

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 667  
3016951

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| BETWEEN | ROGER HAWKINS<br>Applicant   |
| AND     | SAILORS' CORNER LIMITED<br>(IN LIQUIDATION), REX<br>INNES-JONES, RHYS INNES-<br>JONES, SEAN INNES-JONES,<br>JENETTE INNES-JONES<br>Respondents |

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|------------------------|--|
| Member of Authority:   | Rachel Larmer  |
| Representatives:       | Applicant in person<br>No appearance for Respondents   |
| Investigation Meeting: | On the papers  |
| Submissions Received:  | 3 October 2019 from the Applicant<br>7 October 2019 from the Applicant<br>14 October 2019 from Applicant<br>31 October 2019 from Applicant |
| Date of Determination: | 19 November 2019   |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Authority issued its substantive determination in this matter on 12 September 2019, after the High Court had given Mr Hawkins leave to proceed with his claims against Sailors' Corner Limited (in Liquidation), after it had gone into liquidation.<sup>1</sup>

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<sup>1</sup> [2019] NZERA 527.

[2] This determination deals with Mr Hawkins claims for:

- (a) KiwiSaver on his award of lost remuneration;
- (b) Holiday pay on his award of lost remuneration;
- (c) Penalties on Sailors' Corners' breaches of the Act;
- (d) Recovery of his costs and disbursements; and
- (e) Interest on the amounts he has been awarded.

[3] Mr Hawkins' penalties claims relates to Sailors' Corner Limited's (in liquidation) (Sailors' Corner's) breaches of:

- (a) s 65 of the Employment Relations Act 2000 (the Act), arising from its failure to provide him with a written employment agreement; and
- (b) s 69ZD of the Act for failing to give Mr Hawkins paid rest breaks.

#### **Matters that are not within the scope of this determination**

[4] Mr Hawkins has asked the Authority to change the findings it made in its substantive determination regarding its:

- (a) Assessment of his contribution to the situations that gave rise to his successful personal grievance claims; and
- (b) Finding that the s 4A of the Act requirements for imposing a penalty, for the breach of good faith that was held to have occurred, had not been met.

[5] Mr Hawkins has also raised concerns relating to Sailors' Corner's liquidation.

[6] None of these matters are within the scope of this determination. If Mr Hawkins wants to pursue concerns about these matters, then he must do so in a different jurisdictions.

#### **Issues**

[7] The issues to be determined are as follows:

- (a) Should Mr Hawkins be awarded KiwiSaver on the lost remuneration he was awarded?

- (b) Should Mr Hawkins be awarded holiday pay on the lost remuneration he was awarded?
- (c) What is the law relating to the imposition of penalties by the Authority?
- (d) What penalties should be imposed on Sailors' Corner for its breaches of the Act?
- (e) Should some or all of any penalties that are imposed be paid to Mr Hawkins personally?
- (f) What costs should Mr Hawkins be awarded?
- (g) What disbursements should Mr Hawkins be awarded?
- (h) Should interest be awarded?

**Should Mr Hawkins be awarded KiwiSaver on the lost remuneration he was awarded?**

[8] Mr Hawkins was awarded \$5,928 lost remuneration under s128(2) of the Act for his unjustified dismissal claim.<sup>2</sup> The Authority's substantive determination did not address KiwiSaver contributions.

[9] Sailors' Corner is ordered to pay Mr Hawkins the compulsory employer contribution (CEC) to his KiwiSaver of \$474.24, being 8% of the \$5,928 lost remuneration he was awarded.<sup>3</sup>

**Should Mr Hawkins be awarded holiday pay on the lost remuneration he was awarded?**

[10] The Authority's substantive determination did not address an award of holiday pay on top of the lost remuneration Mr Hawkins was awarded.

[11] Sailors' Corner is ordered to pay Mr Hawkins \$474.24, being 8% holiday pay on the \$5,928 lost remuneration he was awarded.

**What is the law regarding the imposition of penalties by the Authority?**

*Relevant legislation*

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<sup>2</sup> Above n1, at [182]-[183].

<sup>3</sup> Mr Hawkins said that Sailors' Corner's CEC was 8%.

[12] The Authority derives its jurisdiction to award penalties in this matter from s 65(4) of the Act for Sailors' Corner's breach of s 65 of the Act and under s 69ZF of the Act for Sailors' Corner's breach of s 69ZD of the Act.

[13] Penalties are discretionary. However s 133A of the Act lists the mandatory matters that the employment institutions must have regard to when determining penalties.

*Relevant case law*

[14] The Employment Court in *Borsboom v Preet Pvt Ltd* set out a four-step process that was to be applied by the employment institutions when they were assessing penalties.<sup>4</sup> The Employment Court has provided further analysis on the Authority's penalty jurisdiction in the cases of a *Labour Inspector v Prabh Limited* and a *Labour Inspector v Daleson Investment Limited*.<sup>5</sup>

*Need for penalties in this case*

[15] The imposition of penalties on Sailors' Corner in this case is necessary to:

- (a) Punish it for its two breaches of the Act;
- (b) Deter it from breaching the Act again in future;
- (c) Eliminate unfair competition in the marketplace by Sailors' Corner, when other employers in its industry incurred the financial costs of complying with their obligations under the Act;
- (d) Deter other employers from breaching the Act;
- (e) Signal the Authority's disapproval of its breaches;
- (f) Reflect the harm these breaches have caused Mr Hawkins;
- (g) Reflect the objects of the Act.

*Objects of the Act*

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<sup>4</sup> [2016] NZEmpC 143.

<sup>5</sup> [2019] NZEmpC 110 and [2019] NZEmpC 12.

[16] Section 3(a) of the Act states that the object of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[17] The Act recognises that employment relationships must be built on the implied mutual obligations of trust and confidence in addition to statutory good faith obligations.<sup>6</sup>

[18] The Act expressly acknowledges the inherent power imbalance involved in employment relationships.<sup>7</sup> One of the aims of the Act is to promote the enforcement of employment standards.<sup>8</sup>

[19] The failure of Sailors' Corner to give Mr Hawkins rest breaks was a breach of minimum employment standards.<sup>9</sup>

### **What penalties should be imposed on Sailors' Corner for its breaches of the Act?**

[20] Sailors' Corner's failure to provide Mr Hawkins with a written employment agreement breached s 65 of the Act. In accordance with s 65(4) of the Act, this breach of s 65 of the Act exposed it to a potential maximum penalty of \$20,000.

[21] Sailors' Corner's failure to provide Mr Hawkins with paid rest breaks breached s69ZD of the Act. In accordance with s 69ZF of the Act this breach exposed it to a potential maximum penalty of \$20,000.

[22] This case involved two breaches of the Act, so the maximum potential penalties that could be imposed is \$40,000 (2 x \$20,000 per breach).

[23] These penalties are not globalised because they relate to different employment obligations. Globalising them would reduce the level of penalties that could be imposed, so that would be inappropriate.

[24] The Authority considers that although these breaches could possibly be described as negligent, in terms of Sailors' Corner failing it its duty as an employer to educate itself of its

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<sup>6</sup> Section 3(a)(i) of the Act.

<sup>7</sup> Section 3(a)(ii) of the Act.

<sup>8</sup> Section 3(a)(ab) of the Act.

<sup>9</sup> Section 5 of the Act.

employment obligations to employees, during Mr Hawkins' employment these breaches turned from negligent to deliberate.

[25] Mr Hawkins specifically raised with Sailors' Corner his concerns that it had not met its basic employment obligations to him regarding the failure to provide him with a written employment agreement and paid rest breaks.

[26] This clearly put Sailors' Corner on notice that it was in breach of its obligations under the Act. However that notification did not result in Sailors' Corner complying with its legal obligations under the Act.

[27] When Mr Hawkins was unjustifiably constructive dismissed on 3 June 2017, Sailors' Corner was still in breach of its obligations to him under the Act. That is an aggravating factor.

[28] The breaches had a very detrimental effect on the employment relationship and on Mr Hawkins personally.

[29] There was considerable evidence put before the Authority indicating that the failure by Sailors' Corner to provide Mr Hawkins with a written employment agreement was at the root of the other employment relationship problems that developed and escalated to the point where Mr Hawkins was unjustifiably dismissed from his employment.

[30] Sailors' Corner's failure to provide Mr Hawkins with paid rest breaks also contributed to the breakdown of the employment relationship and to the mutual distrust and ill will that developed between the parties.

[31] The Authority therefore assesses the nature and extent of the breaches as being serious in terms of the adverse effect they had on Mr Hawkins and the parties' underlying employment relationship.

[32] The Authority considers that had Sailors' Corner complied with its obligations from the outset of the employment relationship then most of the subsequent problems that developed could and should have been avoided. Their employment relationship was unlikely to have deteriorated as significantly and rapidly as it did.

[33] The Authority finds that Sailors Corner did not take adequate or appropriate steps to mitigate the effects of its breaches of the Act on Mr Hawkins. He was never given a written

employment agreement that he considered accurately reflected the terms and conditions of the offer of employment that he had accepted. Mr Hawkins was also deprived of paid rest breaks, and he has still not been compensated for that.

[34] These are aggravating factors in terms of the assessment of penalties.

[35] Mr Hawkins is not a vulnerable employee. Mr Hawkins is a mature employee with considerable employment experience. He was aware of his legal rights and he is someone who attempted to hold Sailors' Corner accountable for meeting its legal obligations under the Act.

[36] The circumstances of the breaches are that Sailors' Corner was running a family owned business that had developed its employment practices in an informal manner. There was some evidence produced to the Authority that the breaches that occurred in Mr Hawkins' case also occurred in respect of other employees, although these other employees have not had cases determined by the Authority.

[37] The Authority is mentioning this background to show that the breaches that occurred in Mr Hawkins' case should not be seen as a one-off or isolated incident, but rather as indicative of the manner in which Sailors' Corner was running its business and engaging with its employees. That is considered to be an aggravating factor.

[38] Sailors' Corner is not previously had penalties imposed on it for breaches of the Act.

[39] There is a high need for deterrence in this case both of Sailors' Corner, and of its directors and the managers of the business, to ensure that they conduct themselves (and businesses they are involved with) appropriately regarding any future employment relationships.

[40] Penalties must be set at a level that acts as a deterrent for those who may be inclined to overlook informing themselves of their basic legal obligations as an employer or worse who may be inclined to ignore or deliberately flout such obligations to obtain an unfair advantage in the labour market over their competitors.

[41] Sailors' Corner has a high level of culpability in this case because Mr Hawkins pointed out to it what its obligations were, but the breaches continued despite that. The breaches also resulted in serious employment relationship problems occurring, to the point where Mr Hawkins ended up being constructively dismissed from his employment.

[42] Because Sailors' Corner is in liquidation it is unable to pay penalties without adversely impacting on the amount of funds that are available to be dispersed to others, such as employees and creditors.

[43] The Authority must also consider the proportionality of the outcome of penalties imposed in relation to the harm caused before penalties are finalised.

[44] Taking into account all of the s 133A factors, the Authority considers that the starting point for the failure to provide a written employment agreement should be \$3,000 and the starting point for failure to provide Mr Hawkins with rest breaks should be \$2,000.

[45] The provisional starting point for Sailors' Corner's failure to provide a written employment agreement is higher than the \$1,000-\$1,500 penalties that have recently been imposed by the Authority for one breach of s 65 of the Act.<sup>10</sup>

[46] The Authority does not consider that a provisional penalty of \$3,000 is inconsistent with these other Authority cases due to the particular aggravating factors that have been identified in this case.

[47] There are no comparable cases for penalties involving the failure to provide paid rest breaks.

[48] However in this case these provisional penalties should be reduced by half, to \$1,500 for the failure to provide an employment agreement and to \$1,000 for failure to provide paid rest breaks, to reflect that Sailors' Corner is in liquidation.

[49] Any funds that Sailors' Corner has available for disbursement should go to employees and creditors, such as suppliers who have not been paid, so that these people/entities can receive as much money as possible, instead of the amount available for disbursement being reduced by a requirement to pay penalties.

[50] The Authority considers that imposing total penalties on Sailors Corner of \$2,500 is a proportional outcome in light of the harm that was caused to Mr Hawkins, that he has not

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<sup>10</sup> See *Li v ICOM Corporation (NZ) Ltd* [2019] NZERA 630; *Snell v Amanda Carmody t/a Woodcote Farms Boarding Kennels and Cattery* [2019] NZERA 627 and *CTL v Toni Skelton t/a Baked on Alexandra* [2019] NZERA 622.

already been compensated for. It represents just over 6% of the total maximum available penalties.

**Should some or all of the penalties imposed be paid to Mr Hawkins personally?**

[51] Normally penalties are paid to the Crown. However, the Authority has jurisdiction under s 136(2) of the Act to order that some or all of any penalties imposed be paid to any person.

[52] Mr Hawkins has clearly suffered personally as a result of the breaches. There was ample evidence produced to the Authority of the harm that these breaches have caused him personally. In addition to this harm he has suffered from considerable anxiety and distress as a result of these breaches.

[53] It is therefore appropriate to order Sailors' Corner to pay a proportion of the penalties to Mr Hawkins personally, because he is unable to be compensated in any other way for these breaches. This part-payment of some of the penalties to Mr Hawkins reflects the adverse impact that the breaches have had on him personally.

[54] Sailors' Corner is ordered to pay \$1,000 of the \$1,500 penalty that was imposed for its failure to provide him with a written employment agreement, to Mr Hawkins, with the remaining \$500 of the total penalty imposed being paid to the Crown Bank Account.

[55] Sailors' Corner is ordered to pay the entire \$1,000 penalty imposed on it for its failure to provide Mr Hawkins with paid rest breaks to him personally, instead of to the Crown Bank Account.

[56] Out of the total \$2,500 penalties awarded, \$2,000 of that penalty is to be paid to Mr Hawkins personally, with the remaining \$500 penalty being paid to the Crown Bank Account.

**What costs should Mr Hawkins be awarded?**

[57] Mr Hawkins represented himself during the Authority's investigation meeting. However, prior to that he engaged the services of a lawyer, and was invoiced \$8,510, including GST, for legal services after he was dismissed on 3 June 2019.

[58] The Authority notes that this invoice included costs associated with mediation that occurred on 19 September 2017. Mr Hawkins is not entitled to recover his mediation costs, so his invoice is reduced by \$1,500 to account for likely mediation costs.

[59] Accordingly, Mr Hawkins is entitled to be reimbursed \$7,010 (GST inclusive) by Sailors' Corner towards his actually incurred legal costs. This amount is appropriate because it is less than the notional daily tariff that is currently \$4,500 for the first day of an investigation meeting and \$3,500 for each day thereafter.

[60] This matter involved a five day investigation meeting, so the notional starting point for assessing costs was therefore \$18,500. The amount of costs Mr Hawkins has been awarded is therefore not inconsistent with the Authority's usual notional daily tariff based approach to costs.

#### **What disbursements should Mr Hawkins be awarded?**

[61] Mr Hawkins is entitled to be reimbursed for:

- (a) His filing fee of \$71.56; and
- (b) Hearing fees of \$1,066.64.

[62] Sailors' Corner is therefore ordered to reimburse Mr Hawkins \$1,138 for the disbursements he has incurred.

#### **Should interest be awarded?**

[63] An award of interest is discretionary. Sailors' Corner is in liquidation so it is not appropriate to award interest in this matter, at this time.

#### **Summary of orders**

[64] Within 30 days of the date of this determination, Sailors' Corner is ordered to pay Mr Hawkins:

- (a) The amounts he was awarded in the Authority's substantive determination dated 12 September 2019;<sup>11</sup>

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<sup>11</sup> Above n1.

- (b) \$474.24, being the 8% compulsory employer contribution to Mr Hawkins' KiwiSaver account;
- (c) \$474.24 holiday pay on his award of lost remuneration;
- (d) \$2,000 penalties (\$1,000 of the penalty imposed for each breach);
- (e) \$7,010 GST inclusive towards his actual legal costs; and
- (f) \$1,138.20 to reimburse him for the disbursements he has incurred.

[65] Sailors' Corner is also ordered to pay the remaining \$500 penalty for its breach of s 65 of the Act to the Crown Bank Account.

**Rachel Larmer**  
**Member of the Employment Relations Authority**