IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 269
3134118

	BETWEEN	MATTHUE LESLIE GERA Applicant
	AND	PLATFORM 4 GROUP LIMITED Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Applicant in person Es Bezuidenhoudt, advocate for the Respondent	
Investigation Meeting:	1 March 2022 at Auckland	
Submissions and Further Information Received:	5 March 2022 from the Respondent 7 March 2022 from the Applicant 12 April 2022 from Respondent 13 April from Applicant	
Date of Determination:	23 June 2022	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Gera worked as a casual Security Officer for Platform 4 Group Limited (Platform) from March 2016 to October 2020. The first shift Mr Gera worked was on 11 March 2016 and last shift he worked was on 26 July 2020.

[2] Mr Gera was paid ‘pay as you go’ holiday pay with his wages while employed. Mr Gera sought a duplicate award of annual holiday pay, on the grounds Platform had not recorded his ‘pay as you go’ annual holiday pay arrangement in his employment agreement.

[3] Mr Gera worked 72 shifts in total over the duration of his employment. Seven of the shifts he worked in 2020 he worked as a Supervisor, meaning he was paid at the higher 'supervisor rate' than what he was normally paid for his other Security Officer shifts.

[4] Mr Gera claimed he had been promoted to a Supervisor role in January 2020. Platform denied that. Platform agreed Mr Gera had undertaken seven temporary 'cover' Supervisor shifts in 2020 because it was short staffed, but said he was still offered normal Security Officer shifts and had not been promoted into a Supervisor role.

[5] Mr Gera claimed he was unjustifiably dismissed. His last text offering work from Platform was sent to him on 28 August 2020. Mr Gera claimed he had been removed from Platform's text/SMS system in response to the personal grievance claim he had raised on 12 October 2020.

[6] Platform denied that Mr Gera was dismissed. Platform said Mr Gera resigned in writing on 12 October 2020 (in his personal grievance letter) when he "*requested to give notice*". Platform accepted his resignation and Mr Gera did not dispute that he had resigned at that time.

[7] Mr Gera claimed he was never given an employment agreement, in breach of sections 64 and 65 of the Employment Relations Act 2000 (the Act). He believed he should have been given two employment agreements, the first in March 2016 when he was initially employed and the second in January 2020 when he claimed he had been promoted to a Supervisor position.

[8] Platform denied that Mr Gera was not provided with a written employment agreement when he started work in March 2016. However, Platform admitted it was unable to produce a signed employment agreement for Mr Gera.

[9] Platform disputed that Mr Gera was promoted to a Supervisor in January 2020, so it said it was not required to give him a new employment agreement or to issue him with a written variation for the seven Supervisor shifts he accepted.

[10] Mr Gera claimed the failures to give him employment agreements were a breach of good faith and unjustifiably disadvantaged him, as well as breaching ss 64 and 65 of the Act. Mr Gera sought penalties for these breaches as well as distress compensation for his disadvantage grievance. Platform denied breaching good faith or disadvantaging Mr Gera.

[11] Mr Gera made a number of other unjustified disadvantage claims (in addition to pursuing the failure to give him employment agreement(s) as a disadvantage grievance), but he was not given leave to pursue these other grievances out of time (see later discussion of that).

[12] Platform disputed the Authority's jurisdiction to investigate Mr Gera's personal grievance claims on the basis they were raised outside the 90 day time limit required by s 114(1) of the Act. The jurisdiction issues were dealt with prior to the substantive investigation meeting.

Authority's investigation

[13] The Authority dealt with Platform dispute of jurisdiction as a preliminary issue that was determined 'on the papers' prior to the substantive investigation meeting.

[14] The Authority in its Minute dated 9 February 2022 granted Mr Gera leave under s 114(4) of the Act to raise the following personal grievances out of time;

(a) Unjustified disadvantage arising from the failure to provide him with an employment agreement; and

(b) Constructive dismissal.

[15] The Authority was satisfied the delay in raising the grievances was due to the exceptional circumstance set out in s 115(c) of the Act, namely that he had not been given an employment agreement that contained an explanation concerning the resolution of employment relationship problems. Mr Gera therefore established the grounds in s 114(4) of the Act, namely exceptional circumstances and that it would be just to grant leave.

[16] The Authority declined to give Mr Gera leave to pursue other more historical disadvantage claims on the basis the extensive delay of many years, and associated prejudice arising from that, meant it was not just to give him leave to raise his other intended disadvantage grievances out of time.

[17] The Authority held an in-person substantive investigation meeting in Auckland. Mr Gera gave evidence and Erika Veysey gave evidence for Platform. Ms Veysey was not employed by Platform at the material times, so her evidence was necessarily limited to her review of the relevant documents.

[18] Both parties filed additional evidence after the substantive investigation meeting.

Issues

[19] The following issues are to be determined:

(a) Did Platform breach s 64 and/or s 65 of the Act?

(b) If so, were the breaches of ss 64 and 65 of the Act also breaches of good faith?

(c) Should penalties be imposed on Platform for any breaches that have occurred?

(d) What were Mr Gera's terms and conditions of employment?

(e) Did Mr Gera's terms and conditions of employment change when he was offered Supervisor shifts in 2020?

(f) What was the nature of Mr Gera's employment status?

(g) Is Mr Gera entitled to duplicate annual holiday pay?

(h) Did Platform unjustifiably disadvantage Mr Gera?

(i) If so, what if any remedy should he be awarded?

(j) Was Mr Gera dismissed?

(k) If so, was his dismissal justified?

(l) If not, what if any remedies should he be awarded?

(m) What penalties should be imposed on Platform for any breaches that have occurred?

(n) Should some or all of any penalties that may be imposed be paid to Mr Gera instead of the Crown?

(o) What if any costs and disbursements should be awarded?

Did Platform breach s 64 and/or s 65 of the Act?

Section 64 of the Act

[20] Section 64 of the Act requires an employer to retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment (as the case may be).

[21] Platform breached s 64 of the Act because it failed to retain a written copy of Mr Gera's individual employment agreement.

[22] The Authority accepted Mr Gera's evidence that he was never provided with a written employment agreement. If Platform had provided Mr Gera with a written individual employment agreement at the outset of his employment then there would have been some record of that having occurred. Neither Platform nor Mr Gera could point to any document that indicated he had ever been given an employment agreement.

Section 65 of the Act

[23] On 25 August 2020, in response to Mr Gera's request for a copy of his employment agreement, he was sent a copy of his induction application forms. When he queried that, he was told those were the only documents Platform had on file for him.

[24] Platform was unable to produce a written individual employment agreement for Mr Gera.

[25] Section 65 of the Act sets out the form and content of an individual employment agreement. The induction material Mr Gera was given on 28 August 2020, in response to his request for his employment agreement, did not meet the requirements of s 65 of the Act because it did not include the specific information that was required under s 65(2) of the Act.

[26] Platform therefore breached s 65 of the Act.

Were Platform's breaches of ss 64 and 65 of the Act also breaches of good faith?

[27] Platform's breaches of s 64 and s 65 of the Act meant it failed to act in a manner that was active and constructive in establishing and maintaining a productive employment relationship, contrary to the good faith requirements set out in s 4(1A)(b) of the Act.

Should penalties be imposed on Platform for these breaches?

[28] Penalties are punitive, as they are intended to punish wrongdoing. The purpose of remedies is to signal disapproval and to act as a deterrent to the wrongdoer and others who may be inclined to engage in such breaches.

[29] The provision of a written employment agreement is a core element of an employment relationship. The absence of a written agreement can often cause disputes and difficulties to arise, as is the case here. It is therefore important that employers meet this minimum code obligation.

[30] It is therefore appropriate to impose penalties on Platform for its breaches of ss 64 and 65 of the Act.

[31] The Authority was not satisfied that the penalty requirements in s 4A of the Act had been met, and in any event the same conduct (being no employment agreement) will be punished due to penalties being imposed on Platform for its breaches of ss 64 and 65 of the Act. It is therefore not appropriate to impose a separate penalty on Platform for its breach of good faith on Platform for its breach of good faith.

[32] The assessment of the penalties to be imposed is addressed later in this determination.

What were Mr Gera's terms and conditions of employment?

[33] Although there was no written employment agreement, the parties agreed (with the exception below) that Mr Gera's core terms and conditions of employment were as set out in an employment agreement template that Platform said all staff had to sign ("the template").

[34] The exception was that Mr Gera claimed he had been promoted to a Supervisor role in January 2020 while Platform denied that. Platform said that its normal practice was for long term employees to be offered stand in Supervisory roles from time to time if/when additional cover was needed that could not be sourced from the existing pool of Supervisor employees.

[35] The Authority finds that Mr Gera was not promoted into a Supervisor role in January 2020. Although Mr Gera was offered seven Supervisor shifts that was not a promotion, because he was also offered normal Security Officer shifts. Mr Gera's employment was for Event Staff Services meaning he could be moved to different roles as required. If Mr Gera did not like the role offered he did not have to accept that shift.

[36] Platform provided Mr Gera with a copy of the template on 28 August 2020, after it could not locate a written individual employment agreement for him. Mr Gera declined to sign it because;

(a) It was not dated;

(b) The start date was not recorded;

(c) The position was for a Security Officer when he believed he had been promoted to a Supervisor position in January 2020;

(d) The hourly rate was for a Security Officer and not a Supervisor.

[37] Platform would send out a group text/SMS message to all employees setting out the details of the offered shift(s) by asking those who were available and wanted to work to respond. Those employees who were not interested in the offered shift were not to respond, meaning Platform would only receive reply texts from the employees who wanted to work the offered shift.

[38] Mr Gera was therefore free to pick and choose which, if any, shifts he worked. He could therefore ensure that the dates, locations and timing of the proposed shifts suited him. There were no restrictions placed on him, meaning he was free to accept or reject any shifts at his sole discretion.

[39] Mr Gera did decline offers of ordinary Security Office shifts that he received in 2020, preferring instead to only accept offers of the higher paying Supervisor shifts.

[40] The parties agreed that Mr Gera was employed on a casual ‘as and when required’ basis, with there being no expectation of ongoing work. Mr Gera acknowledged that he did not have an expectation of ongoing offers of work (shifts), because Platform was not obliged to offer him work.

[41] However, if Platform did offer a particular shift, and Mr Gera accepted that particular offer (shift), then after Mr Gera had accepted an actual offer to work a particular shift he was at that point required to work the particular shift that he had accepted. Mr Gera was paid the agreed hourly rate for each shift he actually worked.

[42] In the absence of a written agreement that provided for a notice period, either party were required to provide reasonable notice to the other to end the employment relationship.

Did Mr Gera's terms and conditions of employment change when he was offered Supervisor shifts?

[43] Platform first offered Mr Gera a Supervisor shift on 24 January 2020. The Supervisor shifts were offered him in the same way as the Security Officer shifts were offered. He was given the details of the shift on offer and could accept or reject it.

[44] Mr Gera was not promoted into a Supervisor role. He was simply offered seven stand-alone shifts, that he accepted, where he would be 'standing in' as a Supervisor due to staff shortages. There was no need for Platform to have issued him with a new employment agreement or a written variation because his core terms and conditions did not change.

What was the nature of Mr Gera's employment status?

[45] Mr Gera was employed by Platform as a permanent casual employee, who worked on an "as required basis". He therefore had no fixed, set, or minimum hours of employment.

[46] There was no requirement for Platform to offer Mr Gera any shifts. Nor was he required to accept any shifts he was offered. This was not a 'zero hours' situation because Mr Gera had complete control over which (if any) offers of work he wanted to accept.

[47] Mr Gera was not required to make himself available to accept any offers of work from Platform. Mr Gera was not even required to reply to any offer of work from Platform. It was only if he wanted to work an offered shift that he would reply to Platform.

[48] Mr Gera was not a fixed term employee. He was not engaged on a series of fixed term engagements because he was a permanent casual employee.

Is Mr Gera entitled to duplicate annual holiday pay?

[49] Mr Gera said that because he did not have a written employment agreement, he is entitled to be paid duplicate annual holiday pay on his total gross earnings while employed by Platform.

[50] Section 28 of the Holidays Act 2003 (HA03) provides that an employer may pay regular annual holiday pay as a component of the employee's pay in each pay period if the employee is employed on a fixed term agreement for less than 12 months or the employee's work is so

intermittent or irregular that it is impractical for the employee to be paid four weeks' annual holidays in accordance with s 16 of the HA03.

[51] Mr Gera was not a fixed term employee and he was employed for more than 12 months. However the casual 'as required' nature of his employment meant his work was so intermittent or irregular that it was impractical for him to be given four weeks paid annual holiday.

[52] Platform could therefore pay Mr Gera 'pay as you go' annual holiday pay, provided it met all of the requirements identified in s 28 of the HA03. In particular, Platform needed to meet all of the following requirements;

(a) He had agreed to be paid 'pay as you go' holiday pay in his employment agreement;[1] and

(b) The annual holiday pay was an identifiable (separate) component of his pay;[2] and

(c) The annual holiday pay he was paid was not less than eight percent of his gross earnings.[3]

[53] Although Platform met the requirements of s 28(1)(a)(ii) and (c) and (d) of the HA03 it failed to meet the requirement in s 28(1)(b) of the HA03, that Mr Gera had agreed to receive 'pay as you go' holiday pay in his employment agreement, because it could not produce a written employment agreement for him.

[54] Platform's failure meant s 28(4) of the HA03 applied. Section 28(4) of the HA03 says that if an employer has incorrectly paid annual holiday pay with an employee's pay, in circumstances where the employee is employed for longer than 12 months then the employee becomes entitled to annual holidays in accordance with s 16 of the HA03.

[55] Section 16 of the HA03 deals with the entitlement to paid annual holidays. Section 16(1) provides that an employee is entitled to not less than four weeks' paid annual holidays per annum. Section 25 of the HA03 sets out how annual holiday pay is to be calculated when

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1 Section 28(1)(b) of the HA03.
2 Section 28(1)(c) of the HA03.
3 Section 28(1)(d) of the HA03.

the employment ends before a further entitlement to annual holidays has arisen (i.e. for a part year of employment).

[56] Section 25(2) requires the employer to pay the employee 8% of their gross earnings since the last annual holiday entitlement arose, less any advance annual holiday pay they had received over that period.

[57] Based on the evidence filed by the parties in April 2022, the Authority orders Platform to pay Mr Gera duplicate annual holiday pay of $692.28.

[58] The duplication (or doubling up of annual holiday pay) that Mr Gera has received is a cautionary tale to employers who are paying 'pay as you go' holiday pay to ensure they have strictly complied with all of the requirements of s 28 of the HA03.

Did Platform unjustifiably disadvantage Mr Gera in his employment?

[59] Mr Gera claimed that the failure by Platform to provide him with a written employment agreement that included the mandatory terms set out in s 65 of the Act unjustifiably disadvantaged him.

[60] Mr Gera said it made him anxious, worried, stressed and distressed to know that he had no formal written employment agreement.

[61] The Authority accepted Mr Gera was disadvantaged by not having a written employment agreement. The disadvantage Mr Gera suffered was unjustified, because it was a breach of minimum employment standards under the Act.

What remedy should Mr Gera be awarded for his unjustified disadvantage grievance?

[62] Mr Gera said he was alarmed and disturbed that he did not have a written employment agreement on file. He found that very stressful and he described feeling:

> Empty and somewhat powerless at that point to realise there was no document which I could fall back on if I wanted to discuss any specific terms related to my employment with the company.

[63] Mr Gera is entitled to an award of distress compensation for the hurt, humiliation and injury to feelings he suffered when he discovered that he had no written employment agreement.

[64] Platform is ordered to pay Mr Gera $3,000 under s 123(1)(i)(c) of the Act as distress compensation for its failures to provide him with a written employment agreement at the outset of his employment and for its failure to keep a written signed copy of his employment agreement.

Was Mr Gera dismissed?

Reason for resignation

[65] Mr Gera's personal grievance letter stated: "*I request to give notice of termination from employment with [Platform] in the same respect as if a signed written employment agreement has been in effect*".

[66] Mr Gera said his resignation was an intended remedy that he had proposed as a "*package of compensation*" he had put forward to settle his personal grievance claim.

[67] Platform saw that as a resignation, that it accepted.

Constructive dismissal

[68] A resignation may be a constructive dismissal if the initiative for the ending of the employment came from the employer. A constructive dismissal may occur if the employer:

(a) Engaged in a course of conduct with the deliberate or dominant purpose of coercing the employee to resign. That is not the case here;

(b) Breached a duty that made it reasonably foreseeable the employee would resign.

[69] The last offer of work Mr Gera received was sent to him on 28 August 2020 for shifts that would occur in September. Mr Gera did not accept that offer and no further offers of employment were made after that time.

[70] Auckland was in Covid-19 lockdowns in August and September 2020. That adversely affected the number of events that were being held in Auckland between August and December 2020, and therefore the shifts that would have been available.

No employment agreement

[71] On 28 August 2020 Mr Gera was given the template to address his concern that he did not have a written individual employment agreement. Mr Gera did not accept that as a valid

employment agreement, because the date on the employment agreement was not defined, and the date of the physical commencement of work had not been completed.

[72] These omissions did not amount to a fundamental repudiation by Platform of its contractual obligations to him, so they did not give rise to a constructive dismissal.

[73] Mr Gera also took issue with the fact the job description in schedule 3 of the template was for a Security Officer and not a Supervisor, because he (incorrectly) believed he had been promoted into a Supervisory role in January 2020. However, Mr Gera did not raise any of these issues with Platform, so it had no opportunity to address his dissatisfaction.

[74] Where there is a genuine dispute the parties need to refer that to mediation. Mr Gera was not entitled to rely on a dispute about whether or not he had been promoted to a Supervisor as amounting to a constructive dismissal, particularly when Platform was unaware of the issue he had about that.

[75] The Authority finds that the failure of Platform to provide or keep a written individual employment agreement for Mr Gera was not a fundamental breach that made it reasonably foreseeable he would resign. Platform acted promptly to remedy these breaches. The template it provided Mr Gera on 28 August 2020 accurately recorded his terms and conditions of employment.

Rest breaks

[76] Mr Gera claimed that he had not been given paid breaks while working. Platform disputed that. The evidence about that was unclear and Mr Gera did not raise those issues at the time. Platform said Mr Gera was required to manage his own rest breaks, so it was not reasonably foreseeable he would resign over this.

[77] If Mr Gera's allegations were correct that he was never given rest breaks, then he continued working in the face of that. He also never raised it as an issue with Platform before he resigned. Mr Gera was not entitled to treat his rest break allegations as giving rise to a constructive dismissal.

Lack of training

[78] The Authority did not consider that Mr Gera was constructively dismissed because he was not provided with training to work his Supervisor shifts. Mr Gera did not ask for such

training and he had not been promoted into that role. If Mr Gera did not believe he could do a Supervisory shift without training, then he should not have accepted the offer to work a Supervisor shift.

Spark incident

[79] Mr Gera claimed that prior to 2020 an incident occurred at Vector (now Spark) arena in which he claimed another employee spoke to him in a humiliating way. However, that was a historical incident that he did not complain of at the time. Platform was therefore not in a position to address it. Mr Gera also continued to accept offers of work from Platform, therefore he cannot rely on that as giving rise to a constructive dismissal.

Sore feet

[80] Mr Gera claimed he got sore feet having to walk around Eden Park. That was also a historical issue. That did not give rise to a constructive dismissal because Mr Gera did not have to accept offers to work shifts ta Eden Park if it resulted in his feet becoming too sore. He was not required by Platform to work there or to take on shifts that had too much walking in them for him to do.

Assessment of reasons for resignation

[81] Mr Gera's concerns about his alleged promotion to Supervisor, lack of training, rest breaks, the Vector incident, sore feet and no employment agreement were all historical issues that were not sufficiently linked in time with his resignation. Nor were any of them serious incidents enough in themselves, or even in combination, to give rise to a constructive dismissal claim.

[82] The Authority was not satisfied that Platform had indicated that it did not intend to be bound by the terms of Mr Gera's employment. The issues he complained about could and should have been addressed by him at the time they arose. Mr Gera's continued work for Platform after each of these incidents and his lack of formal complaints about these matters meant that even if there had been repudiatory conduct by Platform (and the Authority finds there was not), Mr Gera had subsequently affirmed his employment.

Findings

[83] Platform did not fundamentally breach a material term and condition of Mr Gera's employment that made it reasonably foreseeable he would not continue working in such circumstances. There was also no course of conduct by Platform designed to induce him to resign. Nor was not asked to resign.

[84] The Authority finds that the initiative for the ending of the employment came from Mr Gera. He suggested that he "*give notice*". When the notice was accepted, he did not dispute that or attempt to rescind it. He could have asked to be put back on the list of people who would receive offers of shifts, but he did not do so. That was his choice to make.

[85] The Authority was not satisfied on the balance of probabilities that Mr Gera's employment ended due to a dismissal. The Authority concluded that his resignation was a genuine and voluntary resignation, as per his written resignation on 12 October 2020.

[86] Mr Gera's unjustified dismissal grievance does not succeed, so there is no issue as to remedies.

What penalties should be imposed on Platform for its breaches of ss 64 and 65 of the Act?

[87] Section 133A of the Act sets out the mandatory factors that the Authority must consider when assessing penalties. The full Employment Court in *Labour Inspector v Preet* set out a four-step process for the Authority to use when assessing penalties. [4]

Preet Step 1 – nature and number of breaches

[88] Section 64 of the Act requires an employer to retain a signed copy of the employee's employment agreement. Section 65 of the Act governs the form and content of an individual employment agreement.

[89] Platform's omission to provide Mr Gera with a written employment agreement t breached s 65 and the lack of an employment agreement obviously breached s 64 of the Act.

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4 [2016] NZEmpC 143.

[90] Platform engaged in one breach of s 64 of the Act and one breach of s 65 of the Act. Both breaches related to the failure by Platform to meet its obligations under the Act regarding Mr Gera's employment agreement.

Potential maximum penalties

[91] Under a s 64(4) of the Act an employer that fails to retain a signed copy of an employee's individual employment agreement, or of the employee's individual terms and conditions of employment, is liable to a maximum potential penalty of up to $20,000 for an entity or up to $10,000 for an individual.

[92] Section 65(4) of the Act provides that an employer that fails to comply with the requirements relating to the form and content of an individual employment agreement, which has to be in writing and which must include the matters identified in s 65(2) of the Act, is liable to a maximum potential penalty of up to $20,000 for an entity or $10,000 for an individual.

[93] The maximum penalty for each breach is $20,000 per breach, so the maximum potential penalties in this matter are $40,000.

Globalisation

[94] It is appropriate to globalise these penalties because they are very similar employment agreement related breaches. The two potential penalties have therefore been globalised into one breach of the Act for the purposes of imposing penalties in this matter. The maximum potential penalty for the one globalised breach is therefore reduced to $20,000.

Preet Step 2 – provisional starting point

[95] Having regard to the factors set out in s 133A of the Act, the appropriate penalty should be $2,000 as a provisional starting point for the penalty in this matter.

[96] A penalty at that level takes into account the object stated in s 3 of the Act, the nature and extent of the breach which the Authority considered was the lower end of the scale, the fact that the breach was inadvertent, and that Mr Gera has been compensated by an award of distress compensation for the breaches that occurred.

[97] Mr Gera was not a vulnerable employee and the circumstances involved in the breach were that a number of people were onboarded with Platform at the same time. They all filled

out induction documentation as a group so it is possible the volume of applications resulted in document control problems arising on the induction evening.

[98] Platform has not been found by the employment institutions to have engaged in such breaches previously. It is therefore the first penalty that has been imposed on it for a breach of this nature.

Severity of breach

[99] This was not a severe breach. There was no attempt by Platform to exploit Mr Gera or to derive an inappropriate benefit for itself.

[100] Platform's induction material recorded that its casual employees were to sign an employment agreement. Platform's evidence was that normally occurred but due to human error it had not occurred in Mr Gera's case. This was a breakdown in processes.

[101] The provisional starting point, based on the severity of the breaches, for assessing penalties is $2,000.

Aggravating factors

[102] There are no aggravating factors involved in the breaches that occurred.

Mitigating factors

[103] Mitigating factors include that the documentation Mr Gera signed when he expressed an interest in employment by Platform referred to the fact that he would be given a casual employment agreement.

[104] The parties also operated without incident for more than four years before the lack of a written employment agreement came to Mr Gera's attention in mid-2020.

[105] As soon as Platform realised it did not have a written employment agreement on file for Mr Gera, it acted promptly to address that. The template Platform sent Mr Gera accurately recorded the terms of his employment.

[106] Since Mr Gera lodged his statement of problem Platform has undertaken a comprehensive review of its employment documentation. It has upgraded its systems, by

digitalising them to avoid problems arising if agreements are lost or misplaced. A manual review of all employee files was conducted and any problems that were discovered were fixed.

Preet Step 3 – ability to pay penalty

[107] There is no suggestion that Platform does not have the means to pay a penalty.

Preet Step 4 – proportionality of penalty

[108] The Authority has applied the proportionality or totality test to ensure that the amount of the penalty is just in all the circumstances. It was satisfied that it was.

[109] To do that, the Authority stood back and assessed whether the final penalty of $2,000 was proportionate to the original breaches and whether it would be likely to be paid if ordered against Platform. The Authority has also considered whether a penalty at this level is broadly consistent with penalties imposed in other such cases.

[110] Platform is therefore ordered to pay a penalty of $2,000 in total for its breaches of ss 64 and 65 of the Act.

Should some or all of the penalty imposed be paid to Mr Gera personally instead of the Crown?

[111] Section 136 of the Act enables the Authority to order that any part of a penalty may be paid to any person. The aim of a penalty is to deter future breaches and to publicly denounce those who have breached their employment law obligations.

[112] There is a broad public interest in deterring those who may be inclined to do so from breaching their employment law obligations. In recognition of that broader public interest, it is appropriate for $1,000 to be paid to the Crown bank account.

[113] The remaining $1,000 of the total penalty imposed is to be paid to Mr Gera personally to recognise that he has gone to the trouble and expense of bringing this breach to the Authority's attention to enable it to be addressed, both for his benefit and for the broader public good.

[114] Within 28 days of the date of this determination, Platform is ordered to pay the penalty of $1,000 to Mr Gera personally and $1,000 to the Crown bank account.

What, if any, costs and disbursements should be awarded?

[115] Mr Gera represented himself so there is no issue as to legal costs. However, as the successful party he is entitled to be reimbursed his filing fee.

[116] Platform is therefore ordered to pay Mr Gera $71.56 for his filing fee within 28 days of the date of this determination.

Summary of outcome

[117] The Authority makes the following findings and orders:

(a) Platform breached s 64 of the Act because it failed to retain a signed copy of Mr Gera's individual employment agreement.

(b) Platform breached s 65 of the Act because it failed to provide Mr Gera with a written employment agreement at all.

(c) Platform's failure to comply with the s 64 and s 65 requirements of the Act breached its good faith obligations under s 4(1A)(b) of the Act.

(d) No penalty is payable for this breach of good faith, because the requirements of s 4A of the Act were not met.

(e) Mr Gera was employed in March 2016 as a permanent casual employee who had no fixed or set hours of work. He was employed to work on a casual 'as required basis'. This was not a 'zero hours' employment situation because he was not required to accept any offer of employment that was Platform made.

(f) Mr Gera was not promoted into a Supervisor role in January 2020.

(g) Mr Gera is entitled to be paid duplicate annual holiday arrears of $692.28. This is to be paid to him within 28 days of the date of this determination.

(h) Platform's breaches of s 64 and s 65 of the Act unjustifiably disadvantaged Mr Gera.

(i) Within 28 days of the date of this determination, Platform is ordered to pay Mr Gera $3,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of the unjustified disadvantage he suffered arising from him not having a written employment agreement.

(j) Mr Gera was not constructively dismissed. Mr Gera's employment ended because he resigned in writing on 12 October 2020. Accordingly, Mr Gera's unjustified dismissal claim does not succeed.

(k) Platform has been ordered to pay a total globalised penalty of $2,000 for its breaches s 64 and s 65 of the Act.

(l) Within 28 days of the date of this determination, Platform is ordered $1,000 of the penalty imposed on it to the Crown bank account with the remaining $1,000 of the penalty to be paid to Mr Gera personally.

(m) Within 28 days of the date of this determination, Platform is ordered to reimburse Mr Gera $71.56 for his filing fee.

Orders

[118] Within 28 days of the date of this determination, Platform is ordered to pay:

(a) Mr Gera $4,763.84, consisting of;

(i) $692.28 duplicate annual holiday pay;

(ii) $1,000 partial penalty that was imposed on it;

(iii) $3,000 distress compensation;

(iv) $71.56 to reimburse his filing fee;

(b) The Crown bank account $1,000 of the total penalty that has been imposed on it.

Rachel Larmer
Member of the Employment Relations Authority