was unjustifiably disadvantaged by Red Stag.
- Mr Bicknell was sexually or otherwise harassed in his employment.
- Mr Bicknell is owed outstanding wages and/or holiday pay.
- Ms Watkins aided and abetted any breach of employment obligations by Red Stag

### **Background**

[7] Red Stag is a manufacturer and installer of gates, fences and access automation. Ms Nicola Watkins said she acquired Red Stag in May 2018 primarily as a means of assisting her son to obtain a career in fabrication. Ms Watkins is the sole director and shareholder and Red Stag employs approximately 6 employees in total.

[8] Ms Watkins advertised on Trade-Me for a Fabricator and Apprenticeship Manager who would provide training and mentoring to her son and other workshop employees. Mr Bicknell responded to the advertisement, was interviewed, and commenced employment on 7 August 2018.

[9] He was provided with an individual employment agreement (the Employment Agreement) which contained the following clauses:

**Position:** Senior Fabricator – Apprenticeship Manager

**Hours of work**

The employee will work for 42.5 hours each week on Monday to Friday, between the hours of 7.30 to 4.30.

**Vehicle**

The employee will be provided with a vehicle for work purposes only. It cannot be used for personal travel. The vehicle must be parked at 38A Hewletts Road, Mt Manganui when not in use. ...

**Sick Leave**

The employee can take up to 5 paid days off a year due to illness or injury, ... this leave will be available when they have worked for 6 months. ...

**Sick leave: Medical Certificate**

The employer may require proof of sickness or injury at any time if the employee takes, or has asked for, sick leave. ...

**Changes to this agreement**

The employer and employee can agree to change the terms of this agreement at any time. Any changes must be in writing and agreed to by both employer and employee.

**Notice Period**

Unless otherwise set out in this agreement, either the employer or the employee can end the employment by giving 4 weeks notice in writing.

[10] Mr Bicknell and Ms Watkins signed the Employment Agreement, Mr Bicknell signing in the Acknowledgement section which stated:

In signing this agreement, I Shane Bicknell accept the terms and conditions of my employment as detailed within this offer and declare that:

- I have read, and fully understood the terms and conditions of this agreement, and have received a copy of it.

[11] Ms Watkins said that she and Mr Bicknell had had a good working relationship which quickly became a friendship in which both shared details of their personal and home life.

[12] Mr Bicknell had technical expertise in areas of fabrication which he considered could benefit the Red Stag operation. As a result, Ms Watkins and Mr Bicknell had discussed him undertaking a General Manager position. However because she said she considered that she was starting to rely upon him for moral support, Ms Watkins texted Mr Bicknell on 24 September 2018 and stated that she: “may have accidentally developed extra feelings which do not involve work.” Mr Bicknell responded: “it was good of you to come clean, but that has kinda freaked me out”.

[13] Ms Watkins had assured him by responding in a text message: “Nothing to worry about I can keep it totally professional. But this is a huge commitment for you taking on the role we talked about plus my son’s career is at stake so I’ll let you decide what you want to do.”

[14] A meeting at a nearby restaurant the following day was arranged between the parties. During the meeting Mr Bicknell said he could keep their relationship professional and Ms Watkins agreed that she could also do so. On that basis Mr Bicknell said he had accepted the role of General Manager because he believed he had the ability to perform well in that role and expand Red Stag’s operation into new areas.

[15] In a text message to his partner he had explained that he had been offered another job but had decided to accept the Red Stag role stating:

What sucks is that I love Mike and I’d love to work for him, but this job has general manager tagged to it with a brand new truck/fuel card and pretty much \$30 an hr with it. It’s an advancement in my career that’s come early for me and a great step for me coz the place is small so I can also grown the business and grow with it, she’s already said that if I make her rich she will make me rich too.

[16] Mr Bicknell was given a salary increase and permission by Ms Watkins to take home and use one of the Red Stag vehicles for his personal usage, although during the day it was to be parked at Red Stag’s premises and used by other employees. At the outset of employment, Mr Bicknell had also been provided with a company mobile telephone which he could use for personal matters.

[17] Mr Bicknell said that after his appointment to General Manager he and Ms Watkins had attended client calls together. Mr Bicknell said this was at Ms Watkins insistence, however Ms Watkins said that it had been at Mr Bicknell’s insistence that he attend the client meetings to provide the technical input which Ms Watkins lacked.

[18] Mr Bicknell said that he had regarded the position as career advancement and had taken an active interest in developing Red Stag as General Manager. He said that it had become more profitable as a result of his involvement. Ms Watkins confirmed that the financial results of the Red Stag had improved since Mr Bicknell’s appointment as General Manager.

[19] Mr Bicknell said that he had felt uncomfortable around Ms Watkins due to what he said were fleeting moments of her bodily touching him, and alleged that she made sexual innuendos to him constantly. However he had no proof that any of these events had taken place as they were verbal.

[20] Ms Watkins denied this was the case and said that although they continued to be friends in addition to their working relationship, she had never touched Mr Bicknell or made inappropriate sexual comments to him.

[21] Ms Watkins said that Mr Bicknell had never informed her that she made him feel uncomfortable

[22] Mr Bicknell said he had had a late night on Thursday 6 December 2018 and the following morning he advised Ms Watkins that he would have to bring his son to work with him that day. Ms Watkins had told him to take the Friday as a leave day.

[23] Ms Watkins said she had been informed by some employees that Mr Bicknell had been heavily drinking on the night of 6 December 2018. She had texted him on Sunday 9 December 2019 informing him of this and suggesting that they should talk

[24] Mr Bicknell texted Ms Watkins on Monday 10 December 2018 stating: 'I won't be in today as I'm not well Nicola, your txt from yesterday is totally out of line un called for. So yes when I return tomorrow we will definitely need to talk. Don't bother to ring me today please I'm ill.'

[25] Ms Watkins had asked Mr Bicknell to obtain a medical certificate as she was contractually entitled to do and a result Mr Bicknell had seen his GP that day, Monday 10 December 2018, and obtained a medical certificate which signed him off as unfit to attend for work for five days due to a lumbar sprain.

[26] The following Saturday 15 December 2018 after the expiry of Mr Bicknell's medical certificate, Ms Watkins said she had been extremely disappointed when Mr Bicknell did not attend for work without any notification because he had been instrumental in arranging for the Red Stag employees to carry out some work that day.

[27] She had tried to call Mr Bicknell during the day because there were some parts which were required for the work which were in the vehicle he was using, but there had been no answer to her calls, nor had he returned her calls.

[28] Later that day she had seen him by accident in the town during that afternoon in the Red Stag vehicle with his ex-partner and he had told her he would be attending the staff Christmas function that same evening. However, he had failed to turn up for it.

[29] Mr Bicknell said that the Employment Agreement had not been updated as a result of his promotion to the position of General Manager and he was not contractually obliged to

work on a Saturday. He also said that attendance at the Staff Christmas function had not been mandatory.

[30] Ms Watkins text messaged Mr Bicknell the following day informing him that she had spoken to his previous employer and stating: "I think it is important that we meet as soon as possible. If you are well enough I would like to do that tomorrow offsite in private. It's not a disciplinary meeting at all. It's up to you if you want to stick to formality or just talk."

[31] Mr Bicknell responded that he did not want to meet without a representative present and Ms Watkins agreed that he could take Monday 17 December 2018 as paid leave in order to obtain legal advice.

[32] Mr Bicknell did not attend for work the following day, Tuesday 18 December 2018. He said that he had sent Ms Watkins a text message to let her know he would not be at work because he had not been successful in obtaining legal assistance although Ms Watkins said she had not received a text message from him.

[33] Ms Watkins had asked Mr Bicknell to return the Red Stag vehicle and his mobile telephone to the workplace and said this was because the vehicle was required to be used in the business, and the telephone was needed because Mr Bicknell had not been answering calls from her or passing on messages from clients who had been contacting him on the mobile telephone number. Some of the clients had subsequently telephoned Red Stag complaining that they could not make contact with Mr Bicknell.

[34] Ms Watkins emailed Mr Bicknell the following day, Tuesday 18 December 2018 stating:

Yesterday I gave you the day off to seek legal advice as per your request as you said you did not want to talk to me without advice or a support person. Yesterday you were supposed to go and do that and our meeting which I had not scheduled yet could not be arranged according to you without you first finding some help. There was no agreement that you would not show up today and we returned your tools to you out of courtesy as they are not ours and your personal property. ...

It is your off behaviour and attitude that has caused this mess and as you are not communicating or showing up as agreed we will be seeking legal advice today regarding setting up a disciplinary meeting.

[35] Mr Bicknell did not attend for work on Wednesday 19 December 2018. Ms Watkins emailed him on 19 December 2018 asking why he was not at work and noting that he had been expected to attend at 7.30 am.

[36] Mr Bicknell had obtained legal assistance and a personal grievance letter was filed on his behalf that same day claiming that he had been unjustifiably dismissed or constructively

dismissed by Red Stag, had been sexually harassed, and that he had been disadvantaged in his employment.

[37] A response had been sent on behalf of Red Stag that same day denying the claims and pointing out that no decision about a disciplinary investigation had been reached by Red Stag, however Red Stag had communicated to Mr Bicknell that it intended taking legal advice.

[38] The response concluded:

While our client understands Mr Bicknell has decided to resign, it doesn't agree that this is due to constructive dismissal, or that it can otherwise be held accountable for this as his version of events is not correct. If Mr Bicknell wishes to reconsider this resignation, now that our client's version of events has been clarified, he should advise of this by **Friday, 21 December at 9 am**. Should Mr Bicknell not reconsider or not respond to the request that he does so, our client will process his final pay and holiday pay.

[39] Mr Bicknell did not contact Red Stag to rescind his resignation and his employment was duly terminated in accordance with his resignation.

#### **Was Mr Bicknell constructively dismissed by Red Stag or did he voluntarily resign?**

[40] Red Stag did not dismiss Mr Bicknell. He was expected to return to work after a period of sick leave on 17 December 2018 but did not do so, raising a personal grievance for constructive dismissal on 19 December 2018.

[41] Mr Bicknell's evidence was that he believed the request by Red Stag that he return the company vehicle and the mobile telephone on 17 December 2018, and the return of his personal tools indicated that he had been dismissed.

[42] Red Stag responded to the personal grievance letter dated 19 December 2018 that same day in a letter in which it had communicated its intention of seeking legal advice prior to holding a meeting with Mr Bicknell and also asked him to reconsider his resignation provided on 19 December 2018, allowing him until 21 December 2018 to do so.

[43] Mr Bicknell did not respond to that letter or the invitation to reconsider his resignation, and his employment duly terminated.

[44] I find that Red Stag did not dismiss Mr Bicknell, he resigned from his employment.

#### **Was Mr Bicknell constructively dismissed?**

[45] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required; the employee

responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:<sup>1</sup>

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[46] There is no obligation on the employer to dissuade the employee from leaving, although the employer may choose to do so in some cases. An employee who has resigned has not been dismissed.

[47] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[48] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[49] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.<sup>2</sup>

#### *Breach of duty*

[50] Mr Bicknell's evidence was that he had considered he had been constructively dismissed and his employment terminated when Red Stag requested the return of the company vehicle and the mobile telephone with which he had been provided, and also its action in returning his personal tools to him.

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<sup>1</sup> 5/12/00 AC 94/100, AEC 106/00 at para 21

<sup>2</sup> *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etxc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

[51] I note that the Employment Agreement provides for a vehicle to be provided for work purposes only, and there is no entitlement to the private use of a company provided mobile telephone.

[52] However Ms Watkins' evidence is that she entered into a verbal agreement with Mr Bicknell regarding the role change to General Manager and the salary increase. It was agreed that Mr Bicknell was permitted to use the Red Stag vehicle for personal use after work hours and during the weekend and he was allowed to use the mobile telephone for personal use.

[53] I find no breach of duty in Red Stag requesting the return of the company property provided to Mr Bicknell in order for it to be used on Red Stag business until such time as he returned to the workplace.

[54] The mobile telephone was provided to Mr Bicknell for use on Red Stag business and in addition, following his promotion to General Manager, Mr Bicknell could use it for his personal calls.

[55] The evidence is that that it was requested to be returned to the workplace after Mr Bicknell refused to answer calls from Ms Watkins or pass on messages left on it by company clients. In these circumstances I find it was not unreasonable for Red Stag to request its return in order that client calls could be monitored and dealt with by Red Stag.

[56] I find no breach of duty in Red Stag requesting the return of the Red Stag vehicle or the mobile telephone.

[57] Red Stag returned Mr Bicknell's personal tools to him. The return of the personal tools occurred during a period when Red Stag was actively communicating with Mr Bicknell regarding his attendance at a company meeting and I accept Ms Watkins' explanation that the return of the personal tools was to ensure their safekeeping. Moreover there was no contractual requirement that Mr Bicknell's tools be stored on Red Stag premises.

[58] I find no breach of duty by Red Stag returning Mr Bicknell's personal tools.

[59] Ms Watkins contacted Mr Bicknell's previous employer. Ms Watkin's evidence was that Mr Bicknell had frequently exhorted her to do this, and Mr Bicknell confirmed he had done so. However there was no written agreement that she had his permission to do so. I also observe that during the recruitment process Ms Watson could have contacted the previous employer in the normal course of reference checking but did not do so.

[60] I find that Ms Watkins contacted Mr Bicknell's previous employer to make enquiries about his previous personal behaviour and this was a breach of duty in the part of Red Stag.

[61] Mr Bicknell did not attend for work after his medical certificate expired on 17 December 2019, and Red Stag indicated its intention to meet with him on his return to work. An employer wishing to hold a meeting with an employee is not a breach of the Employment Agreement but within management prerogative.

[62] In the case of a disciplinary meeting an employer is required to follow a fair and reasonable process and Red Stag indicated its intention to obtain legal advice prior to a meeting taking place.

[63] I find no breach of duty in Red Stag wishing to hold a meeting with Mr Bicknell but I do find that Mr Bicknell breached his employment obligations by not attending for work without authorisation.

[64] Mr Bicknell did not at any time ask Ms Watkins if he had been dismissed.

*Was the risk of resignation foreseeable?*

[65] There is no indication that there had been any dealings between Mr Bicknell and Red Stag which had been disciplinary in nature, or that there had been any performance issues raised with Mr Bicknell prior to December 2018. In fact it was agreed by Ms Watkins that company performance had improved under Mr Bicknell's management.

[66] Ms Watkins stated that she wished to meet with Mr Bicknell to discuss what had occurred during the period from 7 December until his expected return to work on 17 December 2018.

[67] The text messages sent by Ms Watkins to Mr Bicknell which are not dated but appear to be sent following Saturday 16 December 2018 are emotive in nature. It was after receiving these text messages that Mr Bicknell decided to seek legal advice and have support and/or representation at the proposed meeting.

[68] Ms Watkins initially informed Mr Bicknell that the meeting was to be informal in nature. However when Mr Bicknell requested the opportunity to seek legal advice on Monday 17 December 2018, and leave had been granted to him to do so, Ms Watkins also indicated her intention to seek legal advice prior to a disciplinary meeting taking place, confirming this in a letter dated 18 December 2018. The letter stated:

It is your off behaviour and attitude that has caused this mess and as you are not communicating or showing up as agreed we will be seeking legal advice today regarding setting up a disciplinary meeting.

[69] Mr Bicknell resigned from his employment on 19 December 2018 prior to any disciplinary meeting taking place and when both parties were in the process of seeking legal advice.

[70] Red Stag responded to the letter sent on Mr Bicknell's behalf on 19 December 2018 confirming that no decision about a disciplinary investigation had been reached although Red Stag had indicated its intention to seek legal advice, and giving Mr Bicknell the opportunity to reconsider his resignation decision. Mr Bicknell chose not to do so.

[71] Considering the circumstances in which Mr Bicknell had been informed that Red Stag wished to meet with him about issues that had arisen during the course of his employment, he had requested time to seek legal advice as a result, and for which leave had been granted for that purpose, I do not find that the risk of resignation prior to a meeting being held was reasonably foreseeable.

[72] I determine that Mr Bicknell was not constructively dismissed by Red Stag but that he voluntarily resigned.

### **Was Mr Bicknell unjustifiably disadvantaged by Red Stag?**

[73] Disadvantage grievances are assessed in light of s103 (1)(b) of the Act which states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[74] The elements of s103 (1) (b) are twofold:

- i. An unjustifiable action by the employer, which
- ii. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[75] Mr Bicknell must therefore establish that there was some unjustifiable action or actions by Red Stag which affected his terms and conditions of employment to his disadvantage.

*Was Mr Bicknell unjustifiably disadvantaged by his position being altered from Senior Fabricator to General Manager?*

[76] Mr Bicknell was appointed to the position of General Manager after discussion with Ms Watkins. Mr Bicknell confirmed that he had accepted the position of General Manager which had advantages for him in terms of both financial benefits and career advancement.

[77] Mr Bicknell received a salary increase because of his promotion, in addition to the provision of a company vehicle and a mobile telephone, both of which he was able to use for personal matters.

[78] I find no terms and conditions of Mr Bicknell's employment were affected to his disadvantage by the change in his position from Senior Fabricator to that of General Manager.

*Was Mr Bicknell unjustifiably disadvantaged by the failure to amend his Employment Agreement or Job Description as a result of his promotion to General Manager?*

[79] Mr Bicknell's appointment as General Manager was not formalised. There was nothing provided to him in writing to confirm the appointment or the change to terms and conditions including being able to use a Red Stag vehicle and a mobile telephone for personal usage. However he did receive the pay increase and had the personal use of the company vehicle and mobile telephone.

[80] Whilst a verbal agreement is binding on the parties who enter into it, a written agreement provides certainty between the parties and the Employment Agreement contained the clause:

**Changes to this agreement**

The employer and employee can agree to change the terms of this agreement at any time. Any changes must be in writing and agreed to by both employer and employee..

[81] Towards the latter part of his employment Mr Bicknell was required to return the vehicle and mobile telephone to Red Stag prior to the termination of his employment. The conditions under which he was allowed to use the vehicle and the mobile telephone for personal use had not been set out in writing due to the failure to update the Employment Agreement and I find this constituted a disadvantage in employment to him.

[82] I find that Mr Bicknell's employment was affected to his disadvantage by the failure to amend his employment agreement in writing.

*Was Mr Bicknell disadvantaged by Red Stag increasing his remuneration, providing him with a company vehicle, and a mobile phone?*

[83] I find no detriment to Mr Bicknell in his being provided with increased remuneration or the provision of a company vehicle and mobile phone for personal usage and therefore his claim I find no evidence that his employment was affected to his disadvantage.

*Was Mr Bicknell disadvantaged by Red Stag withdrawing the personal use of a company vehicle and phone?*

[84] Following Mr Bicknell's promotion to General Manager Ms Watkins had agreed to Mr Bicknell using the Red Stag vehicle for personal use, however during the working day it was to be parked at Red Stag's premises and used by the other employees as required. There is no evidence that supports it being provided for Mr Bicknell's sole use as part of his conditions of employment.

[85] Mr Bicknell had been able to use the Red Stag vehicle for personal use although I accept that it was not provided to be used solely by him during his employment. However I find that Mr Bicknell's terms and conditions of his employment were affected to his disadvantage by the withdrawal of his personal use of the Red Stag vehicle.

[86] Mr Bicknell had use of the mobile telephone for personal use, and had clearly used it extensively on a personal basis from the onset of his employment with Red Stag.

[87] I find that withdrawing the use of it during his employment affected Mr Bicknell's terms and conditions of his employment to his disadvantage.

**Was Mr Bicknell sexually or otherwise harassed in his employment?**

[88] Mr Bicknell claims that he was sexually or otherwise harassed by Ms Watkins during his employment at Red Stag.

[89] Mr Bicknell claims that Ms Watkins texted him shortly after his employment commenced stating that: "I think I may have accidently developed some extra feelings which do not involve work".

[90] Mr Bicknell's evidence was that although they had subsequently agreed to keep their relationship professional Ms Watkins had sexually harassed him although he confirmed during the Investigation Meeting that there had been no request for sexual intercourse or contact.

[91] Ms Watkins denied that there had been any contact of a sexual nature.

[92] Mr Bicknell's evidence was that he had felt harassed by otherwise unwanted and unjustified behaviour by Ms Watkins which was serious and repeated by making threats to his job security, and general work communications making personal insults to him

[93] The relevant statutory and procedural requirements of sexual harassment are set out in s.103, s.108 and s.117 of the Act. Sexual Harassment is specifically addressed in the Act being referred to as a personal grievance in s.103(1)(d) of the Act on the basis that: "*that the employee has been sexually harassed in the employee's employment*".

[94] Sexual harassment is defined in s.108 of the Act as:

(1) For the purposes of sections 103(1)(d) and 123(1)(d) an employee is **sexually harassed in that employee's employment** if that employee's employer or a representative of that employer—

(a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—

- (i) an implied or overt promise of preferential treatment in that employee's employment; or
- (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
- (iii) an implied or overt threat about the present or future employment status of that employee; or

(b) by—

- (i) the use of language (whether written or spoken) of a sexual nature; or
- (ii) the use of visual material of a sexual nature; or
- (iii) physical behaviour of a sexual nature,—

directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[95] Pursuant to s.108(1)(a) of the Act sexual harassment primarily occurs where there has been a direct or an indirect request by the employee's employer or a representative of the employer for: "*sexual intercourse, sexual contact, or other sexual activity*" that contains an implied or overt promise of preferential or detrimental treatment in regard to the employee's employment or future employment status.

[96] Apart from the reference to Ms Watkins having developed feelings for Mr Bicknell: “which do not involve work”, I find there is no evidence that there was a request pursuant to s.108(1)(a) made to Mr Bicknell, nor was there conduct of the type set out in s.108(1)(b) of the Act.

[97] In considering the claim that Mr Bicknell was otherwise harassed by Ms Watkins I have examined the text messages submitted by the parties which support the conclusion that the relationship between Mr Bicknell and Ms Watkins was informal in tone and I accept that they had a friendship relationship.

[98] However there is no suggestion in the voluminous amount of emails that the relationship between Mr Bicknell and Ms Watkins was inappropriate or coercive on Ms Watkins’ part. The vast majority of emails submitted over the three month period from September 2018 when Mr Bicknell became the General Manager until early December 2018 are concerned with business matters and the effort to grow and strengthen the business.

[99] There is however evidence that Mr Bicknell had difficult pressures in his home and personal life with which he was having to deal over that period and about which he not infrequently instigated text messages with Ms Watkins outside normal working hours.

[100] The information on personal matters referenced in the emails support there being a friendship element but not that this strayed beyond the boundaries of mutually instigated or acceptable behaviour.

[101] There is no evidence that Mr Bicknell raised a complaint with Ms Watkins to the effect that he found her behaviour towards him sexually harassing in order that she could take the necessary steps to prevent a repetition of the behaviour.

[102] Whilst I accept that Mr Bicknell may have felt constrained against so doing by the fact that Ms Watkins was his employer and the sole director, there is no suggestion in the many text messages exchanges between him and his girlfriend that Ms Watkins had subjected him to unwanted pressure of a sexual or otherwise inappropriate and harassing nature.

[103] I determine that Mr Bicknell was not sexually or otherwise harassed in his employment by Ms Watkins during his employment at Red Stag.

**Is Mr Bicknell owed outstanding wages and/or holiday pay?**

[104] Mr Bicknell claims unpaid wages and Holiday Pay. Red Stag has submitted copies of Mr Bicknell's payslips covering the period 25/11/2018 to 13 January 2019, which show Mr Bicknell was paid all outstanding monies due to him.

[105] On the 13 September 2019 Mr Bicknell confirmed his claim that he was not paid (i) his wages of \$250.00 for the Monday when he was given paid time off to seek legal advice and (ii) his outstanding holiday pay.

[106] The payslip dated 13 January 2019 showed that outstanding amount of wages due included \$250.00 gross plus the employers Kiwisaver contribution of \$23.39 for the relevant Monday. The outstanding Holiday Pay of \$529.60 gross was included under the heading termination pay. In total after deductions for tax a net payment of \$560.25 was shown as being paid into Mr Bicknell's designated bank account.

[107] Upon receiving Mr Bicknell's bank statement on 17 September 2019 covering the relevant period, I note that on 21 December 2018 an amount of \$560.25 was received into the account as being credited from Red Stag. Therefore Mr Bicknell's claim for unpaid wages and holiday pay fails.

[108] I find that Mr Bicknell's claim for unpaid wages and Holiday Pay to be disingenuous given that he denied receiving the amount as late as the 13 September 2019.

[109] I determine that Mr Bicknell is not owed outstanding wages and/or holiday pay

**Remedies**

*Unjustifiable Disadvantage*

[110] I have found that Mr Bicknell has been unjustifiably disadvantaged in his employment by (i) the failure of Red Stag to amend in writing his employment agreement and (ii) the removal of the personal usage of the Red Stag vehicle and mobile telephone during the latter part of his employment as General Manager.

**[111] I order that Red Stag pay Mr Bicknell the sum of \$2,750.00 as compensation pursuant to s.123(c)(i) of the Act.**

*Contribution*

[112] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[113] Mr Bicknell had failed to forward any messages or calls received from Red Stag clients on the mobile telephone which had been provided to him for work as well as personal usage. This fact contributed to Ms Watkins requesting its return to Red Stag in order to be able to service the clients' requirements which was an essential part of the operational sustainability of Red Stag.

[114] During working hours the company vehicle was required for use at the place of work which was the reason why Ms Watkins requested the vehicle be returned to the place of work. Mr Bicknell did not cooperate with the request and in fact left the vehicle in a supermarket car park returning the keys via a third party.

[115] I find that Mr Bicknell contributed to the situation which resulted in the return of the company vehicle and the mobile phone, and reduce the amount ordered as compensation pursuant to s.123(c)(i) of the Act to be reduced by 40%.

**Did Ms Watkins aid and abet any breach of employment obligations by Red Stag?**

[116] I have found that Red Stag disadvantaged Mr Bicknell in his employment and pursuant to s. 134(2) of the Act:

Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[117] In order to aid and abet the relevant person must know of the employment agreement and deliberately intend to interfere with it.<sup>3</sup>

[118] If it is determined that a party to an action has incited, instigated, aided or abetted a breach of an employment agreement, a penalty may be awarded pursuant to s 135 of the Act. The maximum amount of such a penalty is \$10,000.00 in the case of an individual.

[119] A person deemed to be the 'mind' of the company may be found guilty of aiding and abetting the company to commit a breach.

[120] In this case Ms Watkins is the sole director and shareholder of Red Stag. In those circumstances, should a determination be made finding that Red Stag breached its obligations as an employer to Mr Bicknell and Ms Watkins was the directing 'mind' of the company in respect of such default, she may be found guilty of aiding and abetting the company to commit a breach.

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<sup>3</sup> *Credit Consultants Debt Serviveces NZ Ltd v Wilson (No 3)* [2007] ERNZ 252 at [76]

[121] I have determined that Red Stag unjustifiably disadvantaged Mr Bicknell in his employment by breaching its employment obligations and thereby Ms Watkins as sole director aided and abetted those breaches.

[122] Having considered the principles which should govern the imposition of a penalty<sup>4</sup>, I determine that a penalty of \$500.00 is appropriate.

**[123] I order that Ms Watkins is to pay a penalty of \$500.00, of which 70% is to be paid to Mr Bicknell and 30% to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.**

### **Costs**

[124] Costs are reserved. Given the extent to which both parties have been successful I am of a mind to let costs lie where they fall, however, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

[125] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].