IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 622
3062640

	BETWEEN	CTL Applicant
	AND	TONI SKELLON t/a BAKED ON ALEXANDRA Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	CTL in person No appearance for the Respondent
Investigation Meeting:	24 October 2019
Date of Determination:	31 October 2019

DETERMINATION OF THE AUTHORITY

Applicant's name

[1] A random online letter selection tool has been used to select the letters "CTL" that are used in this determination in place of the applicant's name. These three letters do not bear any relation to the Applicant's real name.

Employment Relationship Problem

[2] The Applicant was employed by Toni Skellon, trading as Baked on Alexandra, for just over 3 months as a Café Assistant. He alleges he suffered unjustified disadvantages to his employment, was unjustifiably dismissed, and is owed wage arrears and holiday pay entitlements. He also asks the Authority to order Ms Skellon to pay a penalty for failure to provide him with an individual employment agreement. His grievances are denied by Ms Skellon although his wage claims are accepted.

The Process

[3] There was no appearance for or on behalf of Ms Skellon at the investigation meeting. This was despite the Authority waiting 25 minutes before commencing its investigation. A phone call made by the Authority Officer to the mobile number provided by Ms Skellon to the Authority revealed that the number had been disconnected.

[4] As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act as fully in the matter before me as if Ms Skellon had duly attended or been represented.

[5] As permitted by s 174E of 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 but has not recorded all evidence and submissions received. It reiterates a number of preliminary indications of findings provided during the investigation meeting.

The Issues

[6] The issues identified for investigation and determination were:

a) Was the Applicant dismissed? If so, was this justified?

b) Did the Applicant suffer an unjustified disadvantage to his employment?

c) If the Applicant suffered an unjustified disadvantage, or was unjustifiably dismissed, what remedies should be awarded?

d) If any remedies are awarded, should they be reduced, under s 124 of the Act, for blameworthy conduct by the Applicant that contributed to the situation giving rise to his grievance?

e) Are any wage arrears and/or holiday pay owing to the Applicant?

f) Did Ms Skellon fail to provide the Applicant with an individual employment agreement? If so, should a penalty be ordered?

Relevant background facts

[7] From the commencement of the Applicant's employment, the parties intended the employment relationship to be one of short duration. The Applicant, a student, wanted part-time employment for a few months so that he could save money for an overseas holiday.

[8] After an initial trial day, Ms Skellon agreed to employ the Applicant and he commenced work on 20 February 2019. The terms and conditions of his employment were not recorded in writing.

[9] In or about early May 2019 the Applicant gave notice that his last day of employment would be on 31 May 2019. Thereafter, on or about 12 May 2019, he provided notice of his desire to take three alternative holidays that he had accrued from working on public holidays. Ms Skellon agreed to his request and indicated that he could take alternative holidays on 24, 25 and 26 May 2019.

[10] Text messages that I have viewed show the Applicant responded advising that he didn't want the days off, he just wanted the money. Ms Skellon told him he could either take the days off or he would be paid out for these days when he left. She confirmed she had arranged cover for the days off. The Applicant did not reply even after receipt of his roster that showed he had been rostered off on the days indicated by Ms Skellon.

[11] On 19 May 2019 the Applicant sent a text message to Ms Skellon to advise he was unwell. She replied advising him that text messages were an unacceptable form of communication and next time he needed to call in. Later that day she text him again:

> Have just worked out days and yesterday was then your last rostered day on. So will need uniform etc back by 29/5 thank you.

[12] The Applicant replied asking why this was the case as his notice period ended on 31 May 2019. Ms Skellon responded:

> Yep so this Friday Saturday Sunday you have your 3 days in leau. Next Friday the 31st we won't be needing to roster you on. As you are casual your days go by how the week goes. As we are shut Monday Tuesday over the next few weeks there is no Mondays. Saturday was your last day as you didn't come for shift yesterday (text in sick) rest is explained above. You knew you had this week off as you asked on Saturday what your rostered days off will be where I again explained we are closed Monday and Tuesday.

> you have your 3 days in leau Friday Saturday Sunday so you won't be working this week. You then called in sick.

Issue One: Was the Applicant dismissed?

[13] Having considered the evidence I am not satisfied that the Applicant was dismissed. It is clear from the text messages exchanged between the parties that Ms Skellon anticipated the employment relationship continuing during the notice period provided by the Applicant. During this period the rosters show the Applicant still being named alongside other staff on the roster, although he was marked as "off", as were other staff who were taking annual leave who were not required to work.

[14] I find the Applicant was not dismissed. However, I find he was not paid wages that he was entitled to receive during his notice period. I shall discuss the quantum of wage arrears owed to him later in this determination.

Issue Two: Wage arrears and holiday pay

Failure to pay minimum wage

[15] I am satisfied the Applicant was not paid minimum wage on two occasions. First on his trial day on 7 February 2019 and second for the hours he worked during the week ending 7 April 2019.

[16] In terms of the trial day, the evidence was that he worked for 7.5 hours but was only paid $50. This represents an hourly rate of $6.66. The minimum wage at the time was $16.50. This means the Applicant ought to have been paid $123.75, a difference of $73.75 gross.

[17] On 1 April 2019 the minimum wage rate increased to $17.70. However, the Applicant was only paid $16.50 per hour for the 34 hours that he worked during the week ending 7 April 2019. Multiplying 34 hours by the shortfall of $1.20 per hour I reach a figure of $40.80 gross.

[18] Ms Skellon is ordered to pay the Applicant the combined sum of $114.55 gross within 14 days of the date of this determination.

Failure to pay time and a half

[19] The Applicant was entitled to receive time and a half for the hours he worked on each public holiday.[1] There is no dispute that he was not paid this entitlement in relation to three public holidays namely - Good Friday, Easter Monday and Anzac Day 2019.

[20] The wage records show the Applicant worked a total of 23.5 hours on these days. He was paid his ordinary hourly rate for these hours ($17.70) but not half that amount again. Multiplying the hours he worked (23.5 hours) by half of his hourly rate ($8.85) I come to $207.97 gross.

[21] Ms Skellon is ordered to pay to the Applicant the sum of $207.97 gross under s 50 of the Holidays Act within 14 days of the date of this determination.

Payment for Alternative Holidays

[22] Having worked on three public holidays, the Applicant was entitled to receive three alternative holidays.

[23] I am satisfied, on balance, that it was impliedly agreed that the Applicant would take alternative holidays on 24, 25 and 26 May 2019. There is no dispute that the Applicant did not receive payment for these dates.

[24] The Applicant was entitled to receive payment for his three alternative holidays at the rate of his relevant daily pay or his average daily pay for his last day of employment.[2] Multiplying the Applicant's average daily pay of $127.85 gross by three comes to a sum of $383.55.

[25] Ms Skellon is ordered to pay the Applicant the sum of $383.55 under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Wage arrears owing for notice period

[26] The Applicant was paid for the hours that he worked up to 19 May 2019. In terms of the period 20 May to 31 May I am satisfied that the Café was closed on 20,

[1] Holidays Act 2003, s 50.
[2] Holidays Act 2003, s 60(2).

21, 27 and 28 May. I find, on balance, that the Applicant generally worked Thursdays, Fridays and the weekend.

[27] I have already calculated the Applicant's entitlements for the alternative holidays that were agreed to be taken on 24, 25 and 26 May 2019. To calculate his entitlement for the remaining three days (23, 30 and 31 May) I have used his average daily pay of $127.85 gross and multiplied this by three. I reach a figure of $383.55 gross.

[28] Ms Skellon is ordered to pay the Applicant the sum of $383.55 gross within 14 days of the date of this determination.

Holiday pay on arrears

[29] The Applicant claims holiday pay on the wage arrears that are owing to him. I am satisfied this is appropriate. The combined arrears total $1,089.62. 8% of this sum equals $87.16.

[30] Ms Skellon is ordered to pay the Applicant the sum of $87.16 under s 23 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Kiwisaver on arrears

[31] The Applicant claims Kiwisaver on the wage arrears that are owing to him. I am satisfied this is appropriate. The evidence shows that he was paid Kiwisaver throughout the duration of his employment.

[32] The combined wage arrears (including holiday pay) total $1,176.78. 3% of this sum equals $35.30.

[33] Ms Skellon is ordered to pay the Applicant the sum of $35.30 gross for KiwiSaver arrears. Payment of this sum must be made within 14 days of the date of this determination.

Issue Three: Unjustified disadvantage?

[34] Under s 103(1)(b) of the Act an employee may commence a personal grievance claim where the employee's employment, or one or more of the employee's

conditions of employment, is or are or was affected to the employee's disadvantage by an unjustifiable action by the employer.

[35] The onus will initially be with the employee to establish that their employment or condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Not being provided with rest and meal breaks

[36] At material times, section 69ZD of the Act required Ms Skellon to provide the Applicant with rest breaks and meal breaks that provided him with a reasonable opportunity, during his work period, for rest, refreshment and attention to personal matters, and that was appropriate for the duration of his work period. However, she was exempt from doing so to the extent that the parties agreed that the Applicant was to be provided with compensatory measures.[3]

[37] There is no dispute that the parties mutually agreed that where the Café was busy, and the Applicant was unable to take breaks, he would be remunerated for his rest break on top of the hours he worked and, where it was a meal break, his wages would not be deducted. I find this agreement was reasonable in the circumstances taking into account the nature of the workplace and the number of staff.

[38] Consistent with this agreement, where the Applicant did not take his rest or meal break, he noted the time on his timesheet each day and received compensation by way of additional remuneration. I have viewed his timesheets and payslips. They show only a few occasions where he was not able to take his 30 minute lunch break but it appears on those days he did receive a rest break. There were a number of occasions where he didn't receive his rest break but on those days he did receive a 30 minute lunch break.

[39] Although there were occasions where the Applicant was unhappy not having a break, at no time did he express this to Ms Skellon or revoke his agreement to be

[3] Employment Relations Act 2000, s 69ZEA(1)(a) and 69ZEB.

compensated for breaks not taken by way of additional remuneration. In the circumstances, I find the Applicant has not established that he suffered an unjustified disadvantage to his employment arising from a failure to provide him with breaks.

Unfair treatment?

[40] The Applicant pointed to a number of matters that he felt had resulted in him being treated unfairly by Ms Skellon. I was not persuaded by his evidence that he was treated in a way that was unfair or that created a disadvantage to his employment. His claim under this head is dismissed.

Not paid his contracted hours?

[41] The statement of problem pleaded that the parties agreed the Applicant would work a minimum of 30 hours per week from the commencement of his employment. The Applicant said that Ms Skellon's failure to abide by this agreement resulted in him suffering an unjustified disadvantage.

[42] I was not persuaded that the parties reached an agreement as claimed by the Applicant.

[43] First, I am satisfied that the parties did not intend the Applicant to work 30 hours per week from the commencement of his employment. Under questioning the Applicant accepted that Ms Skellon told him that he would not receive 30 hours per week for the first couple of weeks of his employment. This evidence was consistent with the wage records that show that for the first 3 weeks of his employment the Applicant was only rostered on to undertake between 16.5 and 23.5 hours per week.

[44] Second, the behaviour of the parties after the alleged agreement was made was inconsistent with an agreement that the Applicant would work a minimum of 30 hours per week. For example:

a. For all but 4 of the weeks he was employed, the Applicant was rostered to work less than 30 hours per week. Notwithstanding this, the Applicant said he did not speak to Ms Skellon about any agreement to provide him with a minimum of 30 hours work each week.

b. The only time that the Applicant spoke to Ms Skellon about his hours was on 4 March 2019. On or about this date he had received his roster for that

week that showed he was to work 16.5 hours. By this stage he had worked two weeks. The first week he had been rostered on for 21 hours and the second week for 23 hours. On this day he queried how Ms Skellon was finding his performance and if there was any reason his hours had dropped. Ms Skellon told him that the business could not afford to pay him more hours than what he was being rostered to do. He said he accepted this position.

[45] In the circumstances it is more likely than not that there was no agreement to pay the Applicant a minimum of 30 hours per week. That being the case, the Applicant has failed to establish that he suffered a disadvantage to his employment.

Issue Six: Did the Respondent fail to provide the Applicant with an individual employment agreement? If so, should a penalty be ordered?

[46] Section 65 of the Act requires that an individual employment agreement must be in writing. It must also contain six pieces of information, as set out in that section. Sub-section 65(4) provides that an employer who fails to comply with that section is liable to a penalty imposed by the Authority.

[47] There is no dispute that Ms Skellon failed to provide the Applicant with an individual employment agreement. Therefore, on the face of it, she is liable for a penalty.

[48] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the Act, and the full Court's judgment in *Borsboom v Preet,* was recently summarised by the Court in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited.*[4]

[49] The Court in those cases confirmed the considerations as:

a. The object of the Act as stated in s 3 of the Act (statutory consideration 1)

b. The nature and extent of the breach (statutory consideration 2)

c. Whether the breach was intentional, inadvertent, or negligent (statutory consideration 3)

[4] *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

d. The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4)

e. Whether the person or entity in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5)

f. The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6).

g. Previous conduct (statutory consideration 7).

h. Deterrence, both particular and general (*Preet* additional consideration 1).

i. Degree of Culpability (*Preet* additional consideration 2).

j. Consistency of penalty awards in similar cases (*Preet* additional consideration 3)

k. Ability to pay (*Preet* additional consideration 4)

l. Proportionality of outcome to breach (*Preet* additional consideration 5)

[50] Having taken into account these considerations, I find:

a. There was one breach. The starting point is a penalty of $10,000.

b. The breach was intentional, in that Ms Skellon was aware of the requirement to provide an IEA to her staff and did not provide the Applicant with an IEA. However, I take into account that it was Ms Skellon's intention to provide the Applicant with the IEA once amendments had been made to the existing IEA that she had provided to her other staff. This intention was conveyed to the Applicant when he started his employment. In addition, the breach did not occur over a lengthy period.

c. No financial or other information was provided by Ms Skellon to support an inability to pay a penalty. However, the Applicant told me that he was

aware that the Café' Ms Skellon operated had ceased trading and her contact phone number had been disconnected.

d. In the statement in reply filed by Ms Skellon she accepted responsibility for the breach and was remorseful.

e. I am aware of no other previous conduct by Ms Skellon.

f. The severity of the breach was at the lower end of the spectrum of breaches under s 65 of the Act.

[51] Taking into account the foregoing considerations I conclude an appropriate penalty is $1,000.

[52] A penalty of $1000 is proportionate to the breach and is sufficient to act as a deterrent to other employers who might fail to properly complete the mandatory requirement to provide employees with a written employment agreement covering at least all the elements required by s 63A and s 65 of the Act. It is also a penalty within the range imposed in comparable cases but still very much at the lower end of the levels of penalty that may be awarded against an individual.

[53] Ms Skellon is ordered to pay $1,000 by way of penalty for her breach of s 65 of the Act. This sum is to be paid to the Employment Relations Authority who is then directed to pay 50% of this sum ($500) to the Applicant with the remainder being paid into a Crown Bank Account.

[54] Payment of the penalty is to be paid within 28 days of the date of this determination.

Non-Publication order

[55] During the course of the Authority's investigation meeting the Applicant made an oral application that his name be protected from publication. As Ms Skellon did not appear, the Authority emailed her after the investigation meeting to ascertain whether or not she objected to the application. The issue of this determination was delayed pending her response. No response was received.

[56] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Act. The scope of the Court's

discretionary powers has been traversed by a full Court in *H v A*[5] and by Judge Inglis in *XYZ v ABC*[6] where she considered and applied the approach taken by the Supreme Court in *Erceg v Erceg.*[7]

[57] In *Erceg* the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from. The Supreme Court said:[8]

> … the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

[58] Having heard from the Applicant, and there being no objection to non-publication, I am satisfied that the requisite high standard has been reached so as to grant a non-publication order. There is minimal public interest in knowing the Applicant's identity and personal details, and to the extent that such an interest exists, it is outweighed by the potential prejudicial consequences of publication that the Applicant detailed to the Authority.

[59] A permanent non-publication order in respect of the Applicant's identity and personal details is accordingly made that shall apply except for the purposes of enforcement of this determination.

Costs

[60] The Applicant was not represented and therefore does not claim legal costs. However, the Applicant has paid the Authority's filing fee of $71.56. This fee is an amount reasonably recoverable from Ms Skellon. I order Ms Skellon to pay the sum of $71.56 to the Applicant within 14 days of the date of this determination.

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[5] *H v A Ltd* [2014] ERNZ 38 at [78].
[6] [2017] NZEmpC 40.
[7] *Erceg v Erceg* [2016] NZSC 135.

Outcome

[61] The overall outcome that I have reached is:

a. A permanent non-publication order in respect of the Applicant's identity and personal details is made that shall apply except for the purposes of enforcement of this determination.

b. The Applicant was not unjustifiably dismissed or unjustifiably disadvantaged.

c. Toni Skellon is ordered to pay a sum of $1,283.64 to the Applicant within 14 days of the date of this determination being made up of:

   i. $114.55 for wage arrears arising from a failure to pay minimum wage;

   ii. $207.97 gross under s 50 of the Holidays Act.

   iii. $383.55 gross under s 60 of the Holidays Act.

   iv. $383.55 gross for wage arrears arising from the Applicant's notice period.

   v. $87.16 gross under s 23 of the Holidays Act.

   vi. $35.30 gross for KiwiSaver arrears.

   vii. $71.56 being the Authority's filing fee.

d. Toni Skellon is ordered to pay $1,000 by way of penalty for her breach of s 65 of the Act. This sum is to be paid to the Employment Relations Authority who is then directed to pay 50% of this sum ($500) to the Applicant with the remainder being paid into a Crown Bank Account. Payment of the penalty is to be paid within 28 days of the date of this determination.

Certificate of determination

[62] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that the Applicant be provided with a certificate of determination,

sealed with the seal of the Authority. This certificate is permitted to identify the Applicant and must record that the following orders have been made by the Authority:

a. A permanent non- publication order in respect of the Applicant's identity and personal details is made that shall apply except for the purposes of enforcement of this determination.

b. Toni Skellon is ordered to pay a sum of $1,283.64 to the Applicant within 14 days of the date of this determination being made up of:

   i. $114.55 for wage arrears arising from a failure to pay minimum wage;

   ii. $207.97 gross under s 50 of the Holidays Act.

   iii. $383.55 gross under s 60 of the Holidays Act.

   iv. $383.55 gross for wage arrears arising from the Applicant's notice period.

   v. $87.16 gross under s 23 of the Holidays Act.

   vi. $35.30 gross for KiwiSaver arrears

   vii. $71.56 being the Authority's filing fee.

c. Toni Skellon is ordered to pay $1,000 by way of penalty for her breach of s 65 of the Act. This sum is to be paid to the Employment Relations Authority who is then directed to pay 50% of this sum ($500) to the Applicant with the remainder being paid into a Crown Bank Account. Payment of the penalty is to be paid within 28 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority