

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 252
3082172

BETWEEN TERRI ST CLAIR
 Applicant

AND E J REED & CO LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Murray Broadbelt, advocate for the Applicant
 Doug Blaikie, counsel for the Respondent

Investigation Meeting: 14 and 15 April 2021 at Kaikohe

Determination: 15 June 2021

DETERMINATION OF THE AUTHORITY

- A. E J Reed & Co Ltd unjustifiably dismissed Terri St Clair.**
- B. In settlement of her personal grievance for unjustified dismissal E J Reed & Co Ltd must pay Ms St Clair the following sums:
(i) \$6,153.84 as reimbursement of lost remuneration; and
(ii) \$15,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. E J Reed & Co Ltd must also pay Ms St Clair arrears of \$28,435.93 for holiday pay, with interest to also be paid on that amount from 30 October 2018 until the date payment is made.**
- D. E J Reed & Co Ltd must also pay a penalty of \$2,000 to the Authority for breaches of the Holidays Act 2003.**
- E. All sums ordered for payment must be paid within 28 days of that date of this determination.**

F. Costs are reserved. A timetable for memorandum is set if a determination of costs is needed.

Employment Relationship Problem

[1] On 29 October 2018 E J Reed & Co Limited (EJRC) gave Terri St Clair four weeks' notice of termination of her employment. She had worked as manager of the company's business since 2008. From 11 September 2008 until 31 June 2018 she was also a director of the company.

[2] EJRC operates a quarrying and aggregate supply business from a depot in Kaikohe. Its majority shareholder is Earl Reed. Mr Reed has worked in the business as a quarry operator his whole working life.

[3] Ms St Clair's dismissal occurred against a background of complex personal, commercial and employment relationships between her, Mr Reed and the company.

[4] From 2007 to 2016 Ms St Clair and Mr Reed were in a personal relationship.

[5] According to Ms St Clair she and Mr Reed had signed an employment agreement for her position with EJRC on 11 September 2008. Mr Reed, however, could not recall signing the agreement and doubted he had done so. He claimed to have learnt of the agreement's existence on the day the decision to dismiss Ms St Clair was made.

[6] From 2010 onwards Ms St Clair held a 25 per cent shareholding in EJRC. The parties have unresolved issues over their respective rights and obligations in relation to those shares and the benefit of them. Those issues are not within the Authority's jurisdiction to determine.

[7] During 2017 EJRC began exploring prospects for selling its business. Mr Reed sought help with that work from Doug Blaikie, a Kaikohe-based lawyer. Mr Blaikie had previously acted for Mr Reed in 2010 over property relationship matters following a divorce. During 2017 and 2018 Mr Blaikie acted at various times for Mr Reed and for the company. It was Mr Blaikie who, on 29 October 2018, delivered to Ms St Clair a handwritten notice of termination of her employment. Since February 2019 Mr Blaikie has also been a director of EJRC.

[8] Ms St Clair applied to the Authority for findings that EJRC acted unjustifiably in making and carrying out its decision to dismiss her and that EJRC also unjustifiably disadvantaged her in two ways – firstly, by failing to pay her holiday pay and, secondly, by not properly investigating complaints she said she raised about how she was treated by Mr Reed and another man who worked for the company. She sought remedies for those personal grievances, orders for arrears of holiday entitlements she said she was short paid at the end of her employment and a penalty for breach of the Holidays Act.

[9] EJRC denied acting unjustifiably in terminating Ms St Clair's employment or otherwise disadvantaging her. It said Ms St Clair was not entitled to any further holiday pay.

The issues

[10] At the conclusion of the investigation meeting Ms St Clair withdrew her disadvantage grievance regarding her holiday pay entitlements, accepting that issue could appropriately be dealt through her arrears claim. The issues therefore requiring resolution were:

- (a) Was Ms St Clair an employee of EJRC from September 2008?
- (b) Did EJRC act as a fair and reasonable employer could have done in making and implementing its decision to dismiss her on 29 October 2018?
- (c) Had Ms St Clair notified EJRC of concerns about she had about how Mr Reed and/or another man working for the company behaved towards her and, if so, was she unjustifiably disadvantaged by EJRC not taking reasonable steps to address those concerns?
- (d) If EJRC is found to have unjustifiably dismissed and/or disadvantaged her, should Ms St Clair be awarded lost wages and compensation for distress caused to her?
- (e) If remedies are awarded, should they be reduced for any blameworthy conduct by Ms St Clair which contributed to the situation giving rise to her grievance?
- (f) Did EJRC pay all holiday entitlements due to Ms St Clair at the end of her employment and, if not, what order for payment of arrears and interest should be made?
- (g) Is EJRC liable to a penalty for failure to pay Ms St Clair's holiday pay entitlements and, if so, what penalty should be imposed?

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

The Authority's investigation

[11] The following people attended the Authority's investigation meeting to answer questions, under oath or affirmation, about written witness statements lodged on their behalf:

- Ms St Clair;
- Mr Reed;
- Mr Blaikie; and
- Warwick Ross, EJRC's depot caretaker.

[12] Written witness statements from other former EJRC employees were set aside as they did not attend the investigation meeting and the parties had taken no prior steps to require their attendance. There was ample time before the investigation meeting, delayed some months by the Covid-19 emergency, to have sought summonses or have sought permission for participation by audio visual link.

[13] The investigation meeting concluded with oral closing submissions from the representatives.

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

[15] Findings are reached on the civil standard of the balance of probabilities, that is an assessment of what is more likely to have happened or have been said at the relevant times. This assessment considers both the evidence given by witnesses and what may or may not be corroborated by documents which reliably record or reflect relevant information.

Context

[16] Conclusions about two aspects of the evidence on this employment relationship problem, and the context in which it arose, assist in evaluating other evidence and in reaching findings on the issues for resolution.

[17] One aspect concerns the extent of deterioration in the working relationship between Mr Reed and Ms St Clair by the time she was dismissed.

[18] The other aspect concerns Mr Reed's recall of various events and documents and his capacity for making decisions. At the time of the relevant events during 2018 Mr Reed was aged 80 and Ms St Clair was in her late fifties. Their ages are relevant only because of comments said to have been made about Mr Reed by Ms St Clair suggesting his participation and recall of events was subject to some age-related deterioration.

A dysfunctional working relationship

[19] The evidence of all witnesses confirmed the working relationship between Mr Reed and Ms St Clair was fractious. This worsened during 2018 as financial pressures on the business worsened and they looked for opportunities to put it in a better position for sale. They often argued in the office, including in staff meetings. Strong language was used in some of those exchanges. Employees found the volatile atmosphere difficult and sometimes embarrassing.

[20] Mr Reed said those arguments occurred because Ms St Clair dominated him, insisting she ran the company and ignoring his experience in quarrying and his role as majority shareholder. He blamed her for losing some customers, some employees leaving, the finances deteriorating and difficulties in securing leases for longer term access to quarries. Mr Reed said he did not initiate the arguments but swore at Ms St Clair when defending himself against comments she made to him. He said this included instances when Ms St Clair called him "geriatric" and "senile". In his oral evidence Mr Reed said he did not mind saying that he had called Ms St Clair "a fat catholic f**k" a few times in arguments and accepted he had "probably" also called her "a f**king liar" and "a f**king thieving bitch".

[21] Ms St Clair denied ignoring Mr Reed's experience or excluding him from decisions about company matters. She also denied calling Mr Reed senile but accepted she had sworn at him during some of those arguments, had called him a "silly old man" and had told him to get out of her office. She said she had also attempted to avoid arguments with him on some occasions by removing herself to the toilet but he had ended up shouting at her through the door. She did not agree with criticism from him

and, subsequently from Mr Blaikie, that she had failed to manage the company properly and was responsible for its financial and staffing difficulties.

[22] What was apparent from their conflicting accounts was that the working relationship was dysfunctional and disruptive of the company's ability to address its business problems. As observed by both Mr Blaikie and Mr Ross in their oral evidence, responsibility for that situation lay at the feet of both Ms St Clair and Mr Reed, not just one or other of them.

Gaps in Mr Reed's recall

[23] The second important contextual aspect concerned the question of Mr Reed's memory and capacity to make decisions. This was relevant to the weight to be given to several documents in the evidence, that he denied signing or seeing, and to his responsibility for decisions made, on the company's behalf, about the termination of Ms St Clair's position.

[24] When, at Mr Reed's request, Mr Blaikie became involved in 2017 with discussions about the prospects for selling the business, Mr Blaikie spoke with Ms St Clair to get background information about the company. In those conversations Ms St Clair told him that Mr Reed had difficulty understanding some things. Mr Blaikie asked Mr Reed to discuss this concern with his doctor. Mr Reed's doctor then telephoned Mr Blaikie. Mr Blaikie said the doctor confirmed to him that there were no concerns with Mr Reed's cognitive function. Apart from some physical health problems, including prostate cancer which was being managed by a long term course of medication, Mr Reed was said to be surprisingly well for a man of his age.

[25] In his evidence Mr Blaikie confirmed that, in his role as a legal advisor through his subsequent activities on behalf of Mr Reed and the company, he was confident that Mr Reed was more than capable of making major decisions, including those made in October 2018. I have accepted that evidence as being sufficient to confirm Mr Reed's capacity to make the decisions he made on behalf of EJRC about Ms St Clair's position at that time.

[26] There were, however, also instances where Mr Reed clearly did not recall signing or seeing some documents, and later denied knowing about, but on the balance of probabilities, he had signed or seen them at the relevant earlier times.

[27] Firstly, Mr Reed did not recall signing the employment agreement dated 11 September 2008. He suggested Ms St Clair copied his signature. This was unlikely. The more likely and more compelling account, as given by Ms St Clair in her evidence, was EJRC's office administrator at the time prepared the agreement, using the form of the employment agreement of the previous manager, and Ms St Clair and Mr Reed had both signed it on the same day.

[28] Secondly, Mr Reed denied he saw a letter from Ms St Clair dated 27 July 2018 in which she resigned as ERJC's sole director and denied that he had, soon after, signed a form consenting to becoming a director of ERJC. He had not been a director since resigning from that office, according to Companies Office records, on 12 September 2008. More likely was Ms St Clair's evidence that she left her letter on his desk on 27 July 2018. On checking with him three days she found he had not read it but he did so on 30 July while in the office with her and a new employee. At the same time he signed the director's consent form. The form was subsequently registered with the Companies Office on 31 July, adding Mr Reed as a director and removing Ms St Clair as a director from that date.

[29] Thirdly, Mr Reed said he had not seen a letter to him from Ms St Clair dated 1 August 2018 explaining why she had resigned as a director. Her letter said angry outbursts from Mr Reed undermined her authority with other employees. The letter asked him to agree to mediation, as provided for in her employment agreement, to resolve issues between them. Ms St Clair gave credible evidence that she and Mr Reed had discussed that letter on 7 August 2008. She said he described its contents as "bullshit" and had thrown it in the rubbish bin.

[30] Fourthly, Mr Reed denied seeing a written complaint from Ms St Clair dated 24 October 2018 about an argument with a contractor who was working at the depot. Mr Reed accepted he knew about the argument referred to, because he remembered walking away when it was going on, but he said he did not see or read her letter. In this case Ms St Clair's evidence did not tip the balance of probabilities on whether Mr Reed most likely had seen her letter. Overall the evidence was not sufficient to say he probably had done so. Mr Reed was, however, on his own evidence, aware of several arguments between the contractor and Ms St Clair but considered he did not need to get involved or try to stop them.

Ms St Clair's employment status

[31] Against that background I find Ms St Clair was an employee of ERJC from 11 September 2008. Her position, as recorded in the employment agreement, was formally described as managing director but she used the title of manager in carrying out her work. It described her as "reporting to Owner, Earl Reed".

[32] One other objection by EJRC to the validity of the agreement was also not established. The company suggested Mr Reed had no authority to enter the agreement on the company's behalf on 11 September 2008 because he was not a director at that time. However the Companies Office records show that he was a director on that date. He is recorded as resigning as a director on 12 September 2008, the same day that Ms St Clair was added as a director.

How EJRC came to terminate Ms St Clair's employment

The immediate context

[33] As already noted the chain of events that led to Ms St Clair being issued with notice of dismissal on 29 October 2018 were linked back to attempts through 2017 and 2018 to arrange a sale of the business.

[34] The company faced a number of financial and operational difficulties. Ms St Clair arranged to sell off various assets including a hammer mill, a bulldozer, trucks and trailers in order to reduce maintenance costs and to generate cash needed for ongoing operation of the business. One prospect for the sale of the entire business fell through and the company failed to win a contract to supply aggregate to a major roading contractor in the region.

[35] Against that background three events occurred during October 2018 which led to a decision by Mr Reed to remove Ms St Clair from her role.

[36] Firstly, a local contractor, who ran his own business and had the certification necessary to run a quarrying operation, confirmed an earlier-expressed interest in investing in EJRC and becoming involved in operating its business. He is referred to in the remainder of this determination by his initials CTL. This is because he did not give evidence in the Authority investigation and did not have the opportunity to comment on some negative evidence given about him by Mr Reed.

[37] Both Mr Reed and Ms St Clair were keen on pursuing the option of CTL buying into the company. Tension arose around what value CTL was prepared to put on his potential investment. CTL wanted to gain a significant shareholding for the funds he said he had available. As a shareholder Ms St Clair wanted a price that better reflected what she believed the business, and any portion of shares in EJRC as the company owning and operating the business, was worth.

[38] She met CTL on 18 October 2018 to discuss his proposal and its value. From those discussions Ms St Clair understood CTL's investment was conditional on her leaving the business. He intended carrying out the role of managing the business and operating its quarries himself. The intended arrangement, as Mr Reed later described it in his evidence to the Authority investigation, was that CTL "was supposed to be the manager and I was to be the boy in the yard".

[39] Ms St Clair's own diary note about her discussion with CTL on 18 October recorded that "[he] said he couldn't buy in unless I left [and] I said I would leave if that was the case". She made it clear that she did not agree with CTL's proposed valuation and said she would get further information to back up her position once the company's external accountant was back from leave.

[40] Ms St Clair's oral evidence confirmed she understood by 18 October that her position as manager would likely end if CTL's investment in the business came through. She described herself as having "an open mind to it" and said she had reported back to Mr Reed about her discussion with CTL on 18 October and their different views of the value of the business.

[41] A second event around this time also affected the operational ability of the business. The crushing machine used by two workers working in a quarry broke down on a Friday. They did not report the issue to Ms St Clair until the following Monday morning. On hearing that news Ms St Clair was angry not to be told sooner as she could have taken steps to get the machine fixed over the weekend. She told the two workers there was "nothing you can do, you might as well f**k off home". The workers did leave as suggested but then also decided not to return to work on subsequent days. One of them was the only person working for the company who held a certification needed for legal operation of the quarry. His absence meant the quarry could not operate and the loss of two workers left Mr Reed as the only person available to work in the quarry.

[42] The third event occurred on the morning of 29 October. Early that morning Ms St Clair and Mr Reed completed paperwork applying for finance the purchase of a local quarry used by the company. The purchase was aimed at ensuring long-term access to the quarry rather than the insecurity of a lease.

[43] While Mr Reed had signed the necessary documents it appeared he has doubts about the financial viability of the planned purchase or, at least, from discussions with Mr Blaikie and CTL changed his mind about those plans.

[44] These events – comprising Ms St Clair’s knowledge of CTL’s interest in investment but at a disputed value, the inability of the business to carry out any work in its quarries and doubt about a quarry purchase plan – became the immediate context of what then unfolded during the remainder of 29 October 2018.

Events of 29 October 2018

[45] For the most part this determination has relied on the account given by Mr Blaikie and Mr Reed about how and why Ms St Clair came to be dismissed on 29 October 2018. It was not necessary to reconcile some of the differences in their recall from that of Ms St Clair because accepting, mostly, their own account of their rationale and their actions showed they had treated Ms St Clair unreasonably and unfairly.

[46] Soon after signing the financing documents that morning Mr Reed left the EJRC’s depot office and went to a meeting in Mr Blaikie’s law office, which was nearby in the town.

[47] As a result of discussions in that meeting Mr Reed and CTL signed a document headed “Special Resolution of E J Reed & Co Ltd made at Kaikohe on this the 29th day of October 2018”. It listed two resolutions. One was to remove Ms St Clair as a director of EJRC “effective immediately”. The other was to appoint Mr Reed and CTL as directors, also “effective immediately”.

[48] Mr Reed signed the agreement as “the holder of 75% of the shares of the company”. The company’s constitution allowed for a holder of that portion of shares to make such resolutions.

[49] He and CTL also signed a statement on the document confirming they consented to their appointment “as a new director of the company”.

[50] They then agreed that Mr Blaikie and CTL would go to EJRC’s depot office to speak to Ms St Clair, give her a copy of the resolutions and advise her that her position as managing director had ceased to exist. Ms St Clair was to be told she would be paid one months’ notice but not required to attend work if she did not want to. Mr Reed remained at Mr Blaikie’s office as he did not want to be part of that conversation.

[51] Mr Blaikie and CTL then went to EJRC’s office and told Ms St Clair of those decisions. Mr Blaikie recalled Ms St Clair making only one comment when told that news: “It’s come to this has it”. She left the room and went to her office. She returned soon after and spoke to Mr Blaikie. She told him that she had ceased to be a director some months earlier and that Mr Reed was already a director. She also gave Mr Blaikie a copy of her employment agreement.

[52] Mr Blaikie was surprised by the news regarding directorships and Ms St Clair’s status as an employee of the company. He immediately checked the Companies Office records online and found the entries referring to the resignation of Ms St Clair as a director and the appointment of Mr Reed as a director, both dated 31 July 2018. In his evidence Mr Blaikie said he had searched the Companies Office record some six months or so earlier but Mr Reed had not told him of any change since then. In what he described as an oversight, Mr Blaikie said he had not checked the records again before the resolutions of 29 October were made.

[53] Mr Blaikie then returned to his own office to seek instructions from Mr Reed. As a result of those discussions they decided to terminate Ms St Clair’s employment. Mr Blaikie handwrote a notice and Mr Reed signed it. Mr Blaikie took the notice to EJRC’s office and delivered it to Ms St Clair. It read:

Notice of Termination of Employment: To Terri St Clair

E J Reed & Co Limited hereby give you notice of the termination of your employment with company under clause 8 of the employment agreement dated the 11th September 2008. As provided for in the employment contract you will be paid 4 weeks pay from the 29th of October 2018.

You will not be required to provide any services to the company during this 4 week period but will be required to provide any information you may have relating to the Contract.

Dated at Kaikohe this 29th day of October 2018.

[signed]

E J Reed
Company Director

[54] The clause referred to provided that “either party may terminate this agreement by providing not more than four weeks’ written notice”.

[55] Mr Blaikie then asked Ms St Clair to attend a shareholders’ meeting to be held at the company’s depot office at 1pm.

[56] Mr Reed, Mr Blaikie, CTL and Ms St Clair attended that meeting. She was asked to agree to a resolution changing the company’s constitution so that CTL could buy shares in EJRC from either her or Mr Reed. This would have changed a provision giving existing shareholders a pre-emptive right of purchase. Ms St Clair declined to agree so, under the terms of the company’s constitution, the resolution could not be passed. The meeting, which Mr Blaikie described as tense but cordial, then ended.

[57] Ms St Clair left the office soon after. As permitted by the terms of her notice she did not return to the office during the following four weeks but did answer telephone queries from the office administrator about various business matters.

Was the termination of employment an unjustified dismissal?

[58] The action EJRC took to end its employment relationship with Ms St Clair on 29 October 2018 had to be assessed against the test of justification set by s 103A of the Act. This test asks whether what the employer did, and how it did so, were what a fair and reasonable employer could have done in all the circumstances at the time?

[59] Such an employer is bound by the good faith obligations in s 4(1A) of the Act. This requires an employer proposing to end an employment relationship to first give the employee information about that prospect and the opportunity to comment on the information before the decision is made.

[60] The Act also sets steps that should be taken as part of a fair process for making such decisions.¹ These steps reinforce the good faith obligation to give the employee a real opportunity to respond to the proposal and for the employer to then genuinely

¹ Employment Relations Act 2000 s 103A(3).

consider what the employee has to say before making any decision about the future of the employment. Where defects in that process are more than minor and result in the employee being treated unfairly, the Authority may find the resulting dismissal was unjustified.²

[61] In Ms St Clair's case EJRC, through Mr Blaikie and Mr Reed, failed to observe those obligations under employment law once they became aware that the legal situation was different from their understanding at the outset of their plans on 29 October 2018.

[62] As became apparent through Mr Blaikie's oral evidence in the Authority investigation, he had not appreciated at the time the real difference that Ms St Clair's employment status made to what could be done that day. He did not pause to seek any specialist legal advice on what was needed to fairly consider or arrange the end of the employment relationship. He read the reference in her employment agreement to giving four weeks' notice and, as he said, took it at its face.

[63] In part this was because, on first reading, Mr Blaikie also doubted the status of the employment agreement as he, wrongly, believed Mr Reed was not a director of the company at the time he signed it in September 2008. For reasons given earlier in this determination, the employment agreement was effective and binding from that time.

[64] The result was that how Ms St Clair was treated that day, being given notice of dismissal in that way, was not what a fair and reasonable employer could have done in all the circumstances at the time.

[65] Having realised the matter was not one simply one of company law about removing a director but rather one involving employment law obligations, a fair employer could not have proceeded without pausing to allow Ms St Clair a reasonable opportunity to comment on the proposal that her employment end in that way and at that time.

[66] What happened was not entirely out of the blue for Ms St Clair because she knew from talking with CTL on 18 October that her time in the role of manager would come to an end if his investment in the business went ahead. However she was still

² Section 103A(5).

waiting for further information from the accountant about valuation of the business. As far as she knew, the sale of the business to CTL was not an absolute certainty and she did not know that Mr Reed, in discussion with CTL and Mr Blaikie, had resolved to press ahead sooner than Ms St Clair understood would happen.

[67] The failure to consult her about the prospect of her employment ending sooner, rather than later, resulted in her being treated unfairly in two ways.

[68] Firstly, she was, in effect, bundled out of her job unexpectedly early and without a chance to talk about how and when that would happen. This denied her an opportunity, for example, to discuss options on timing and to leave with dignity.

[69] Secondly, the decision to move quickly was in part motivated by criticisms of her performance of the role. Those criticisms had not been fully and fairly put to her before the decision was made to end her employment. The effect was that she was denied a fair opportunity to address the degree to which she was blamed by Mr Reed and Mr Blaikie for the difficulties faced by the business.

[70] The urgency of financial and operational pressures on the business did not relieve EJRC of its obligation to allow Ms St Clair an opportunity to comment before the decision was made on the future of her employment. A fair opportunity did not need to take a long time but it did need to be genuinely given.

[71] For the reasons given, the defects in the process followed by EJRC were more than minor and resulted in Ms St Clair being treated unfairly. Accordingly, she has established her personal grievance for unjustified dismissal.

Did Ms St Clair establish another grievance?

[72] Ms St Clair clearly had concerns about the nature of interactions between her and Mr Reed and between her and a contractor working for the business. Mr Reed's evidence showed he was aware of the conflict Ms St Clair had with the contractor because he had heard and seen at least one such situation and, on his own account, simply walked away from it.

[73] However, for reasons already given, the evidence on this point did not establish to the necessary degree that Ms St Clair had formally raised those concerns in a way that would then have given rise to a further personal grievance, for unjustified

disadvantage, because the company had not then taken adequate steps to address those concerns. While it could be accepted that Ms St Clair wrote a letter asking for action, it was not reliably clear that Mr Reed got the letter.

Remedies for Ms St Clair's grievance

Lost wages

[74] Two factors limited the period for which Ms St Clair could be awarded reimbursement of wages or other money lost as a result of her established personal grievance for unjustified dismissal.

[75] Firstly, the extent of the loss is limited by the realistic prospect that her employment would have ended after a relatively short period anyway, even if EJRC had followed a fair process before dismissing her. Assessing what is described in the case law as the “counterfactual analysis”,³ it was unlikely her employment would have extended more than a few weeks beyond the four weeks' notice period paid to her.

[76] Secondly, Ms St Clair opted not to seek further paid employment after her job with EJRC. Instead she had earned income from rearing and selling calves on her rural property. While this decision was in part due to the blow to her confidence resulting from how her employment ended, it also meant she had limited her endeavours to mitigate her loss of wages.

[77] On that assessment of the extent of Ms St Clair's loss and her limited mitigation efforts, the appropriate award for reimbursement of lost wages under s 123(1)(b) and s 128 of the Act was a further four weeks' wages. The amount due is \$6,153.84, less any applicable tax. EJRC must pay that sum to Ms St Clair within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[78] Ms St Clair was hit hard by the suddenness of her dismissal and how it was carried out after ten years working in the business. She felt humiliated and experienced a loss of personal and social confidence. Some months afterwards Ms St Clair reported to a nurse counsellor that she was still experiencing poor sleep, poor appetite, excessive worrying and frequent tearfulness. She also had symptoms of anxiety and depression.

³ *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315, at [73].

[79] However not all of that difficult experience could be attributed to the end of the employment relationship. Her former personal relationship with Mr Reed and her concerns about the fate of her commercial interests as a shareholder in the company contributed to some degree to the upset she experienced but were not factors that could be compensated for under the provisions of the Act applicable to employment relations.

[80] Assessing an award of compensation had to weigh the relevant factors, exclude to the extent possible non-employment aspects of the distress experienced, and consider the general range of awards in similar cases. From that assessment the appropriate award of compensation under s 123(1)(c)(i) of the Act was \$15,000. EJRC must pay that amount, without deduction, to Ms St Clair within 28 days of the date of this determination.

Reduction of remedies for contributory conduct

[81] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to any blameworthy conduct by Ms St Clair that contributed to the situation giving rise to her grievance.

[82] From that assessment can be excluded criticism of how she had carried out the role. Those criticisms had not been put to her in any fair or thorough way before the decision was made to dismiss her.

[83] The company also claimed, in subsequent correspondence between Mr Blaikie and Ms St Clair's lawyer, that the end of her employment was "not for any cause" but "was simply restructuring in an attempt to reverse the many years of compounding losses within the company". It was EJRC's failure to carry out that 'restructuring' in a fair way that was the situation giving rise to Ms St Clair's grievance. She cannot be held to have contributed in a blameworthy way to the company's representatives making those errors.

[84] Accordingly no reduction of remedies was required.

Was Ms St Clair short paid her holiday entitlement?

[85] Ms St Clair identified a shortfall in payment of her entitlements to paid annual leave totalling \$28,435.93 for the six year period up to her last day of employment. Her

calculations were based on the company's payroll records kept by the office administrator.

[86] Two points of dispute arose. One concerned Ms St Clair's salary level, varying across some years, on which the calculations were based. The other concerned an allegation that Ms St Clair took more leave than was accounted for in the company's pay records.

[87] Ms St Clair's employment agreement, signed in 2008, provided for an annual salary of \$80,000. This rate was adjusted at various stages during her employment, reaching \$90,000 by 2014 but was reduced by agreement in subsequent years as the business sought to control costs. By her last year of employment, Ms St Clair's annual salary had returned to \$80,000. Those rates of pay were clearly shown in the company's payroll records, kept by the company's office administrator at the time, and was the appropriate information for making holiday pay calculations.

[88] Similarly the evidence from Mr Reed and Mr Blaikie did not reliably establish their proposition that Ms St Clair took more leave than was accounted for in those payroll records and her holiday pay claim should be discounted accordingly. While Mr Reed said he believed she took more days off, he provided no evidence corroborating the notion she took more days off than listed in the company's record. Her calculation included a deduction of more than \$13,700 for leave taken or cashed up during her employment.

[89] Ms St Clair's calculation of holiday pay due but not paid to her at the end of her employment is accepted. EJRC must pay Ms St Clair \$28,435.93 as arrears of holiday pay, less any applicable tax, within 28 days of the date of this determination.

[90] Ms St Clair is also entitled to interest on that amount from 30 October 2018 to the date of payment. The interest due must be calculated by using the Ministry of Justice's civil debt interest calculator.⁴

Penalty for breach of the Holidays Act 2003

[91] Ms St Clair also asked for penalties to be imposed on EJRC for failing to pay her holiday pay and for failing to provide her pay records when requested for the

⁴ www.justice.govt.nz/fines/civil-debt-interest-calculator

purpose of calculating her entitlements. EJRC was liable to a penalty on both counts under s 75 of the Holidays Act 2003, for its failure to comply with the s 27 requirement to pay annual holiday pay at the end of the employment and with the s 82 requirement to comply “as soon as practicable” with a request from an employee for access to the information about that employee in their holiday and leave records.

[92] The failure to pay annual holiday pay when due at the end of the employment has already been addressed in this determination.

[93] In November and December 2018 Ms St Clair formally asked for her complete holiday records. Those requests were repeated by a lawyer acting for her in February 2019 but the records were not provided by EJRC until after the advocate then acting for her in the Authority asked again in May 2019. The delay fell well outside the requirement for an employer to provide such requested records as soon as practicable.

[94] Globalising the breaches of the two sections of the Holiday Act EJRC was potentially liable to a single penalty of up to \$20,000. The appropriate penalty to set in this case is determined by having regard to all relevant matters, including those listed in s 133A of the ER Act, and further factors identified in case law on such penalties.⁵

[95] EJRC’s delay in providing records must be taken to be intentional. Having regard to the importance of workers having access to money they are due and to records for the calculation of their entitlements, a penalty was appropriate. There was no information EJRC had previously been penalised for similar breaches, so the provisional penalty could be substantially reduced for a first offence. While EJRC had financial difficulties in the operation of its business, this did not mean it would not be able to pay a penalty. Balancing all relevant factors, and giving weight to the need to deter both this employer and all employers from withholding leave records and holiday pay, an appropriate penalty to impose was \$2,000.

[96] EJRC must pay this penalty of \$2,000 for breach of s 27 and s 82 of the Holidays Act 2002 to the Authority by no later than 28 days from the date of this determination. On recovery of the penalty the Authority must transfer that amount to the Crown Account.

⁵ *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].

Costs

[97] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[98] If they are not able to do so and an Authority determination on costs is needed Ms St Clair as the successful party may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum EJRC would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[99] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶ In this case, as a preliminary indication that may assist the parties resolve costs themselves, the tariff applying would be \$4,500 for the first day and a further \$500 for the further part day needed to hear closing submissions.

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].