IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 363
3150822

BETWEEN	MARLON BATISTA DOS SANTOS Applicant
AND	SOUTHLAND FOOD SERVICES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Buckingham, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	2 May 2022 in Queenstown
Submissions Received:	26 May 2022 from the Applicant
Date of Determination:	5 August 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marlon Batista dos Santos was employed by Southland Food Service Limited (SFS) from March 2020 as a delivery driver. The employment was discontinued during the Covid-19 lockdown in March 2020, but resumed in June 2020. SFS offered and Mr dos Santos accepted a new employment agreement in June 2021.

[2] Mr dos Santos's 3 March 2020 work visa, originally due to expire in March 2021, was extended to September 2021 due to the Covid-19 lockdowns.

[3] Mr dos Santos suffered a non-work accident on 17 July 2021 and was off work from then on ACC. Although he was off work on ACC, Mr dos Santos applied for a new work visa on 18 July 2021. It was granted on 6 August 2021. SFS apparently became concerned that information Mr dos Santos had included in his new visa application might affect its future ability to hire migrant labour. The company sought to meet with Mr dos Santos, but he preferred to meet once Covid-19 restrictions reduced to Level 2.

[4] Mr dos Santos instructed a representative (Mr Buckingham) who emailed SFS on 10 September 2021 asking for details of SFS's concern and other information ahead of any meeting. SFS responded, without providing any of the requested information. The representative repeated the information request. SFS replied that it had requested a meeting 5 weeks earlier and it needed to know when Mr dos Santos was returning to work from ACC. SFS instructed the representative not to email them again. At the same time, SFS sent an email directly to Mr dos Santos stating that its concern was now resolved. SFS asked Mr dos Santos to confirm when he would return to work.

[5] The representative replied to SFS's message to Mr dos Santos and alleged that the company's failure to engage with the representative undermined SFS's employment relationship with Mr dos Santos.

[6] The present application was lodged on 14 September 2021, shortly after these communications. It sought: a direction to mediation; penalties; arrears of wages and holiday pay; a direction that SFS provide time and wages records; a direction that SFS provide the employment agreement and personal file; a determination that SFS's refusal to engage with the authorised representative gave rise to an unjustified disadvantage personal grievance for Mr dos Santos; in the alternative, a determination that SFS's failure to pay wages and holiday pay and to engage with the representative amounted to the respondent repudiating the employment agreement, giving rise to an unjustified dismissal personal grievance; compensation for a personal grievance pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and costs.

[7] SFS did not lodge a statement in reply and did not participate in the case management conference.

[8] Following the case management conference, I set out the issues for investigation, particularly so SFS understood what it faced. It is not necessary to repeat that in full, but the issues can be summarised for present purposes as:

(a) Are there any arrears of wages?

(b) Are there any arrears of holiday pay?

(c) Is SFS liable for penalties for breach of agreement, breach of the Holidays Act 2003 and not providing time and wage records?

(d) Does Mr dos Santos have a personal grievance against SFS?

The Authority's investigation

[9] SFS did not participate in the Authority's investigation. I am satisfied from the file that the application, directions and notice of meeting were all served on the company. However, it did not lodge a statement in reply. No one was available to participate in the case management conference when a call was made to the company phone number. It did not respond to the Authority's directions dated 24 January 2022. It did not appear during the investigation meeting.

[10] SFS was directed to produce wages and times records and employment agreements with its statement in reply, to defend the application. It did not.

[11] A direction to mediation was not made because it would not have contributed constructively to resolving the problem, given the lack of engagement by SFS.

[12] At the investigation meeting, I heard evidence from Mr dos Santos. Mr Buckingham made submissions in support of the claims.

[13] Following the investigation meeting, Mr Buckingham lodged a copy of the 2020 letter of offer and employment agreement, as requested by me. It was copied to SFS for any comment. There was no response.

[14] I need not set out a record of all the evidence I heard or summarise all the submissions made. I will state the relevant facts, state and explain findings on legal issues, express my conclusions on issues necessary to dispose of the matter and specify any orders in response to the substantive claims made.

Are there arrears of wages?

First period of employment

[15] There is an offer letter and a signed written employment agreement for Mr dos Santos to be employed starting on Monday 2 March 2020 as a delivery driver based in Queenstown. The position was permanent and fulltime with a minimum of 40 hours per week at $25.00 per hour. Wages were payable fortnightly in arrears by direct credit. Mr dos Santos's evidence, which I accept, is that he started work on 5 March 2020.

[16] A Covid-19 Alert level system was introduced in New Zealand on 21 March 2020. New Zealand was placed at Alert Level 2, it was moved to Alert Level 3 on 23 March 2020 and to Alert Level 4 just before midnight on 25 March 2020. SFS was affected by these rules. The Government also introduced an employer wage subsidy to assist businesses to retain people in employment.

[17] There were txt messages between Mr dos Santos and a director of SFS (Mr Devlin) on 27 March 2020. Mr Devlin confirmed that SFS had applied for the wage subsidy. On 28 March Mr Devlin advised that SFS had confirmation of the subsidy and that it would pay Mr dos Santos $585.00 per week. Mr dos Santos asked and was told that it would be for 12 weeks but he did not need to report for work. Mr dos Santos's evidence is that on 3 April 2020 he then received a call from Mr Devlin who told him that SFS had decided to close its Queenstown branch and end Mr dos Santos's employment. Mr Devlin told Mr dos Santos that SFS would use the wage subsidy in its Invercargill branch or return it to the Government.

[18] The txt exchanges prior to the dismissal did not amount to a contractually valid variation of the employment agreement. The original employment agreement applied until the employment was ended.

[19] The written employment agreement required SFS to follow a "good faith restructuring process" before deciding that the employee's role was no longer needed. The employee could then be given notice of dismissal in the event of a redundancy.

[20] Mr dos Santos seeks payment of the Government wage subsidy for the full 12 weeks. However, on the evidence available I find that SFS terminated Mr dos Santos's employment on 3 April 2020. Section 113 of the Employment Relations Act 2000 limits an employee's right to challenge a dismissal to a personal grievance claim. Exceptions to that rule allow actions for unpaid notice, wages or money owed prior to the dismissal or other money payable on dismissal. However, the present claim for the remainder of the promised but unpaid Covid-19 wages subsidy does not fit into any of these exceptions. Mr dos Santos did not raise a personal grievance about the 3 April 2020 dismissal within time, so the claim for the full 12 weeks' wage subsidy for the period following his dismissal cannot succeed.

[21] Under the employment agreement, Mr dos Santos was entitled to payment of two weeks' notice of dismissal, a total of $2,000.00 (gross). Mr dos Santos was also contractually entitled to wages of at least $1,000.00 per week from Thursday 5 March 2020 until he was dismissed on Friday 3 April, a period of four weeks and one day. Mr dos Santos should have received wages for that period of at least $4,200.00 (gross). Together with payment for two weeks' notice, Mr dos Santos should have been paid under his employment agreement at least $6,200.00 (gross) for his first period of employment.

[22] There is a payslip in evidence that shows payment to Mr dos Santos of 2 x $585.00 totalling $1,170.00 (gross) for the period ending 29 March 2020. SFS did not explain the basis of the payment but it is at the rate of the Covid-19 wage subsidy. The payslip records year to date taxable earnings as $1,170.00. Also in evidence is a copy of a payment into Mr dos Santos's bank account on 15 April 2020 from "Crisp" of a further $1,170.00. "Crisp" is the trading name for SFS. Although the payslip for this deposit is not in evidence, I take the payment as being a second wage subsidy payment to Mr dos Santos by SFS. I treat the

payslip payment and deposit payment as part-payment by SFS of wages due to Mr dos Santos under the employment agreement. In total, SFS paid Mr dos Santos $2,340.00 for the first period of employment.

[23] I find that Mr dos Santos was paid $3,860.00 less than was payable to him under his employment agreement for this first period of employment. Orders against SFS will include this amount of arrears.

Second period of employment

[24] On or about 30 May 2020 Mr dos Santos was re-employed by SFS. SFS apparently provided a written employment agreement at the time, but Mr dos Santos did not sign and return it. However, Mr dos Santos in a txt exchange with Mr Devlin on 7 June 2020 agreed to work for $20.00 per hour.

[25] There are several later dated payslips in evidence: 8/11/2020, 17/2/2021 and 9/5/2021. They show payment at $20.00 per hour.

[26] I accept Mr dos Santos's evidence that he felt he had no other choice, but I must find that $20.00 per hour was the agreed rate for work when Mr dos Santos was reemployed from about June 2020.

[27] The evidence falls short of establishing grounds of unfair bargaining under s 68 of the Employment Relations Act 2000.

[28] No arrears of wages are established for this second period of employment.

Third period of employment

[29] The June 2020 agreement to work at $20.00 per hour (rather than $25.00 per hour) was accepted by Mr dos Santos as a temporary arrangement.

[30] SFS advertised for a delivery driver based in Queenstown in April 2021.

[31] On 22 June 2021 SFS wrote to Mr dos Santos offering him the advertised fulltime position, at the rate of $25.50 per hour. There is a written employment agreement of the same

date to that effect. SFS also completed an immigration application form for Mr dos Santos describing the offer of fulltime employment at $25.50 per hour Monday to Saturday. The new hourly rate was set to facilitate Mr dos Santos's new visa application, but the offer was not conditional on that visa application. The only condition was that the employee had to have the legal right to work in New Zealand, which Mr dos Santos already had. The letter of offer and the employment agreement did not expressly set a start date. In the absence of agreement about a later start date, I find that the new terms of employment including the hourly rate of $25.50 applied from 22 June 2021.

[32] In evidence are payslips for the fortnights ending 4 July 2021 and 18 July 2021. The payslips show that SFS continued to pay Mr dos Santos at the rate of $20.00 per hour. They record that Mr dos Santos worked 169.25 hours over the four weeks. By paying Mr dos Santos at $20.00 per hour, SFS paid him $930.88 less than he was entitled to be paid under the terms of the June 2021 employment agreement. Orders against SFS will include that sum.

[33] Mr dos Santos injured himself in a non-work accident on 17 July 2021. He did not return to work, so no further arrears for time worked would be due from SFS.

Payment for sick leave

[34] Payslips for 15 August 2021, 29 August 2021 and 12 September 2021 record payment for five days sick leave, paid at 8 hours by $20.00 per hour, totalling $160.00 per day.

[35] SFS eventually paid Mr dos Santos for his first week's absence from work following the non-work injury. Mr dos Santos had earlier requested payment for his first week's absence. The employment agreement provided for up to five paid days off a year (accumulative) due to illness or injury. By mid-July 2021, Mr dos Santos had completed more than a year's continuous service following his re-employment. Whether by reference to the employment agreement or the statutory entitlement at s 63 of the Holidays Act 2003, Mr dos Santos was entitled to paid sick leave for his first week's absence due to injury.

[36] Under s 71 of the Holidays Act 2003, sick leave must be paid at relevant daily pay or at average daily pay for each day. Given the absence of wage and time records, I am not able to assess average daily day. Relevant daily pay defined by s 9 of the Holidays Act 2003 is

ascertainable. If Mr dos Santos had worked on the days concerned, he should have received 8 hours pay at $25.50 per hour, a total of $204.00 per day.

[37] SFS paid Mr dos Santos $44.00 per day less than he was entitled to receive. Arrears of sick pay of $220.00 for the week's absence are established. Orders against SFS will include that amount.

Are there arrears of public holiday pay?

[38] There is a claim for arrears of holiday pay for Labour Day 2020 (Monday 26 October), Waitangi Day 2021 (Monday 8 February) and ANZAC Day 2021 (Sunday 25 April). Monday was a day that would otherwise have been a working day for Mr dos Santos. Mr dos Santos requested annual holidays on working days adjacent to Labour Day and Waitangi Day, expecting that he would also be paid for Labour Day and Waitangi Day as public holidays.

[39] I note the employment agreement provided that Mr dos Santos would work if required, but agreed not to work on public holidays unless asked to do so. If this provision was intended to mean that these Mondays were not otherwise working days for Mr dos Santos, it would be of no effect.[1]

[40] Payslips show SFS paid Mr dos Santos for Labour Day and Waitangi Day, but recorded it as annual leave. Mr dos Santos should have been paid both of these days as public holidays, not as annual leave. There will be a shortfall in holiday pay paid to Mr dos Santos caused by the wrong classification. Orders against SFS will include two days annual holidays.

[41] 25 April 2021 fell on a Sunday. Sunday was not an otherwise working day for Mr dos Santos, so the observance of the public holiday was transferred to Monday 26 April. Mr dos Santos worked on Monday 26 April, as usual. The payslip for the fortnight ending 9 May 2021 does not include half-time extra payment for time worked on 26 April. I accept Mr dos Santos's evidence that he usually worked at least 8 hours. He is entitled to arrears of $80.00 pay for work on the public holiday. Mr dos Santos was also entitled to an alternative holiday,

[1] Holidays Act 2003, s 6.

having worked on the day observed as the public holiday. Orders against SFS will include $80.00 plus one alternative day.

Are there arrears of final holiday pay?

April 2020

[42] Mr dos Santos was not paid holiday pay when SFS terminated his employment on 3 April 2020.

[43] The exact date that Mr dos Santos was re-employed by SFS is uncertain, but Mr dos Santos outlined events in emails to Mr Buckingham dated 23 & 26 May 2020, without reference to being re-employed. I take from that and the 7 June 2020 txt exchange that the re-employment was more than a month after the 3 April 2020 dismissal (even if the required notice period was counted). As a result, Mr dos Santos's re-employment does not engage the presumption of continuous employment provided by s 85 of the Holidays Act 2003.

[44] When dismissed on 3 April 2020, Mr dos Santos should have been paid holiday pay in accordance with s 23 of the Holidays Act 2003. On gross of $6,200.00,[2] Mr dos Santos should have received $496.00 gross holiday pay. Orders against SFS will include this amount of arrears.

October 2021

[45] Mr dos Santos resigned by notice on 22 October 2021 without returning to work after the July 2021 accident. At that point, Mr dos Santos was entitled to payment for the untaken portion of four weeks' annual holidays that he became entitled to in June 2021 together with 8% of his gross earnings since then.

[46] The payslip for when Mr dos Santos last worked (period ending 18 July 2021) records 17.00 days "ANNUAL LEAVE O/S FROM LAST YEAR" and 3.00 days "ANNUAL LEAVE ACCRUED THIS YEAR", so 20.00 days "ANNUAL LEAVE TOTAL". The calculation appears to conflate the entitlement for annual holidays as at June 2021 and an accrual for the part-year at 8% on gross earnings thereafter. I am not assisted by the failure of

[2] See paragraph [21] above.

SFS to produce time and wage records or to engage with the Authority's investigation. However, I will take this information as correct to meet the statutory obligations, subject to crediting the days for the public holidays wrongly treated as annual leave and a third day to cover the alternative holiday for work on Monday 26 April 2021.

[47] The leave totals change on subsequent payslips. SFS did not explain these changes so I will work from the 18 July 2021 information.

[48] I am unable to calculate average weekly earnings for Mr dos Santos, given the lack of information. However, SFS should have paid Mr dos Santos no less than his ordinary weekly pay at the end of the employment. Based on the June 2021 employment agreement, Mr dos Santos's ordinary weekly pay was $1,020.00 ($204.00 per day). That generates an entitlement to final holiday pay of $4,080.00 for the 20 days shown in the payslip.

[49] It is possible that the entitlement under s 25 of the Act might be inflated by that calculation, but the entitlement under s 24 of the Act might be understated as I am not able to assess average weekly earnings. I take $4,080.00 as a fair approximation for current purposes. To this figure must be added two days to cover Labour Day and Waitangi Day, wrongly treated as annual leave days. A third day must be added to cover an alternative holiday for work on 26 April. SFS must show it paid Mr dos Santos a total of $4,692.00 in holiday pay.

[50] The payslip for the period ending 18 August 2021 relates to sick leave, so that payment is not relevant for present purposes. The same is the case for payments shown on the payslip dated 29 August 2021 and part of the 12 September 2021 payslip. That last payslip includes a payment for "Time in lieu". There is no evidence to explain the purpose of this payment, so it too is not relevant for present purposes. Similarly, a further payment for "Time in lieu" shown on the payslip for the period ending 26 September 2021, is not relevant. Mr dos Santos was on ACC at all these times, so the payments were not annual leave.

[51] The payslip for the period ending 10 October 2021 records gross payment of $323.00 for annual leave. It is not clear why this payment was made at the time, but I will treat it as part-payment of annual leave. Some payments followed the resignation. A gross payment of $242.42 for annual leave is shown in the payslip for the period ending 24 October 2021.

There are two payslips for the period ending 7 November 2021. Revised figures are shown on the second of those payslips, matching net payments made on 10 November and 24 November 2021. The second revised payslip shows a gross payment of $3053.40 for “Annual leave not taken” and for “holiday Pay Owing”. The revised 7 November payslip, the 10 October payslip and the 24 October payslip show payments of $3,618.82 in holiday pay.

[52] Mr dos Santos is entitled now to recover the difference between $4,692.00 and $3,618.82, amounting to $1,073.18. There will be an order against SFS for that amount as the arrears of holiday pay due at termination of the employment.

Is SFS liable for penalties?

Breach of employment agreement

[53] There is a claim for a penalty for the failure to pay wages at the agreed rate. Section 134 of the Employment Relations Act 2000 makes every party to an employment agreement who breaches the agreement liable to a penalty under the Act

[54] As explained above, SFS should have paid Mr dos Santos $25.50 per hour rather than $20.00 per hour from 22 June 2021, the date of the new employment agreement. SFS breached the employment agreement when it paid Mr dos Santos at the lower rate as shown in the payslips dated 4 & 18 July 2021, and is therefore liable to a penalty.

[55] I treat this as a single breach of the employment agreement, given the short timeframe involved. SFS is liable to a penalty of up to $20,000.00 for the breach of s 134 of the Act.

Penalty – failure to be communicative and response, refusing to engage with the representative, not complying with s 130 of the Employment Relations Act 2000

[56] The statement of problem does not specifically refer to the sections of the Employment Relations Act 2000 relied on for these penalty claims.

[57] A party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty under the Act if: the failure was deliberate, serious and sustained; or the failure was intended to undermine bargaining, an employment agreement, an employment

relationship or a pay equity claim resolution process; or the failure was a breach of passing on provisions in the Act.[3] Only the first is potentially relevant here.

[58] I am asked to treat SFS's lack of response to the representative as it being unresponsive and uncommunicative with Mr dos Santos, for present purposes. However, the real problem here was the failure by SFS to recognise the authority of the representative, contrary to s 236 of the Employment Relations Act 2000. Breach of that section does not create liability for a penalty for breach of the Act. Taking into account the direct exchanges with Mr dos Santos, I am not satisfied that the failure by SFS to be responsive and communicate was "egregious bad faith",[4] so as to create liability for a penalty.

[59] SFS was on notice that this problem included a penalty claim for not providing access to or a copy of the wages and time record. Section 130(2) of the Employment Relations Act 2000 requires an employer, on request by an authorised representative, to provide that person with access to or a copy of the employee's wages and time record. Section 130(4) makes every employer who fails to comply with s 130(2) liable to a penalty.

[60] Mr Buckingham requested wages and time records for Mr dos Santos from SFS on 10 September 2021. The request included a copy of Mr Buckingham's signed authority and specifically referred to s 130(2) of the Act. SFS breached s 130(2) by failing to provide access to or a copy of its wages and time record for Mr dos Santos. I find SFS is liable to a penalty of up to $20,000.00 for breach of s 130(2) of the Employment Relations Act 2000.

Penalty – non-compliance with the Holidays Act 2003

[61] The statement of problem sought a penalty for deducting annual leave entitlements on public holidays. Later, SFS was on notice that the Authority would consider whether a penalty should be imposed for any proven non-compliance with minimum entitlements under the Holidays Act 2003.

[62] I disregard the failure to pay holiday pay on termination of employment in April 2020 for current purposes. An action in respect of that was not commenced within 12 months.

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[3] Employment Relations Act 2000 s 4A.
[4] *Waikato District Health Board v New Zealand Public Service Assoc Inc* [2008] ERNZ 80.

[63] Section 40(1) of the Holidays Act 2003 provides that a public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not part of the employee's annual holidays. SFS paid Mr dos Santos for Labour Day 2020 and Waitangi Day 2021 but recorded it as annual leave, not public holidays. SFS thereby breached s 40(1), but that subsection is not in the list of provisions that non-compliance with renders an employer liable for a penalty: see s 75 of the Act.

[64] However, treating the public holidays as annual leave days resulted in SFS paying less than the full entitlement of final holiday pay to Mr dos Santos when his employment ended. That amounts to a breach of s 24 and s 27 of the Holidays Act 2003.

[65] Mr dos Santos worked on Monday 26 April 2021 but was not paid half-time extra, was not provided with an alternative holiday and was not paid for the alternative holiday at the end of the employment. SFS breached s 50(1), s 56 and s 60(2)(b)(ii) of the Holidays Act 2003. However, the substantive problem brought to the Authority was the correct accounting for and payment of annual and public holiday entitlements at the termination of the employment. These breaches can be globalised as part of the breach of s 24 and s 27 of the Holidays Act 2003. On that basis, SFS is liable for a penalty of up to $20,000.00 for the breach of s 24 and s 27 of the Holidays Act 2003.

Penalties – fixing quantum

[66] I first consider the breach of the employment agreement.

[67] The breach occurred shortly before Mr dos Santos went on ACC, so was of short duration.

[68] No specific evidence points to the breach being intentional. The higher rate was included in the material SFS provided in support of Mr dos Santos's visa extension and in the June 2021 agreement, but SFS did not give effect to it. That was perhaps because SFS considered the new rate would not apply until the replacement visa was issued. Given that possibility, I am willing to regard the breach as arising from inadvertence, rather than negligence.

[69] Mr dos Santos lost the benefit of the increased wage rate for the last month (approximately) of his employment and the flow on effect to his final holiday pay. The damage suffered by Mr dos Santos was of some significance.

[70] SFS has done nothing to mitigate the adverse effects suffered by Mr dos Santos.

[71] Mr dos Santos was vulnerable as a migrant worker with a visa to work only for SFS. He was paid a modest wage with limited other resources. Language and cultural barriers added to Mr dos Santos's vulnerability.

[72] I was not directed to other cases where SFS has been found to have engaged in similar conduct. No issue about capacity to pay is apparent. The finding of a breach together with a penalty set at a modest level will be sufficient to deter SFS or others.

[73] I fix $2,000.00 as the penalty for the breach of s 134 of the Employment Relations Act 2000.

[74] I next consider a penalty for the breach of s 130(2) of the Employment Relations Act 2000. Section 130(2) is part of employment standards and an object of the Act is to promote the effective enforcement of employment standards. There is a need to set this penalty at a level that deters other employers from not providing wages and time records on request. I regard the breach as intentional. As well as not providing a substantive response to the representative, SFS did not copy its wage and time records to Mr dos Santos. If the records had been provided, these matters may have been capable of resolution without these proceedings. SFS persisted with the breach, despite the Authority's direction. Mr dos Santos has been hampered in having his employment relationship problem fairly determined by the lack of records. I repeat the point about Mr dos Santos's vulnerability. No issue about capacity to pay is apparent. However, I recognise that SFS has not been found in other cases to have engaged in similar conduct. Having regard to a similar case,[5] I fix a penalty for this breach at $5,000.00.

[75] Finally, I consider a penalty for the breach of s 24 and s 27 of the Holidays Act 2003. Timely and correct payment of minimum entitlements under the Holidays Act 2003 is part of

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[5] *Newman v Solid Roofing Limited* [2018] NZERA Auckland 214.

employment standards. An object of the Employment Relations Act 2000 is the effective enforcement of employment standards. The penalty needs to be set at a level that deters other employers from not complying with holiday entitlements. The payment shortfall partly resulted from not applying the June 2021 rate, but not all the breach is explained by inadvertence. However, evidence does not establish that the breach was intentional. Mr dos Santos was affected by not receiving correct payment in full when it should have been made. SFS has done nothing to mitigate that harm. I repeat the point about Mr dos Santos's vulnerability. No issue about capacity to pay is apparent. SFS has not been found in other cases to have engaged in similar conduct. These factors lead me to fix the penalty for the breach of s 24 and s 27 of the Holidays Act 2003 at $4,000.00.

[76] Mr dos Santos asks that all penalties be made payable to him. I accept that Mr dos Santos has suffered harm by not being paid at the agreed rate, by not being provided with his wages and time records and by not receiving correct holiday pay when the employment ended. That is apparent from the communications between Mr dos Santos and his representative. The harm is not remedied by the arrears orders now made against SFS. It is appropriate to exercise the discretion under s 136(2) of the Employment Relations Act 2000.

[77] The breach of the employment agreement mostly engages private interests, while there are public interests involved with the breaches of s 130 of the Employment Relations Act 2000 and the Holidays Act 2003. The differing interests are recognised by ordering the whole of the penalty for breach of the employment agreement payable to Mr dos Santos together with half of the other two penalties, while the remaining half of those other two penalties should be paid to the Crown.

Personal grievance – unjustified disadvantage

[78] Mr Buckingham in his email to SFS on 10 September 2021 advised he represented Mr dos Santos in accordance with s 236(1) of the Employment Relations Act 2000 regarding the earlier formal meeting request. In advance of the meeting, he sought the employment agreement, file information and time and wage records.

[79] SFS replied about 15 minutes later to say that Mr dos Santos was on ACC. The agreement, information and records were not mentioned or provided.

[80] Mr Buckingham responded about 15 minutes later. He sought confirmation whether there were concerns about and a need to meet with Mr dos Santos. Mr Buckingham referred to good faith and Mr dos Santos's distress following the insinuation that he had done something wrong. Mr Buckingham repeated the request for a substantive response to the initial request.

[81] SFS replied 4 minutes later. SFS said that it had requested a meeting 5 weeks earlier but Mr dos Santos had not made an appointment. SFS needed to know when Mr dos Santos was returning to work, but he had not yet communicated that. The messaged ended "Please do not email us again".

[82] About 10 minutes after that message to Mr Buckingham, SFS sent an email directly to Mr dos Santos. SFS responded to Mr dos Santos's message from 28 August 2021 in which he had updated SFS about his ACC situation. The message string earlier included SFS's expression of concern and its meeting request. In its 10 September message, SFS advised that its meeting request was five weeks ago, it had now received advice "and all is fine". The company asked Mr dos Santos to let it know when he was returning to work. Mr dos Santos forwarded the message from SFS to Mr Buckingham.

[83] Mr Buckingham replied to SFS the same day. He repeated the advice that he represented Mr dos Santos, set out the day's messaging timeline and asserted that SFS had undermined its relationship with Mr dos Santos by refusing to engage with Mr Buckingham. Mr Buckingham notified SFS that matters would be lodged with the Authority.

[84] Mr dos Santos would have a personal grievance if his employment, or a condition of his employment, was affected to his disadvantage by some unjustifiable action by his employer: see s 103(1)(b) Employment Relations Act 2000.

[85] Mr dos Santos had a right to a copy of his employment agreement and a copy of his time and wage records.[6] Mr dos Santos had a right to relevant information prior to a meeting about SFS's concern mentioned in the 7 August 2021 email.[7] Mr dos Santos exercised his statutory right to appoint a representative for these matters and was entitled to expect his

[6] Employment Relations Act 2000 s 64 and s 130(2).
[7] Employment Relations Act 2000 s 4(1A)(c).

employer to be responsive and communicative.[8] The unhelpful response to Mr Buckingham that "Marlon is on ACC as he had an accident" was not consistent with good faith.

[86] The actions and inactions by SFS that are relied on to establish a personal grievance as defined at s 103(1)(b) of the Act are also relied on for the unjustified dismissal personal grievance claim. For reasons that follow, it is not necessary to separately find that Mr dos Santos was unjustifiably disadvantaged.

Personal grievance – unjustified dismissal

[87] Mr Buckingham in his message to SFS on 10 September 2021 responded to the company's failure to provide a substantive response to him and its direct contact with Mr dos Santos. Mr Buckingham described these actions by SFS as undermining trust and confidence, causing Mr dos Santos to lodge matters with the Authority.

[88] In his application to the Authority lodged on 10 September 2021, Mr dos Santos outlined employment relationship problems that included unjustified dismissal for "failure to pay wages and failure to engage with his representative". Mr dos Santos sought a determination that SFS had by these failures undermined the relationship of trust and confidence amounting to a repudiation of the employment agreement, giving rise to a personal grievance of unjustified dismissal.

[89] Despite these statements, Mr dos Santos contacted SFS. On 8 October 2021 Mr dos Santos updated SFS about his ACC status (fully unfit until 31/10/2021 then partly fit from 1/11/2021). Mr dos Santos also obtained a new visa dated 21 October 2021 with a condition that he work for a different company. Mr dos Santos then sent an email to SFS on 22 October 2022 in which he gave two weeks' notice of resignation because:

> … you have not paid me my correct money, putting me through stress with the immigration stuff and not replying to my advocate … Because of all of this, I can't see myself being able to work with you in the future.

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[8] Employment Relations Act 2000 s 236 and s 4(1A)(b).

[90] Mr dos Santos next sent an email to SFS on 31 October 2021 to say that his latest physiotherapist advice was that he should remain off work for a week starting 1 November 2021.

[91] On 3 November 2021, Mr dos Santos emailed SFS as follows:

> … As you know, the notice period for my resignation ends on Friday.
>
> I have a key and my uniform to return to you as I will not be working for you any longer.
>
> You know that I have resigned because of your behaviour towards me, not paying my correct wages and refusing to engage with my representative, in addition to the way you handled your allegations regarding the immigration application process.
>
> This mater is at the Employment Relations Authority. You have absolutely failed to engage with the Authority at all, showing that you have breached your good faith obligations to such an extent that I cannot see a working relationship with you.
>
> …

[92] SFS the following day in reply directed Mr dos Santos to a person in Invercargill "to discuss your wages, [as] I am aware you have been short paid." There is an 18 November 2021 email from that person confirming a holiday pay mistake. This was followed by a payment marked "Holiday Pay" on 24 November 2021. As explained above, the additional payment still left a shortfall.

[93] Mr dos Santos resigned, so a personal grievance claim of unjustified dismissal could not arise until then. The effect of Mr dos Santos's 22 October 2021 and his 3 November 2021 correspondence, in the context of the statement of problem which had by then been served on SFS, raised his personal grievance claim of unjustified dismissal.

[94] Constructive dismissal includes where a breach of duty by the employer causes an employee to resign. There is no reason to doubt Mr dos Santos's explanation in his 3 November email about the reasons for the resignation. These factors caused his decision to resign. Being paid less than the agreed rate in July 2021 and the failure to engage with the representative and provide the wages and time records were serious breaches of duty. I find that the breaches were sufficiently serious to make it reasonably foreseeable that Mr dos

Santos would not be prepared to work under those conditions.[9] SFS has not sought to justify its actions or how it acted. I find that Mr dos Santos was unjustifiably dismissed and has a personal grievance.

Personal grievance – remedies

[95] There is no evidence to establish that Mr dos Santos lost remuneration as a result of his personal grievance. He obtained a visa that allowed him to work for another employer, so once he was fit to resume work Mr dos Santos had replacement income. Compensation for lost remuneration is not sought in the statement of problem. SFS is not required to pay compensation for lost remuneration.

[96] There is a claim for compensation for humiliation, injured feelings and lost dignity. The evidence in support is limited. However, I accept that Mr dos Santos was anxious, unsettled and frustrated as a result of the interactions with SFS and the company's lack of response to his concerns. I assess $10,000.00 as the amount of compensation required to remedy those effects.

[97] Mr dos Santos did not contribute in a blameworthy manner to the circumstances giving rise to his personal grievance.

Summary and orders

[98] SFS paid Mr dos Santos $3,860.00 less than it should have paid him under the employment agreement for March and April 2020. SFS also paid Mr dos Santos $930.88 less than it should have paid him for the fortnights ending 4 July and 18 July 2021 under the June 2021 employment agreement. Taking these figures together, there was a default in payment to Mr dos Santos of $4,790.88 of wages due under the employment agreements in force at the relevant dates. I order Southland Food Services Limited to pay Marlon Batista dos Santos arrears of wages of $4,790.88 (gross).

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[9] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 (CA).

[99] SFS paid Mr dos Santos $220.00 less than it should have paid him in sick leave for his first week's absence due to the non-work injury. I order Southland Food Services Limited to pay Marlon Batista dos Santos arrears of sick leave of $220.00 (gross).

[100] SFS did not pay Mr dos Santos half-time extra for working on 26 April 2021. I order Southland Food Services Limited to pay Marlon Batista dos Santos arrears of holiday pay of $80.00 (gross).

[101] Mr dos Santos was not paid holiday pay of 8% on his gross earnings in March and April 2020 at the termination of his employment in 2020. Gross earnings should have been $6,200.00, so holiday pay of $496.00 was due. I order Southland Food Services Limited to pay Marlon Batista dos Santos arrears of holiday pay of $496.00.

[102] SFS did not pay Mr dos Santos all his holiday pay due at the termination of the employment in 2021. Southland Food Services Limited is to pay Marlon Batista dos Santos arrears of final holiday pay of $1,073.18 (gross).

[103] SFS is liable for penalties for breaching the employment agreement, for not providing wage and time records and for breaching the Holidays Act 2003 at the end of the employment in 2021. Mr dos Santos should be paid the whole of the first penalty and half of each of the two other penalties. I order Southland Food Services Limited to pay Marlon Batista dos Santos penalties of $2,000.00 for breaching the employment agreement, $2,500.00 for not providing him with access to or a copy of his wages and time record, and $2,000.00 for breach of final holiday pay.

[104] Half of the penalties for not providing the wages and time record and for not paying final holiday pay at termination of the employment in 2021 are payable to the Crown. I order Southland Food Services Limited is to pay penalties of $2,500.00 and $2,000.00 to the Authority for transfer to a Crown bank account.

[105] SFS unjustifiably dismissed Mr dos Santos. To remedy that personal grievance, I order Southland Food Services Limited to pay Marlon Batista dos Santos compensation of $10,000.00 (without deduction).

[106] There is no reason to defer the date by which SFS must satisfy the foregoing orders, so the orders are enforceable immediately. The determination is accompanied by certificates of determination.

[107] Costs are reserved. Mr dos Santos may seek costs by lodging and serving a memorandum, within 14 days. SFS may then lodge and serve a memorandum in response within a further 14 days. I will then determine costs on the papers.

Philip Cheyne
Member of the Employment Relations Authority