IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 648
3049912

	BETWEEN	JANIS MCCUE Applicant
	AND	O'BOYLE LAW LIMITED First Respondent
	AND	LYNETTE O'BOYLE Second Respondent

Member of Authority:	Robin Arthur
Representatives:	David Grindle and Cheyenne Kumar, counsel for the applicant Vinay Deobhakta, advocate for the respondents
Investigation Meeting:	12 June 2019 in Whāngarei
Written submissions	From applicant on 19 June 2019, from respondents on 26 June 2019 and, in reply, from applicant, on 2 July 2019
Determination:	11 November 2019

DETERMINATION OF THE AUTHORITY

A. Janis McCue was unjustifiably disadvantaged by the failure of her employer, Lynette O'Boyle, to provide a written employment agreement and to keep compliant holiday and leave records.

B. Ms McCue's employment ended as a result of breaches of her terms of employment by Ms O'Boyle that amounted to a constructive dismissal.

C. In settlement of Ms McCue's personal grievances for unjustified disadvantage and unjustified dismissal Ms O'Boyle must pay her the following sums within 28 days of the date of this

determination:

(i) $14,625 (less any applicable tax) as reimbursement of lost remuneration; and

(ii) $15,000 (without deduction) as compensation for humiliation, loss of dignity and injury to her feelings.

D. Within 28 days of the date of this determination Ms O'Boyle must also pay Ms McCue the following sums (less any applicable tax) due as wage arrears:

(i) $2,925 for 13 unpaid public holidays; and

(ii) $675 for three days bereavement leave' and

(iii) $6,750 for six weeks (30 days) annual leave; and

(iv) interest on the net amount due as arrears, calculated from 5 October 2018 to the date of payment.

E. Ms O'Boyle must also pay $4,000 to the Authority as penalties for failures to provide a written employment agreement and to keep compliant holiday and leave records. On recovery of the penalties the Authority must transfer that amount in full to the Crown Account.

F. Costs are reserved.

Employment Relationship Problem

[1] On 4 October 2018 Janis McCue resigned from her role as a legal secretary to Lynnette O'Boyle, a lawyer specialising in family law matters. Ms McCue had not been at work since 25 September. She had walked out of the office that day after a discussion with Ms O'Boyle over Ms McCue's holiday entitlements got out of hand. Ms McCue said Ms O'Boyle had used words to the effect that she could leave if she did not like what she was hearing, so Ms McCue had left.

[2] Their difference of views escalated through texts, emails and letters exchanged during the remainder of that day and over the following days. This included Ms O'Boyle demanding Ms McCue return to work, Ms McCue refusing, Ms O'Boyle sending Ms McCue a written warning for taking unauthorised leave and Ms McCue providing, through her solicitor, a medical certificate issued by her doctor on 1

October 2018. The certificate said Ms McCue was "experiencing work-related stress" so had been unable to work since 26 September but "should be able to return to work once the issues are resolved".

[3] Ms McCue did not return to work. Instead her lawyers wrote to Ms O'Boyle on 4 October 2018. The letter tendered Ms McCue's immediate resignation and raised a personal grievance on the grounds of unjustified disadvantage and constructive dismissal. She proposed mediation but this did not resolve the matter and Ms McCue lodged an application in the Authority. She sought orders for payments of arrears due for holiday and other leave entitlements and for personal grievance remedies of lost wages and distress compensation. Ms McCue also asked for penalties to be imposed on Ms O'Boyle for failing to provide her with a written employment agreement and for failing to keep accurate holiday and leave records.

[4] Ms O'Boyle's statement in reply accepted she "could have handled the … situation in a more conciliatory and less emotionally-charged manner" but said this had occurred during a period of some significant commercial and personal stress.

[5] Ms O'Boyle also raised the issue of whether she was, in her personal capacity, Ms McCue's employer or whether the employment relationship was with O'Boyle Law Limited, a company in which Ms O'Boyle was the sole shareholder and director. However Ms O'Boyle conceded this point during the Authority investigation. She accepted she employed Ms McCue in her personal capacity in 2014. No formalities were agreed and completed to transfer the employment relationship to the company after it was registered in 2016. Ms O'Boyle remained personally liable for obligations arising from her employment relationship with Ms McCue.

[6] However Ms O'Boyle firmly denied that her efforts to keep pay and leave records were inadequate or that the circumstances arising from the dispute with Ms McCue over her entitlements amounted to a constructive dismissal.

The Authority's investigation

[7] The issues for determination in the Authority's investigation were:

(i) Was Ms McCue unjustifiably disadvantaged by Ms O'Boyle:

(a) failing to provide her with a written employment agreement; and/or

(b) issuing her with a written warning on 26 September 2018?

(ii) Was Ms McCue's resignation on 4 October 2018 a constructive dismissal caused by breaches of duties owed to her by Ms O'Boyle?

(iii) If Ms O'Boyle's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

(a) Lost wages (subject to evidence by Ms McCue of reasonable endeavours to mitigate her loss); and

(b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?

(iv) If any remedies were awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms McCue that contributed to the situation giving rise to her grievance?

(v) Was Ms McCue owed any arrears of wages (for holiday and leave entitlements)?

(vi) Was Ms O'Boyle liable to a penalty for:

(a) not keeping holiday and leave records compliant with s 81 of the Holidays Act 2003; and/or

(b) not providing Ms McCue with a written employment agreement?

(vii) If any penalties are to be imposed, what amount should be set and should any of part of that amount be paid to Ms McCue?

(viii) Should either party contribute to the costs of representation of the other party?

[8] Ms McCue and Ms O'Boyle each provided written witness statements for the Authority investigation and, under oath, answered questions at the investigation meeting.

[9] One other person, a Whāngarei lawyer, also attended the investigation meeting in response to a witness summons and answered questions. She had earlier provided a written statement reporting some negative comments Ms O'Boyle had made to the witness and another lawyer about Ms McCue's health and family life. Ms O'Boyle made those comments about four weeks after Ms McCue had resigned. She did so while she and the other two lawyers were waiting for their respective clients and talking informally during a break in a meeting at Ms O'Boyle's offices.

[10] The evidence about that conversation was initially advanced by Ms McCue as conduct that aggravated the distress she had experienced as a result of her personal

grievance and that might hamper her job search for another legal services job in the city. However, in her closing submissions, Ms McCue did not pursue that point. To Ms McCue's knowledge, the comments had not been repeated to anyone else. As she had subsequently gained further employment in a legal services role, neither had those comments appeared to have any real negative effect on her employment prospects.

[11] While the comments Ms O'Boyle made about Ms McCue on that occasion were inappropriate in the context they were made, nothing more regarding them needed to be considered in this determination. For that reason, it was also not necessary for this determination to include the name of the witness who gave evidence about it.

[12] As permitted by s 174E of the Act this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It has not recorded all evidence and submissions received. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.[1]

No written employment agreement

[13] Ms McCue began work as Ms O'Boyle's personal assistant on 22 September 2014. Her terms of employment were agreed verbally over time. In early 2015 Ms O'Boyle suggested those arrangements continue on a basis that would have amounted to Ms McCue working as an independent contractor but Ms McCue did not agree to that proposal. In late 2016 when Ms O'Boyle registered O'Boyle Law Limited, as already noted, no changes were made to transfer the employment relationship to the company.

[14] Over an extended period Ms McCue had raised various concerns about how time taken for annual leave and sick leave was recorded. These matter came to a head in September 2018 partly because Ms McCue was making arrangements with Ms O'Boyle to take a holiday in October.

[15] The pay records were dealt by an accountant and Ms McCue had a query about why five leave days taken over the Christmas period were recorded as amounting to seven days. Ms O'Boyle had responded to the query by saying the

[1] Employment Relations Act 2000, s 174C(4).

leave was calculated on the basis of hours worked rather than days and suggested they talk about Ms McCue moving to being paid on a salaried rather than hourly basis.

[16] Although the two women spent much of their working days at desks only metres apart in Ms O'Boyle's office, they did not talk directly to one another about these issues at this time. Instead they debated them through lengthy emails, some written outside office hours, exchanged over several days between 18 and 24 September.

[17] As was apparent from those and later events, not having a written employment agreement that clearly set out her terms of employment was a disadvantage to Ms McCue in those exchanges. Even the simple fact of having an agreement that stated her starting date of employment would have made a difference because one disputed point was the correct anniversary date that annual leave entitlements became due.

[18] This was made worse by Ms O'Boyle, entirely incorrectly, asserting in her emails that a written agreement was "not a legal requirement" and that while "it is wise to have an agreement … it is not a statutory requirement". Ms O'Boyle's statement in reply said she had not been aware of the requirement to provide a written agreement and acknowledged her failure to do so was in contravention of the Act. She accepted her failure to provide a written agreement had caused Ms McCue "some confusion with respect to her annual leave entitlements".

[19] The fact that Ms McCue's conditions of employment were affected to her disadvantage by this failure, which was not what a fair and reasonable employer could have done in all the circumstances at the time, meant she had established a personal grievance on that ground.[2]

The events of 25 September to 4 October 2018

[20] During the course of their email exchanges between 18 and 24 September Ms McCue had asked for a meeting with Ms O'Boyle "to try and resolve differences and sort out any discrepancies". In one email Ms McCue had referred to a discussion in 2015 with Ms O'Boyle and Ms O'Boyle's accountant about her pay arrangements. She wrote that, at that time in 2015, Ms McCue's PAYE deductions had not been paid to IRD. In an email sent to Ms McCue at 7.30am on 24 September Ms O'Boyle

[2] Employment Relations Act 2000, s 103(1)(b) and s 103A(2).

reacted to the reference to PAYE payments. Ms O'Boyle described what Ms McCue had written as "a very serious statement" which she regarded as a breach of the employment relationship. She wrote to Ms McCue:

> You are required to attend an employment meeting to explain that statement and other matters of your performance which will be put to you in a separate email within the next 24 hours with the date of the meeting.

[21] At 5.38am the next morning, Tuesday 25 September, Ms O'Boyle sent Ms McCue an email calling her to a meeting at the suggested time of 9am on Friday 28 September. She wrote that the purpose of the meeting was to talk about what she saw as changes in Ms McCue's performance of her work which Ms O'Boyle suggested were influenced by changes in Ms McCue's personal life, a reference to Ms McCue having separated from her husband nine months earlier. Ms O'Boyle set out eight bullet points with topics for discussion about work matters, including one on what she called the "allegation about IRD". Ms O'Boyle's email suggested that "the leave dispute" could be taken to mediation once Ms McCue provided some more information about her account of her leave entitlements.

[22] After Ms O'Boyle had arrived at her office around 9am that Tuesday morning Ms McCue asked that her proposed Friday meeting could, instead, be held that morning. A client meeting Ms O'Boyle had scheduled that morning had been cancelled and Ms McCue understood Ms O'Boyle had an hour free at that time to talk with her. However Ms O'Boyle did not think she had that time free. She was instead expecting to see a different client to assist with an urgent application to the Family Court and she thought Ms McCue knew about that work too.

[23] Against that background of different understandings of what time was available to talk then, Ms McCue and Ms O'Boyle had a brief discussion at Ms McCue's desk. It quickly became heated with voices raised.

[24] According to Ms McCue, in the course of responding to her request to discuss the leave matter that morning, Ms O'Boyle said that if Ms McCue wanted to run the office, she would need to go law school and then her name could be on the door. Ms O'Boyle had said that, for now, it was her name on the door and if Ms McCue did not like it she could leave. Ms McCue said she walked out as a result of Ms O'Boyle's "invitation for me to leave the premises".

[25] In her written evidence Ms O'Boyle said she had told Ms McCue that she "could not accommodate her demand to meet that morning" and Ms McCue "became upset, left the office and did not return". In her oral evidence Ms O'Boyle said she could not really recall what was said, apart from knowing that there were "raised voices". In a letter she wrote the next day Ms O'Boyle referred to Ms McCue as having "stormed out" on the Tuesday morning and Ms McCue saying, as she left, that Ms O'Boyle could take the day out of her leave entitlement.

[26] At 9.46am on Tuesday, 25 September Ms O'Boyle sent Ms McCue an email which included the following passage:

> I record you have just walked off the job. Please note that if you do not return I will consider you absent without permission and that will be considered grounds for disciplinary action. Please note absence without leave for a period is grounds for instant dismissal. Can I suggest you take an hour to calm down and then come back. As I have said I will get someone to look at the payroll and have it audited it again, the other issues will have to wait to Friday.

[27] During the course of the day the following text exchanges also occurred:

11.32am	O'Boyle to McCue	Are you coming back to work.
11.51am	McCue to O'Boyle	I've sent you an email.
12.26pm	O'Boyle to McCue	Please advise if you are coming back to work I need to make arrangements if you are not.
2.37pm	McCue to O'Boyle	I am not coming back today. I will wait to hear from you regarding my last email.

[28] The email Ms McCue's 11.51am text had referred to was sent at 11.31am. She wrote that she was prepared to come back to work when Ms O'Boyle had resolved her leave issues. She set out her view of events:

> I have asked you countless times over the years about lawful entitlements you have withheld from me and also as discussed this morning, your incorrect calculation of leave.
>
> I do not consider I have walked off the job. I consider under the circumstances mentioned you are not employing me as per the employment act and I can no longer work under these conditions. You have forced me into this decision. If you decide to dismiss me, having been made aware of the disputes and emphatically stating you are not going to resolve them, I will consider this unfair dismissal.

> You have told me in writing and verbally this morning you are withholding banked holiday pay I am entitled to, adamant you are not going to pay me outstanding entitlements as per the Holidays Act and are accusing me of a breach I did not commit, which I want formally withdrawn. If you decide to dismiss me I expect my pay to be paid to date including the balance of all outstanding holidays and leave entitlement and the five weeks holiday due to be credited from my anniversary date of 22 September 2018.

[29] Further email exchanges followed through the day. In one email Ms O'Boyle told Ms McCue that she was required back at work the next day or Ms O'Boyle would consider she had abandoned her work. Ms O'Boyle also wrote that she wanted to go ahead with the meeting on Friday to discuss the issues she had raised. Ms McCue replied disputing Ms O'Boyle description of her leave entitlements, saying the only stresses in her life were work related and suggesting they meet on Thursday. Ms O'Boyle in turn replied suggesting Ms McCue "get some legal advice". Soon after Ms O'Boyle also sent Ms McCue a letter with subject heading "Request to return to your place of employment", requiring her to return to work on Wednesday, 26 September.

[30] Ms McCue did not go to work the next day. Further email exchanges between the two women continued throughout that day, all of the same tenor – with Ms O'Boyle telling Ms McCue to attend work and Ms McCue saying she would not do so until her pay and leave issues were resolved.

[31] On 27 September Ms O'Boyle issued a written warning, dated 26 September, to Ms McCue. The warning was for being away from her place of work for two days without leave and for refusing to return. The letter stated her employment would be terminated if Ms McCue repeated her actions of "failing to attend work when asked". It said she was "required at work tomorrow and no leave will be granted."

[32] Ms McCue did not return to work that day either. Instead she instructed her lawyers to deal with her issues with Ms O'Boyle. On 2 October Ms McCue's lawyers asked Ms O'Boyle to provide copies of Ms McCue's employment records and sent Ms O'Boyle the medical certificate issued by Ms McCue's GP.

[33] Ms O'Boyle replied the same day stating the medical certificate was not accepted, Ms McCue had "failed to attend a performance meeting", she had been on unauthorised leave for five days and she was "required to come back to work". The letter also said Ms O'Boyle would assume Ms McCue had terminated her

employment unless her lawyers advised by 5pm that day what her intentions were. In a later email that day Ms O'Boyle also wrote that, if Ms McCue failed to return to work, it was "more probable than not her employment will no longer be available for her to return to".

[34] Ms McCue's lawyers replied the following morning, Wednesday 3 October, saying they were meeting with Ms McCue that next day and would reply then. Ms O'Boyle responded half an hour later saying that Ms McCue was required to attend a disciplinary meeting on Friday 5 October. Ms O'Boyle said the meeting was being called so Ms McCue could answer an allegation that she had received work-related emails and messages sent by a client of Ms O'Boyle's to Ms McCue's personal email address and Facebook page.

[35] Before receiving a reply from Ms McCue's lawyers Ms O'Boyle sent a further email saying Ms McCue had refused to meet with her or provide any explanation of her whereabouts. She wrote that she was currently making up Ms McCue's pay for the few days she had worked in the last fortnight and asked if they would do her "the professional courtesy of advising if this will be your client's final pay".

[36] At the end of that day, 4 October, Ms McCue's lawyers wrote to advise Ms O'Boyle that they were authorised to communicate Ms McCue's resignation with immediate effect. They raised a personal grievance on Ms McCue's behalf on four grounds: firstly, failure to provide a written employment agreement; secondly, breach of statutory employment and holiday obligations; thirdly, unjustifiable disadvantage for the written warning on 26 September and, fourthly, unjustifiable constructive dismissal as a result of the preceding three grounds.

[37] The evidence canvassed earlier in this determination showed two of those grounds were already clearly established. Ms McCue was unjustifiably disadvantaged by not having a written employment agreement to refer to in her discussions about her leave entitlements. And a fair and reasonable employer could not have decided on and issued the 26 September written warning in the way that Ms O'Boyle did. She had not given Ms McCue the minimum opportunity to respond to the concerns addressed in the warning, including by getting advice and representation in any meeting about them. Those defects in the process Ms O'Boyle followed were more

than minor, did result in Ms McCue being treated unfairly and, consequently, amounted to an unjustified action to her disadvantage.[3]

[38] The grievance regarding statutory holiday obligations was also established. Some of the details regarding this aspect are covered later in this determination in respect of the arrears orders made and consideration of a penalty for breach of the Holidays Act. For immediate purposes, the evidence did establish a breach of duty owed by Ms O'Boyle to Ms McCue by not fairly addressing her concerns about her leave entitlements and by failing to pay her minimum statutory entitlements. Ms McCue had genuine concerns because her annual leave entitlements were, according to Ms O'Boyle's correspondence to her, being accumulated on a formula linked to a 25-hour week. This reflected Ms McCue's earlier work arrangements but were out-of-date, meaning she was not getting the appropriate amount of leave credited for her actual, longer working hours. And, as the arrears award made later shows, Ms McCue was also not paid her entitlements for bereavement leave and public holidays.

Was Ms McCue's resignation really a constructive dismissal?

[39] Ms McCue submitted her resignation, tendered on 4 October 2018, amounted to one recognised category of constructive dismissal, that is where the resignation was really caused the employer's breaches of the terms of employment.

[40] The conclusions already reached in this determination established breaches of Ms McCue's terms of employment had occurred. However two further elements had to be satisfied for the resignation to be deemed a constructive dismissal resulting from what Ms O'Boyle did.[4]

[41] Those breaches must have been of a sufficiently serious nature that they crossed the line from being inconsiderate conduct, causing Ms McCue some unhappiness or resentment, to having become such dismissive or repudiatory conduct so that it was then, in that context, reasonable to decide to resign.[5] The assessment of the seriousness of the breaches is a matter of fact and degree.[6] It then must also be reasonably foreseeable to the employer that the worker could resign rather than put up with that situation.

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[3] Employment Relations Act 2000, s 103A(3) and (5).
[4] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IOUW Inc* [1994] 1 ERNZ 168 at 172.
[5] *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.
[6] *Spotless Facility Services NZ Limited v Mackay* [2016] NZEmpC 153 at [71].

[42] The nature of the breaches, particularly in the context of Ms O'Boyle's correspondence set out at some length above, clearly established her conduct was so dismissive of Ms McCue's rights as an employee that Ms McCue could reasonably have lost trust that her terms of employment would be honoured in the future. This conclusion results not from the 'heat of the moment' exchanges on 25 September but rather because of how Ms O'Boyle's failure to fairly address Ms McCue's concerns escalated over the following days.

[43] Objectively, it was foreseeable that a worker would resign rather than put up with being disadvantaged by not having a written employment agreement, being unfairly issued with a written warning and, reasonably, having lost trust that her or his leave entitlements would be properly paid. Subjectively, it was also reasonably foreseeable Ms McCue would no longer put up with that situation. She said as much in her first email after leaving the office on the morning of 25 September when she wrote that she could "no longer work under these conditions".

[44] As a result Ms McCue's resignation is accepted to have been a constructive dismissal. An assessment of remedies for her personal grievances was needed.

Remedies

Lost wages

[45] Almost six months passed before Ms McCue secured new employment. Having provided evidence of her endeavours through five months of that period to secure new work, Ms McCue was entitled to an award of three months' ordinary time remuneration.[7]

[46] At her hourly rate of $30 for the 37.5 hour weeks she worked in the year before her dismissal, the amount due as lost remuneration was $14,625.[8] This is the amount due as reimbursement of lost remuneration that Ms O'Boyle must pay to Ms McCue, less any applicable tax, within 28 days of the date of this determination.

[7] Employment Relations Act 2000, s 123(1)(b) and s 128 (2).
[8] $30 x 37.5 hours x 52 weeks ÷ by 12 months x three months.

Compensation for humiliation, loss of dignity and injury to feelings

[47] The distress caused by the actions of Ms Boyle that led to Ms McCue's grievances crystallised during the period from 25 September to 4 October. Compensation for each of the associated grievances could appropriately be assessed on a global basis.

[48] Ms McCue found the dismissive nature of Ms O'Boyle actions humiliating and hurtful. This distress was, Ms McCue submitted, compounded by Ms O'Boyle's use of her position and supposedly better understanding as a lawyer to suggest that Ms McCue was simply wrong about her entitlements. Ms McCue was humiliated by the suggestion she "leave" on 25 September and by subsequent threats to the future of her employment. Ms O'Boyle further injured Ms McCue's feelings by rejecting her medical certificate and suggesting her concerns were due to personal stresses rather than legitimate employment matters.

[49] Each person's experience in responding to such circumstances will vary.[9] Awards of compensation vary according to the evidence of that experience. Ms McCue's evidence disclosed no acute or ongoing effects on her. Weighing that relative resilience, Ms McCue's evidence on the effects on her at the time and the range of awards in similar cases, $15,000 was a suitable amount to order be paid as compensation under s 123(1)(i) of the Act. Ms O'Boyle must pay that amount, without deduction, to Ms McCue within 28 days of the date of this determination.

Any reduction for contributory behaviour

[50] Ms O'Boyle's closing submissions did not identify any particular factors or circumstances that amounted to blameworthy behaviour by Ms McCue that contributed to the situation giving rise to her grievance. The evidence did not otherwise disclose any actions by Ms McCue that were of such a blameworthy extent that any reduction of the remedies awarded to her was required.[10]

Wage arrears: outstanding holiday and leave entitlements.

[51] Ms McCue's established three shortfalls in payments she was due as holiday and leave entitlements.

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[9] *Richora Group Limited v Cheng* [2018] NZEmpC 113 at [42].
[10] Employment Relations Act 2000, s 124.

[52] She was not paid for 13 of the public holidays that fell during the period she was employed. She was also not paid for three days of leave that should have been paid as bereavement leave.

[53] Ms McCue's claim for outstanding annual leave, initially put at 38.5 days, was subject to detailed scrutiny during the investigation meeting. This resulted in agreement that she was still owed 30 days annual leave.

[54] The amounts due for those outstanding entitlements were not specified in Ms McCue's evidence or closing submissions. For the purpose of an award of arrears under s 131 of the Act orders have been made on the basis Ms McCue was, at the time her employment ended, paid $30 an hour for 37.5 hours a week – that is $225 a day or $1,125 a week.

[55] Within 28 days of the date of this determination Ms O'Boyle must pay Ms McCue the following amounts (less any applicable tax):

(i) $2,925 for 13 unpaid public holidays; and

(ii) $675 for three days bereavement leave' and

(iii) $6,750 for six weeks (30 days) annual leave.

Interest on the arrears due

[56] The amounts due in arrears should have been paid to Ms McCue by no later than 5 October 2018. Ms McCue was entitled to an award of interest on the net amount due to her from that date until the date payment of those amounts is made to her in full.[11] The amount of interest due for that period should be calculated using the Civil Interest Debt Calculator.[12]

Penalties

[57] Ms O'Boyle was liable to penalties for one breach of the Act and one breach of the Holidays Act 2003.

[58] She had not provided and agreed a written employment agreement with Ms McCue so was in breach of the obligations in s 63A and s 64 of the Act to provide an

[11] Employment Relations Act 2000, Schedule 2 clause 11(1).
[12] See *www.justice.govt.nz/fines/civil-debt-interest-calculator*.

intended agreement and to then keep a signed copy of the resulting employment agreement.

[59] The arrears orders made showed Ms O'Boyle had failed to keep accurate holiday and leave records compliant with s 81 of the Holidays Act. While a system was in place for a handwritten record of hours of work to be kept in the office and then for that information to be transferred by Ms O'Boyle into payroll software administered through her accountant, there were shortcomings in what and how this was recorded.

[60] Taking the breaches under the two acts as two breaches Ms O'Boyle was liable to a penalty of up to $10,000 for each breach. Determining the appropriate level of penalty is guided by the factors set in s 133A of the Act applied through a methodology developed by the Employment Court.[13]

[61] Penalties had to be imposed because Ms O'Boyle's actions had breached employment standards as defined in the Act.[14] Those breaches caused loss to Ms McCue as was apparent from the eventual arrears award made for her leave entitlements. Ignorance of these employment standards was not acceptable for any employer and far less so for Ms O'Boyle as a lawyer who could more readily than others check what was required. Her culpability was increased because she told Ms McCue, quite wrongly, that an employment agreement was not a legal requirement and that Ms McCue was wrong about being short changed on her leave entitlements.

[62] Although Ms O'Boyle gave evidence about her practice serving clients with little or no income, this did not establish that she lacked the financial ability to pay any penalties imposed. There was no evidence of similar previous conduct. While Ms O'Boyle gave evidence that she has since taken steps to ensure she meets the necessary standards in the employment of staff, penalties were nevertheless appropriate to punish the previous conduct and to deter other employers from breaching those standards. Considering consistency with penalties imposed in similar cases and the proportionality of outcome to the effect and extent of the breaches in this case, the penalty for the breach of each Act could fairly be set at $2,000 each.

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[13] *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

[14] Employment Relations Act 2000, s 5 definition of "employment standards".

[63] Accordingly Ms O'Boyle must pay total penalties of $4,000. This is the amount she must pay to the Authority within 28 days of the date of this determination.

[64] Ms McCue sought an order under s 136(2) of the Act that a part of any penalties recovered be paid to her. While the breaches directly affected Ms McCue's ability to secure her rights, those effects have been addressed in the compensation awarded for her personal grievances and the order, with interest, for arrears. Her request for part of the penalties is declined. On recovery of the penalty the Authority must transfer the full amount to the Crown Account.

Costs

[65] Costs follow the event of Ms McCue's success in her application. In her closing submissions she sought an award of costs for the one-day investigation meeting at the Authority's usual daily tariff of $4,500. That amount would have been awarded in this determination but Ms O'Boyle, in her closing submissions, sought to be heard on costs following this determination.

[66] The parties may be able to agree the costs issue without any further determination of the Authority being required. If they cannot, Ms O'Boyle may lodge and, at the same time, serve a memorandum on costs by no later than 14 days after the date of this determination. This should address any of the relevant principles, including whether any prior settlement offers for greater than the eventually determined outcome were made, that would warrant adjustment of that tariff.[15]

[67] If Ms O'Boyle does lodge a memorandum on costs, Ms McCue will then have seven days to lodge and serve any reply memorandum. If Ms O'Boyle does not lodge a costs memorandum within the required time frame, a brief supplementary determination of costs is to be issued.

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

[68] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Robin Arthur
Member of the Employment Relations Authority