

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 239  
3085332 and 3106052

BETWEEN                      MOIRA MACFARLANE  
   Applicant/Respondent

AND                              BB ICY LIMITED (IN LIQ)  
   Respondent/Applicant

Member of Authority:        Nicola Craig

Representatives:              Geoff Martin and Louise Smith, advocates for Moira  
   MacFarlane  
   No appearance for BB ICY Limited (in liq)

Investigation Meeting:        11 February 2021

Submissions [and further    At the investigation meeting, 12 and 26 February, 5, 18  
Information] Received:        and 29 March, 14 April 2021 for Ms MacFarlane  
   29 March 2019 from the liquidators of BB ICY Ltd (in  
   liq)

Date of Determination:        3 June 2021

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**DETERMINATION OF THE AUTHORITY**

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- A.        Moira MacFarlane was disadvantaged by unjustified actions of BB ICY Limited (in liq) regarding two warnings.**
- B.        Ms MacFarlane was unjustifiably dismissed by BB ICY Ltd (in liq).**
- C.        In remedy of her grievances BB ICY Ltd (in liq) is to pay Ms MacFarlane the following sums within 21 days of the date of this determination:**
- (a) **\$1,715.70 gross lost wages along with \$137.26 gross holiday pay on that amount; and**
- (b) **\$18,000 as compensation for non-economic loss.**

- D. Within 21 days of the date of this determination BB ICY Ltd is to pay Ms MacFarlane \$1,415.50 gross for wage arrears along with \$113.24 gross holiday pay and interest on those sums.**
- E. The claims by BB ICY Ltd (in liq) are not established.**
- F. Within 21 days of the date of this determination BB ICY Ltd (in liq) is to pay Ms MacFarlane the following sums:**
- (a) \$6,000.00 as a contribution to her costs;**
  - (b) \$300.00 for a service fee; and**
  - (c) \$71.56 for the Authority's filing fee.**

### **Employment Relationship Problem**

[1] Moira MacFarlane was employed by BB ICY Limited (in liq) (BB ICY or the company) as store manager for the company's operation Shake Shed in Auckland's Dress Smart mall.

[2] Ms MacFarlane claims that she was constructively dismissed by BB ICY. BB ICY filed a counterclaim alleging that Ms MacFarlane did not perform her work properly and caused the company to incur costs.

### **The Authority's investigation**

[3] Ms MacFarlane's claim was originally filed against another company with an amended statement of problem later lodged naming BB ICY Limited as respondent. The initial attempt to have the amended statement of problem served on the company was unsuccessful. Ms MacFarlane's representative subsequently arranged for personal service on the company in Christchurch. No statement in reply was lodged within the required period after service.

[4] At this time the company's sole director was Chang Xi. Mr Xi also held a shareholding in the company along with Parita Phamornpibul and Nan Li. Effective from 20 February 2020, BB ICY's registered office was changed on the Companies Register.

[5] Mr Xi made contact with the Authority in April 2020. It was pointed out to him that BB ICY needed to apply for leave to file a statement in reply out of time. A statement in reply was received on 11 May 2020.

[6] According to the Companies Register Mr Xi ceased his directorship on 5 June 2020 with Parita Phamornpibul taking over on 11 May 2020.

[7] Later in May 2020, BB ICY filed its claim against Ms MacFarlane.<sup>1</sup>

[8] The Authority directed BB ICY to lodge wages and time and holiday and leave records for Ms MacFarlane, along with other information. An issue arose about access to the store as it had closed down. An attempt was made by the Authority Member then responsible for the matter to ensure that BB ICY had access to its former premises to obtain records relating to Ms MacFarlane. Mr Xi advised that a store visit found “not much record for when” Ms MacFarlane was working in the store. Nothing was lodged which was identified as coming from the store.

[9] This file was subsequently allocated to me. In November 2020, Mr Xi responded that he was available for a conference call when a time was proposed by the Authority. However, the day before the case management conference was due to be held, Mr Martin for Ms MacFarlane became aware that Mr Xi was no longer a director of BB ICY and questioned whether he had the authority to speak or make decisions on the company’s behalf. Mr Xi replied that he had full knowledge regarding the case as events had occurred when he was a director. He said that he was happy to discuss the matter with the current director and asked for full authorisation. Mr Xi suggested that that may delay matters as the director was said to be outside New Zealand. The conference call was postponed for three days.

[10] Under s 236 of the Employment Relations Act 2000 (the Act) parties may be represented. This includes by an agent, in accordance with clause 2 of Schedule 2 of the Act. However, under s 236(3) of the Act any person purporting to represent must establish their authority for that representation. BB ICY was directed to lodge in the Authority its written authority for Mr Xi to represent the company in the proceedings. In the event that it did not do so, one or both directors of the company were directed to attend the case management conference. The Authority indicated that if the director/s wish to have Mr Xi attend as well, he may do so.

[11] No written authority for Mr Xi to represent BB ICY was lodged nor other information about how to contact the directors. A call was made to Mr Xi on the number he provided

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<sup>1</sup> File no 3106052.

but there was no answer. I decided to proceed with the case management conference. A timetable was set for the filing of various documents including witness statements.

[12] The second amended statement of problem along with notice for the investigation meeting in these matters were served on the company.

[13] No-one attended the investigation meeting at the designated start time. An attempt was made to contact Mr Xi by phone, in the absence of any other telephone contact details for BB ICY. I was satisfied that BB ICY had proper notification for the investigation meeting and decided to go ahead.

[14] At the investigation meeting I heard evidence from Ms MacFarlane. I considered signed witness statements from two other employees from the Dress Smart store. I also considered a document from Mr Xi, entitled an affidavit, which although signed was not sworn or affirmed.

[15] In March 2021 Mr Martin notified the Authority that the company had gone into liquidation and later indicated that the liquidator was expecting the determination in these matters. The Authority made contact with the liquidators to confirm they were consenting to these proceedings continuing. The liquidators confirmed that they agreed to these proceedings continuing and would abide by the decision.

[16] As permitted by s 174E of the Act, this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **Issues**

[17] Ms MacFarlane and BB ICY's claims have been considered together. The issues for investigation and determination are:

*Ms MacFarlane's claims:*

- (a) Was Ms MacFarlane disadvantaged by an unjustified action by BB ICY regarding a first warning letter issued on 20 August 2019, including consideration of good faith?

- (b) Was Ms MacFarlane disadvantaged by an unjustified action by the company regarding a second warning letter issued on 27 August 2019, including consideration of good faith?
- (c) Was Ms MacFarlane constructively dismissed and if so, was it unjustified?
- (d) If Ms MacFarlane establishes a grievance what remedies, if any, should she receive, including consideration of contribution?
- (e) Is Ms MacFarlane owed arrears of wages?
- (f) Did BB ICY breach its obligations to provide wages and time records and if so, should it be penalised?
- (g) Did the company obstruct or delay the Authority's investigation and if so, should it be penalised?

*BB ICY's claims:*

- (h) Does the company have an unjustified action claim?
- (i) Did Ms MacFarlane breach her duty of good faith?
- (j) Did Ms MacFarlane breach the employment agreement?
- (k) Is the company entitled to compensation from Ms MacFarlane?

[18] Although submissions sought to have the corporate veil lifted and awards of compensation or penalties ordered against Mr Xi and other director/s, no director was a party to this proceeding nor present at the investigation meeting. No orders are made against them.

**The start of Ms MacFarlane's employment with BB ICY**

[19] Ms MacFarlane worked at the store from 2018 for another company which operated under a different franchise name. BB ICY started trading on about 25 March 2019 as Shake Shed and Ms MacFarlane began working for it then. She was on an hourly rate of \$19 gross.

[20] As store manager, Ms MacFarlane was in charge of about seven staff and arranged rosters to ensure the store was open during mall hours. These were Monday to Sunday, 10am to 5pm plus a late night on Thursday to 7pm.

[21] Company representatives told Ms MacFarlane that the manager's job would be five days a week and "full time" was mentioned. Her employment agreement specified hours

and days of work to be “Mall hours”.<sup>2</sup> In order to open in time and tidy up after closing, the shifts were 9.45am to 5.30pm, with a 7.30pm finish on Thursdays. Ms MacFarlane usually worked Monday to Friday. I conclude that Ms MacFarlane’s minimum hours of work were the hours required to ensure the store was open on the days she worked, namely Monday to Friday.

[22] For almost five months Ms MacFarlane worked an average of 43 hours a week for BB ICY.

### **Change to Ms MacFarlane’s working hours**

[23] Ms MacFarlane describes the arrangement abruptly changing from about the start of August 2019 when either Mr Xi or the regional manager began changing the rosters, reducing hours. Ms MacFarlane messaged the regional manager who said Mr Xi adjusted the start time. Others were having similar problems, with Ms MacFarlane messaging the regional manager that people were starting to look for new jobs because they could not afford to live without their previous hours.

[24] On about 8 August 2019 the regional manager visited Ms MacFarlane at the store and said that Ms MacFarlane was not performing her job and would no longer be undertaking the rostering. Mr Xi was to take over the rostering. No further information or particulars were offered about any performance issues despite Ms MacFarlane asking. Ms MacFarlane had not been spoken to previously by either the regional manager or Mr Xi about any concerns about her performance. What feedback she had had was positive. As a result she was confused and quite shocked.

[25] The regional manager also told Ms MacFarlane that her weekly hours would be reduced to 12 per week. She said that this cut was because they did not need so many people. Ms MacFarlane found this strange as additional staff without particularly good English skills kept on turning up unexpectedly, saying that the regional manager had sent them. This had happened before the cut in hours and continued afterwards. Other regular staff also had their hours cut.

[26] As Ms MacFarlane was unhappy about the reduction in hours, she messaged Mr Xi on 11 August 2019 telling him that it was difficult to continue to work in the store with the

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<sup>2</sup> Employment agreement, Schedule 1.

reduced hours. There was no response, so she messaged again. At that time she was paying some of the family's rent and had two loans which she was paying off.

[27] Mr Xi did not reply to Ms MacFarlane's messages for a week after the start of her messages. She questioned how she could undertake the manager role when she was only being rostered for two days a week. She texted that she "can't continue to work here on two days".

[28] Mr Xi texted asking for copies of the roster which Ms MacFarlane believes he would have had anyway. At one point Mr Xi replied that the regional manager would fix it, however, that appears not to have occurred.

[29] Ms MacFarlane describes herself as distraught while all this was happening, speaking to her fellow workmates and her parents. She was referred to Mr Martin.

[30] Ms MacFarlane's hours of work were increased to 16 for the week of 17 August 2019, but she was still struggling to pay her bills. She had to borrow money from her mother who could not well afford to lend to her.

### **Ms MacFarlane's disadvantage claims**

#### *First warning*

[31] On Ms MacFarlane's behalf, Mr Martin wrote to Mr Xi on 20 August 2019 raising a claim of unjustified disadvantage regarding the unilateral hours' reduction. This identified her as working shop hours; around 40 to 45 hours per week normally. The reduction financially disadvantaged her by about \$200 to \$300 a week. Reinstatement of her usual 40 hour work was sought immediately.

[32] As a result, BB ICY, through Mr Xi, replied as follows:

This is the formal warning letter issued to you that you have sent an untrue story to legal agent regarding your working hours. On 18 August 2019 you asked me your hour is too less (sic), then the roster was fixed immediacy after you told me so, therefore, your working hour has been maintained in the similar level. It means you do not have any financial suffer. The letter from your legal agent clearly said your rostered hour was only 12 hours, which is not true. You also demanded a ... personal grievance be paid to you...

We cannot tolerate such behaviour. I'd like to arrange a meeting with you through video call in approximate a week's time from today. You are welcome to bring a support person with you to the meeting.

[33] Under s 103A of the Act I examine whether this warning was something which a fair and reasonable employer could have given in all the circumstances.<sup>3</sup> Going to see a legal representative is a right employees have if they are concerned about matters at work. Employees are entitled to bring personal grievance claims.<sup>4</sup> Ms MacFarlane's hours had been substantially reduced for a period which concerned her, leading to her repeatedly texting Mr Xi without response. A slight rectification of hours shortly before the letter does not make it improper for her to raise a grievance. There was no reason to give Ms MacFarlane a warning.

[34] In addition it is not evident what, if any, investigation the company undertook. It did not raise its concerns with Ms MacFarlane before issuing the warning, give her a chance to respond or genuinely consider any response.<sup>5</sup> The attempt to line up a meeting a week after the warning was far too late to meet those requirements.

[35] Ms MacFarlane was disadvantaged in receiving a written warning due to unjustified action by BB ICY. Compensation is considered below.

#### *Second warning*

[36] Ms MacFarlane describes being so stressed she felt unable to go into work on 26 August 2019. She organised for another worker to cover her shift. This was something which staff did on occasion between themselves.

[37] Unfortunately that worker slept in. Ms MacFarlane was phoned by the regional manager at about 11am and asked to go in to open the shop and work for the day. Ms MacFarlane explained that she had asked the worker to cover her shift but the regional manager kept blaming Ms MacFarlane. Ms MacFarlane went in and worked the day even though she was not feeling well.

[38] Later that night Mr Xi emailed Ms MacFarlane a second warning letter regarding not coming into the shore that day. She was also criticised for failing to inform him and the

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<sup>3</sup> The Act, s 103A(2).

<sup>4</sup> The Act, s 102.

<sup>5</sup> The Act, s 103A(3).

regional manager, with them finding out via a call from mall management. Mr Xi describes this as being a serious issue which has led to a breach of the lease for which the mall could fine BB ICY. Mr Xi writes that he would like to arrange a meeting regarding the issue. He continues that they would have to:

reschedule the working shift in the next few weeks to mitigate the risk until the problem is solved. That means we cannot guarantee we can provide the hours stated in the employment agreement.

[39] Ms MacFarlane considers that to be something of a joke as her hours had not been changed back to her usual 43 hours a week anyway. She describes herself at that point as shaky and inconsolable with her mother being really worried about her.

[40] On 27 August 2019 Ms MacFarlane's representative wrote to BB ICY challenging the lawfulness of the warnings, seeking reinstatement of 40 hours' work immediately and making reference to constructive dismissal.

[41] There is no indication in the warning letter that Mr Xi was aware that Ms MacFarlane had arranged for another worker to cover her shift. Given the past practice of such arrangements without apparent company dissatisfaction, there was no reason to give Ms MacFarlane a warning.

[42] As with the previous warning, BB ICY again appears not to have investigated. Other than the call where Ms MacFarlane felt the regional manager was not listening to her, the company did not put its concerns to Ms MacFarlane, give her an opportunity to respond and consider her explanations before deciding to issue a warning. The procedure was inadequate.

[43] Ms MacFarlane was disadvantaged by receiving another warning due to unjustifiable action by BB ICY. Remedies are dealt with below.

### **Constructive dismissal claim**

[44] Having received no response to his 27 August 2019 letter, on 30 August Mr Martin sends another letter:

Moira has repeatedly implored you to provide her with the 40-hour working week, generating her the expected income, so that she can pay her bills. Non-payment of her fortnightly wage is expected Wednesday 28 August has further exacerbated her financial woes.

Consequently, we take your actions as constructive (unjustified) dismissal, and give you notice pursuant to section 103(1)(a) of the Employment Relations Act 2000.

Moira's last day of work will be today, Friday 30 August. Your actions have negated the need for Moira to work the stated notice period of 4 weeks. She has however offered to work an extra week as a measure of goodwill so that you are immediately disadvantaged.<sup>6</sup>

[45] Mr Xi did not take up this offer.

[46] The three categories of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* are situations where:

- (a) the employee is given a choice of resignation or dismissal;
- (b) the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
- (c) a breach of duty by the employer leads an employee to resign.<sup>7</sup>

[47] In terms of the second category, the company's actions in reducing hours, repeated warnings and postponing of work due to "the risk" Ms MacFarlane posed, could be seen as suggesting the company or Mr Xi in particular did not want her. However, I think this matter is better dealt with under the next constructive dismissal category.

[48] As regards the third category of constructive dismissal it is not sufficient for the employer's conduct to be inconsiderate and cause some unhappiness to the employee.<sup>8</sup> There needs to be dismissive or repudiatory conduct; a breach of the employer's duty to the employee. If that is established, it is necessary to examine:

- (a) Whether the conduct caused the resignation; and
- (b) Was the breach of duty sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Was there a substantial risk of resignation?<sup>9</sup>

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<sup>6</sup> Later amended to "immediately not disadvantaged".

<sup>7</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375.

<sup>8</sup> *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

<sup>9</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

[49] There were several breaches of duty by BB ICY:

- (a) The company reduced Ms MacFarlane's hours of work significantly. Her contractual "mall hours" worked out at around 43 per week. Her hours were reduced to 12 hours;
- (b) Her subsequent complaints were met by no response for an extended period, meaning that the company breached its duty of good faith to Ms MacFarlane. Calls went unanswered and unreturned. The regional manager and Mr Xi seemed to be blaming each other;
- (c) Ms MacFarlane's raising a grievance regarding her hours was punished by a warning about that action. BB ICY's adjustment of the roster still only increased Ms MacFarlane's hours to around 65% of her previous hours; and
- (d) A second warning was given when Ms MacFarlane's arrangements went awry due to another worker's fault. BB ICY then suggested that Ms MacFarlane's hours would be postponed for the next few weeks to mitigate the risk she posed.

[50] Did these actions cause Ms MacFarlane to resign? I accept that they did. The letter from her representative sets that out. Her evidence about the effects of BB ICY's actions on her was also compelling. BB ICY's breaches of duty were substantial. The company had plenty of warning of Ms MacFarlane's dissatisfaction:

- (a) Her messages earlier in August indicated she could not continue to work with reduced hours;
- (b) She appointed a representative who raised a personal grievance, who included in his letter reference to the change "foisted" on her and her resulting financial embarrassment; and
- (c) Her representative on 27 August 2019 described the written warnings as unlawful and referred to BB ICY's "blatant disregard for NZ employment law" as amounting to a constructive dismissal.

[51] I conclude that Ms MacFarlane was constructively dismissed by BB ICY. Her dismissal was unjustified as BB ICY had breached its duty to Ms MacFarlane and not

followed a proper process in its dealings with her. Ms MacFarlane was unjustifiably dismissed by BB ICY.

### **Remedies for Ms MacFarlane's grievances**

#### *Lost wages*

[52] Fortunately Ms MacFarlane was able to obtain another job and started two weeks after she finished at Shake Shed. Two weeks' wages at 43 hours per week amounts to \$1715.70 gross.

#### *Compensation*

[53] Although separate compensation amounts are sought for the each of the two disadvantage and the dismissal grievances, I consider that a global award reflects the role which the two warnings had in the constructive dismissal.

[54] Ms MacFarlane describes herself as being distraught while the whole process was happening. She lost sleep, often could not eat and was stressed out. She cried a lot. The warnings scared her and made her very anxious. This was her first job. Ms MacFarlane felt she was letting her mother down as she was not able to pay her share of the rent. At times she was inconsolable and towards the end felt physically sick at the prospect of going into work.

[55] Ms MacFarlane felt that a big load had been lifted off her shoulders when she finished and did not have to work with Mr Xi or his business any more. She slept extensively after she finished, describing it as necessary to get over the shock of how she was treated.

[56] I assess \$18,000 as appropriate compensation for the effects on Ms MacFarlane of the grievances, before considering any contribution.

#### *Compensation for good faith*

[57] Ms MacFarlane seeks \$10,000 as compensation for lack of good faith. The courts have on occasions expressed doubts about the availability of damages for a breach of the

duty of good faith.<sup>10</sup> A penalty is available for non-compliance with the duty of good faith where that is deliberate, serious and sustained.<sup>11</sup> However, no penalty was sought regarding good faith and particularly given the quasi-criminal nature of penalties I am not prepared to order one.

[58] In any event Ms MacFarlane's good faith concerns are encompassed in her three grievances claims for which compensation will be awarded.

#### *Contribution and award*

[59] I have considered under s 124 of the Act whether Ms MacFarlane's actions contributed to the situation giving rise to her grievances. In order to make a finding of contribution I must be satisfied that her behaviour was both causative of the outcome and blameworthy.<sup>12</sup>

[60] Ms MacFarlane's actions cannot be seen as blameworthy. She was entitled to seek representation. She made arrangements for another staff to cover a shift and did come in promptly when that plan fell over. I cannot say that her actions caused the reduction in her work hours.

[61] I order BB ICY to pay Ms MacFarlane the following sums in remedy of her grievances within 21 days of the date of this determination:

- (a) \$1,715.70 gross lost wages along with \$137.26 gross holiday pay on that amount; and
- (b) \$18,000 as compensation under s 103(1)(c)(i) of the Act.

#### **Arrears for reduced hours and notice period claims**

[62] Ms MacFarlane claims for 101 hours of work she was not offered from early August 2019. I have examined Ms MacFarlane's wages slips during pay periods beginning 29 July 2019 and ending 8 September 2019. Excluding the final week of the last pay period which was after Ms MacFarlane's constructive dismissal, she was underpaid by 74.5 hours.

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<sup>10</sup> See for example, *NZ Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571 at [75] and *Hally Labels Ltd v Powell* [2019] NZEmpC 92 at [33].

<sup>11</sup> The Act, s 4A(a).

<sup>12</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court at [175].

[63] At her \$19 pay rate, 74.5 hours totals \$1,415.50. This is arrears of wages so I order BB ICY to pay Ms McFarlane \$1,415.50 gross within 21 days of the date of this determination, along with \$113.24 gross holiday pay on that amount. The company is also to pay her interest on those amounts calculated from 9 September 2019 until the date of BB ICY's liquidation commenced.<sup>13</sup>

[64] A claim was made that Ms MacFarlane should be paid for her notice period. She left without giving four weeks' notice as was required by her employment agreement. Whilst that is understandable in the context of her constructive dismissal claim I struggle to see how she is entitled to be paid for the notice period in those circumstances. In addition, her wages covering some of that period have already been reimbursed by the lost wages award.

### **Wages and time records claim**

[65] A penalty is sought for failure to provide wages and time records as required by 130(2) of the Act.

[66] BB ICY (in liq) has not provided Ms MacFarlane's wages and time records. Mr Xi asserted that paper files were held in the store but it is evident that the payment of wages was made electronically away from the store.

[67] Ms MacFarlane is relying not on any request by her representative for these records but on the Authority's direction that they be provided. The section relied on, s 130(2) of the Act states:

Every employer must, upon request by an employee or by a person authorised under section s 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part of all of the wages and time record relating to the employment of the employee...

[68] Although the Authority is not focused on a technical approach, I do not consider that I can proceed with a penalty claim on some other provision. As penalties are a quasi-criminal matter and in the absence of consent, the claim must be examined against the section it relies on. Section 130(2) is about requests by employees or their representatives. That is not wide enough to capture a direction of the Authority to provide documents.

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<sup>13</sup> Calculated as per the Civil debt interest calculator - <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

## **Obstructing and delaying claim**

[69] Ms MacFarlane claims that BB ICY failed to:

- (a) accept documents served on a valid address for service and file a statement in reply;
- (b) provide documents resulting in expense to Ms MacFarlane to reproduce documents; and
- (c) appear at a case management conference and the investigation meeting.

[70] The Authority is able to penalise those who obstruct and delay its investigations without sufficient cause.<sup>14</sup> Whilst I accept there have been some frustrations for Ms MacFarlane in getting her case heard, I suspect these matters may be more appropriately reflected in the costs award. Recognition of this could be seen from the inclusion of submissions on penalties being included in the costs submissions.

[71] The circumstances around the initial difficulty with service are not sufficiently clear to establish definite impropriety on the company's part.

[72] Efforts copying documents which Ms MacFarlane or her representative held can be dealt with more appropriately in costs.

[73] The 20 November 2020 case management conference was held three days after the original date. The absence of the company at the investigation meeting did not delay the start of the process by more than 15 minutes.

[74] There is insufficient basis established for a penalty under s 134A of the Act.

[75] Reference is also made to contempt. The current contempt provision focuses on hearings and orders or directions made in the course of a hearing.<sup>15</sup> That does not relate to the behaviour identified as a concern here.

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<sup>14</sup> The Act, s 134A.

<sup>15</sup> The Act, s 196(3).

## **BB ICY's claims**

[76] I now turn to the claims the company brought against Ms MacFarlane. There are difficulties with BB ICY's claims. Mr Xi's affidavit is unsworn and he did not attend the investigation meeting. On the material before me I can find no basis for any of the company's claims.

### *Unjustified action*

[77] BB ICY claims that Ms MacFarlane had a "calculated strategy (resignation) to rip off the employer". Under s 102 of the Act an employee may pursue personal grievances against her or his employer. Likewise s 103 begin with a definition of personal grievances as "any grievance that an employee may have against the employee's employer or former employer".

[78] There is therefore no provision for employers to bring personal grievance claims against employees. Even if there was, I have found no evidence that Ms MacFarlane had any plan to rip off BB ICY.

### *Good faith*

[79] There is again a reference to unjustified action, meaning this claim suffers the same flaw as the previous one. Even if it is a claim for breach of s 4 of the Act, I can see no basis for it. BB ICY's statement of problem hints that it may have been Ms MacFarlane's resignation after it had asked to meet with her about her performance which is seen as not being in good faith. I struggle to see any validity to the company's claim.

### *Breach of the employment agreement*

[80] The company lists various particulars which are largely in the nature of performance concerns. Photos lodged did not appear to substantiate the claims. Some matters on the company's list are things which, even if established, could be the responsibility of other staff. Ms MacFarlane provides explanations for her actions, denying any poor performance. She was not formally warned about these issues during her time with the company. BB ICY has not established its claim.

### *Compensation*

[81] BB ICY's statement of problem refers to Ms MacFarlane's failure to four weeks' notice costing it big financial losses. Reference is made to damage to the company's profitability and problems with the relationship with the landlord. Mr Xi's 'affidavit' refers to extra training costs, additional work for the regional manager and a short staffed roster. Ms MacFarlane did offer to work out a week after resigning but that offer was not taken up by BB ICY.

[82] The company has failed to establish that it had losses or that Ms MacFarlane should be held responsible for any losses there were.

[83] The company claims unparticularised slander but defamation is not within the Authority's jurisdiction. Reference is also made to seeking \$5,000 for Mr Xi's unnecessary travel to Auckland. No receipts are filed and it is hard to see how trips from Christchurch to Auckland covering a four week period notice could lead to that amount of travel costs being incurred. Ms MacFarlane, who went on to find other work at the mall, saw a new manager in place at the store fairly quickly.

### **Costs**

[84] The applicant has asked that costs be dealt with in this determination. The liquidators of BB ICY have indicated that they will not have an active role and will abide by the Authority's decision. Therefore I now determine costs.

[85] On Ms MacFarlane's behalf costs of \$8,000 are sought on the basis of the two days of investigation meeting which these matters were set down for. Claims are made for uplifts. In addition the actual costs of \$991.87 for defending the counterclaim are sought.

[86] Ms MacFarlane has been successful on most of her claims. There is no indication that she could have achieved the outcome she did in any other way than pursuing her claim this far. BB ICY's claims were successfully defended. Ms MacFarlane is entitled to a contribution towards her costs.

[87] The starting point had the matter taken two days would be the daily tariff of \$4,500 for the first day of an investigation meeting and \$3,400 for the second day, totalling \$8,000. However, usually costs are awarded on the actual hearing length, which in this case was half

a day, amounting to \$2,250. I recognise that Ms MacFarlane’s representatives had to travel for the investigation meeting and committed their availability for those two days

[88] Although the two days were set to cover the claim and counterclaim and thus captured within the \$8,000 claim, I am prepared to make an uplift for the counterclaim, albeit not to the indemnity costs level sought. Indemnity or actual costs are only provided in exceptional cases, including those involving “exceptionally bad behaviour”.<sup>16</sup> There was not sufficient evidence of such circumstances existing in this case.

[89] Ms MacFarlane was put to the expense of providing a detailed statement in reply to BB ICY’s claim, including responses on jurisdictional issues. An uplift is warranted.

[90] A further uplift is justified on the basis of BB ICY’s conduct in this proceeding which incurred additional costs in the time that the company was involved. This included a failure to lodge a statement in reply within the specified time, not initially applying for leave to lodge a statement in reply out of time, not providing documents held by the company, failing to inform the Authority that Mr Xi was no longer a director and suggesting that Mr Xi was still authorised to represent but not providing written evidence of representation.

[91] Disbursements for the costs of arranging service on BB ICY are sought along with the Authority’s filing fee. Both are justified, with an invoice provided for the document service.

[92] I order BB ICY to pay Ms MacFarlane the following sums within 21 days of the date of this determination:

- (a) \$6,000.00 as a contribution to her costs;
- (b) \$300.00 for the service fee; and
- (b) \$71.56 for the Authority’s filing fee.

**Nicola Craig**  
**Member of the Employment Relations Authority**

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<sup>16</sup> *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].