

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 536  
3060392

BETWEEN                      GRAEME CAVANAGH  
Applicant

AND                              X FACTOR SHEARING  
LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:            Kevin Murray, advocate for the Applicant  
No appearance by the Respondent

Investigation Meeting:      30 September 2020 in Invercargill

Submissions                    On day from the Applicant

Date of Determination:      23 December 2020

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**DETERMINATION OF THE AUTHORITY**

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**A      X Factor Shearing Limited is to pay to Graeme Cavanagh the following statutory entitlements:**

**(a)      \$11,551.74 gross for holiday pay.**

**(b)      \$5,572.58 gross for public holidays that would otherwise be working days.**

**(c)      \$75 gross for payment at time and a half for working on Easter Monday 2015.**

**(d)      \$150.61 gross for one alternative day.**

**(e)      \$1,506.10 gross for sick leave.**

- B Graeme Cavanagh was unjustifiably disadvantaged and dismissed. X Factor Shearing Limited is ordered to pay to him:**
- (a) \$500 gross for hours of work lost because of the unjustified action causing disadvantage under s 123 (1) (b) of the Employment Relations Act 2000.**
  - (b) \$3,072 gross for lost wages under s 123(1)(b) of the Employment Relations Act 2000.**
  - (c) \$15,000 without deduction for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C X Factor Shearing Limited is ordered to pay penalties for the failure to provide a written employment agreement and breaches of good faith as below:**
- (a) \$9,000 to Graeme Cavanagh**
  - (b) \$3,500 to the Crown.**
- D Interest of \$354.33 is payable on amounts as set out in paragraph [92].**
- E X Factor Shearing Limited is ordered to pay costs of \$2,250 together with reimbursement of the filing fee of \$71.56.**
- F Leave is reserved for the applicant to return to the Authority by 29 January 2021 if KiwiSaver employer contributions are sought.**

### **Employment Relationship Problem**

[1] Graeme Cavanagh was employed by X Factor Shearing Limited (X Factor) in January 2015 as a firewood processor. He dealt mainly with Roger Kidd who was the son of the directors Hugh and Marion Kidd.

[2] Mr Cavanagh says that he was not provided with an individual employment agreement. He says that it was agreed he would be a full-time employee working at least 40 hours per week and that he would be paid \$20 per hour and receive a tank of fuel each week for his vehicle.

[3] Mr Cavanagh says that there were actions during his employment that caused disadvantage and breached good faith obligations as set out below:

- (a) A failure to disclosure information pertaining to a disciplinary matter prior to making a decision to terminate his employment.
- (b) That X Factor withdrew work from him which had financial ramifications.
- (c) That he was suspended without due process.
- (d) That his authority was removed as punishment without notification or discussion.
- (e) That there were unilateral changes to the terms and conditions of his employment.
- (f) That he was not provided with an individual employment agreement.

[4] Mr Cavanagh says that he was unjustifiably dismissed from his employment on 12 November 2018 when he was told that he no longer had a job and was asked to leave.

[5] Mr Cavanagh also says that there was a failure to properly pay him for his statutory entitlements under the Holidays Act 2003. He says that he was incorrectly regarded as a casual employee and paid holiday pay as he went. As a result he was not paid when there was a close down at Christmas or for other leave such as a public holiday and was not paid for sick leave.

[6] Mr Cavanagh also says that there was a failure to pay him when he was on ACC during his last week at work.

[7] By way of remedies Mr Cavanagh seeks reimbursement of lost wages, statutory entitlements, KiwSaver employer contributions, payment for loss of a benefit and compensation. Penalties are also sought for breaches of good faith, failing to produce wage and time records and failing to provide an individual employment agreement.

[8] X Factor in its statement in reply denies that there were actions that caused disadvantage to Mr Cavanagh and denies that Mr Cavanagh was unjustifiably dismissed. Further it raised issues as to whether grievances were raised with the statutory timeframe. It denies that there were breaches of the Holidays Act or that other statutory entitlements are

owed. It says that an individual employment agreement was provided. A copy of an individual employment agreement was attached to the statement in reply. Pay details were attached to the statement in reply for the period of employment.

### *The investigation process*

[9] After the statement in reply was lodged the Authority was advised in January 2020 that the lawyer who had acted for X Factor was withdrawing as representative for the company. Mr Roger Kidd's phone and email address were provided to the Authority as the representative of X Factor.

[10] Mr Kidd was contacted for a telephone conference with the Authority and Mr Murray on 14 February 2020 but after answering the telephone appeared to disconnect and was no longer available. Mr Kidd had also failed to respond to an earlier email from the Authority Officer setting up the telephone conference. The telephone conference proceeded without Mr Kidd and the matter was set down for an investigation meeting issues were identified and a timetable set for an exchange of evidence.

[11] The investigation meeting was originally set down for 11 and 12 June 2020 however had to be adjourned because of COVID-related issues. The investigation meeting was thereafter rescheduled to 30 September 2020. I am satisfied that the notice of direction and the first and second investigation meeting notices were served on X Factor at its registered office.

[12] On the basis that there is no good reason provided to the Authority as to why the respondent did not attend at the investigation meeting, the Authority elected to proceed with the meeting and heard evidence from Mr Cavanagh.<sup>1</sup>

### **The Issues**

[13] The Authority needs to resolve at the outset what the nature of Mr Cavanagh's relationship was with X Factor and whether he was a casual or permanent employee. As part of that assessment it will need to reach some findings about whether there was a written employment agreement. When the nature of the relationship is determined it will then be necessary to examine whether the correct statutory entitlements were provided.

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<sup>1</sup> Clause 12 of Schedule 2 to the Employment Relations Act 2000

[14] The Authority needs to determine if Mr Cavanagh raised grievances within the statutory timeframes in his letter of 29 October 2018 that was couriered to Mr and Mrs Kidd Snr and Mr Roger Kidd.

[15] If grievances were raised then the Authority needs to determine whether Mr Cavanagh was unjustifiably disadvantaged and dismissed.

[16] If the grievances are made out the Authority will have to consider the issue of remedies and whether there are issues of contribution and/or mitigation.

[17] The Authority will also need to consider whether there should be awards for penalties for any breaches established of good faith, failure to provide an individual employment agreement and wage and time records.

### **Was Mr Cavanagh a casual or permanent employee?**

[18] Mr Cavanagh in his oral and written evidence says that he was a full-time permanent worker. Attached to the statement in reply was an unsigned casual individual employment agreement that Mr Cavanagh says he has never seen before. The employee's name is left blank in the body and front of the agreement. Schedule A is not filled in with respect to the name and position of the employee and remuneration. The agreement appears on its face to be for a Shearing Shed Hand or a Shearer. Mr Cavanagh was employed to cut firewood. His work was referred on his pay details as "Wood Cutting". I could not be satisfied that Mr Cavanagh was provided with a written employment agreement.

[19] The Employment Court has stated that the strongest indication of ongoing employment is that the employer has an obligation to offer an employee further work and the employee has an obligation to carry that work out.<sup>2</sup> However, if these mutual employment-related obligations only exist during periods of work the employment will be regarded as casual.<sup>3</sup>

[20] Mr Cavanagh says that he was offered full-time work. Consideration of the pay records support that there was a regular work pattern over the 3 years and almost 11 months employment. Mr Cavanagh worked nearly every week. He said he was unaware that he could simply decline work.

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<sup>2</sup> *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 255 at [41].

<sup>3</sup> Above n 1 at [40]

[21] Mr Cavanagh's view that he was not a casual was expressed in his letter dated 29 October 2018 to the directors and Mr Kidd in which he set out his concerns about the employment relationship. He wrote this letter before seeking advice from Mr Murray. One of the concerns was about being treated as a casual employee and he stated about that as follows:

I am not getting my right employment entitlements for a full-time employee, which I have asked about twice, with the response that you would close the yard down if you had to pay them.

I am on the wrong tax code, I am not a casual employee and haven't been since I started in 2015.

[22] There was no response to that letter.

[23] I have considered the pay records. For the last year of employment Mr Cavanagh worked an average of 38.4 hours per week and not a dissimilar average number of hours for the earlier periods. He processed firewood and his duties included loading and unloading the trucks, splitting firewood and making deliveries. Mr Cavanagh described his hours of work as Monday to Friday between 7.30am and 4.30pm and sometimes on Saturday between 8.00am and 5.00pm. He said that he was unaware that he could turn down work and never did. He was required to complete timesheets each day and these were collected from the work shed.

[24] Having considered the pay records and the evidence I am not satisfied that the relationship Mr Cavanagh had with X Factor was of a casual nature with no legitimate expectation of ongoing employment. There was a regular work pattern without features of as-and-when-required employment.

[25] I find that Mr Cavanagh was employed on an ongoing basis and that he had an expectation of continuing employment. He was not a casual employee.

[26] Given that finding I need to consider the claims for statutory entitlements.

## **Statutory entitlements**

### *Holiday Pay*

[27] The pay records support that Mr Cavanagh was paid 8% of his gross earnings each week.

[28] I do not find that Mr Cavanagh should have been paid his holiday pay in that manner under the Holidays Act 2003.<sup>4</sup> His employment was not so intermittent or irregular that it was impracticable for him to be provided with 4 weeks annual holidays.

[29] I have then considered what should occur if an employer has incorrectly paid annual holiday pay with an employee's pay. That is the situation in this case because I have found that s 28(1) does not apply. Section 28(4) provides as below:

If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[30] Mr Cavanagh's anniversary date was 5 January 2015. He became entitled to not less than 4 weeks paid annual holidays on 5 January 2016 after 12 months of continuous employment. His employment ended on 12 November 2018.

[31] Payment where employment ends and entitlement to holidays has arisen is calculated in accordance with s 24 of the Holidays Act 2003.

[32] I have assessed payment for the entitlement to holidays based on Mr Cavanagh's average weekly earnings for 12 months immediately before the end of his last pay period.<sup>5</sup> I note that it is a greater amount than the ordinary weekly pay at the end of employment. There were no paid holidays taken over the period of employment because Mr Cavanagh was regarded and treated as a casual. Any time off was unpaid.

[33] There were no pay records for a period between 19 September and 27 November 2018. From time to time there also appeared missed pays, then two payments were made in

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<sup>4</sup> Section 28 of the Holidays Act 2003

<sup>5</sup> Section 24 (2)(b) of the Holidays Act 2003

short succession. I have had to go back to the last pay received in October 2017 in order to average 52 weeks of earnings before termination date. Mrs Cavanagh has helpfully provided me with a breakdown of Mr Cavanagh's net pays for that period. From those and looking back at the known pay detail I have been able to calculate hours for that period where pay details are missing and from that gross earnings for that period.

[34] I have calculated that the average weekly earnings for the 12 months before termination were \$753.07 gross on the basis of total gross earnings of \$39,160 divided by 52.

[35] Mr Cavanagh was entitled to four weeks paid annual leave from 5 January 2016. His employment terminated on 12 November 2018. He did not take that leave as it accrued. As at the date of his termination he is therefore entitled to a payment for 12 weeks accrued annual leave in the sum of \$9,036.84 (\$753.07 multiplied by 12 weeks).

[36] Additionally Mr Cavanagh is entitled for the period between 5 January 2018 when he last became entitled to annual leave and 12 November 2018 a further amount of 8% of his gross earnings.<sup>6</sup> I have calculated gross earnings for that period as the sum of \$31,436.16. 8% of that figure is \$2,514.90 gross.

[37] Mr Cavanagh is owed holiday pay in the total sum of \$11,551.74 gross.

#### *Public holidays*

[38] Mr Cavanagh was not paid for public holidays that he did not work but were otherwise a working day for the period of his employment. In his oral evidence he said that he worked three public holidays for the first year of his employment but was not paid for these. The Southland Anniversary Day is celebrated on the Tuesday after Easter Monday.

#### *2015*

[39] For 2015, Mr Cavanagh would have been entitled to payment for 7 public holidays of which he says that he worked, Easter Monday, Queens Birthday and Labour weekend.

[40] That year, Easter Monday was 6 April. There is a pay record for 12 April showing 41.50 hours worked. I am prepared to accept Easter Monday was worked. Mr Cavanagh

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<sup>6</sup> Section 25 of the Holidays Act 2003

should have been paid at time and a half for that day which is \$30 per hour instead of \$20 and he should have received a paid alternative day.

[41] Queens Birthday was 1 June 2015. The pay records reflect 32 hours worked for the pay period ending 7 June 2016. I am not satisfied that Queens Birthday was worked.

[42] Labour Day was 26 October 2015. The pay record for that period reflects that only 26 hours were worked for that pay period. I am not satisfied that Labour Day was worked.

[43] Mr Cavanagh is entitled to payment for 6 public holidays in 2015 as days that he would otherwise have worked but for the fact they were public holidays. Additionally he is entitled to time and a half and an alternative day for working on Easter Monday.

#### *2016 and 2017*

[44] Mr Cavanagh is entitled to payment for 11 public holidays for each of the years 2016 and 2017. That is a total of 22 days' pay.

#### *2018*

[45] Mr Cavanagh is entitled to payment for 9 public holidays for 2018.

#### *Average daily pay*

[46] I have considered the average daily pay to calculate the entitlements. I have calculated it under s 9A of the Holidays Act 2003. I have divided the gross earnings for the 52 calendar weeks before the last pay period by the number of whole or part days during which the employees earned the gross earnings. I do not have a record of the days actually worked. I consider however it more likely the earnings were received over a 5 rather than a 6 day period. I accept that if there was wet weather the fifth day worked may have been a weekend day.

[47] I have taken the gross earnings of \$39,160 and divided by 260 days (5 days multiplied by 52). That is an average daily pay of \$150.61 per day which in turn is 7.5 hours per day.

[48] Mr Cavanagh is entitled to payment for 37 public holidays that would otherwise have been working days over the period of his employment. That is the sum of \$5,572.58 gross based on \$150.61 multiplied by 37.

[49] Mr Cavanagh is also entitled to payment at time and a half for another public holiday on which he worked on Easter Monday at \$30 per hour for 7.5 hours less payment already received of \$150 (20 hours x 7.5). \$75 is owed for the time and half payment together with payment for an alternative day of \$150.61.

*Sick leave*

[50] Mr Cavanagh said that he did not take a lot of sick leave, but if he did it was not paid. He claims payment for the last week of his employment when he was off with a sore back. In its statement in reply, X Factor says that it was not aware that the days taken off were for a back injury or that Mr Cavanagh was in receipt of ACC. Mr Cavanagh provided the Authority with a text message to Mr Kidd dated 5 November saying that he has hurt his back and would be off until Friday. A medical certificate is referred to but without reference to ACC. The text supported that Mr Cavanagh was given a medical certificate for longer than 2 days and more likely 3 days. The only payment made to Mr Cavanagh for the week from 5 – 9 November was \$130.86.

[51] Taking a pragmatic approach that accords with the role of the Authority, I will simply treat that text as advice of absence because of a sore back. I will allow three days sick leave for that week as the text suggests a return on the Friday with the injury occurring on the Monday and advice of injury that evening. I will also allow a further 7 days for sick leave over the balance of the employment relationship. I have assessed this on a conservative basis because Mr Cavanagh said he did not take many sick days over the period.

[52] Mr Cavanagh is entitled to payment for 10 days sick leave based on the average daily rate of \$150.61 which is \$1,506.10 gross.

**Did Mr Cavanagh raise personal grievances in his letter of 29 October 2018?**

[53] In a letter dated 29 October 2018 Mr Cavanagh raised a number of concerns with Mr and Mrs Kidd Snr and Mr Roger Kidd.

[54] I have already referred to some concerns raised in the letter about Mr Cavanagh's classification as a causal employer. He also referred to the fact he did not have an employment agreement. Much of what he said however was about Mr Roger Kidd not talking to him after issues arose at work. He referred to an issue in June 2018 when oil leaked and he

told Mr Kidd. He said that he apologised, but Mr Kidd did not talk to him for about two weeks. He said that when they started talking again, Mr Cavanagh apologised again and offered to pay for the oil but was told not to worry about it.

[55] Mr Cavanagh wrote that after another issue in August 2018 Mr Kidd did not talk to him for two to three weeks. Issues then arose with a chainsaw and Mr Cavanagh wrote that Mr Kidd talked in a disparaging manner to other employees about Mr Cavanagh's action with the chainsaw. Mr Cavanagh confronted Mr Kidd and asked him to talk to him about any problems with the chainsaw. He wrote that he tried to explain what was happening with the chainsaw but was told Mr Kidd "was the boss an didn't have to listen to me an if I didn't like it to get in my truck an fuck off."

[56] Mr Cavanagh said that after that date, Mr Kidd did not respond to any of his text messages or phone calls. These included requests for pay slips, for a "sit down and talk" and for files, chains and oil.

[57] Mr Cavanagh referred to several dates in October 2018 where there was no work because of a failure to communicate about the tool requirements. Specifically there was reference to dates on 24, 25, 26 and 29 October 2018.

[58] Mr Cavanagh also wrote that on 26 October 2018 he was told by the service station that he was not allowed to fill up his ute any longer. He stated that he was told that instruction had come from Mr Kidd. Mr Cavanagh says that he had been filling up his ute since he had started work because he was told by Mr Kidd that he could do that as part of his employment.

[59] He wrote about the impact on his physical and mental health in September 2018 when he suffered a breakdown, was hospitalised and undertook counselling because of the way he had been treated. He wrote that he had discussed this with Mr Kidd Snr. There was reference to his relationship with Mr Kidd and Mr Kidd Snr having come to an end. He noted that if Mr Kidd had made contact and talked to him he did not think it would have gotten to that stage and that he was finding it very hard as he loved his job.

[60] Under the heading “solutions”, Mr Cavanagh wrote as below:

Please resolve my concerns.

Please respond within 48hrs of receiving this letter.

[61] There was no response to the letter before Mr Cavanagh’s employment was terminated on 12 November 2018.

[62] In its statement in reply X Factor denies that it ever received the letter. Mr Cavanagh provided the Authority with a screen shot of courier delivery details showing that an item was delivered and signed for by Mrs Marion Kidd and the tracking number. It is not obvious from the document the date the item was delivered. Mr Cavanagh in his oral and written evidence says that it was signed for on 7 September 2018. That date is also consistent with that referred in the letter from Mr Murray raising the dismissal grievance and other concerns dated 23 November 2018. I accept Mr Cavanagh’s evidence as more likely than not that the letter was delivered on this date. I am fortified in this conclusion by the consistency in earlier communication about the date Mrs Kidd signed for the letter.

[63] I am satisfied that Mr Cavanagh’s letter raises a grievance that Mr Kidd failed to be responsive and communicative since late August 2018 under s 114 of the Act. The letter refers to the impact of this on Mr Cavanagh, including his ability to undertake work and the resulting harm to his mental and physical health by the failure to communicate. The letter also raises a grievance about a change to a term of his employment in that he was no longer able to fill his ute with petrol which he had been doing since he started work. There is also reference to the failure to provide an employment agreement.

[64] There was no response to the letter.

### **When and how the employment relationship ended**

[65] On the morning of 12 November 2018, Mr Kidd advised Mr Cavanagh that he now owned the firewood yard and there was no longer a job for him there. Mr Cavanagh was asked to leave. Mr Cavanagh asked for his dismissal in writing and advised Mr Kidd he was not leaving until that occurred.

[66] Mr Kidd called the police and Mr Cavanagh was issued with a trespass notice.

**The test of justification in section 103A**

[67] Section 103A of the Employment Relations Act 2000 (the Act) contains the test of justification that is relevant to assessing both the alleged disadvantage and dismissal grievances the Authority are being asked to consider.

[68] The Authority needs to determine whether X Factor's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. There are also procedural fairness factors set out in s 103A that must be adhered to. There are also the overarching statutory good faith obligations in s 4 of the Act that a fair and reasonable employer could be expected to adhere to.

**Disadvantage grievances**

[69] I turn firstly to the alleged unjustified disadvantage grievances. The main grievance is the failure by Mr Kidd to be communicative and responsive. Whilst that was denied in the statement in reply, Mr Kidd did not attend the investigation meeting and I did not hear from him. I accept Mr Cavanagh's evidence that Mr Kidd stopped communicating with him from August 2018 seemingly because of some damage Mr Cavanagh accidentally caused. I find that failure to communicate continued until 12 November when employment was terminated.

[70] Mr Kidd could have dealt with the matter in a justifiable manner. This could have involved a meeting to raise concerns and hear explanations. There could have been a performance process. Instead Mr Kidd simply stopped communication with Mr Cavanagh which is the antithesis of good faith obligations to be responsive and communicative that underpins the Act. That was unjustifiable. Mr Cavanagh's ability to work and his well-being was affected. Mr Cavanagh did the right thing and wrote to the directors of X Factor about his concerns. There was no response. A grievance of unjustified disadvantage is made out for the failure to be responsive and communicative. It was not what a fair and reasonable employer could have done in all the circumstances.

[71] I also find it more likely than not that Mr Cavanagh had been authorised to fill a tank of fuel each week for his vehicle at the start of his employment. Nothing had been raised with him about doing so, even though there would have been a clear record that he had done this for over three years. There was a unilateral removal by Mr Kidd without consultation of his ability to use the Mobil card to fill his vehicle. That was unjustified. There was corresponding

disadvantage, albeit limited as it was only a few weeks before the relationship ended. The failure to provide an employment agreement continued towards the disadvantage and the vulnerable position Mr Cavanagh was in because there was nothing in writing about the petrol. Grievances in those respects are made out.

[72] Some other disadvantage grievances were alleged but considered in the round, the unjustified disadvantage is part of the grievances found established above.

### *Dismissal*

[73] The dismissal was not what a fair and reasonable employer could have done. There was an absence of any process. The failings were not simply minor. They were significant and leave the Authority unclear about the substantive justification for the termination of Mr Cavanagh's employment.

[74] The dismissal was unjustified.

[75] Mr Cavanagh has made out grievances of unjustified disadvantage and dismissal and is entitled to consideration of remedies.

### **Remedies**

#### *Loss of a benefit*

[76] I have treated this claim for \$1,500 as being in respect of the loss of hours of work because of the failure to communicate. I think it is probably more appropriately assessed under s 123(1)(b) of the Act rather than loss of a benefit.

[77] It is not possible to conclude with any degree of exactness the amount of hours of work lost. I have assessed Mr Cavanagh lost about 25 hours of work from the pay details which at \$20 per hour is \$500 gross.

[78] Subject to any issue of contribution Mr Cavanagh is entitled to be reimbursed the sum of \$500 for lost wages as the result of his disadvantage grievance.

#### *Lost wages*

[79] After dismissal, Mr Cavanagh was without work until 10 December 2018 when he started at a new role. He said that he looked for about six other roles before securing his

current job but his age counted against him. I am satisfied that there were steps taken to mitigate loss. Assessed on the basis of an average of 38.4 hours per week at \$20 per hour that is the sum of \$3,072 gross.

### *Compensation*

[80] A global sum is sought of \$15,000 for the disadvantage and dismissal grievances. The impact on Mr Cavanagh with the failure by Mr Kidd to be responsive and communicative was significant. Mr Cavanagh had a breakdown of sorts and was briefly hospitalised. There were no steps taken to deal with the concerns when raised and the impact and humiliation of simply being ignored in the work place by the person in charge cannot be underestimated. This was exacerbated because Mr Cavanagh said that he was treated previously as if he was a manager. Mr Cavanagh said that the Police being called at the time of dismissal was humiliating and until he obtained a new role it was difficult financially as he had to turn to his children.

[81] Subject to any issues about contribution, a suitable award for the compensation for the unjustified disadvantage is \$15,000.

### *Contribution*

[82] I do not find that Mr Cavanagh contributed in a blameworthy way to either of the grievances found established so as to reduce remedies. X Factor had options open to them if they were unhappy with Mr Cavanagh rather than simply not communicating. The above remedies are not reduced.

## **Penalties**

### *Failure to provide an employment agreement and time and wage records*

[83] Penalties are sought for the failure to provide wage and time records and an employment agreement. It was accepted at the investigation meeting that pay details attached to the statement in reply could largely satisfy the requirements of s 130 of the Act. I accept the delay in the provision of the records between late November 2019 and June 2020 could amount to a breach. There was acceptance that records had been provided and that they were able to be used with respect to calculations of statutory entitlements. Whilst acknowledging

the delay in provision was unacceptable I am not minded in all the circumstances to exercise my discretion and award a penalty for a breach of s 130 of the Act.

[84] I am not of that view with respect to the failure to provide an individual employment agreement. The maximum penalty for a breach is \$20,000. I have had regard to the object of the Act including to address the inherent inequality of power in the employment relationship. There appeared to be some form of employment agreement available as one was attached to the statement in reply. I find the failure to provide one to Mr Cavanagh was likely more than simply inadvertent. Mr Cavanagh was vulnerable and trusted that his employer was correctly attending to his pay, status and other matters.

[85] I have had regard to all matters in s 133A of the Act. I have considered penalties imposed in similar cases. I impose a penalty for a breach of s 65 of the Act for the failure to provide a written individual employment agreement in the sum of \$2,500. \$2,000 is to be paid to Mr Cavanagh and \$500 for the use of the Crown.

*Penalty for a breach of good faith*

[86] A party who fails to comply with the duty of good faith in s 4(1A) is liable to a penalty if the failure was deliberate, serious and sustained or intended to undermine the employment relationship.

[87] I have found X Factor breached its duty of good faith. There was a deliberate, serious and sustained failure to be constructive and responsive in maintaining a productive employment relationship. The breaches also undermined the employment relationship.

[88] The maximum penalty is \$20,000. I have considered the nature and duration of the breach of good faith of about 3 months and its impact. I have considered other broadly similar cases where penalties have been imposed for a breach of good faith. The breach in this case was particularly serious. I assess an appropriate penalty as \$10,000.

[89] \$7,000 is to be paid to Mr Cavanagh and \$3,000 to the Crown.

**Further matters**

[90] I understood at the investigation meeting that the claim for KiwiSaver employer contribution was not to be pursued. If that is not the situation then I will reserve leave for Mr Murray to return to the Authority by 29 January 2021 with any claim about that.

### **Interest**

[91] Interest is claimed. The Authority has power to award interest under clause 11 of schedule 2 of the Act calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016. I will allow interest for the amounts found owing for public holiday entitlements including the alternative day, sick leave and the \$500 loss of wages due to the unjustified action found. That is a total sum of \$7,804.30. I do not consider interest should be awarded on the holiday pay in the circumstances where it was paid incorrectly. I shall calculate interest from the date the statement of problem was lodged on 3 May 2019. It is a sum of \$354.33.

### **Costs**

[92] The investigation meeting occupied about half a day. Mr Murray asked for an increase in the daily tariff however I am not satisfied that there are grounds to justify that. Half of the daily tariff is \$2,250 and that is the appropriate cost award. There should also be an order for reimbursement of the filing fee of \$71.56.

### **Orders made**

[93] X Factor Shearing Limited is to pay to Graeme Cavanagh the following statutory entitlements as he was incorrectly regarded, and paid, as a casual employee:

- (a) \$11,551.74 gross for holiday pay.
- (b) \$5,572.58 gross for public holidays that would otherwise be working days.
- (c) \$75 gross for payment at time and a half for working on Easter Monday 2015.
- (d) \$150.61 gross for one alternative day.
- (e) \$1,506.10 gross for sick leave.

[94] Graeme Cavanagh was unjustifiably disadvantaged in and dismissed from his employment. X Factor Shearing Limited is ordered to pay to Graeme Cavanagh the following:

- (a) \$500 gross for hours of work lost because of the unjustified action causing disadvantage under s 123 (1) (b) of the Employment Relations Act 2000.
- (b) \$3,072 gross being lost wages after dismissal under s 123(1)(b) of the Employment Relations Act 2000.
- (c) \$15,000 without deduction for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[95] Penalties have been ordered payable by X Factor Shearing Limited for failure to provide a written employment agreement and breaches of good faith as below:

- (a) \$9,000 to Graeme Cavanagh
- (b) \$3,500 to the Crown.

[96] Interest of \$354.33 is payable on amounts as set out in paragraph 92.

[97] X Factor Shearing Limited is ordered to pay costs of \$2,250 together with reimbursement of the filing fee of \$71.56.

**Helen Doyle**  
**Member of the Employment Relations Authority**