IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 376
3135464

	BETWEEN	RONIQUE ROSSER Applicant
	AND	SIMPLY GIRLS PAINTERS AND DECORATORS LIMITED First Respondent
	AND	KATHERINE COURTENAY-ROE Second Respondent
Member of Authority:	Pam Nuttall	
Representatives:	Dave Cain for the Applicant Katherine Courtenay-Roe for the Respondents	
Investigation Meeting:	31 May 2022 by audio visual link	
Submissions received:	2 June 2022 from Applicant 9 June 2022 from the Respondents	
Determination:	9 August 2022	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ronique Rosser was employed as a Brush Hand by Simply Girls Painters and Decorators Limited (Simply Girls) on 2 November 2020. She claims to have been unjustifiably dismissed on 11 January 2021 following her attempts to discuss non-payment of statutory holidays with Katherine Courtenay-Roe, the sole director and shareholder of Simply Girls.

[2] Ms Rosser seeks payment of lost wages and unpaid statutory holidays, remedies of lost wages and compensation under s123 Employment Relations Act 2000 (the Act)

and penalties against both respondents for breaches of the Act, the Holidays Act 2003 (HA) and the Wages Protection Act 1983 (WPA).

[3] Simply Girls says that because Ms Rosser was a casual employee she was not entitled to payment for statutory holidays, and she was not unjustifiably dismissed. Simply Girls also asserts that Ms Rosser's conduct on 11 January 2021 justified peremptory dismissal with no further process.

The Authority's investigation

[4] These proceedings have a long history in attempting to engage the respondents. A direction to mediation was not followed, nor was a statement in reply lodged. Neither respondent attended nor was represented at a case management conference. There was no 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 directed timetabling.

[5] Some video material was provided to the Authority comprising general commentary by Ms Courtenay-Roe, though this was not accompanied by an application for leave to lodge a statement in reply out of time. This material was not served on the applicant and there were technical issues with the Authority forwarding it. Because the video material was not viewed by the applicant or her representative the Authority has not accorded it any weight in investigating this employment relationship problem.

[6] A statement in reply and witness statements were eventually lodged on 22 May 2022 prior to the investigation meeting, though still not accompanied by any application for leave or explanation in respect of the late lodgement of the statement in reply and the timetabled documents for the investigation meeting. These documents were not served on the applicant who received them from the Authority on 27 May 2022.

[7] The investigation meeting was conducted by audio visual link (Zoom) on 31 May 2022. Witnesses who attended this meeting affirmed their written witness statements and answered questions under affirmation from me and the parties' representatives. These witnesses comprised Ms Rosser and Ms Joanna Cummins, a co-worker, for the applicant and Mr Al Haggar, a business advisor, for the respondents. Ms Courtenay-Roe also gave evidence for herself and Simply Girls on the basis that the contents of the statement in reply were affirmed as her witness statement.

[8] Untested evidence was also provided by the respondents in the form of a witness statement purporting to be from an employee or former employee of the company. Since this witness did not attend the investigation meeting it was not possible to establish the authenticity of this statement or to confirm the veracity of the evidence it provided because the witness could not be questioned. Accordingly the statement was not accorded any weight in the Member's deliberations.

[9] Subsequently an affidavit was lodged from this employee with the applicant's closing written statements. This affidavit stated that the employee had not provided or signed any witness statement for these proceedings. The annexures to the affidavit included a text message from Ms Courtenay-Roe to the employee asking for written statements from the employee in this matter and also in another matter before the Authority lodged by a different applicant. The witness statement produced to the Authority was also annexed. The employee referred to this witness statement in her affidavit:

> 9. To be absolutely clear, this is not my witness statement. I did not write this statement, it is not my evidence and that is not my signature on the document.
>
> 10. I am absolutely horrified that Katherine would do such a thing and I am considering whether or not to report her actions to the Police. It is totally unacceptable for anyone to produce a document and forge a signature in this way and I cannot believe her level of dishonesty.

[10] Simply Girls' response to these allegations was provided by Ms Courtenay-Roe in the respondents' closing written statement. The response asserted that the employee had provided the statement and it was assumed that it had been recanted when the employee discovered she was still indebted to Simply Girls.

[11] On the basis of the material before me I find that the purported witness statement cannot be relied on as being the evidence of the employee. As stated in [8] it has not been accorded any weight in the Authority's investigation of this matter.

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

[13] The issues requiring investigation and determination were:

(a) Was there unpaid public holiday pay?

(b) Was there an unjustified dismissal?

(c) If Simply Girls' actions were not justified in respect of dismissal, what remedies should be awarded, considering:

i. Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and

ii. Compensation under s123(1)(c)(i) of the Act?

(d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Rosser that contributed to the situation giving rise to her grievance?

(e) Should an order be made for payment of public holiday pay arrears?

(f) Should penalties be award against either or both respondents for breaches of the Act, the Holidays Act 2003 (HA), the Wages Protection Act 1983 (WPA) and the employment agreement?

(g) Should penalties be awarded against either or both respondents for obstructing and delaying the Authority's investigation under s 134A of the Act?

(h) Is either party entitled to an award of costs?

Background

[14] Ms Rosser was employed by Simply Girls on 2 November 2020 and signed an individual employment agreement. She worked for Simply Girls until 11 January 2021 when she was dismissed by Ms Courtenay-Roe.

[15] Ms Rosser's evidence was that her friend suggested that she come and work with her for Simply Girls. Her friend, Ms Cummins, was already employed by Simply Girls on an individual employment agreement which specified a minimum of 30 hours per week. Ms Rosser says she was phoned by Ms Courtenay-Roe and had a conversation in which she was offered a full time position of up to 40 hours per week, working Monday to Friday 9am-5pm. Having accepted this offer, she gave two weeks'

notice at her previous full time employment. She received a further phone call advising her of the address for the job site and a time to be there.

[16] Ms Rosser says she was given a written individual employment agreement at the jobsite and returned it signed the next day. Her written statement says she was confused to see the employment agreement was only casual, but she did not raise this with Ms Courtenay-Roe.

[17] Early in January Ms Rosser noticed that she had not been paid for the statutory holidays over the Christmas/ New Year period and raised this with her employer by text message. She was informed that she was not entitled to be paid for public holidays but believed this was not what was set out in her individual employment agreement. When Ms Courtenay-Roe came to the jobsite on 11 January 2021 she attempted to raise the matter again.

[18] The exact nature of the ensuing altercation is contested between the parties but the outcome was that Ms Rosser was told to leave the jobsite and informed that she was fired.

Was Ms Rosser working as a casual employee?

[19] Simply Girls believed that it could peremptorily dismiss Ms Rosser because it said she was employed on a casual employment agreement.

[20] 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.

[21] In *Jinkinson*, 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.[1]

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

[22] 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.

[23] It was clear from Ms Courtenay-Roe's testimony at the investigation meeting that she mistakenly believed that the written contractual description of Ms Rosser as a casual employee was sufficient to define the nature of the employment relationship and that she acted on that belief.

[24] Was that belief objectively justified? The terms of the written employment agreement provide conflicting indications as to employment status.

[25] 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**
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> 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.

[26] 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.

[27] 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.

[28] The written employment agreement, then, seems an equivocal guide as to the agreed categorisation of Ms Rosser's employment. Ms Courtenay-Roe's evidence at the investigation meeting indicated that she considered "casual" employment to be 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.

[29] Given the absence of clear evidence as to any common understanding by the parties of the criteria defining a "casual" engagement, I must adopt the approach set out by Judge Couch in *Jinkinson.* 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]

[30] 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]

[31] Looking at the written document as a whole, while it is clear that the contractual 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 Rosser on-going work.

[32] However, when the Simply Girls' record of hours worked and wages paid eventually became available just prior to the investigation meeting, it was clear that there was a consistent pattern of work. This averaged 33 hours per week over the eight weeks from the beginning of Ms Rosser's employment until Christmas. Ms Rosser's evidence was that she worked five days a week every week and did not take any days off during the time she was employed. The time and wage records provided by the

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

company do not show the number of hours worked each day in a pay period as required by s130(g) of the Act. Accordingly I accept the evidence given by Ms Rosser as to the continuous nature of her work pattern over this period.

[33] 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 Rosser would be available to do it. On the balance of probabilities I find that the real nature of the employment agreement between Ms Rosser and Simply Girls could not be characterised as "casual" and that an expectation of on-going employment had become established.

Was Ms Rosser unjustifiably dismissed?

[34] Because I have found that Ms Rosser was not a casual employee, 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.

[35] Even if I am wrong in finding that Ms Rosser was not employed on a casual basis, she was dismissed part way through a shift, a period of on-going work which had not been completed. As confirmed in both *Jinkinson* and *Rush Security Services Ltd*, casual employees have employment protections during the period of their actual engagement to work.[5] In *Rush* it was stated:

> …whether or not there may be other mutual obligations sufficient to create an ongoing employment relationship, the worker will be an "employee" for the purposes of the Act from the time each offer of a period of work is made and accepted until that work is completed.[6]

[36] On either basis, Ms Rosser was entitled to a fair process to establish that there was a justifiable reason for dismissing her. The basic requirements of fair process are set out in s 103A(3) of the Act and require that:

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[5] *Jinkinson* above n1; *Rush Security Services Ltd, (T/A Darien Rush Security) v Samoa* [2011] NZEmpC 76 at [21] (*Rush*).
[6] *Rush* at [21] per Colgan, CJ quoting Couch, J in *Jinkinson*.

> (3) In applying the test in subsection (2), the Authority or the court must consider—
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[37] Ms Rosser's dismissal occurred as part of a sequence of events on a jobsite on 11 January 2021. The parties' accounts of these events are broadly congruent although the behaviour and reactions of the protagonists is contested.

[38] When Ms Courtenay-Roe arrived there were three employees already on-site, including Ms Rosser. Ms Rosser raised the issue of not being paid for public holidays, referring to a copy of the written employment agreement. There was an exchange as to Ms Rosser's entitlement. Ms Courtenay-Roe's explanation that clauses in the written document did not apply to Ms Rosser because she was a casual employee was not accepted. Ms Courtenay-Roe phoned her business advisor, Mr Haggar and spoke with him while the phone was on speaker phone. Both parties assert that the other party became angry, aggressive and argumentative at this point while they remained calm and that the other party was yelling and shouting.

[39] The outcome of the phone call was that a meeting for the following Thursday was agreed. Ms Courtenay-Roe's evidence was that Ms Rosser left the job site at this point while Ms Rosser's evidence was that she went to the far side of the job-site and continued to work with two of the other employees. This discrepancy is not material to determining whether Ms Rosser was unjustifiably dismissed.

[40] Subsequently the interaction between Ms Rosser and Ms Courtenay-Roe was resumed. Ms Rosser's evidence was that this was because Ms Courtenay-Roe was making disparaging comments about her to others on the job site. Again Mr Haggar was phoned because Ms Courtenay-Roe had become distressed. Again both parties insist that the other party was being hostile and confrontational.

[41] During this interaction, Ms Courtenay-Roe told Ms Rosser that she was fired and that she was to leave the jobsite. At this point Ms Rosser began to record the interaction on her phone. The short audio file put in evidence confirms that Ms Rosser was being told that she was fired and that this was because she was bullying and harassing Ms Courtenay-Roe. Ms Rosser said she would be back the next day and is told that she won't be paid if she returns, that Ms Courtenay-Roe has already made up her mind and that she is fired. Ms Rosser responds that she has to have two weeks' notice because it's in the contract.

[42] Later that day Ms Rosser received a text message from Ms Courtenay-Roe which read: "I have been advised to Tresspass you from all job sites police will be informed if you turn up to job site."

[43] Although there had been an attempt to convene a meeting to address the issue of Ms Rosser's entitlement to public holiday pay, there is no other indication that any statutory fair process requirements have been complied with in dismissing Ms Rosser. No specific allegations are put to Ms Rosser, raising particular concerns, there is no reasonable opportunity for her to respond and consequently no consideration, genuine or otherwise, of her response to any concerns the employer may have had. Without some form of natural justice process Simply Girls cannot claim that it had any grounds to dismiss Ms Rosser. The court has said:

> 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.[7]

[44] Accordingly I find that Ms Rosser was unjustifiably dismissed by Simply Girls.

Remedies?

Lost wages

[45] Ms Rosser's evidence is that she made every effort to mitigate her loss and to get back into work by applying for jobs advertised on SEEK or Trade Me and in the paper and by using assistance from WINZ and attending WINZ seminars. She told the

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

investigation meeting that unfortunately her record of job applications was on a cell phone which had been smashed and could not be repaired.

[46] Ms Rosser claims a sum equal to three months remuneration and calculates this on the basis of gross weekly pay of $627 as a total amount of $8,151.00.

[47] I award Ms Rosser loss wages pursuant to s123(1)(b) of the Act in the amount of $8,151.00 to be paid by Simply Girls within 28 days of the date of this determination.

Compensation

[48] Ms Rosser's evidence is that it was humiliating being dismissed in front of her colleagues and the builders who were on site at the time. She says she couldn't believe how she was being treated and that it was incredibly stressful not having any idea how she was to support her young son. Initially she was facing a 13 week stand down before being able to access social welfare payments and had to get emergency food grants.

[49] Her evidence is that she could barely afford the basic necessities and her son had to miss out on a lot. She says she felt like an absolute failure. She was anxious all the time, couldn't sleep and struggled to get out of bed each morning. Because she had previously suffered from depression, she was terrified that she might relapse and was helped through a dark time because of her son. I have also taken into account that Ms Rosser gave up her previous employment in a permanent full-time position to work for Simply Girls.

[50] I find that Ms Rosser is entitled to compensation under s1231(c)(i) and award her compensation under the three statutory heads in the amount of $12,000.00 to be paid by Simply Girls within 28 days of the date of this determination.

Contribution?

[51] A finding of contribution requires that the alleged contributory conduct must be culpable or blameworthy and must have created or contributed towards the situation giving rise to the dismissal. Raising concerns about not being paid for public holidays could not be considered in any way to be culpable or blameworthy. Although there are allegations of aggressive or confrontational behaviour these have not been established. No arguments have been advanced as to how such alleged behaviour might relate to

any grounds for dismissal. I do not find that Ms Rosser has contributed towards the situation giving rise to her personal grievance.

Was Ms Rosser entitled to be paid for public holidays?

[52] I have found that Ms Rosser's employment could not be characterised as "casual" and that an expectation of on-going employment had become established. Accordingly she was entitled to payment for public holidays on which she did not work if the day was 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. I have already accepted Ms Rosser's account of her continuous pattern of employment as a result of this record keeping failure.

[53] This failure also means that I am unable to establish from the wage and time records if any particular public holiday would otherwise be a working day for this 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. I am accordingly unable to determine from these records if any particular public holiday would otherwise be a working day for the employees.

[54] Consequently I am entitled to accept Ms Rosser's statements as to public holiday leave actually taken under s83(4) HA. Simply Girls has not proffered any evidence to the contrary besides the argument that Ms Rosser's employment was on a casual basis which I have not accepted. I accept the claim that these days were taken as public holiday leave.

[55] The payment for these public holidays on which Ms Rosser 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.

[56] Ms Rosser has claimed payment for four unworked public holidays (25 and 28 December 2020 and 1 and 4 January 2021) on the basis of 7.5 hours of paid work per day. However, the wage and time records do record hours per fortnight for each pay cycle - an average of 33 hours worked per week for the period employed prior to

Christmas. This means that payment should be calculated on the basis of 6.6 hour of paid work per day, a total of $501.60 gross. Ms Rosser has also claimed payment of annual leave entitlements at 8% for these four days, that is a sum of $40.13.

[57] I award Ms Rosser $541.73 gross as payment for unworked public holidays and annual leave entitlement for these days.

Other unpaid wages and entitlements?

[58] Ms Rosser has claimed payment for five hours worked on 11 January 2021 before she was dismissed plus 8% annual leave entitlement. I award Ms Rosser the $102.60 as payment for this work.

[59] Ms Rosser has also claimed payment for two weeks contractual notice. An award of payment for this entitlement is in addition to reimbursement for lost wages awarded pursuant to s123(1)(b) of the Act. The obligation to pay crystallises "at the time of notice of dismissal in circumstances where the company elected, for its own reasons…to summarily terminate employment".[8] I have found that Simply Girls had no basis for dismissal without notice. I am accordingly to deal with this entitlement as wage reimbursement because its non-payment amounts to remuneration lost and I may "direct payment of a sum that should have been paid, as it should have been paid at the time".[9] The entitlement to payment of two weeks' wages is calculated on the average weekly hours worked over the period of her employment which is 33 hours per week. The amount of the entitlement should therefore be $1,254.00 gross. I award Ms Rosser $1,254.00 gross in payment of unpaid contractual notice.

[60] Ms Rosser has also claimed interest on sums owing to her. Pursuant to cl 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on any judgment amount. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. I have found that Ms Rosser is entitled to:

a. $541.73 the amounts awarded for unpaid public holidays plus 8% annual leave loading on these payments;

[8] *Atwill v Tanners Timberworld Ltd* [1994]1 ERNZ 321 at 324-325.
[9] At 325.

b. $102.60 unpaid wages and the 8% annual leave loading on these payments;

c. $1254.00 unpaid contractual notice in lieu.

This is a total of $1,898.33 in unpaid entitlements. As Ms Rosser has been deprived of the use of what is owed to her, the Authority orders that Simply Girls pay Ms Rosser interest on $1898.33 from 25 January 2021 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made no later 28 days from the date of this determination.[10]

Penalties?

[61] Ms Rosser has sought penalties to be awarded against both the first and second respondents for breaches of the WPA, the HA, breaches of the written employment agreement and breaches of good faith. The breaches for which these penalties are sought are:

a. withholding payment of wages;
b. non-payment for unworked public holidays and consequent annual leave payments of 8%;
c. failure to follow a fair process in dismissing Ms Rosser;
d. failure to provide payment of two weeks' notice;
e. breaches of good faith.

[62] These breaches would have been apparent to Ms Rosser on the day she was dismissed, 11 January 2021 or by the day in the subsequent pay cycle when wages and notice payments should have been made, that is 25 January 2021.

[63] However the statement of problem lodged with the Authority on 31 March 2021, although it seeks payment of unpaid wages and entitlements, does not seek to have penalties awarded. Neither are penalties identified as an issue for the Authority to investigate in the Member's Minute issued on 18 February 2022 subsequent to a case management conference on this matter.

[64] However this Minute also granted leave to file an amended statement of problem joining Ms Courtenay-Roe as second respondent. The amended statement of problem,

[10] <www.justice.govt.nz/fines/civil-debt-interest-calculator>.

lodged on 28 February 2022 does refer to financial penalties for breaches of the Act, the HA and the WPA as being sought by Ms Rosser.

[65] The Act, under s135(5) requires the following:

> (5) An action for the recovery of a penalty under this Act must be commenced within 12 months…after the earlier of—
>
> (a) the date when the cause of action first became known to the person bringing the action; or
>
> (b) the date when the cause of action should reasonably have become known to the person bringing the action.

[66] Accordingly I find that an action for the recovery of these penalties was not commenced until 28 February 2022 and that this date falls outside the 12 month period specified by the Act. I am therefore not able to further consider an award of penalties for these breaches.

Penalties for obstructing and delaying Authority investigation?

[67] The applicant has also sought a penalty under s134A of the Act. Penalties may be imposed where a person obstructs or delays an Authority investigation without sufficient cause.

[68] The grounds for this application for a penalty are stated to be the respondents' failure to engage with the Authority's investigation process from the outset, the late lodgement of a statement in reply without leave or explanation, and the provision of an allegedly false witness statement upon which the second respondent relied when challenging Ms Rosser's account of events when she was dismissed. Further detail about this allegation is set out in [8]-[11] above.

[69] While the applicant has been most unfortunately inconvenienced by these circumstances, s134A requires me to consider whether the Authority's investigation itself has been obstructed or delayed.

[70] No delay has been occasioned to the Authority's investigation. Despite the tardy engagement of the respondents and the protracted delay in their producing documents, a case management conference and an investigation meeting have been held as timetabled and a determination has been issued.

[71] Has the Authority's investigation been obstructed? To determine this, I must consider whether the Authority's ability to conduct a just and fair investigation as it is required to do was undermined and impeded.

[72] The events are as follows. A witness statement was produced and introduced into the Authority's investigation meeting. Subsequently allegations were made in the applicant's closing written statements, supported by an affidavit from the purported witness, that this statement was fraudulent and that the signature at the foot of the written statement was forged. These allegations were not accepted in the respondents' closing written submissions.

[73] However, since the witness has not appeared at the investigation meeting, this purported written witness statement is untested material because it has not been possible for the Member or the parties' representatives to question the witness.

[74] I addressed this matter at the outset of the investigation meeting and ruled that the status of this material was that of unsworn testimony provided to the Authority which is untested because it is not subject to questioning. The Member's record of the investigation meeting recorded her stating to the meeting that: "The Authority recognises that the weighting given to this information is very inconsiderable because of the way it has been furnished to the Authority."

[75] Despite the second respondent relying on statements made in this purported witness statement in her interactions in the investigation meeting, this material has not been given any weighting in the Authority's investigation and deliberations.

[76] Accordingly, although serious allegations have been made in relation to this purported statement, it has not undermined or impeded the Authority's enquiry and determination of this matter. Consequently there are no grounds to impose any penalty.

Summary

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

$8,151.00 in lost wages under s123(1)(b) of the Act;

$12,000.00 in compensation under s123(1)(c)(i) of the Act;

$541.73 gross as payment for unworked public holidays and annual leave entitlement for these days;

$102.60 unpaid wages and the 8% annual leave loading on these payments;

$1254.00 gross in payment of unpaid contractual notice.

Interest on these unpaid entitlements (a total of $1898.33) from 25 January 2021 until the date payment is made in full.

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed Ms Rosser may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Simply Girls and Ms Courtenay-Roe would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[80] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[81] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[11]

Pam Nuttall
Member of the Employment Relations Authority

[11] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.
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