IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 574
3093314

	BETWEEN	OLIVIA FRASER Applicant
	AND	EL TURKO LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Dave Cain, advocate for the Applicant Cengiz Kanat, for the Respondent
Investigation Meeting:	21 October 2021
Submissions received:	21 October 2021 from Applicant 8 November 2021 from Respondent
Determination:	21 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Olivia Fraser, worked for the respondent company in its kebab store. She was hired by the owner of the company, Mr Cengiz Kanat.

[2] After some 14 months of work, Ms Fraser burned her arm on a fryer basket. In her view, Mr Kanat belittled her over it, and failed to offer her assistance. Shortly thereafter, she resigned, on or about 4 November 2019.

[3] Mr Kanat did not pay her for her last week's work, instead raising an allegation that Ms Fraser had stolen money by undercharging customers for their food.

[4] Ms Fraser raised a claim for constructive dismissal, which is denied by the respondent.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Fraser, and from her mother and father. Mr Kanat appeared himself, together with Ms Aman Kaur, who had worked for him together with Ms Fraser. All witnesses answered questions, under oath or affirmation, from me and the parties' representatives. Both parties provided written closing submissions.

[6] 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.

The issues

[7] The issues requiring investigation and determination were:

(a) Was Ms Fraser constructively dismissed? And if not, did Ms Fraser suffer an unjustified disadvantage?

(b) If the respondent's actions were not justified (in respect of dismissal and/or disadvantage), what remedies should be awarded, considering:

- Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
- Compensation under s123(1)(c)(i) of the Act?

(c) Should penalties be awarded;

(d) Costs.

Facts

[8] Ms Fraser started work in the respondent's restaurant in about October 2018. She is not certain of the date, as she was not provided with a written employment agreement, and the respondent's records are incomplete.

[9] She was paid by the hour, and received the minimum wage.

[10] Ms Fraser's main task was to work the till, taking orders and payment. She would also help in the kitchen, doing such tasks as cooking the hot chips, preparing

falafel, and clearing the small number of tables as needed. At the end of the shift, she and the other staff would take turns on dishwashing duty. Mr Kanat would often, although not always, provide a meal for the staff at the end of the evening.

[11] At start of Ms Fraser's employment, she only worked one or two days per week. This quickly became three days per week.

[12] Ms Fraser was happy in her work, and happy to receive pay in what was her first job.

[13] She says that over time this changed. She says that Mr Kanat would belittle her, by calling her names such as "slow", "useless", "lazy", and on one occasion "ugly". She says that Mr Kanat would occasionally yell at her when the shop got busy.

[14] Mr Kanat firmly denied calling Ms Fraser, or any other staff, any of these names, saying that this was not how one treated staff. He did note that on some busy nights, Ms Fraser and another co-worker (her friend) would go to the rear of the shop to get started on the dishes, and would not always notice when customers came in and needed serving. He indicated that he would then call out to them to come and serve the customers.

[15] Despite this, when Ms Fraser's friend left her employment with the respondent, Ms Fraser was excited to have the opportunity to work more hours. She spoke with Ms Kaur (another co-worker), who advised her not to immediately approach Mr Kanat. Instead, Ms Kaur spoke to Mr Kanat, and told him to offer Ms Fraser more hours as they were busy in the shop, and Ms Fraser wanted to work more hours. This occurred, and the timesheets show that Ms Fraser's hours increased accordingly. Both Mr Kanat and Ms Fraser agreed that Ms Fraser had wanted to work more hours in the restaurant, and had been happy to accept the increased hours offered.

[16] From Ms Fraser's perspective, matters came to a head when in October 2019, she burned her arm on the basket of the chip fryer. She says she jumped back with the pain, and Mr Kanat must have seen it, even though he was working the BBQ at the time, and was not near where she was working at the fryer. A photo of the burn was produced to the Authority, showing a "stripe mark" on the side of Ms Fraser's forearm, consistent with her arm having contacted the heated handle of a fryer basket.

[17] Ms Kaur saw that something had happened, and took Ms Fraser to the sink and made her run cold water over the burn.

[18] The restaurant was busy, and Ms Kaur had to leave Ms Fraser after a short time to attend to customers. Ms Fraser then joined her to serve the customers, and carried on working.

[19] Ms Fraser was rostered to do the dishes at the end of that shift, and did not wish to do so as the water was hot. So she agreed with Ms Kaur that Ms Kaur would wash the dishes instead, and she would dry them. When Mr Kanat came to see them at the end of the shift, he asked why Ms Kaur was washing dishes instead of Ms Fraser. Ms Kaur told Mr Kanat that Ms Fraser had burned her arm. Ms Fraser accepted that she herself never told Mr Kanat that she had received a burn.

[20] Ms Fraser went home, and her mother gave evidence that she was upset and in pain. Ms Fraser treated the burn with cold water. The following morning, her mother helped her bandage her arm from wrist to elbow[1].

[21] When Ms Fraser went to work in the evening, she says that Mr Kanat saw her with a bandaged arm, and told her to take the bandage off. She says that she said nothing to him, but took the bandage off, quickly put it in the rubbish, and continued working without anything to cover her burn.

[22] Mr Kanat rejects this. He says quite firmly that when Ms Fraser came to work, she was not wearing any bandage, but was wearing short sleeves, with bare arms as was usual. He says he noticed there was a burn mark on Ms Fraser's bare arm, and went and found plasters, as he knows from experience that when you are working in a kitchen it is possible to get burns on your arms, and then the burn needs to be covered, or the heat and steam from the kitchen will aggravate it. He said that he asked Ms Kaur to get Ms Fraser to wear a plaster to cover her burn, but he did not put the plaster on Ms Fraser himself.

[23] Ms Fraser continued with her shift. In fact, she continued with her work that week, and finished that week's work with no further incident. She then decided she could not continue working for Mr Kanat, and texted him the following week shortly

[1] For the sake of clarity, Ms Fraser's burn was a short "stripe" mark, and did not extend from wrist to elbow.

before the start of her first shift[2], saying that she would not be returning to work, but had found a new job. She added in her text message: "*I don't like the way I get treated most of the time, despite how much I help you. I feel like it's time for me to move on…and get new experiences.*"

[24] Mr Kanat didn't question this. He explained that, between 1 and 2 months ago, another staff member had left the restaurant. This staff member was Ms Fraser's friend, and they had enjoyed working together and had talked together in the kitchen while they worked. The staff member had left, and Mr Kanat believed that she was giving unauthorised discounts to friends and family members, instead of charging them full price as per the shop menu, as Mr Kanat had expected her to do.

[25] Mr Kanat believed that Ms Fraser was also offering unauthorised discounts to her family. He explained that Ms Fraser's mother and step-father would place a regular order on Wednesday nights, for two meals and chips, which should have had a price of $31.50. However, he had checked the EFTPOS receipts, and believed Ms Fraser was charging only $10 for a meal.

[26] Ms Fraser explained that her friend did give discounts to others, and had told her to give a discount to friends and family. She had not discussed this with Mr Kanat, but had simply heard it from her friend. As a result, she did provide a discount to her family, although she did not offer any discounts to friends. She said the discount she provided to family was about $5.

[27] Mr Kanat decided not to pay Ms Fraser her last week's wages, because he believed she had been giving unauthorised discounts.

[28] When it became clear that Ms Fraser's wages for her last week of work were not going to be paid, Ms Fraser's father texted Mr Kanat. Mr Kanat replied, explaining that he believed Ms Fraser was not correctly charging her friends and her mother for purchases. Mr Kanat said that he believed Ms Fraser had stolen from him and he was going to calculate how much Ms Fraser had stolen from him, and if there was any remaining wages, he would pay these.

[2] Which would have been 4 November 2019.

[29] After this, communications between the parties stalled. Ms Fraser sought advice and raised a personal grievance.

[30] Despite what he had indicated, Mr Kanat took no particular steps to work out what amounts he thought Ms Fraser had been undercharging, or to make any payment to her. At hearing, he said that he thought the undercharging had gone on for maybe 2 months, and amounted to maybe $240 or $250. He admitted that he was unable to prove this, as EFTPOS receipts would be the only lead, but these did not record who rang up specific till charges, and he had never discussed his suspicions with Ms Fraser.

[31] Ms Fraser was out of work for approximately a year.

[32] Ms Fraser explained to the Authority that she did not in fact have another job to go to, and when she had said in her resignation text that she had found a new job, this was just a lie because she felt uncomfortable resigning with no notice. She indicated that she had started looking for other jobs after a couple of months or so, but had not focused on this at all due to some other matters that were going on in her personal life. She said that she had really only started looking for a new job in October of the following year, when she had applied for a job at another local restaurant, and had taken her CV in and asked for a job trial, which was successful.

[33] Ms Fraser's mother confirmed this. She indicated that she had been the person who encouraged Ms Fraser to apply for a new job in October 2020, and was pleased that her "little push" had given Ms Fraser the confidence to make a successful application.

Claims

[34] Ms Fraser raises a claim of unjustified constructive dismissal (or unjustified disadvantage in the alternative), and remedies resulting, plus a claim for unpaid wages.

[35] The unpaid wages claim results from the respondent's failure to pay Ms Fraser for her last week of work. This is a claim for 17.5 hours worked, at Ms Fraser's hourly net rate of $17.00 per hour. This amounts to a claim of $297.50 on a net basis.

[36] In regards to the claim of unjustified dismissal and/or unjustified disadvantage, three months compensation for lost wages is claimed, being $2,351.55, as well as compensation for hurt and humiliation.

[37] There is also a claim for unpaid annual leave, as Ms Fraser never took any paid leave during her employment (and received no payment of annual leave on the ending of her employment).

[38] Ms Fraser also makes a claim for interest on monies owing to her under the Money Claims Act 2016, and costs on a reserved basis.

Findings

[39] Ms Fraser was distressed by what she felt was poor treatment by Mr Kanat, including his brusque manner during her employment, and culminating in what Ms Fraser says is his ignoring her burn injury. She relies primarily on what she says is Mr Kanat's dismissal of her injury in support of her claim for constructive dismissal. She also refers to Mr Kanat's poor treatment of her, including that he called her names, which is referred to in legal submissions as verbal abuse.

[40] Constructive dismissal can arise where there was a breach of the terms of employment by the employer sufficiently serious to warrant the employee leaving, for example, in circumstances where:

a. an employer gives an employee a choice between resigning or being dismissed; or
b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
c. A breach of duty by the employer causes an employee to resign[3].

[41] Constructive dismissal includes a variety of circumstances where the employment comes to an end as a result of acts or omissions of the employer[4]. It is where the intent of the employer is to terminate the employment relationship, even if this is by conduct that compels the employee to leave, rather than an actual dismissal[5]. A wide range of conduct by employers has been found to amount to constructive dismissal, often with an emphasis on actions by the employer that amount to sending the employee away from the workplace, or creating a working environment where it is reasonably foreseeable that an employee would not continue work.

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[3] See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372,
[4] *Richards v Fresh Flower Wholesaler Ltd* [2016] NZERA Auckland 66
[5] *Taranaki Health Care v Lloyd,* [2001] ERNZ546, quoted at [44] and [45].

[42] The Court has commented that:

> I draw attention to the emphasis of both the common law and the statute on whether a reasonable person would conclude from the behaviour that the other party did not intend to perform the obligations undertaken[6].

[43] In the present case, it is submitted for Ms Fraser that Mr Kanat verbally abused her, and that Mr Kanat's lack of care for her injury and telling her to leave her burn uncovered, was "*the final straw*" in a course of "*deliberate and dominant conduct demonstrated by the employer*", which amounted to a "*breach of the employer's primary duty of care to the applicant*"[7].

[44] I will first consider whether Mr Kanat's treatment of Ms Fraser following her burn was such that it amounted to a breach of duty by the employer that was sufficiently serious that it caused Ms Fraser's registration.

[45] Both Ms Fraser and Mr Kanat stated that, when Ms Fraser suffered her burn, Mr Kanat did not see what had happened. Further, Ms Fraser did not tell Mr Kanat she had been burned, but rather continued working after taking only a short break to go to the kitchen area of the restaurant. Ms Fraser suggested that Mr Kanat "*must have known*" she had been burned, but I do not accept that he could have known this in the absence of Ms Fraser telling him that she was hurt, particularly considering she continued working as normal, both that day, and on following days. Once he became aware of the burn, Mr Kanat considered he had done what needed to be done by offering Ms Fraser a plaster to cover her burn, although he did this through another staff member. Ms Fraser feels this was insufficient, but she neither asked Mr Kanat for any particular accommodations, nor felt the need to seek any medical treatment.

[46] In the circumstances, it was not reasonable for Ms Fraser to expect more, as she did not give any indication to her employer that she was in need of any specific support or help. Instead, she carried on working without mentioning it, and consistent with her actions, Mr Kanat considered that the matter was at an end.

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[6] *Ibid,* at [47].
[7] As set out in paragraph 10 of the applicant's written submissions.

[47] This is not conduct that is sufficient for a reasonable person to conclude that Mr Kanat did not intend to perform his fundamental obligations of on-going employment.

[48] I need also to consider the allegations by Ms Fraser that Mr Kanat verbally abused her by calling her names, culminating in an allegation that he had belittled her when he eventually became aware of her burn, by saying "boo hoo". This is denied by Mr Kanat, who says he never said anything to Ms Fraser, but did ask Ms Kaur why she was washing the dishes instead of Ms Fraser on the evening that Ms Fraser received her burn.

[49] It is relevant to note that despite this alleged conduct, Ms Fraser remained willing to work, including finishing her shift, and then returning to work for the remainder of that week as normal. Overall, she had not raised any such issues with Mr Kanat before, and she was clearly willing to continue working more with Mr Kanat, to the extent that she had recently had her hours of work increased at her request, and had been happy to work more when the opportunity to do so arose.

[50] Ms Fraser's behaviour and willingness to continue working and increasing her work hours with Mr Kanat do not support the idea that Mr Kanat's alleged behaviour during her employment (which he denies) was sufficiently serious to indicate that he was in fundamental breach of his employment obligations, or that Ms Fraser viewed his behaviour as reaching this level of seriousness at that time.

[51] Taking all this into consideration, the circumstances do not reach the threshold for constructive dismissal, or unjustifiable disadvantage.

[52] Turning to the remedies for outstanding entitlements that Ms Fraser seeks.

[53] Ms Fraser is entitled to be paid for her last week of work, being 17.5 hours worked, at the rate of $17.70 per hour gross, which is the minimum wage rate applicable at the time. The respondent is not entitled to with-hold Ms Fraser's wages[8]. Mr Kanat accepted that he with-held Ms Fraser's last week of wages due to a concern that she was effectively taking money from the business by giving unauthorised discounts, however, he properly conceded that he could not demonstrate what discounts Ms Fraser had in fact been giving, and that he had never raised this with her as a concern at any

[8] Section 4 of the Wages Protection Act 1983.

point. The allegation of stealing is therefore not one that can be upheld in any respect, and Ms Fraser's wages are due in full.

[54] Ms Fraser is also entitled to be paid holiday pay, for annual leave owing to her on the termination of her employment, in accordance with section 27 of the Holidays Act 2003.

[55] In response to this claim in particular, Mr Kanat says that he paid Ms Fraser annual leave in her weekly pay calculated at the rate of 8%. Mr Kanat acknowledges that there is no employment agreement which sets out this arrangement in writing, and no payslips which show the calculation and payment of annual leave as a separate and identifiable component of Ms Fraser's pay. The respondent has no records to demonstrate even Ms Fraser's agreed rate of pay on a gross basis[9]. Mr Kanat explained verbally at the Investigation Meeting that he had paid Ms Fraser at the minimum wage rate, from which he deducted a certain percentage amount for PAYE taxes, and then added back an amount representing 8% annual leave on a pay-as-you-go basis. He invited the Authority to perform these calculations and compare them to the figures shown on the handwritten timesheets to verify what had occurred. None of this can be established from the minimal documentation kept, and this was not explained to Ms Fraser at any point during her employment.

[56] Section 28 of the Holidays Act 2003 sets out how and when holiday pay can be paid with an employee's pay. This is often referred to as paying holiday pay on a "pay-as-you-go" basis. This section states that holiday pay can only be paid on a pay-as-you-go basis when all the following criteria are met:

a. the employee is employed on a fixed term basis for less than 12 months, or is employed on an irregular or intermittent basis;
b. the employee agrees in a written employment agreement to be paid holiday pay with their regular pay;
c. the holiday pay is paid as an identifiable competent of the employee's pay; and
d. it is calculated at not less than 8% of the employee's gross earnings.

[9] A written employment agreement is required by section 65(1) of the Employment Relations Act 2000, and section 65(2) provides that this must contain the wages payable to the employee.

[57] The respondent cannot meet any of these requirements. Ms Fraser was not employed on a fixed term basis[10], and had worked for more than 12 months in any case. She was not employed on an intermittent or irregular basis, but worked according to a roster, and generally worked the same days of the week.

[58] Fundamentally, there was no written employment agreement recording Ms Fraser's agreement to be paid holiday pay on a pay-as-you-go basis. Mr Kanat's intention to pay holiday pay on a pay-as-you-go basis was never explained to Ms Fraser at any point, and she was not given any chance to agree to it in writing.

[59] Holiday pay was not paid as an identifiable component of Ms Fraser's pay. Ms Fraser simply received her weekly wages into her bank account as a net lump sum, and no breakdown or any calculations to show how this figure was arrived at existed. Mr Kanat invited the Authority to perform these calculations "after the fact", and essentially attempt to re-create the wages and time[11] and holiday and leave records[12] that the respondent as an employer was required to keep. It is not clear that his suggested calculations were correct, and attempting to get the Authority to re-create the employer's records after the hearing falls far short of being able to demonstrate that holiday pay was paid as an identifiable component of Ms Fraser's pay. This comment also goes to the requirement that the rate of pay must be at not less than 8% of gross earnings. Compliance with the requirement that pay-as-you-go holiday pay must be paid as an identifiable part of the employee's pay simply cannot be demonstrated by the respondent, despite the statutory requirement that the respondent keep such records.

[60] The respondent has not complied with the requirements of section 28 of the Holidays Act 2003, which sets out how and when holiday pay can be paid with an employee's pay, and cannot demonstrate that Ms Fraser has in fact been paid her annual leave. When an employer fails to keep a wage and time record, and that failure to keep records has made it more difficult for the employee to bring an accurate claim for lost wages or money payable, section 132 of the Act states that the Authority may accept as

[10] It is noted for completeness that the creation of a fixed term agreement also requires a written employment agreement, as set out in section 66 of the Employment Relations Act 2000.
[11] Section 130 of the Employment Relations Act 2000 requires that the employer must keep a wages and time record for each employee.
[12] Section 81 of the Holidays Act 2003 requires that the employer must keep a holiday and leave record for each employee.

proved all claims made by the employee in respect of wages actually paid to the employee.

[61] In the present case, Mr Kanat accepts that there is no compliant wages and time record. I accept that the lack of records has made it more difficult for Ms Fraser to bring her claims. By way of example, Ms Fraser's claims have been made on a "net" basis, as she explained that she understood she received $17.00 per hour "in hand", but was not able to say what her gross rate was, or what deductions had been made to arrive at her net rate. That being the case, I find that section 132 of the Act applies.

[62] Ms Fraser's claim for $782.71 of holiday pay owing to her is accepted in accordance with section 132 of the Act, and needs to be paid to her.

[63] Ms Fraser also claims interest on any unpaid monies. I have found that she is owed both her last week's wages and holiday pay. Both of these sums should have been paid to her at the ending of her employment, on or about 4 November 2019. Section 9 of the Interest on Money Claims Act 2019 states that interest must be awarded in accordance with that act, beginning on the day on which the cause of action arose. In the present case, Ms Fraser was owed money from 5 November 2019 onwards. Ms Fraser has been denied the use of the money due to her, and is entitled to interest on it, calculated in accordance with the Interest on Money Claims Act 2016.

[64] Ms Fraser is not entitled to any reimbursement for lost remuneration. On Ms Fraser's own evidence, she did not make any particular efforts to find new employment due to being focused on other matters arising in her life at the time. It was only after approximately a year that she started her job search in earnest. Under these circumstances, it is not possible to conclude that that she in fact suffered any loss of wages as a result of the actions of the respondent, separate from her own decision not to continue working and/or to seek new work. It is well established that a failure to mitigate loss can reduce or remove any entitlement to compensation[13].

Penalties

[65] Ms Fraser has made claims against the respondent for penalties, for breaches of the following statutory requirements:

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[13] See for example, In *Argosy Imports Ltd v Lineham* [1998] 3 ERNZ 976 (EmpC), where the employee did not take any steps until at least 6 months following his dismissal, meaning he was not entitled to reimbursement of lost wages.

a. Failure to provide a written employment agreement, in breach of s. 65 of the Employment Relations Act 2000[14];
b. Failure to keep time and wage records, in breach of s. 130 of the Employment Relations Act 2000[15];
c. Failure to provide for annual leave, in breach of section 16 of the Holidays Act 2003[16];
d. Breaches of the respondent's duty of good faith, in breach of section 4 of the Employment Relations Act 2000[17];
e. Failure to pay wages in full when due, in breach of section 4 of the Wages Protection Act 1983[18];

[66] For each of the 5 breaches of statute referred to, the respondent is liable to a maximum penalty of $20,000.

[67] It is submitted that Ms Fraser has been financially disadvantaged by the respondent's failures to abide by its statutory obligations, and that the respondent's actions (or inactions as the case may be) caused significant hurt, frustration, and embarrassment.

[68] The failures to provide an individual employment agreement, failure to keep wages and time records, failure to provide for annual leave, and failure to pay wages in full when due, are made out, as set out above.

[69] It is clear that the respondent has fundamentally failed in the various record-keeping obligations owed by all employers. This has consequences for the respondent, for example, the award of unpaid holiday pay already made. The failures to keep proper records, including the failure to have a written employment agreement setting out all the terms that the respondent says were intended to apply (eg, the hourly rate and the payment of annual leave on a Pay-As-You-Go basis), are best viewed as a single failure, as they all stem from the way Mr Kanat has set up the running of his business. The

[14] Penalty liability is set out at sections 65(4) and 135(2)(b) of the Employment Relations Act 2000.
[15] Penalty liability is set out at section 130(4) and 135(2)(b) of the Employment Relations Act 2000.
[16] Penalty liability is set out at section 75 of the Holidays Act 2003.
[17] Penalty liability is set out at section 4 of the Employment Relations Act 2000 where the failure was "deliberate, serious, and sustained".
[18] Penalty liability is set out at section 13 of the Wages Protection Act 1983 and section 135(2)(b) of the Employment Relations Act 2000.

failure to pay wages when due, in breach of the provisions of Wages Protection Act, is a second and distinct action for which a penalty is also available.

[70] The law in respect to quantification is well established given the content of s 133A of the Employment Relations Act 2000 and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited,*[19] *A Labour Inspector v Prabh*[20] and *A Labour Inspector v Daleson Investment*.[21]

[71] Section 133A of the Act requires that when making a penalty determination, I have regard to the object of the relevant statutes that have been breached, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, any mitigating actions, the circumstances of the breach and any vulnerability, and any previous conduct.

[72] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances involving a distinct power imbalance.[22]

[73] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[23], or failures to take reasonable steps to fulfil their legal obligations.[24] Here the evidence leads to a conclusion the failures of the respondent in respect of record keeping obligations can be reasonably characterised as a failure to take steps to fulfil its legal obligations. The failure to pay Ms Fraser her last week's wages is deliberate, as admitted by Mr Kanat.

[74] With respect to the severity of the breaches, the starting point for failures to pay proper entitlements is around 80%.[25] In this case, the loss is for a relatively small sum, suggesting a reduction should be applied.

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[19] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[20] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[21] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12
[22] *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].
[23] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[24] *El-Agez v Comprede Limited*, TT 4121553, at para 18
[25] See *Preet,* at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

[75] There is no evidence of similar previous conduct by the respondent. The circumstances of the respondent are also relevant, and it is important to note that the respondent is a small business, owned and operated by Mr Kanat, with resources proportionate to this. Finally, it is important to consider both consistency and proportionality. In the present case, all these factors serve to reduce the amount that might be properly awarded as a penalty.

[76] The record-keeping breaches by the respondent have made it difficult for Ms Fraser to understand and enforce her contractual and statutory rights. A penalty of $2,000 is appropriate for these breaches, particularly taking into account the resources of the employer, and Mr Kanat's willingness to take responsibility for the running of his business.

[77] A further penalty of $1,000 is appropriate for the breach of the Wages Protection Act 1983, that is, the respondent's deliberate decision to with-hold Ms Fraser's last week's wages. There was no good reason for this, the disadvantages to Ms Fraser are clear, and this action on the part of the respondent requires a penalty as both specific and general deterrence of such conduct by employers who are in control of employee's wages.

[78] Ms Fraser is to receive 50% of the penalties ordered, eg $1,500. This is to reflect the adverse impact of withholding her wages, as well as recognise that she has had to take these proceedings in order to obtain the entitlements that were rightfully hers.

Orders

[79] The respondent is to pay to Ms Fraser, within 28 days:

a. Unpaid wages of $309.75 gross, being 17.5 hours calculated at the minimum wage rate of $17.70/hour;

b. Holiday pay of $807.41, being $782.71 gross plus a further $24.70 being the holiday pay on the unpaid wages awarded above calculated at the rate of 8%.

c. Interest on the outstanding wages and holiday pay down to the date of payment in accordance with the Interest on Money Claims Act 2016, being $44.27 if paid within 28 days.

d. A penalty of $1,500 without deduction, with a further remaining $1,500 penalty to be paid to the Crown account.

Costs

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

Claire English
Member of the Employment Relations Authority