

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 38
3061272

BETWEEN	JARROD ELLISON Applicant
AND	MOOVENTURES LIMITED (IN LIQUIDATION) First Respondent
AND	ROBERT COWAN Second Respondent
AND	KELLY COWAN Third Respondent

Member of Authority:	Nicola Craig
Representatives:	Fraser Wood, counsel for the applicant Kelly Cowan in person and for the first and second respondents
Investigation Meeting:	16 March 2020 in person and 9 April 2020 by telephone
Submissions and further information received:	9 and 14 April, 29 June, 16 July, 11 August, 7 September and 2 November 2020 from the applicant 30 April 2020 from the second and third respondents
Date of determination:	2 February 2021

DETERMINATION OF THE AUTHORITY

- A. Jarrod Ellison was employed by Robert Cowan and Kelly Cowan (the Cowans).**
- B. Mr Ellison was unjustifiably dismissed and the Cowans are jointly and severally liable to pay the following sums as remedies to him within 28 days of the date of this determination:**

- (a) \$355.77 gross for lost wages; and**
- (b) \$15,000 as compensation.**

- C. The Cowans breached the Wages Protection Act 1983 by withholding Mr Ellison's final pay.**
- D. The Cowans are jointly and severally liable to pay Mr Ellison arrears of \$2,054.00 gross within 28 days of the date of this determination.**
- E. The Cowans shall each pay \$900.00 to the Authority within 28 days of the date of this determination as a penalty for breach of the Wages Protection Act 1983. The penalty is to be distributed as set out in the determination.**
- F. Costs are reserved and a timetable set if the parties are not able to resolve costs by agreement.**

Employment relationship problem

[1] Jarrod Ellison worked and lived on a farm near Rotorua where married couple Robert and Kelly Cowan (the Cowans) share milked. Mr Ellison claims he was unjustifiably dismissed. There is a question about who his employer was for the farm work.

The Authority's investigation

[2] This claim was originally filed solely against Moventures Limited (Moventures or the company) before the company went into liquidation. At that stage the company was represented although later Ms Cowan took over representation for all three respondents.

[3] Shortly before the investigation meeting scheduled for 16 March 2020 Mr Ellison applied to join the Cowans personally as respondents to this claim on the basis that they may personally have been his employers. This was based on:

- (i) the failure by Moventures to pay PAYE to the Inland Revenue Department (IRD) despite deductions being made from Mr Ellison's wages for tax;
- (ii) the wages being paid directly from the Cowans' personal bank account according to Mr Ellison's bank statements; and

(iii) Mr Ellison being answerable for the performance of his work to the Cowans.

[4] The Cowans were given the opportunity to respond but did not file anything. I ordered that the Cowans be joined.

[5] On 16 March 2020 an investigation meeting was held in Rotorua. Ms Cowan attended on behalf of all three respondents. I heard evidence from Mr Ellison, Ms Cowan, Nicholas Edmonds, Marianne Muller and Crystal Carroll. Witness statements were not received from the Cowans despite a direction that statements be lodged. Mr Cowan did not attend the meeting. A letter from one of the farm's owners was set aside as he was not available to be questioned.

[6] At the close of the investigation meeting additional documents were directed to be filed and it was agreed that submissions would be heard by telephone. Shortly after this New Zealand went into lockdown under Covid-19 Alert Level 4. Some but not all of the documents sought from the respondents were filed. The investigation meeting to hear submissions was held on 9 April 2020. Ms Cowan informed the Authority that morning that she was unavailable to attend, despite the meeting being organised for a time which suited her. No one attended for the respondents. Mr Ellison's representative went ahead with his oral submissions.

[7] The respondents were given the opportunity to respond to those submissions. Ms Cowan questioned what she was supposed to do.

[8] The Authority then became aware that Moventures had been placed in liquidation and informed the parties that the claim against the company could not proceed without the consent of the liquidator or the High Court.

[9] Mr Ellison's representative sought information from the liquidator. Later the liquidator consented to the Authority issuing a determination on the basis that the company and/or the liquidators would not have to incur any costs in relation to the proceeding.

[10] The Authority provided the respondents with a summary of the submissions from Mr Ellison's representative. A timetable was set for the filing of submissions from the respondents and anything further from Mr Ellison. Nothing was received from any of the respondents and Mr Ellison's representative advised that he had nothing further to add.

[11] Overall although Ms Cowan made occasional contact with the Authority and attended the investigation meeting, there were many occasions on which no response was received to communications. Ultimately fewer documents were lodged than the Authority sought, including some which I was informed were in the Cowans' possession.

[12] As permitted by s 174E of the Employment Relations Act 2000 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

[13] The issues for investigation and determination are:

- (i) Who was Mr Ellison's employer?
- (ii) Was Mr Ellison unjustifiably dismissed and if so what remedies, if any, is he entitled to receive?
- (iii) Does the Authority have jurisdiction to consider whether Mr Ellison's bond was wrongfully withheld and if so, should any orders be made?
- (iv) Did the employer wrongfully withhold some of Mr Ellison's final pay?

[14] The statement of problem identified a penalty sought for breach of the Wages Protection Act 1983 and that will be considered. I have decided not to permit progression of other possible penalties mentioned at the investigation meeting. Penalties are a serious matter. In the circumstances of Ms Cowan representing all of the respondents it would not be fair to allow the addition of additional penalty claims at that late stage.

How was Mr Ellison appointed?

[15] Mr Ellison posted on Facebook seeking work. The Cowans got in contact through their personal Facebook page with no apparent mention of Mooventures. An interview was held although witnesses gave different evidence on whether Ms Cowan or Mr Cowan or both, were at the interview.

[16] At the interview Mr Ellison disclosed that he had two related medical conditions for which he was on medication. He also mentioned the medication made him over-tired and fatigued, meaning he sometimes slept in. Ms Cowan, who says she was at the interview, asked Mr Ellison if it was going to compromise his job and he replied that it would not.

[17] Mr Ellison believes he was shown something in writing at the interview with “Mooventures” on it. This did not necessarily refer to a company. He thinks this was the employment agreement document however that seems unlikely. Ms Cowan says they did not have the employment agreement at the time. It was in fact signed some weeks later.

[18] Ms Cowan’s recollection is that she gave Mr Ellison a DairyNZ document with employment information on it.¹ She believes it was a template document the Cowans got at a workshop, which referred to Mooventures but not to Mr Ellison personally. Mr Ellison was offered the job at the interview as someone was needed straight away. He accepted.

[19] During the investigation meeting, Ms Cowan looked on her phone for a DairyNZ document but was unable to find it. After the investigation meeting the respondents filed, without comment, an unsigned sheet headed “Jarrod Ellison – Job Offer from mooventures ltd”. It contains a list of about half a dozen employment points such as what the salary rate. At the bottom “R & K Cowan” then “Mooventures Ltd” is noted. Mr Ellison’s representative conveyed that Mr Ellison had not seen the sheet.

[20] The sheet does not strike me as a template from a Dairy NZ workshop as described by Ms Cowan and does not fit with Ms Cowan’s description of a document

¹ DairyNZ is an industry organisation representing New Zealand dairy farmers.

without Mr Ellison's name on it. I cannot be satisfied that Mr Ellison ever saw that sheet.

[21] It is agreed that Mr Ellison was employed as a farm assistant for a six month period until the end of the Cowans' share milking contract. Although there was some discussion about Mr Ellison possibly becoming the second in charge (2IC) that did not occur.

[22] Mr Ellison's first day of work appears to have been 10 December 2018. The employment agreement is dated by Mr Cowan and Mr Ellison as having been signed on 29 December 2018.

[23] Mr Ellison did not see any references to Moventures when he was working. The Cowans did not mention the company to him. Mr Ellison liaised with Mr Cowan about the work.

What happened about pay?

[24] Mr Ellison's bank statements refer to his pay as being from:

COWAN K A

WagesR k cowan

[25] I take the bank's primary account as being in KA (Kelly) Cowan's name, used by the couple. The payment reference set up by Ms Cowan is the second line. Obviously there is no mention to Moventures.

[26] Ms Cowan told the Authority that the money came from the Cowans' account but also mentioned a reference to Moventures on their bank account. At the meeting she showed the Authority and Mr Ellison's representative the account on her phone. Under the Cowans' base account, there are sub-accounts labelled Home, Moventures Ltd, Tax and GST and Farm First Loan.

[27] After the investigation meeting Ms Cowan filed bank statements with the account name of Moventures Ltd, showing payments to Mr Ellison with references "Wages" and "Rk cowan".

[28] Pages from what appear to be a book including a wages record and a holiday and leave record were filed after the investigation meeting. The photo did not show the

entire book and there was no visible reference to the employer's name. Mr Ellison was not supplied with payslips.

What happened with tax?

[29] Ms Cowan says the PAYE deducted went into the Tax and GST account. However, that appears to have been one of the Cowan sub-accounts rather than a specific Moventures account.

[30] Mr Ellison complains that his tax was deducted but not paid to the IRD. As of 16 March 2020 Mr Ellison understood the tax had still not been received by the IRD. Ms Cowan told the Authority at the meeting that there were some issues related to their previous accountant which had now been sorted, with tax paid. Ms Cowan indicated that the money for the payment had been offered to her by Mr Cowan's parents. However, after the investigation meeting Mr Ellison's representative was unable to get confirmation of payment to the IRD.

Who was the employer?

[31] Ms Cowan described the couple initially operating under a partnership when they started share milking, moving to using a company. She says that Mr Ellison was employed under Moventures Limited but answerable to Mr Cowan.

[32] In support of the company being the employer are the following:

- (i) The job offer sheet albeit that I am not satisfied that Mr Ellison saw this;
- (ii) The employment agreement signed some weeks after employment started, identifying the company as the employer;
- (iii) Mr Ellison's pay, along with the relief milkers' contract earnings, came from a bank account in Moventures' name, although that account is part of the Cowan account;
- (iv) Disciplinary and dismissal letters refer to Moventures; and
- (v) An invoice from Ms Carrol's cleaning business is addressed to "Moventures Ltd c/o Rob and Kelly Cowan".

[33] On the other hand the following factors suggest the Cowans personally may have been the employers:

- (i) Contact to Mr Ellison initially through a personal Facebook page seemingly without any mention of a company;
- (ii) There was no evidence of verbal mention of Mooventures or the existence of a company at the interview or at any time thereafter;
- (iii) Even though Mr Ellison may have seen some written mention of Mooventures at the interview, it was not established that this included the word “Limited”, which could have alerted him to there being a company;
- (iv) Mr Ellison’s bank statements identify his pay as coming from a Cowan account;
- (v) Ms Cowan indicated that Mr Ellison’s PAYE was paid into the Tax and GST bank account. This appears to have been one of the Cowans’ accounts, not specifically labelled as relating to Mooventures;
- (vi) Ms Muller, a relief milker who had worked at the farm for longer than Mr Ellison, was not aware of Mooventures Limited. The other relief milker had heard the Mooventures name but said her pay came through from Ms Cowan; and
- (vii) A 9 May 2019 email from the farm owners identifies that “Rob and Kelly Cowan work for us as Contract Milkiers. They employ staff to assist them with the day to day operation of the farm”. The email continues to say that Mr Ellison “was an employee of Rob and Kelly Cowan”.

[34] I take into account the guidance from the Employment Court in *Mehta v Elliot (Labour Inspector)* that the identity of the employer must be concluded at the outset.² Although finely balanced I conclude that the Cowans were personally Mr Ellison’s employers. Mr Ellison was contacted through the Cowans’ personal email account, seemingly with no mention of Mooventures or a company. There was no clear

² *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451.

identification of the company at the interview. The mention of Moventures was not necessarily associated with the existence of a company. The employment agreement was not signed until some weeks later.

[35] If I am wrong about that and the company was the employer, I would have concluded that the Cowans did not disclose the company's identity and existence at the outset, not providing Mr Ellison with a written employment agreement until later, making them responsible under the undisclosed principal doctrine.³ The Cowans would then have been responsible for meeting the company's obligations.

How did Mr Ellison's work go?

[36] A background factor to the disagreement that developed between Mr Cowan and Mr Ellison is a lack of clarity about whether Mr Ellison was hired to be responsible when the Cowans were away. He says he was hired as a farm assistant, not the 2IC (second in charge). He says the Cowans went for a 15 day holiday in January and left him in charge. The Cowans saw Mr Ellison as responsible while they were away although Ms Cowan acknowledged that Mr Ellison was not actually employed as 2IC although there was talk of that possibility.

[37] Mr Ellison says that other than the medication's effect on his concentration and sleepiness, he thinks he did his job properly. However, the sleeping in and missing the start time for milking became a concern for Mr Cowan. Mr Ellison did not find Mr Cowan's behaviour difficult until Mr Cowan got back from holiday in January 2019. After that he found Mr Cowan started swearing at him.

[38] The main relief milker Ms Muller recalled four different occasions when Mr Ellison did not turn up on time. The first appears to have been around 11 January 2019. Only two of the occasions involved a lateness of greater than 15 minutes.

[39] The other relief milker Ms Carroll found Mr Ellison tended to start the afternoon milking later than Mr Cowan although she did not raise this with the Cowans. She also got the impression Mr Ellison was not overly concerned when some milk spilled although he denies this.

³ *Fuimaono v Houia* [2017] NZEmpC 63.

[40] Mr Ellison acknowledges that, including 23 and 24 February, he was late up to four or five times for the morning milking, by up to 20 or 30 minutes. He had been phoned to wake him up and once woken up in person. Once or twice in the afternoon he had lost track of time and was late for the afternoon milking. On the other hand a few times he had to do milking alone or with a visiting friend, when relief milkers did not turn up.

[41] Mr Ellison acknowledged that he had been spoken to by Mr Cowan about lateness. The message was along the lines of “you’ve got to stop this sleeping in, I need you to be here on time”. There was no use of the word “warning” or anything along the lines of his job being at risk. In the absence of any contrary evidence, I accept Mr Ellison’s report that Mr Cowan did not give him an opportunity to respond before telling him off.

[42] Ms Cowan was not present when Mr Cowan told Mr Ellison off about being late. She suggested that the week before 23 February her husband told Mr Ellison that this was his last chance but that was not Mr Ellison’s evidence. I cannot conclude that a last chance was mentioned.

[43] There appears not to have been any discussion about the medication causing sleepiness. Mr Ellison thought he had done his part by declaring it on appointment. Mr Cowan’s views are largely unknown.

What occurred on the 23rd and 24th of February 2019?

[44] On Saturday 23 February 2019 Mr Ellison was late to the afternoon milking, saying he had taken a nap and not awoken to his alarm. He estimates he was 15 minutes late. Mr Ellison says he was upset and swearing at himself on the way down to the shed. The relief milker Ms Carroll paints a different picture. She contacted Ms Cowan and then went to Mr Ellison’s farm house and tried to wake him. She describes milking being delayed by an hour. Ms Carroll was not impressed by Mr Ellison’s attitude.

[45] The following afternoon, 24 February, Mr Ellison was not at the shed when Ms Carroll arrived so after five minutes she went towards Mr Ellison’s farmhouse. Before she got to his house he came past. Part way through the milking the palm kernel feed ran out. Mr Ellison was conscious of not leaving Ms Carroll alone in the shed as she had not been trained in the machine’s operation, as well as the milking being almost over. He decided not to go to check or refill the kernel hopper.

Why did Mr Ellison receive three disciplinary letters at the same time?

[46] On 24 February 2019 Mr Ellison received a text from Mr Cowan asking if he was going to be around that evening. Mr Ellison replied that he was and Mr Cowan asked him to go to the Cowans' house at 8pm.

[47] On his arrival, both the Cowans were present. They handed Mr Ellison three letters and gave him a brief opportunity to read them.

[48] Two letters were dated the day of the meeting, 24 February. Letter One was referred to as being a "formal written warning". Mr Ellison was said to have been unorganised and late to work that day, not having the cows at the milking shed on time. As a result the relief milker had to wait and the cows were milked later. There is reference to this not being tolerated any more.

[49] Letter Two is also described as a formal written warning. It refers to Mr Ellison, again on 24 February, failing to carry out daily tasks. The single reference to a specific task is to filling the palm kernel hopper. A lengthy sentence referring to that issue as well as unspecified "other issues" from "whenever we go away" leads to the conclusion that "we are hereby terminating you employment with moventures ltd".

[50] Letter Three, undated, informs Mr Ellison that his employment with Moventures has come to an end due to continuous poor performance. He was said not to be able to carry out daily (unspecified) tasks when left in sole charge "even after repeated phone calls to wake you up". Mr Cowan is said to have let a lot of the sleeping slide and given chances to improve. Confusingly the letter said that Mr Ellison's employment was terminated immediately but also said he had his notice period to work out.

[51] The parties agree that Mr Ellison was given three letters at the 24 February meeting. However, confusingly the respondents filed a fourth letter (dated 24 February) after the investigation meeting, being a warning for sleeping in on 23 February. I cannot be satisfied that Mr Ellison received this letter.

[52] At the meeting the Cowans asked Mr Ellison if he wanted to finish immediately. He replied that he would work out his notice. Mr Ellison agreed to vacate the farm house by 8 March 2019.

[53] However, things changed on 25 February 2019. Mr Ellison went to work as normal in the morning and milked the cows. Mr Cowan saw him after breakfast and told him aggressively to pack his “shit up and piss off”. Mr Ellison proceeded to pack up and leave. He was not permitted to work out his notice period.

[54] Ms Cowan suggested that Mr Ellison had not turned up to work on 25 February but I prefer Mr Ellison’s evidence as Ms Cowan was not relying on direct knowledge.

Was Mr Ellison unjustifiably dismissed?

[55] Under s 103A(2) of the Act, I must consider whether the employers’ actions and how they acted were what a fair and reasonable employer could have done in all the circumstances. This includes taking into account whether:

- (a) Having regard to resources, they sufficiently investigated the allegations before dismissing;
- (b) Raised the concerns with Mr Ellison before dismissing;
- (c) Gave him a reasonable opportunity to respond; and
- (d) Genuinely considered any explanation before dismissing.⁴

Warnings?

[56] I look firstly at whether the earlier discussions Mr Cowan had with Mr Ellison were sufficient to amount to warnings. The evidence does not establish that Mr Ellison knew his employment was in jeopardy if he did not improve. Even if the discussions were sufficient to amount to warnings they were not carried out in a procedurally fair way. Mr Ellison was not given the opportunity to comment before he was told off by Mr Cowan.

[57] In addition, the employment agreement covers situations such as lateness where performance is below expectation.⁵ A formal meeting is to be arranged, giving at least

⁴ The Act, s 103A(3).

⁵ Employment agreement, cl 25.

48 hours' notice and confirming the decision in writing. Ms Cowan acknowledged that that did not happen before 23 February 2019.

[58] Also, giving all the letters at the same time was unfair. If warnings as to be used as a basis on which to justify a subsequent dismissal, there must be a time for improvement. Here the written warnings were given at the same time as the dismissal letter.

Sufficient investigation?

[59] I do not know what Mr Cowan did in terms of investigation before calling Mr Ellison to the 24 February meeting. Mr Ellison disputes some but not all aspects of the allegations.

[60] Mr Cowan had some information but I cannot say that he investigated sufficiently, even given the small size of the operation.

Raising concerns?

[61] Mr Ellison was not told what the 24 February meeting was about or that it was intended to be disciplinary. He was not offered the chance to bring a representative. There was no discussion before Mr Cowan gave Mr Ellison the three letters.

Opportunity to respond?

[62] Expecting Mr Ellison to read three letters and respond whilst at the meeting was unreasonable. Mr Ellison felt that Mr Cowan kept shutting him down, saying it was not acceptable. Mr Ellison estimates the meeting as lasting five to ten minutes if that.

[63] Ms Cowan acknowledged that Mr Ellison was not asked about the palm kernels matter at the meeting. In her view the Cowans did not have to ask him specific questions as she thought he knew what it was about, namely the whole weekend. I disagree. The particular concerns the Cowans had should have been put to Mr Ellison and his response sought. That did not happen.

Genuinely considered explanations?

[64] Ms Cowan acknowledged that a decision had been made to dismiss Mr Ellison before the meeting. The Cowans cannot say that Mr Ellison's explanations were

genuinely considered when a decision to dismissal had already been made and put in writing before the meeting started.

Reasons for dismissal

[65] The dismissal letter refers to continuous poor performance, not carrying tasks and having to be woken up. Mr Ellison accepted there were some instances of him being late for milking. Lateness is a performance issue, although the explanation about his medication would need to be considered. However, the Cowans had not given Mr Ellison proper warnings until the same time as he was told he was dismissed.

[66] At one point in the investigation meeting Ms Cowan suggested that there may have been an instance of misconduct by Mr Ellison but ultimately accepted that he was dismissed on performance grounds.

Conclusion on dismissal

[67] None of the elements in s 103A of the Act were met. Nor the employment agreement's requirements. The Cowans did not act as fair and reasonable employers could have done. It was too early for a dismissal even if the medication issue had been properly considered. Mr Ellison's dismissal was unjustified.

Remedies

Lost wages

[68] Fortunately Mr Ellison was able to obtain another job swiftly, commencing on 28 February 2019. As a result his lost wages claim only concerns the period from 25 to 27 February 2019. At a daily rate of \$118.59, Mr Ellison's lost wages are \$355.77. Below I consider the possibility of a reduction for any contribution by him to the situation giving rise to his dismissal.

[69] The question of what arrears of wages Mr Ellison is owed is dealt with later.

Compensation

[70] Mr Ellison is a relatively young man. He was devastated by the unfair way he was treated.

[71] On the basis of Mr Ellison's evidence and text messages, albeit after dismissal, I conclude he was dealt with in an aggressive and harsh manner by Mr Cowan. From when Mr Cowan came back from holiday he was abusive to Mr Cowan, telling him repeatedly he was "fucking useless" and a "lazy c***". Ms Cowan accepted that Mr Cowan probably called Mr Ellison a "lazy cunt". This had not been the language of the farm prior to that.

[72] Mr Cowan was aware of Mr Ellison's medical history and vulnerability but there is no indication that he took it into account in his treatment of Mr Ellison.

[73] After his dismissal, Mr Ellison went into what he describes as a very dark place. He was afraid and weary as a result of threatening comments Mr Cowan made. Mr Cowan had spoken to Mr Ellison about his treatment of other employees. Mr Ellison's sense was that Mr Cowan seemed to delight in reporting how badly he had treated staff if they did not do what he wanted. Mr Ellison reports being physically assaulted by one of Mr Cowan's friends and he began having flashbacks of being strangled, along with thinking it was Mr Cowan strangling him. This is not to suggest that Mr Cowan was physically aggressive to Mr Ellison as Mr Ellison accepts that he was not.

[74] Mr Ellison took himself off his medication and went downhill. He was in a position of acute despair before seeking medical help.

[75] Mr Edmonds gave compelling evidence of the dismissal's effects on Mr Ellison. The two had been friends for some years. Mr Ellison asked to stay in the Edmonds family's granny flat after he was dismissed. Whilst there, the two talked at length. Mr Edmonds could see the dismissal and poor treatment was playing on Mr Ellison's mind. He knew of Mr Ellison's serious despair.

[76] Mr Ellison has claimed \$15,000 and that is moderate compensation given the dire effects of the dismissal on him.

Contribution

[77] I have examined whether Mr Ellison can be said to have contributed to the situation giving rise to his dismissal. In order to make a deduction for contribution the conduct must have been both causative of the outcome and blameworthy⁶.

[78] Clearly Mr Ellison was late to start milking on a number of occasions causing modest inconvenience to others and delays in the milking process. However, I accept his evidence that the medication had a negative side effect of sleepiness. He had disclosed this on appointment.

[79] Preferably some discussion would have occurred between the Cowans and Mr Ellison about possible ways to minimise the impact of the medication's side effects on his work or otherwise deal with the situation. It did not. Mr Ellison could have attempted to initiate this discussion but I accept that he sometimes found Mr Cowan's approach unhelpful and aggressive, which inhibited such discussion.

[80] I conclude that whilst Mr Ellison's lateness contributed, it cannot be said to be blameworthy.

[81] A post-dismissal email from the farm owners refers to a couple of farm practice incidents but even aside from whether there was a legitimate basis for concern, it is not clear that the Cowans knew about those incidents before deciding to dismiss Mr Ellison. They are not on the face of it referred to in the disciplinary or dismissal letters. I cannot say that these concerns were causative of the dismissal.

[82] No deduction for contribution is warranted.

Conclusion on remedies

[83] Mr Cowan and Ms Cowan are jointly and severally liable to pay the remedies. I order the Cowans to pay Mr Ellison \$355.77 gross as lost wages and \$15,000 as compensation within 28 days of the date of this determination.

⁶ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178] and *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 (Full Court) at [175].

What happened with the final pay and bond?

[84] The employment agreement stipulated a weekly rent of \$250 and a bond equivalent to three weeks' rent (\$750). Mr Ellison says he was never asked to pay the bond. Ms Cowan confirmed they did not deduct or take it earlier. She described the bond being deducted from the final pay. Mr Ellison received no final payment from the Cowans after his dismissal.

[85] There is a dispute about the state of the farm house on Mr Ellison's departure. He says he and his mother cleaned the house thoroughly. Video footage was provided which appeared to show the house as clean and tidy. The respondents suggested photos and video may not have captured the true state of the house. Mr Ellison did not attend the inspection as he was concerned about Mr Cowan's aggressive tone towards him. Mr Cowan told Mr Ellison he would send the inspection report and photos but never did.

[86] In the absence of payslips or communication about Mr Ellison's final pay, it was difficult for Mr Ellison and his representative to assess what had happened. He claims that the bond was deducted.

[87] However, the bond is not really the issue. Under the Wages Protection Act wages must be paid without deduction except as provided in the Act.⁷ Deductions may be made with the written consent of the worker including consent in a general deductions clause in the employment agreement.⁸

[88] What happened was that in the absence of holding a bond, the Cowans simply decided not to pay anything out at all and withheld the entirety of Mr Ellison's final pay, seemingly to cover the costs of the house clean and some minor electrical work.

[89] Cleaning was undertaken by Ms Carroll. Unusually she invoiced before she cleaned, based on photos Mr Cowan had taken. The cost was \$895.50. Ms Cowan provided an electrician's invoice for \$332.12 incl GST, although only an unspecified amount of that was for the farm house work.

⁷ Wages Protection Act, s 4.

⁸ Wages Protection Act, s 5(1)(a).

[90] The employment agreement authorises the employer to deduct from wages including holiday pay, any monies owed by the employee to the employer.⁹ These include damages to property and cleaning accommodation and carpets. However, the agreement requires that before a deduction is made the employee must be consulted about it.¹⁰

[91] The Wages Protection Act also requires prior consultation before a specific deduction is made under a general deduction clause.¹¹

[92] There was no prior consultation with Mr Ellison and the deduction was therefore not entitled to be made. Even if the total cleaning and electrical costs are combined, they are still less than what was owed to Mr Ellison as wages. Ms Cowan suggested that the notice period may have been deducted as well but I do not accept that it was Mr Ellison's decision to leave on 25 February.

[93] The Cowans breached the Wages Protection Act by making a deduction from wages without prior consultation with their employee and must pay Mr Ellison his wages.

What arrears of wages are owing to Mr Ellison?

[94] Mr Ellison did not receive amounts that should have been incorporated in his final pay. Ms Cowan says that their accountant had done a reconciliation and offered to send it. Despite two promptings that did not occur. That put Mr Ellison's representative to extra effort in providing a calculation in the absence of sufficient records which the employer should have kept. I have calculated what Mr Ellison should have been paid.

[95] The gross pay was \$1,423.08 per fortnight. The last pay was received on 15 February 2019, which covered until Sunday 10 February.

Wages

[96] Mr Ellison claims pay for the two week period leading up to 24 February 2019. I am satisfied that he was not paid for that period and is owed \$1423.08 gross.

⁹ Employment agreement, cl 13.3.

¹⁰ Employment agreement, cl 13.4.

¹¹ Wages Protection Act, s 5(1A).

Public holidays

[97] The respondents' record indicate Mr Ellison working on Christmas Day, Boxing Day, 2 January and Waitangi Day. Mr Ellison's recollection was of working Christmas and Boxing Days along with Anniversary and Waitangi Days but not 1 and 2 January. I accept that Mr Ellison worked a total of four public holidays

[98] Mr Ellison did not recall getting time and a half or a day in lieu for working on public holidays (alternative holiday). He received his standard pay for those fortnights and no final pay so is owed the extra half-time public holiday rate. At half the daily rate of \$118.59, Mr Ellison is owed four days at \$59.30 totalling \$237.20.

[99] As regards alternative days, Mr Ellison recalls being given four or five days off in early January 2019. He is not clear how they were characterised and the limited records from the respondents do not assist. From the respondent's calendar page it appears Mr Ellison was off work for five days. I will deduct five days from the amount of final pay owing.

[100] The amount owing for four alternative days at \$118.59 a day is \$474.36 gross.

Annual leave

[101] From a total gross earnings of \$7,886.19 (including public holiday pay and alternative days which should have been paid), 8% holiday pay of \$630.90 is owing.

Conclusion on arrears

[102] The calculation of arrears is as follows:

Wages	\$1,423.08
Public holiday pay	\$237.20
Alternative days	\$474.36
Annual leave	\$630.90
<hr/>	
Sub-total	\$2,765.54
Less five days off	\$711.54
<hr/>	
Total owing	\$2,054.00

[103] Robert and Kelly Cowan are jointly and severally liable to pay Jarrod Ellison arrears of \$2,054.00 gross within 28 days of the date of this determination.

Should a penalty be imposed?

[104] Mr Ellison claims a penalty for breach of the Wages Protection Act. I see the withholding of Mr Ellison's final pay and the bond as one issue. Employers are required to pay employees their wages when they become payable.¹² Despite Mr Ellison's employment finishing in 2019 no payment has been made. The Cowans breached s 4 of the Wages Protection Act by failing to pay Mr Ellison his final pay. Employers are liable to a penalty for failure to make payments of wages.¹³

[105] In deciding whether to impose a penalty in this case and if so, at what level, I am guided by the criteria set out in s 133A of the Act, as well as by case law.¹⁴

[106] The Wages Protection Act is aimed at ensuring employees are paid promptly for their work. This supports a penalty being imposed on the Cowans. This was not an accidental non-payment. There have been plenty of opportunities, including at times when they were represented, to repay at least some of the money. No payment was forthcoming. In these circumstances a penalty should be imposed.

What amount of penalty should be imposed?

[107] The Cowans have breached one provision, with a maximum penalty of \$10,000 for an individual. The provisional total is thus \$10,000 for each of them. I cannot assess either of the Cowans as having a lesser degree of responsibility for what occurred.

[108] The non-payment was deliberate although the Cowans thought they were entitled withhold at least part of the money. Mr Ellison was deprived of what is quite a significant amount of money for a man of his age and circumstances. The Cowans have done nothing to compensate or mitigate the effects of the breach on Mr Ellison. They did not even pay the amount owing after deduction for the cleaning and electrical

¹² Wages Protection Act, s 4.

¹³ Wages Protection Act, s 13.

¹⁴ *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

work. My impression was that the Cowans were annoyed at Mr Ellison and decided to keep the lot.

[109] I did not find Ms Cowan's defence of not being able to pay because Mr Ellison had not come to the house inspection, compelling. Another suggestion that they had left it to their former representatives to sort out but were happy to pay was also not plausible when payment remains outstanding almost two years after Mr Ellison's employment finished.

[110] There was no evidence of Cowans not paying other employees.

[111] I have considered the need for deterrence. Both the Cowans and other employers in similar circumstances need to be encouraged to work out what is owing and pay it promptly, even if some remaining amounts stay in dispute.

[112] There was little evidence about the Cowans' financial position although the successful seeking of Moventures' liquidation by a creditor suggests a weak financial situation.

[113] I have taken into account the level of penalty awarded in other cases involving a single instance of non-payment such as *McLeod v C and S Brown Enterprises Limited* and proportionality to the amount outstanding.¹⁵

[114] I consider that it is right for a substantial proportion of that penalty to go to Mr Ellison for having to pursue this matter under trying circumstances. I order Rob Cowan and Kelly Cowan to each pay a penalty of \$900.00 into the Authority's account within 28 days of the date of this determination, with \$600.00 from the total paid to be forwarded to the Crown account and \$1200.00 to Mr Ellison.

Costs

[115] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Ellison shall have 21 days from the date of this determination in which to file and serve a memorandum on the matter. The Cowans shall have a further 14 days in which to file and serve a memorandum in reply. Submissions claiming costs

¹⁵ *McLeod v C and S Brown Enterprises Limited* [2020] NZERA 83.

must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[116] The parties could expect the Authority's assessment to start from the notional daily tariff for a one day investigation meeting which is \$4,500.

Nicola Craig

Member of the Employment Relations Authority