IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 360
3144464

BETWEEN	ETE REWHA, SMITHY BARTON, ASACIA REWHA LAKAU, OCEANIA TAIRAKENA BARTON Applicants
AND	SIMPLY GIRLS PAINTERS AND DECORATORS LIMITED Respondent

Member of Authority:	Pam Nuttall
Representatives:	Carleton Mateer for the Applicants Katherine Courtenay-Roe for the Respondent
Investigation Meeting:	26 and 27 May 2022 by AVL
Submissions received:	3 June 2022 from the Applicants 14 June 2022 from the Respondent
Determination:	03 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] All four applicants worked for the respondent company, Simply Girls Painters and Decorators Limited (Simply Girls) for varying periods between May 2020 and May 2021. Each of these workers says that they were unjustifiably dismissed and disadvantaged and that Simply Girls breached the Wages Protection Act 1983 (WPA) ss 4 & 5 by not paying the entire amount of wages due to them without deduction.

[2] Also claimed are breaches of ss 64 & 130 Employment Relations Act 2000 (the Act) and breaches of the good faith duty required by s4(1A)(b) of the Act. Penalties are sought for these breaches and for breaches of the WPA.

[3] The respondent denies any unjustified dismissal because it says that the workers were either casual employees or, in the case of Smithy Barton, engaged as an independent contractor. It also disputes that any payments are owing because it says that the workers did not comply with instructions as to how to report their hours of work.

The Authority's investigation

[4] These proceedings have a long history in attempting to engage the respondent. A direction to mediation was not followed, nor was a statement in reply lodged. Although the company was eventually represented at a case management conference, this involvement was not followed by compliance with directions to file an application for leave with a draft statement in reply, nor were documents and witness statements produced according to the agreed timetabling.

[5] When statements and documents did eventuate just prior to the investigation meeting, they were not served on the applicants, which necessitated adjourning the investigation meeting overnight.

[6] The investigation meeting was conducted by AVL (Zoom). Witnesses who attended this Zoom meeting affirmed their written witness statements and answered questions under affirmation from me and the parties' representatives. These witnesses comprised Ete Rewha, Asacia Rewha Lakau and Oceania Tairakena Barton as applicants and Al Haggar for Simply Girls. Katherine Courtenay-Roe, the sole director and shareholder, also gave evidence for the company on the basis that the contents of the statement in reply were affirmed as her witness statement.

[7] Untested evidence was provided in the form of a witness statement from the fourth applicant, Smithy Barton, who was unable to attend the investigation meeting because of illness and one further statement from an apparent client of the company. For Simply Girls, witness statements were lodged from two other employees who did not attend the investigation meeting. Because they were not present at the investigation meeting it was not possible to test the authenticity of these statements or to confirm the

veracity of the evidence they provided. Consequently little weight was accorded to this material.

[8] The representatives also provided closing written submissions: the applicants on 3 June 2022 and Simply Girls on 14 June 2022.

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

The issues

[10] The issues requiring investigation and determination were:

(a) What was the applicants' employment status?

(b) Were the actions of Simply Girls, and how Simply Girls acted, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred?

(c) Were the applicants unjustifiably disadvantaged in their employment?

(d) Were there breaches of the WPA? Are there wage arrears owed?

(e) Were there breaches of s64 and s130 of the Act ?

(f) Was there a breach of the obligation to act in good faith as required by s4 (1A)(b) of the Act?

(g) If Simply Girls' actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

  a. reimbursement for lost wages pursuant to section 123(1)(b) of the Act; and

  b. compensation under s123(1)(c)(i) of the Act?

(h) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicants, or any one of the applicants, that contributed to the situation giving rise to the applicants' grievance?

(i) Should wage arrears and outstanding holiday entitlements be paid?

(j) If there were statutory breaches should penalties be awarded?

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

Background

[11] Ms Rewha was employed by Simply Girls pursuant to a written employment agreement signed on 3 & 4 May 2020. In her witness statement Ms Rewha claims to have been a full time employee, working 40 hours a week from Monday to Friday and sometimes on Saturday as additional hours.

[12] From 11 September 2020 Ms Lakau also began to work for Simply Girls although no written employment agreement was provided or executed. In her witness statement she says that she worked 9 to 5, five days each week from Monday to Friday. A written agreement was subsequently offered on 6 April 2021 but was not signed by Ms Lakau because she disputed the written description of her workplace status.

[13] From 15 October 2020 Ms Barton also began to work for Simply Girls, although again without being offered or signing a written employment agreement. Ms Barton also states that she worked 9 to 5, five days each week from Monday to Friday. She was also offered a written employment agreement which she refused to sign on 6 April 2021. She states that the proposed written agreement purported to change her employment from a full-time role to casual employment.

[14] Ms Lakau and Ms Barton are Ms Rewha's nieces. They worked together at various worksites and Simply Girls' evidence was that Ms Rewha was the Team Leader for this group.

[15] Mr Barton, Ms Rewha's partner, also worked for Simply Girls from January 2021. His witness statement says that he was told he would be paid "under the table", while Simply Girls evidence was that he was engaged as an independent contractor.

[16] Towards the end of April there was an acrimonious staff meeting at which concerns were raised about the quality of work being done by Ms Rewha and her team. This was apparently a general meeting involving other employees and Mr Hagger as well as Ms Courtenay-Roe. It was not conducted as a disciplinary meeting.

[17] Following this meeting, Ms Courtenay-Roe apparently decided to enforce a requirement that only hours notified through a cellphone app specified by Simply Girls would be remunerated. Previously hours worked had been notified by text message or through Facebook messenger.

[18] Simply Girls accepted that Ms Rewha, Ms Lakau and Ms Barton had turned up to work following the staff meeting. Ms Courtenay-Roe's evidence was that she needed someone to finish off the work and was happy to let them do this.

[19] However Ms Rewha, Ms Lakau and Ms Barton were not paid for all the hours they claimed to have worked in the pay cycle 30 April 2021 to 11 May 2021. Simply Girls says this was because hours were not notified through the cellphone app as required. An on-line message dated 1 May 2021 was produced to the effect that "if you don't use the app you won't get paid."

[20] Acrimonious on-line messaging ensued, including claims by the applicants that they did not have data to upload information about the hours worked. Ms Rewha also attempted to remonstrate personally with Ms Courtenay-Roe at her residence on 11 May 2021. Further acrimonious messages subsequently appeared on social media.

[21] Three written warnings were sent by email to Ms Rewha from Ms Courtenay-Roe: one on the 3 May 2021 and two on the 16 May 2021. These warning letters were not issued as a result of any disciplinary process in which Ms Rewha was invited to participate. They set out Ms Courtenay-Roe's view of events about which she is aggrieved and what she believes should happen. The first relates to arguments on two different job sites about non-payment of wages. It states: "I have filed a police report due to your threatening text message and if need be a trespass notice and restraining order…As the employer I would be within my rights for my safety and sanity to terminate your contract."

[22] The second letter, dated 16 May 2021, relates to events on 11 May 2021 at Ms Courtenay-Roe's residence when Ms Rewha attempted to remonstrate with her about unpaid wages. The third letter also dated 16 May 2021 relates to acrimonious messaging on social media. Both these letters reiterate the sentence from the first letter that "[a]s an employer I would be within my rights for my safety and sanity to terminate your contract."

[23] It is Ms Rewha's evidence that when she notified her employer that she would continue to work, even though she had not been paid, she was told that she was trespassed from the job site and was not to return. Ms Lakau and Ms Barton were notified by text message that there was no further work available for them.

Were Ms Rewha, Ms Lakau and Ms Barton working as casual employees?

[24] Simply Girls believed that it could peremptorily dismiss Ms Rewha because she had been employed on a casual employment agreement. It also believed that because Ms Lakau and Ms Barton were casual employees, it was sufficient to notify these two workers that there was no longer any work for them. Simply Girls believed it was not necessary to terminate their employment because it considered they were hired on a day by day basis.

[25] The concept of casual employment refers to a situation of sporadic, occasional or intermittent engagement to work. In this situation a common law 'contract of service' exists between the parties only during each engagement to work. Although there may be some understanding or arrangement between the parties as to the worker's continuing availability to work, these arrangements lack the necessary mutuality of obligation to create ongoing employment relations between the parties.

[26] In *Jinkinson*[1], the court analysed the real nature of the relationship between the parties as required by the definition of "employee" in s6 of the Act in order to establish whether an on-going "contract of service" existed between the parties. The Act provides that the "label" applied to the employment relationship is not sufficient by itself to define this relationship.

[27] Drawing on authorities from previous New Zealand decisions and United Kingdom and Canadian appellate cases, the decision in *Jinkinson* characterises "casual" engagement as occasional, irregular, spasmodic, ephemeral, transitory, unpredictable, unreliable and unforeseen in nature, usually requiring engagement on a call-in basis.

[28] Ms Rewha was the only one of the applicants who had a written, executed individual employment agreement. It was clear from Ms Courtenay-Roe's testimony at the investigation meeting that she mistakenly believed that the written contractual description of Ms Rewha as a casual employee in this agreement was sufficient to define the nature of the employment relationship and that she acted on that belief.

[29] Was that belief objectively justified? The terms of Ms Rewha's written employment agreement provide conflicting indications as to employment status.

[1] *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC) at 233 (*Jinkinson*).

[30] The nature of the agreement is explicitly labelled as casual, and the implications of casual employment are spelled out in the standard terms:

> **Type of employment agreement**
>
> The employee will work on a casual "as required" basis with no expectation of ongoing employment. The employer will give reasonable notice when asking the employee to work, and the employee may choose whether to accept or decline the work. If the offer of work is accepted. the employee must complete it — unless either the employer or the employee ends this agreement.
>
> Each time the employee accepts an offer of work it is considered a new period of employment. The terms of this agreement will apply to each new period of employment unless the employer and employee agree to any changes.

[31] Holiday pay is also provided for on a "pay as you go" basis, but there is provision for other types of leave after the statutory qualifying periods and provision for Kiwisaver deductions and for employer obligations in the event of restructure and redundancy.

[32] Casual employment does not involve any expectation of ongoing work. The worker is simply not offered a new assignment or is not rostered for work. However, this employment document provides for termination for reasonable cause on two weeks written notice and for summary dismissal without notice for serious misconduct. Both these clauses are only relevant to permanent, ongoing employment where dismissal must be justified, in this case either by showing reasonable "cause" or establishing serious misconduct by fair process. The document also makes provision for a restraint of trade clause.

[33] The written employment agreement, then, seems an equivocal guide as to the agreed categorisation of Ms Rewha's employment. The contradictory nature of its provisions is unsurprising however given Ms Courtenay-Roe's evidence that she compiled the document herself from the standard clauses on the Ministry of Business, Innovation and Employment's website employment agreement builder. Her evidence at the investigation meeting indicated that she considered "casual" employment as akin to a form of trial period in which the worker established their competence and reliability, with "permanent" employment being granted as type of reward for suitability by the employer. Ms Courtenay-Roe also confirmed that she regarded permanent or on-going employment as the equivalent of full time employment. The corollary, presumably, would be that being offered less than full time hours indicated a "casual" hiring arrangement.

[34] Given the absence of clear evidence as to any common understanding by the parties of the implications of a "casual" engagement, I must adopt the approach set out by Judge Couch in *Jinkinson* and rather than determining the categorisation of the arrangement between the parties and then inferring from this the particular obligations they had to each other, "a sounder approach is to look at the obligations assumed by the parties and then decide the nature of the relationship created".[2]

[35] The most fundamental obligation, the "irreducible minimum of mutual obligation necessary to create a contract of service", is that the employer had an obligation to offer the employee further work and the employee had an obligation to carry it out.[3]

[36] Looking at the written document as a whole, while it is clear that the contractual At document does contain some terms incompatible with casual employment and that perhaps it does require what *Jinkinson* describes as "some ongoing mutual obligations on the parties",[4] the written agreement does not impose an obligation on Simply Girls to offer Ms Rewha on-going work.

[37] However, when the Simply Girls' records of hours worked and wages paid eventually became available immediately prior to the investigation meeting, it was clear that Ms Rewha had been paid for working for Simply Girls in every pay period from the time she was hired. The number of hours worked in any given pay period fluctuated, but there were only two pay periods where a very small number of hours had been worked. Over the whole year from 4 May 2020 to 30 April 2021 Simply Girls' own records show that Ms Rewha had worked an average of 25 hours per week.

[38] This pattern of work is simply not consistent with the description in *Jinkinson* of casual work as occasional, irregular, spasmodic, ephemeral, transitory, unpredictable, unforeseen in nature and usually requiring engagement on a call-in basis. Clearly there was on-going work to be done and the assumption was that Ms Rewha would be available to do it.

[39] In the investigation meeting when asked why she had allowed Ms Rewha to continue working after the acrimonious staff meeting in late April, Ms Courtenay-Roe

---

[2] At 231.
[3] At 237.
[4] At 236

confirmed that she needed someone to do the work, that she did not have alternative workers and that it took time to train up new workers.

[40] In addition, the evidence provided by Ms Rewha, Ms Lakau and Ms Barton was that although they were ostensibly permitted to refuse work offered, in reality the only acceptable reasons for not being available for work were sickness or bereavement leave. It appeared they believed they were not able to refuse work offered.

[41] On the balance of probabilities, then, it does seem that an expectation of a pattern of at least some hours of regular work each week became established. To that extent I find that the employment agreement between Ms Rewha and Simply Girls had "morphed" into an on-going relationship and could not be characterised as "casual".

[42] Both Ms Lakau and Ms Barton worked for Simply Girls over a shorter period of time and for less consistent hours per week than Ms Rewha. However there was similar reliance on their availability to work when required and an apparent requirement not to refuse work offered without good cause. Again it seems more likely than not that a pattern of on-going expectation of some work being regularly offered and that work being performed developed over time. I find that this expectation is not compatible with a casual work arrangement.

Did Mr Barton work for Simply Girls as an independent contractor?

[43] Because Mr Barton was unable to attend the investigation meeting his witness statement was not questioned and oral evidence could not be elicited. However extensive comment was provided by both Ms Courtenay-Roe for Simply Girls and Mr Haggar. It appeared that Mr Barton was engaged to work on one site where a large amount of sanding work needed to be done and that neither Simply Girls nor Mr Haggar considered that the work had been done to a satisfactory standard. Again, it seemed that Simply Girls believed that it was sufficient to simply label Mr Barton as an independent contractor to establish that as his workplace status.

[44] No record of hours worked or payments made was provided for Mr Barton. The explanation from Simply Girls was that: "Smithy does not have any as he was a sub-contractor who was suppose to send me an invoice for hours worked unfortunately he never sent me an invoice."

[45] From the evidence available to me it seems highly improbable that Mr Barton could be considered to be in business on his own account or that he had any specific marketable skill or expertise to offer Simply Girls. I find on the balance of probabilities that the real nature of the relationship was not that of an independent contractor. It seems that Mr Barton was employed to do a short term task at one particular site for Simply Girls.

[46] However the closing written submission of the applicants' representative do not provide any further argument nor any specific detail as to Mr Barton's claims. Consequently I am not able to consider the grounds for any particular grievance or potential remedies in this determination. Further orders may be sought.

Were Ms Rewha, Ms Lakau and Ms Barton unjustifiably dismissed?

[47] Where a personal grievance has been raised, once the employee has established the fact that a dismissal has occurred, it falls to the employer to discharge the onus that the dismissal was justified. Because I have found that Ms Rewha, Ms Lakau and Ms Barton were not casual employees, the statutory standard for justification must be met. The test set out in s103A of the Act requires the employer to establish objectively that the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[48] In order to meet the statutory test of justifiable dismissal the process followed by Simply Girls in reaching its conclusion to dismiss Ms Rewha, Ms Lakau and Ms Barton must be what a fair and reasonable employer could have done in all the circumstances. The requirements of procedural fairness are not some process separate from determining the reasons for which an employer may dismiss. In relation to dismissal for misconduct the Court has stated that:

> An employer who has failed to give its employee an adequate opportunity of being heard prior to a dismissal…cannot be said to have any valid reason to reach a conclusion adverse to the employee and therefore is treated as if it had not reached it.[5]

[49] Simply Girls did not follow even the minimum requirements of fair process set out in s103A(3) of the Act. Where an employer has concerns about the quality of work done or the behaviour of an employee or a failure to follow lawful and reasonable instruction then a fair and reasonable process is required. Ms Courtenay-Roe's evidence

[5] *Madden v New Zealand Railways Corp* (1991) 2 ERNZ 690 (EmpC).

appeared to suggest that she believed that issuing written warning letters by email, in the absence of any investigation or opportunity to hear and consider the employee on the matter, was in some way complying with fair process requirements.

[50] I find that Simply Girls did not meet the standard of the fair and reasonable employer in its dismissal of these employees and that their dismissal was unjustified.

Were Ms Rewha, Ms Lakau and Ms Barton unjustifiably disadvantaged in their employment?

[51] No separate grounds for a personal grievance for unjustified disadvantage were advanced to me during my investigation. Issues which may have been considered as disadvantaging these litigants have been presented instead as statutory breaches and have been investigated as such.

[52] Accordingly I do not find any separate grievance for unjustified disadvantage has been made out.

What remedies are available to Ms Rewha, Ms Lakau and Ms Barton under s123 of the Act?

[53] I have found that Ms Rewha, Ms Lakau and Ms Barton were unjustifiably dismissed. Consequently they are entitled to have remedies of reimbursement of lost wages and payment of compensation considered.

[54] Ms Rewha has provided evidence of action taken to mitigate her loss of wages. She claims four weeks lost wages calculated on weekly earnings averaged over the period of employment, which I accept. I award Ms Rewha the sum of $2,150.38 in lost wages.

[55] Ms Lakau has provided evidence of action taken to mitigate her loss of wages. She claims eight weeks lost income calculated on weekly earnings averaged over the period of employment, which I accept. I award Ms Lakau the sum of $3,922.56 in lost wages.

[56] Ms Barton has provided evidence of action taken to mitigate her loss of wages. She claims seven weeks lost income calculated on weekly earnings averaged over the period of employment, which I accept. I award her $2,593.69 in lost wages.

[57] I find all three employees are also entitled to compensation for humiliation, loss of dignity and injury to feelings. They have all commented on their struggle to manage financially without income and on the stress and humiliation which the situation has caused them. The injustice of being dismissed without fair process is corrosive of human dignity and a sense of self-worth and must be fairly compensated.

[58] I award Ms Rewha $9,000 in compensation under all three heads of compensation under s123(1)(c)(i) of the Act.

[59] I award Ms Lakau $9,000 in compensation under all three heads of compensation under s123(1)(c)(i) of the Act.

[60] I award Ms Barton $9,000 in compensation under all three heads of compensation under s123(1)(c)(i) of the Act.

Contribution?

[61] Interactions between Ms Rewha and Ms Courtenay-Roe in the final weeks of Ms Rewha's employment appear to have been marked by a high degree of acrimony. However text and social media messages put in evidence have not been disclaimed by Ms Rewha and are highly intemperate in tone. However much she may have considered these responses to have been provoked, I find that these messages made a contribution to the situation giving rise to her dismissal. Accordingly her award of compensation is reduced from $9,000 to $8,000.

Were there breaches of the Wages Protection Act 1983?

[62] Ms Rewha, Ms Lakau and Ms Barton state that they were not paid for hours worked in the pay cycle 30 April 2021 to 11 May 2021.

[63] Ms Courtenay-Roe confirmed under questioning at the investigation meeting that she had circulated a social media message to Simply Girls' workers that if the timesheet cell phone app was not used to log hours the employees would not get paid. She agreed that she considered it was the employees' responsibility to prove that they have done the hours worked.

[64] The relevant provisions of the WPA are:

> **4 No deductions from wages except in accordance with Act**

> …, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.
>
> **5 Deductions with worker's consent**
>
> (1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—
>
> (a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or
>
> (b) on the written request of the worker.
>
> (1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.

[65] The responsibility for keeping wages and time records rests with the employer under s130 of the Act. The company had been prepared to accept text messages or social media notification of hours worked until the final pay period for which these workers were employed. Simply Girls asserts that its instructions as to notifying hours by cell phone app were not followed and that this justified it withholding wages. However, the WPA does not provide an exception that would allow the employer to withhold payment of wages in these circumstances nor was specific written consent given in relation to these deductions. I find that the WPA has been breached.

Was there a breach of s130 of the Act?

[66] Simply Girls has not complied with requests from its former employees as required under s130(2) of the Act to:

> provide that employee…immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.

[67] Records were requested on 18 May 2021. They were not produced until 22 May 2022. This matter is not disputed between the parties. The failure to produce these records immediately has prejudiced the applicants' ability to bring an accurate claim. Under s132 (2) of the Act I may accordingly accept as proved all claims made by the employees in respect of wages actually paid and hours, days and times worked.

[68] Since records of hours worked were not provided immediately, Ms Rewha, Ms Lakau and Ms Barton may claim unpaid wages for the pay cycle 30 April 2021 to 11 May 2021 based on the average wages received during their employment.

[69] Consequently I award the following payments from Simply Girls to these employees within 28 days of the date of this Determination:

Ms Ete Rewha	$1,075.19
Ms Asacia Rewha Lakau	$980.64
Ms Oceania Tairakena Barton	$841.05

Were there breaches of ss 64 of the Act?

[70] Written employment agreements were not offered to Ms Lakau and Ms Barton when they began to work for Simply Girls. This assertion was not contested between the parties. Under s64 of the Act the requirement is that employment agreements are retained by the employer and that copies must be provided to a requesting employee "as soon as is reasonably practicable". This requirement applies also to intended agreements, even if the employee has not signed them or agreed to any terms and conditions.

[71] A request for copies of employment agreements was made to Simply Girls on 18 May 2021. The unsigned copies of documents offered to Ms Lakau and Ms Barton on 6 April 2021 but not executed by them were provided to the Authority on 9 May 2022. The signed copy of an employment agreement between Ms Rewha and Simply Girls was not provided to the Authority until 27 May 2022.

[72] This tardy provision of requested documents is a breach of s64(3) of the Act.

Was there a breach of the obligation to act in good faith as required by s4(1A)(b) of the Act?

[73] The statutory obligation set out in this provision:

> requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[74] Both parties in this situation have exhibited behaviour which is not active and constructive in establishing and maintaining a productive employment relationship. This is a duty which cuts both ways. At times the behaviour of both parties has been such that it could not be described as responsive and communicative. Both parties have breached the obligation to act in good faith set out in s4(1A)(b) of the Act.

Are there entitlements to public holidays?

[75] I have found that Ms Rewha, Ms Lakau and Ms Barton were not employed by Simply Girls on a casual basis. These employees have claimed entitlement to be paid for all the public holidays which have fallen within the period during which they were employed by Simply Girls.

[76] The Holidays Act 2003 (HA) specifies that where an employee does not work on a public holiday, payment depends on the day being one which would otherwise be a working day for the employee. Wage and time records eventually supplied to the Authority do not document the number of hours worked each day in a pay period and the pay for those hours, as required under s130(1)(g) of the Act and s81(2)(c) HA. Consequently I am unable to establish if there is any regular pattern of days worked which would establish if any particular public holiday would otherwise be a working day for the employees. I find that there has been a failure to comply with s130(1)(g) of the Act and s81(2)(c) HA and that failure has prevented the applicants from bringing an accurate claim.

[77] Consequently I am entitled to accept the applicants' statements as to public holiday leave actually taken by them under s83(4) HA. The evidence elicited at the investigation meeting established that public holidays were not worked and that these employees had not been asked to work on public holidays. I accept the claim that these days were taken as public holiday leave.

[78] The payment for these public holidays on which the employees did not work is specified in s 49 HA to be not less than the employee's relevant daily pay or average daily pay for that day. However, because Simply Girls has not documented the number of hours worked each day in a pay period, I am unable to calculate payment on this basis. Ms Rewha, Ms Lakau and Ms Barton have claimed payment for unpaid public holidays on an average daily hours basis. I have awarded payment accordingly:

[79] Ms Rewha 10 public holidays $1076.00

Queen's Birthday, Labour Day Christmas Day, Boxing Day in 2020: New Year's Day, Day after New Year's Day (observed), Auckland Anniversary, Waitangi Day (observed) Good Friday, Easter Monday 2021.

Ms Lakau 9 public holidays $882.00

Labour Day Christmas Day, Boxing Day in 2020: New Year's Day, Day after New Year's Day (observed), Auckland Anniversary, Waitangi Day (observed) Good Friday, Easter Monday 2021.

Ms Barton 9 public holidays $667.80

Labour Day Christmas Day, Boxing Day in 2020: New Year's Day, Day after New Year's Day (observed), Auckland Anniversary, Waitangi Day (observed) Good Friday, Easter Monday 2021.

Penalties?

[80] Penalties for breaches of good faith are sought because Simply Girls failed to act as a fair and reasonable employer. The finding that Ms Rewha, Ms Lakau and Ms Barton were unjustifiably dismissed is the result of Simply Girls not meeting the statutory test for justification, in that it failed to act as a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Remedies awarded to the applicants are sufficient. Given the nature and extent of the breaches, a penalty in my view would be disproportionate particularly given the finding of failures of good faith behaviour by both parties.

[81] Penalties are also sought for breaches of ss 64 and 130 of the Act, of ss 81 & 82 HA and ss 4 & 5 WPA. These breaches relate to:

a. the failure to provide copies of employment agreements and intended agreements; and

b. the failure to provide timely information about their employment to the applicants with respect to hours and days worked and wages paid. This failure impeded the applicants' ability to prepare for the Authority's investigation meeting; and

c. withholding payment of wages in the pay cycle 30 April 2021 to 11 May 2021.

[82] The primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations owed. Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.[6]

[6] *Xu v McIntosh* [2004] 2 ERNZ 448 at 464.

[83] When assessing penalties I have had regard to the factors set down in s133A of the Act. The Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited*[7] and further refinements have been subsequently made by the Court, including in *Nicholson v Ford*.[8]

[84] The failure to provide timely information as to the applicants' employment agreements and as to hours and days worked was intentional and impeded the applicants' ability to provide an accurate claim to the Authority. Information was eventually provided only after the Authority's reiterated requirement that Simply Girls respond and engage in the Authority's investigation. The inadequacy of the record keeping and tardiness in providing it impacted on both the applicants' claims to public holiday pay and the quantum owing in unpaid wages for the final pay cycle of their employment. Penalties for these failures to keep and produce records have been globalised across the Act and the HA and relate to three employees. I award penalties of $6,000 to be paid by Simply Girls. Because these breaches have impeded the applicants' ability to present accurate claims to the Authority, I direct that 50% of the award is paid to Ms Rewha, Ms Lakau and Ms Barton.

[85] Penalties are also sought for breaches of the WPA in relation to three of the applicants. I award penalties of $2,000 against Simply Girls in relation to these breaches.

[86] The applicants' closing submissions requested that penalties also be awarded against Ms Courtenay-Roe personally. Penalties for breaches of the WPA are available against every person involved in the contravention or failure to comply with provisions of the WPA but are only recoverable by a Labour Inspector under s13(2) of the WPA. Accordingly I am unable to award penalties against Ms Courtenay-Roe in relation to the WPA breaches.

[87] Inclusion of Ms Courtenay-Roe as a second respondent had not previously been sought in these proceedings. Simply Girls has not commented on this request in its written closing statement. As Ms Courtenay-Roe is not a party to these proceedings I make no findings against her personally. However Ms Courtenay-Roe would fall within the definition of "a person involved in a breach of employment standards" under s142W of the Act. Accordingly under s142Y of the Act the applicants would be able to recover

---

[7] *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC Christchurch 143.

[8] *Nicholson v Ford* [2018] NZEmpC 132.

from her personally any default in payment of wages or other money payable due to a breach of employment standards if there is a default in payment by Simply Girls. The Authority grants leave for the applicants to recover any such arrears of wages or money owing in these circumstances.

Counterclaim/ set-off?

[88] Simply Girls has filed a statement with its closing submissions as to a debt for a car loan purchased from KSA Commercial Limited (a company associated with Mr Haggar) on 25 January 2022. Although repayments of this loan were arranged as deductions from Ms Rewha's wages, this matter is not currently before the Authority. Lodging a counterclaim is the appropriate procedure should Simply Girls choose to bring this matter to the Authority's attention.

Costs

[89] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect.[9] Among other things, the practice note reaffirmed the Authority's use of the notional daily tariff (currently $4,500 for the first day of any matter and $3,500 for any subsequent day of the same matter) as the starting point in assessing costs.[10] Various factors and principles may have the effect of increasing or decreasing the amount of costs awarded.

[90] One of these principles is that costs are modest. Principles also include that costs are reasonable and that they normally follow the event. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct. However it may be reasonable that an uplift from the daily tariff approach may be considered where there is a needless increase in the parties' costs.

[91] Following the daily tariff approach, a starting point of a two day investigation meeting is reasonable because of the forced adjournment of the first day's meeting (as noted above at [5]). The applicants' closing written submissions ask that costs be awarded on this basis.

---

[9] <www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.
[10] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820; *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

[92] Accordingly Simply Girls is ordered to pay the applicants the sum of $8,000.00 towards their legal costs.

Summary of orders

[93] Simply Girls Painters and Decorators Limited is to pay the following amounts within 28 days of the date of this determination:

To Ms Ete Rewha:

$1,075.19 for unpaid wages
$1076.00 for unpaid public holidays
$2,150.38 in lost wages under s123(1)(b) of the Act
$8,000.00 in compensation under s123(1)(c)(i) of the Act

To Ms Asacia Rewha Lakau:

$980.64 for unpaid wages
$882.00 for unpaid public holidays
$3,922.56 in lost wages under s123(1)(b) of the Act
$9,000.00 in compensation under s123(1)(c)(i) of the Act

To Ms Oceania Tairakena Barton:

$841.05 for unpaid wages
$667.80 for unpaid public holidays
$2,593.69 in lost wages under s123(1)(b) of the Act
$9,000.00 in compensation under s123(1)(c)(i) of the Act

To the Employment Relations Authority for payment by the Authority into the Crown account:

$2,000.00 in penalties
$6,000.00 in penalties. 50% of this award of $6,000.00 is to be paid to Ms Rewha, Ms Lakau and Ms Barton.

To the applicants jointly:

$8,000.00 in costs.

Pam Nuttall
Member of the Employment Relations Authority