IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 500
3134416
3136423

BETWEEN	SONJA POTGIETER Applicant
AND	BLISS BEAUTY NZ LIMITED First Respondent
AND	RONALD AJIT NARAYAN Second Respondent
AND	RONICA DEVI Third Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Geoff Martin and Louise Smith, advocates for Applicant Rajendra Chaudhry, counsel for Respondents
Investigation Meeting:	22 and 23 March, and 9 May 2022
Submissions received	11 and 12 July 2022
Determination:	5 October 2022

DETERMINATION OF THE AUTHORITY

A. **Sonja Potgieter was unjustifiably dismissed by Bliss Beauty and has a personal grievance.**

B. **To remedy that grievance Bliss Beauty is to pay compensation of $23,500 to Ms Potgieter and reimburse her lost wages of $4,940.**

C. **Interest is to be paid on $4,940 lost wages ordered to be reimbursed to Ms Potgieter.**

D. **Ms Potgieter was unjustifiably disadvantaged in her employment by Bliss Beauty and has a personal grievance.**

E. **Bliss Beauty breached s 65 of the Employment Relations Act 2000 by failing to provide a written employment agreement.**

F. **A penalty of $7,000 is ordered for the breach of s 65. Of that sum, Bliss Beauty is to pay $2,000 to the Crown and $5,000 to Ms Potgieter.**

G. **Bliss Beauty breached s 39ZD(3) of the Employment Relations Act by failing to provide rest and meal breaks.**

H. **No orders are made against Ronald Narayan. He was not a party to any breach for which a penalty has been claimed by the applicant.**

I. **No orders are made against Ronica Devi. She was not a controlling third party, and she did not cause or contribute to Ms Potgieter's personal grievances.**

J. **Costs are reserved.**

Employment relationship problem

[1] This is a determination of claims brought by an employee, Sonja Potgieter, against her former employer, Bliss Beauty NZ Ltd (BBL), Ronald Narayan, a director of BBL, and Ronica Devi who was joined by the Authority as a controlling third party into the investigation of personal grievance claims.

[2] In a determination of 27 June 2022[1] under the same party names as this one, the Authority referred to its oral indication given to the parties during the investigation meeting, that Ms Potgieter had been unjustifiably dismissed by BBL. The Authority maintained that view in its 27 June determination.

[1] [2022] NZERA 275

[3] Also on 27 June 2022, for the reasons given, the Authority determined that an arguable case had been made out that Ronica Devi had been a controlling third party in Ms Potgieter's employment relationship, and therefore the test at s 103B(3) of the Employment Relations Act 2000 (the ER Act) had been met for joining her to the grievance claims.

A final determination

[4] Following the determination given to them in June, the parties have made further submissions directed to the matters and issues remaining for final determination, which are

- a determination that Ms Potgieter has a personal grievance against BBL, and whether more than one
- any personal grievance remedies she is entitled to
- whether BBL breached the ER Act and, if so, remedies including any penalties
- whether BBL breached the terms and conditions of Ms Potgieter's employment agreement and, if so, any remedies including penalties
- whether Mr Narayan, as a director of BBL, was party to any breach of the employment agreement, and if so any penalty to be ordered against him
- whether Ms Devi was a controlling third party and, if so, whether any actions of hers caused or contributed to any personal grievance Ms Potgieter is finally determined by the Authority to have
- the remedies Ms Potgieter is entitled to from Ms Devi for any part Ms Devi is found to have had in any personal grievance while being a controlling third party

[5] In giving this written determination, not all the evidence examined or submissions made has been set out or referred to. The Authority has been guided by s 174E of the ER Act in that regard.

[6] The Authority heard evidence from the applicant Ms Potgieter, the second respondent Mr Narayan, the third respondent Ms Devi, and several other witnesses. Advocates and counsel for the parties made written submissions on two occasions during the investigation.

The employment relationship of Ms Potgieter and Bliss Beauty NZ Ltd

[7] Ms Potgieter commenced on 8 October 2020 as a Nail Technician working in BBL's Bliss hair and beauty salon in South Auckland. She had gained some 14 years of experience in beauty salon work while residing in South Africa, from where she had immigrated in August 2019 with her husband and two young children.

[8] There is no dispute that Ms Potgieter was engaged as an employee of BBL. Payslips and the wages and time records of BBL show her to have been an employee of the company.

[9] At a job interview prior to commencement, she was told by Mr Ronald Narayan, the owner and sole director of BBL, that she would receive an employment agreement or contract in writing. She was given the form of an agreement or proposed agreement, but that was not until 21 October 2020 by which time she had been employed for nearly two weeks under an oral contract of service.

[10] Later on 21 October, in the early evening, Mr Narayan sent her a text message

> Due to not enough wrk in company for nails
> we closing nail side hope
> u understand thanx for
> your service

[11] Ms Potgieter did not read the proposed employment agreement when it was given to her in the salon to sign. Instead, she took it home to read but had not done so when she received Mr Narayan's text. After viewing the message she saw no point in looking at the proposed agreement, or in signing it.

[12] Ms Potgieter immediately concluded she had been dismissed by the text message and by a phone call shortly after from the salon manager, Ms Riyah Tofilau -

Riyah Mohammed, in which she was told not to return to her job. She sent a text to Mr Narayan observing that she had just received her employment contract, and in another text to him the following day she described what had happened as 'instant dismissal without any explanation'.

[13] She received no notice of her dismissal and was not paid in lieu of notice until two months later when she received four weeks' pay.

[14] No reason was given to Ms Potgieter at the time for the termination, apart from closure of the nail side of the salon. She did not work again for BBL and it was some 9 months before she found employment again.

Personal grievance letter of 6 November 2020

[15] About a fortnight after the dismissal, on 6 November 2020, a letter was sent to BBL by Ms Potgieter's representative. It gave notice of a personal grievance with reference to the employment relationship between Ms Potgieter and BBL. It referred to termination of the employment by Mr Narayan's text and asserted that Ms Potgieter had been dismissed without justification or due process. All the complaints raised in the letter were expressly or by clear implication made against BBL as the employer. There was no complaint against the second respondent Mr Narayan, whose actions, the letter implied, had been carried out on behalf of BBL.

Third respondent - Ronica Devi

[16] Ms Devi was mentioned in the grievance letter at paragraph 13

> 13. Throughout her few weeks of employment, Mrs Potgieter reports she was continually harassed by text and email to late at night from Mr Narayan's partner "Veronica". Veronica is reported to reside overseas and would monitor the staff by video camera all day. She is then reported to have frequently contacted Mrs Potgieter outside her hours of work via text or email, haranguing her about how long it would take her to do nails and comparing her to other (cheaper) nail bars in the area. Mrs Potgieter is a qualified nail technician of at least 14 years' experience in the profession.

[17] The only reference to any role Ms Devi had in BBL when she harassed and harangued Ms Potgieter or surveilled her as complained of, was business partner of Mr Narayan. Nothing was said in the grievance letter about any legal responsibility of Ms Devi personally for her actions, whether in relation to a personal grievance or any other relief available under the ER Act.

[18] The letter outlined several personal grievances of Ms Potgieter, including unjustified dismissal, failing to provide a written employment agreement and an action for breach of s 4 of the ER Act in relation to good faith obligations.

[19] Later Ms Potgieter applied to join Ms Devi to the personal grievance claims as a controlling third party.

[20] In its 27 June 2022 determination the Authority, for the reasons given, found there was an arguable case that the tests of the ER Act had been met for finding a person to be a controlling third party. Accordingly, Ms Devi was joined to Ms Potgieter's personal grievance claims on an interim basis. A final determination now must be made whether she was a controlling third party.

[21] Ms Devi has maintained that there was no contract or arrangement between herself and Mr Narayan or BBL, and that she had simply been helping him as a friend and former employer when she communicated with Ms Potgieter about her work. The communications were daily but remote, by text, because Ms Devi resided in Fiji. Ms Devi was also able to watch Ms Potgieter working in the salon, by means of CCTV installed for security purposes.

Ms Potgieter was unjustifiably dismissed

[22] At the investigation meeting and in its determination of 27 June 2022, the Authority advised the parties of its view that Ms Potgieter was dismissed from her employment and that her dismissal was not justifiable.

[23] For the following reasons the Authority confirms its view which becomes its final determination of that issue.

[24] In his oral evidence Mr Narayan tried faintly to suggest that he had only suspended Ms Potgieter on 21 October, although he could not say how long he had intended the suspension to last. The suggestion seemed to be that suspension would allow time for him to consider with Ms Devi whether and how the employment might be continued. Mr Narayan claimed that the employment did not end until 6 November 2020 when Ms Potgieter's representatives raised a personal grievance. He considered that bringing the grievance amounted to confirmation of her resignation while she was suspended.

[25] This evidence was sharply contradicted by his affidavit evidence affirmed on 21 February 2022

> 42. I was forced to let go of the applicant on 21 October 2020 and asked her not to return to work on 22 October 2020
>
> and
>
> 57. In the final analysis I had the legislative authority to terminate the applicant's employment within the 90-day trial period and did so

[26] The Authority rejects Mr Narayan's suspension explanation and finds that Ms Potgieter was dismissed, summarily, on 21 October 2020.

[27] The use of 'let go' by Mr Narayan was intended to mean that Ms Potgieter was losing her job; she was being dropped, not suspended. This expression is commonly used when an employer finds it no longer has a need for a position of employment, as Mr Narayan had said was the case in his text.

[28] The text and Mr Narayan's affidavit claim that a redundancy situation was the reason for the dismissal and that there was a trial period which enabled BBL to terminate the employment.

Non-existent and unenforceable trial period provision

[29] The Authority rejects Mr Narayan's attempt to rely on a 90-day trial period under the ER Act to justify the dismissal. Section 67A of the ER Act, which provides for 90-day trial periods, requires the provision to be in writing and to state that the

period is to start at the beginning of the employment. Ms Potgieter received no written agreement at all when her employment began. Consequently, she was not notified before or by commencement of the employment that there was to be a trial period.

[30] Although the proposed employment agreement given to Ms Potgieter on 21 October had a 90-day trial period in it, the words of it might as well have been written in invisible ink. It was meaningless, unenforceable, and invalid, as was the entire written agreement which Ms Potgieter had had no time to read before she was dismissed. The document did not ever become her employment agreement.

[31] Furthermore, the Authority accepts the evidence of Ms Potgieter that at the job interview Mr Narayan had not discussed with her the inclusion of a trial period as a term of her employment. The written agreement at best was an intended agreement, or intended variation of her oral contract of service, on the part of BBL. Ms Devi could not assist with any evidence on this point one way or another, for although she was able to observe the interview from Fiji via CCTV, there was no audio for her to hear what was discussed between Mr Narayan and Ms Potgieter.

[32] Even if Ms Potgieter had accepted the terms of the written agreement by signing the document, the trial period would have been invalid and unenforceable because it had not been agreed to in writing by the time employment commenced on 8 October 2020.

Performance as justification for the dismissal

[33] Performance was not given by either Mr Narayan or Ms Devi as the operative reason for the action taken by BBL on 21 October 2020, and the Authority's tentative view was also that BBL could not justify the dismissal on the grounds of performance or conduct. The recognised steps that must usually precede a justified performance dismissal, did not appear to have been taken in this case.

[34] Cases such as *Trotter v Telcom Ltd*[2] have long established the requirements of fairness to be met before performance can become a ground for justifiable dismissal. From her many text messages, it is clear that Ms Devi was becoming concerned about the time it was taking Ms Potgieter to do her work with clients, but aside from pointing

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[2] [1993] 2 ERNZ 659 at 681

this out there was no discussion about how she was to improve, how long she had to do that, and the likely consequences if she did not.

Contributory conduct

[35] For the same reason BBL cannot say that Ms Potgieter was partly to blame for the situation where she was unjustifiably dismissed. Ms Potgieter may not have been dismissed if her work rate had been better and she had brought in more revenue, but unless the requirements of the job were made clear and she had been given a fair opportunity to meet them, there was no causal link between performance and BBL's dismissal in reliance upon the trial period clause in the written agreement offered to Ms Potgieter after the fact.

[36] The Authority also must reject the claim made for BBL that Ms Potgieter had misrepresented her skill and experience. She had taken with her to the job interview a carefully compiled file of material to support her advice that she had had acquired some 14 years of experience in salon work when residing in South Africa. Mr Narayan took no interest in this material and must be taken to have accepted what Ms Potgieter had told him about her suitability, rather than making any enquiry to verify her claims in any way. It was his choice to employ her on trust alone and he cannot complain later about that.

[37] It was also contended for BBL that Ms Potgieter had behaved unreasonably by threatening her employer with resignation on 8 October. This was not a threat but a statement of her intention to exercise her right to terminate the employment agreement. She changed her mind and did not resign after all.

[38] At any level, BBL's actions and how BBL acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal and action occurred.

[39] The statutory test at s 103A of the ER Act is met and the Authority determines that Ms Potgieter has a personal grievance arising from her unjustified dismissal.

Remedies for dismissal grievance

[40] The Authority accepts that Ms Potgieter was devastated by the abrupt termination of her first job in New Zealand, occurring after only two weeks work. Her life was particularly unsettled at the time because she and her family had left their homeland and were trying to adjust to a new country a long way away. Consequently, she lacked an established circle of friends and relatives that locals can rely on in times of crisis. She had young children who were having to settle into school, and the family had bills to pay.

[41] The Authority accepts without reservation her evidence of the personal consequences Ms Potgieter suffered to her health, including the anguish she experienced at the plight her husband and children were placed in financially, socially, and emotionally.

[42] Unjustified dismissal after a very short employment as in this case, may in itself increase the shock and distress caused. Balanced against that must be the circumstance that Ms Potgieter had become aware on the day she started of the high expectations BBL placed on her to work quickly with clients. She had responded to this portent then by resigning on her first day, but she was encouraged to change her mind and continue. The Authority does not consider that Ms Potgieter was at all at fault for what happened less than two weeks later, but it is apparent that she was not suited to the demands of BBL's salon under the direction of Ms Devi from afar. Ms Potgieter has successfully become re-employed in similar salon work for some time now, and she is clearly capable of performing well in the right work environment.

[43] The claim for Ms Potgieter is for $30,000 compensation under s 123(1)(c)(i) of the ER Act. The Authority finds the appropriate award is $23,500, a mid-range sum in the bands used by the Employment Court as a guide.

[44] Ms Potgieter is also entitled to recover lost remuneration for three months; 13 weeks at her rate of $19.00 per hour for 20 hours a week = $4,940. The award is limited to three months because the Authority views it as unlikely that she would have remained much longer at BBL, given the demands of that workplace. She is likely to have soon resigned again, as she did on the first day.

[45] Interest is to be paid on $4,940 from 22 March 2021, when the statement of problem was lodged.

Ms Potgieter was unjustifiably disadvantaged

[46] A grievance claim has been raised from the circumstances where BBL employed Ms Potgieter in breach of s 65(1)(a) of the ER Act, which requires an individual employment agreement to be in writing.

[47] The importance of this requirement for an employee is highlighted by the right of action that can be taken when there is a failure to comply with s 65. An employer who breaches that provision is liable to a penalty of up to $20,000 (where the employer is a company) in an action brought by a Labour Inspector or by the employee concerned. The failure is not merely 'administrative' or 'technical' but is one that goes to the heart or substance of the employment relationship and the benefits of it an employee is guaranteed by statute. Writing is not mere embroidery around spoken words but has its own purpose in emphasising the seriousness and solemnity of an employment relationship and the attendant rights and obligations to be observed by the parties to it.

[48] The grievance is that the failure of BBL was unjustified and disadvantaged Ms Potgieter. Disadvantage in s 103(1)(b) of the ER Act is not confined to 'conditions of employment' such as the provision of access to knowledge of an employee's rights and entitlements. Disadvantage extends to 'employment' in the wider sense including the ties of trust, confidence and good faith that bind employer and employee.

[49] Some determinations of the Authority have noted the importance of the requirement at s 64 of the ER Act for an employer to retain a signed copy of the employment agreement, as an 'employment standard'. They have found the employee has been disadvantaged by the employer imposing or allowing a lower standard than that required by law. Section 65 and s 64 are complementary provisions.

[50] In the view of the Authority, the chances of Ms Potgieter's employment relationship being effective and successful were in this case reduced demonstrably by the lack of a written agreement at commencement of the employment. Such reduction is a disadvantage.

[51] The employment commenced on 8 October 2020 under a contract of service. The terms and conditions of it had been orally agreed at the job interview. Although not in writing, the terms were valid except to the extent they were required to be in writing when the employment commenced. A trial period would have been an invalid oral term for that reason if one had been agreed to. The Authority has accepted Ms Potgieter's evidence that a trial period was not discussed. It was therefore not a term of the employment and could not become a valid one once the employment had commenced. Yet BBL had sought to impose a trial period as a term of employment and had sought to rely on it to justify the dismissal of Ms Potgieter.

[52] The failure to provide a written agreement allowed BBL a later opportunity to try and insinuate a new term of the employment, when reducing the oral agreement to writing. Although BBL's objective could not have been achieved because the clause would have been invalid, the lack of a written agreement allowed the situation to arise where BBL could attempt to alter agreed terms of employment.

[53] Had she been dismissed under a valid 90-day trial period clause written into an employment agreement considered and signed by Ms Potgieter, it is likely she would not have challenged the dismissal once she had considered the effect of the provisions of s 67B of the ER Act.

[54] A person who has not been afforded their full legal rights, particularly when those have been enshrined in statute as an adjunct to a minimum legal standard, could rarely if ever be said not to have been disadvantaged, constructively if not actually. To say Ms Potgieter was not disadvantaged is to question why the law required that she was to be given a written employment agreement in the first place, if not to meet a standard set for her employment relationship.

[55] Ms Potgieter endured a breach of duty by BBL which continued for every day she was employed. She was anxious to receive the agreement and the evidence shows she was conscious of its importance, because several times she had asked Ms Devi when she would be given the documentation.

[56] The Authority does not accept Mr Narayan's excuse that an office worker employed in one of his businesses and who was away on leave, was the reason why a proposed written agreement was not given to Ms Potgieter until just a few hours before

she was dismissed. While that might mitigate a delay of one or two days, the failure in this case lasted for nearly two weeks. If it was good enough for the company to have Ms Potgieter begin earning revenue for it from 8 October, it was good enough for it to ensure its legal obligations to her were observed from the very start of the employment.

[57] Mr Narayan was not a novice director of an employer company, and s 65 is not difficult to comply with. Templates for an employment agreement are readily accessible on-line, or through the accountant who did the books if a key office staff member was away.

[58] After considering the situation the Authority finds that Mr Narayan acted deliberately in failing to ensure BBL fulfilled its the responsibilities as an employer.

[59] The failure of BBL to provide a written agreement was a breach of s 65 and it was also an unjustified action (by omission) causing disadvantage in Ms Potgieter's employment. The test of s 103A of the ER Act is met. Ms Potgieter has a disadvantage grievance.

Penalty is the appropriate remedy

[60] Regarding remedies for BBL's failure, the Authority considers that s 65 of the ER Act provides a more purposeful way of addressing the wrong or harm in this case than s 123 remedies for the disadvantage grievance.

[61] Claims for penalties must be commenced in the Authority within 12 months, under s 135(5) of the ER Act. The statement of problem lodged by the applicant inside 12 months on 22 March 2021, refers to a 'failure to provide a written agreement' (para 1.A) and 'failure to keep record of Employment Agreement'(para 4 (iv)). These are the different requirement of s 65 and s 64 of the ER Act, both of which provisions are referred to in the statement of problem.

[62] A claim for a penalty under s 64 seems unlikely to succeed where no written agreement was created at any time during the employment. The statutory obligation is predicated upon the existence of a written agreement, a signed copy of which is required to be retained by the employer. The employer cannot retain that which it does not have.

[63] In the circumstances of this case the breach was of s 65 and its requirement for an employment agreement to be in writing. The applicant's submissions refer to a penalty for 'failure to provide employment contract', although they also refer to s 64(4) rather than s 65(4) of the ER Act.

[64] Although the penalty claim has not been precisely identified, the Authority is satisfied that the ingredients of an action under s 65 have been referred to with sufficient particularity and that the merits of the claim should not be defeated by the reference to the wrong section number of the ER Act.

[65] Justice will be best served by ordering a penalty to be paid by BBL for its breach of s 65 and for some of that to be awarded to Ms Potgieter who suffered the disadvantage and the attempt by BBL to insinuate a new term of employment into her contract.

[66] The maximum penalty is $20,000 for a company such as BBL. The claim made is for $10,000.

Penalty principles

[67] In reaching the appropriate level of penalty the Authority has navigated the principles and methodology identified by the Employment Court for this exercise. These have recently been considered in *Shah Enterprise NZ Ltd and another v A Labour Inspector*[3]. The Authority applies them as follows.

[68] BBL's conduct was contrary to the objects of the ER Act in several respects. The lack of certainty as to the terms impeded the building of trust and confidence, and establishment of good faith. Using the absence of a written agreement as an opportunity to try to vary the oral agreement without advising Ms Potgieter that the written terms were not all those she had agreed to orally, was not a demonstration of openness or honesty.

[69] The need for judicial intervention was probably increased by the absence of the written agreement to give certainty as to whether there was or was not a trial period provision and a valid one.

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[3] [2022] NZEmpC 177

[70] The breach was a single one but of a key provision, as s 65 is closely aligned to the employment standard of s 64.

[71] The breach was intentional. BBL through Mr Narayan knew Ms Potgieter had not been given a written agreement and decided to let time go by until a staff member returned, or it had decided to end Ms Potgieter's employment. A term of the proposed written agreement was then purportedly invoked to try and justify and support the dismissal.

[72] The Authority does not know whether Ms Potgieter is paying fees to her advocates for their work. If she is, as seems likely, much of that expense was needless as it could have been avoided with a written agreement. If the written agreement had contained a trial provision and had been agreed in writing no later than commencement of the employment, the expense to the parties of the Authority investigation is likely to have been avoided or considerably reduced. There has been a cost to the time of Ms Potgieter in having to attend the investigation meeting and mediation, and the taxpayer funded mediation service and Authority have had their resources diverted unnecessarily to trying to resolve this dispute.

[73] The Authority does not accept that Ms Potgieter was provided all her entitlements due under the oral agreement. The Authority has accepted that she was not constrained by a trial provision in the oral agreement, whereas the proposed written agreement was an attempt to reduce her terms and conditions by placing a restriction that had not previously applied.

[74] No compensation or reparation has been paid to Ms Potgieter by BBL, to the knowledge of the Authority.

[75] Ms Potgieter was vulnerable worker as a recent immigrant seeking her first job in New Zealand and prepared to work at the lowest lawful rate of the minimum wage.

[76] Nothing is known about any previous conduct of BBL that might be considered relevant, whether adverse or favourable to the company.

[77] There is a need for general deterrence to make employers aware that they must not fail or delay for any reason in complying with s 65.

[78] The level of culpability is higher than medium.

[79] Nothing is known by the Authority about the ability of BBL to pay a penalty of any level.

[80] The breach was serious in relation to the obligation cast on BBL by the ER Act, and the misuse of a situation where an employee had been left without a written agreement at the critical introductory phase of her employment.

[81] The starting point should be 50% of the maximum, or $10,000, but to achieve some consistency with other awards a further reduction of 30% is made, bringing the amount to $7,000. This will recognise the importance of s 65 which is a close companion provision to the employment standard of s 64.

[82] It is also just that Ms Potgieter should be awarded $5,000 of the penalty, as claimed for her. It was her right which was infringed by BBL, a right she regarded as important because she asked when she would be given the written agreement discussed with her by Mr Narayan at interview. The award will provide some compensation.

Liability of Ronica Devi

[83] For the reasons given in its 27 June 2022 determination, the Authority found, to the standard of an arguable case, that Ms Devi had been a controlling third party in the employment relationship between Ms Potgieter and BBL. For that reason, Ms Devi was joined into the personal grievance claims.

[84] The Authority must now determine finally whether she has that liability and if so the extent of any remedies she should meet to resolve Ms Potgieter's grievances of unjustified dismissal and unjustified disadvantage.

[85] The definition of a controlling third party at s 5 of the ER Act requires the Authority to be satisfied that

> (a) Ms Devi had a contract or other arrangement with BBL under which Ms Potgieter performed work for the benefit of Ms Devi
>
> and

(b) Ms Devi exercised control or direction over Ms Potgieter similar to the control or direction that an employer exercises

A contract or other arrangement

[86] Mr Narayan and Ms Devi denied the existence of a contract or other arrangement. Ms Devi told Ms Potgieter that while in New Zealand on a previous visit she had renovated or redecorated the Bliss salon, with support from Mr Narayan. It might be supposed she had some financial interest in carrying out those improvements. Lease documents produced on request, showed that Ms Devi did not lease the salon premises at material times. That interest was held in BBL's name.

[87] Mr Narayan and Ms Devi had at times described themselves to Ms Potgieter as partners, although that may have simply been an embellishment of an informal relationship. If they were business partners, the question would remain whether the terms of that partnership allowed for Ms Devi to benefit from the work performed by Ms Potgieter.

[88] As a general observation, the relationships within a small business such a BBL are probably at the outer edge of the target area intended for 'triangular employment' legislation which sprang partly from the operations of labour hire companies. An 'arrangement' and a 'benefit' under the definition of a controlling third party may be things that are elusive and, although they may not be deliberately hidden, not easily seen when there is a small number of employees and others, possibly family members, involved in a business such as BBL owned and run by one person.

No contract with BBL

[89] The Authority has found no evidence that the legal relationship of contracting parties existed between Ms Devi and BBL, or anyone else with regard to Ms Potgieter's employment. There was no evidence of any written or oral contract. The lease of the salon premises at Kimpton Rd, was entered into in 2019 in the name of BBL as tenant and Mr Narayan as guarantor. The name of Ms Devi does not appear in the lease.

No arrangement with BBL

[90] Continually throughout her short employment Ms Potgieter was closely monitored and directed by Ms Devi. Mr Narayan knew of this and permitted it from the start. Objectively there appears to have been a systematic plan. There did not need to be legal rights or obligations arising from it.

[91] Ms Devi was clearly intent on helping the Bliss business, but was her commitment to BBL or to Mr Narayan, her friend and business partner as she described him? The arrangement must be with the employer BBL if the claim in this case is to be upheld.

[92] The Authority finds it is equally possible in the circumstances that the arrangement was with Mr Narayan in a personal capacity rather than as a director, officer, or owner of BBL. Mr Narayan and Ms Devi had been previously associated when Ms Devi worked in the Bliss salon while residing in New Zealand. They were obviously friends and Ms Devi's explanation is that she was helping him, which seems more like a favour Mr Narayan received personally.

[93] The Authority is not satisfied the arrangement which existed was with BBL. The information has about that is at best equivocal.

No benefit flowed to Ms Devi

[94] The arrangement must also be such that under it Ms Potgieter performed work for the benefit of Ms Devi.

[95] There was no requirement for Ms Potgieter to have had knowledge that she was working for the benefit of Ms Devi, and there was no requirement for any benefit to be of a monetary or financial kind.

[96] The notion of triangular employment on the facts of this case sits uncomfortably with the reality that the proprietor of the employer BBL was not a beautician but a motor mechanic, and that a friend or acquaintance who knew the beauty business was giving him a hand. Ms Devi may have been rewarded by the satisfaction of knowing she had helped a friend but that does not seem to be a material or tangible benefit as contemplated by s 5 of the ER Act.

[97] It could well be that in time Mr Narayan will pay back the favour to Ms Devi in some way, perhaps by employing her again, or by fixing her car, or by paying for her travel from Fiji to New Zealand, but that is a long way from finding an arrangement under which, at the time of performance, Ms Potgieter worked for some present or future identifiable tangible or material benefit.

Exercise of control or direction

[98] The Authority finds that at least this element of the statutory definition was abundantly present in the circumstances. The evidence is plain from the text messages that on each day of work Ms Devi, intensely at times, observed and directed Ms Potgieter in her work as Nail Technician. Ms Devi, although in Fiji, was also involved in the procurement of product needed by Ms Potgieter in her work. Ms Mohammed told the Authority she had regarded Ms Devi as her boss.

Ms Devi was not a controlling third party

[99] To the standard of the balance of probabilities, the Authority must determine that Ms Devi's involvement in the employment of Ms Potgieter did not bring her within the s 5 of the ER Act definition of controlling third party.

[100] To find on balance that Ms Devi had that legal capacity, the Authority needed from its investigation to be left in a position to describe with a reasonable degree of particularity not only what the arrangement was, but who it was with and what benefit Ms Devi received from it.

[101] The Authority determines that Ms Devi was not a controlling third party and for that reason has no liability for the personal grievances of Ms Potgieter arising from her employment by BBL.

Ms Devi's involvement in any personal grievance of Ms Potgieter

[102] For completeness the Authority has considered whether, if she had been a controlling third party, Ms Devi was responsible in any way for the grievances Ms Potgieter has been found to have.

[103] The Authority has determined that Ms Potgieter was unjustifiably dismissed and unjustifiably disadvantaged by the failure of BBL to give her a written employment agreement.

[104] What must be caused or contributed to is not only dismissal or disadvantage but *unjustified* dismissal or *unjustified* disadvantage. It is the additional elements of unfairness or unreasonableness in the actions of dismissal or disadvantage, that must be found present and must be linked to the controlling third party by the Authority. Incitement to dismiss without cause or without fair process might be sufficient, but any employment agreement can potentially be terminated justifiably if there is sufficient cause. Ms Devi, who was not Ms Potgieter's employer, appears to have left it to Mr Narayan to get that part right.

[105] The Authority accepts that Mr Narayan is likely to have discussed with Ms Devi the ending of Ms Potgieter's employment. Ms Devi would have had an opinion about that which she was able to give without causing or contributing to the dismissal. It was left for Mr Narayan ultimately, on behalf of BBL, to ensure that any dismissal could be justified both as to cause and the way it was carried out.

[106] Regarding the failure to provide a written agreement, again there is no evidence that this was the responsibility of Ms Devi. She was not the employer. The Authority has accepted the admission of Mr Narayan that this was his responsibility. He blamed the absence of a staff member for the failure. The Authority does not accept that as an excuse. It was a failure within BBL and nothing to do with Ms Devi. Ms Devi told Ms Potgieter that Mr Narayan was the person to ask for her agreement.

[107] The requirement was breached from the moment Ms Potgieter commenced work without a written employment agreement. It is unlikely that Ms Devi who was 2000km away in Fiji somehow had responsibility for allowing that to happen.

[108] Another disadvantage grievance the Authority found was not sustainable on the facts was the complaint by Ms Potgieter of being harassed, harangued and surveilled. Ms Devi's frequent text communications during and after work may have been inconsiderate and annoying but ultimately were not such as to give rise to a disadvantage grievance. In any event unless she was a controlling third party, BBL or

Mr Narayan would have been fully responsible for allowing Ms Devi to act unreasonably at any time.

[109] The Authority finds therefore that even if she had been a controlling third party, Ms Devi did not cause or contribute to any personal grievance of Ms Potgieter.

Liability of Ronald Narayan

[110] Although the employer of Ms Potgieter was BBL, a person other than the employer can have liability under several provisions of the ER Act.

[111] One of those is s 134(2) which is referred to in the statement of problem lodged in the Authority by Ms Potgieter, and in submissions made for her. The provision is concerned with liability for a breach of an employment agreement. The breaches relied on by the applicant are breaches of the ER Act, not the employment agreement. There is a penalty sought for breach of 's 64(4)' – failure to provide an employment agreement (which the Authority has accepted was intended to be a reference to s 65(4)) – and s 69ZD(1) - failure to provide rest and meal breaks.

[112] BBL has not been found liable for a breach of Ms Potgieter's employment agreement or contract of service. The claim under s 134(2) of the ER Act against Mr Narayan as a party to such a breach cannot succeed.

Person involved in a breach of an employment standard – s 142W

[113] Section 142W of the ER Act has also been referred to by the applicant with regard to Mr Narayan. That provision is to be read in conjunction with s 142X and s 142Y of the Act. A person found to be involved in a breach of an employment standard may become liable to a penalty under s 142X, but the penalty can be claimed only by a Labour Inspector who in this case is not joined as a party to Ms Potgieter's claims. The statement of problem did not refer to a penalty under s 142X and any claim is now outside the 12-month limitation period.

[114] Under s 142Y a person involved in a breach of an employment standard, although not an employer, may become liable to pay wages or other money due to an employee under an employment standard. The prior leave of the Authority is needed, and liability only arises to the extent the employer is 'unable to pay' the money.

[115] If Mr Narayan had been a person involved in a breach of the employment standards at s 64 – requirement to retain copy of the employment agreement – or s 69ZD – duty to provide rest and meal breaks - leave had to be sought and obtained from the Authority before employment standard wages or other money could be claimed.

[116] Mr Narayan is one of the respondent parties named in the statement of problem lodged on 22 March 2021. That document makes no reference at all to s 142W or s 142Y. I accept the submission of counsel for Mr Narayan that his client was not adequately notified that he was being pursued personally for remedies under s 142W.

[117] Although there is reference to s 142W and s 142 X in the application to join a controlling third party (Form 4), that was regarding Ms Devi, not Mr Narayan. Even then the application was not made to have her determined to be a person involved in any breach of an employment standard. While the Form 4 application refers to the 'leave of the Labour Inspectorate', an Inspector has not been joined and no application has been made in that regard.

[118] Without any application having been previously made under s 142W or s 142Y, and without any leave applied for under the latter provision, the applicant in submissions of 25 May 2022 sought an order against Mr Narayan 'that all awards and penalties will be paid, per s 142W subs (1) and (2) of the Act'. It is to be inferred that the awards and penalties are any made against the employer BBL.

[119] For the above reasons the Authority is unable to make any orders under s 142X or s 142Y against Mr Narayan, or Ms Devi.

[120] The Authority does acknowledge that an order under s 142Y can extend to *future* as well as present inability to pay. In a recent decision of the Employment Court, *Shah Enterprise NZ Ltd and another v A Labour Inspector*[4] the Court made a s 142Y order against the contingency of the employer failing to pay. If that occurred the person involved in the breach would, without further application to the Court, become liable to pay to the extent of the default. The Authority steps back from the view it took in its 27 June 2022 determination, that the inability to pay had to be a *present* circumstance before such an order could be made.

[4] [2022] NZEmpC 177

[121] The breaches in this case are of employment standards under s 64 and s 69ZD of the ER Act, which are not payment provisions such as those under the Holidays Act 2003, the Wages protection Act 1983, or the Minimum Wage Act 1983. They are about providing and retaining documentation and providing time for a rest or meal.

Rest and meal breaks

[122] The statement of problem made a claim for a penalty of $6,000 against BBL for a breach of s 69ZD(1) of the ER Act. Half of that is claimed for Ms Potgieter.

[123] Ms Potgieter worked on average from 9 am to 2 pm, Wednesday to Saturday, and was paid for those hours at the minimum wage rate. Under s 69ZD(3), for each work period she was entitled to a 10-minute paid rest break and a 30-minute meal break.

[124] She worked 8 days in total during her employment, between commencement on 8 October and dismissal on 21 October.

[125] Time sheets produced by BBL show '0.30' recorded under the column 'Lunch' for 4 of her 8 days of work. Presumably this signifies a 30-minute meal break on those days.

[126] The proposed employment agreement when it was finally produced in writing on her last day of employment, contained a provision about 'Breaks'. In the circumstances it was of no use, as she did not get time to read the written agreement and decide whether to sign it before she was dismissed.

[127] Ms Riyah Mohammed another BBL employee was present in the salon during the employment. She said she saw no real reason why Ms Potgieter could not have taken breaks, although no one had instructed her to have them. She did confirm to the Authority that Ms Potgieter had said she was prevented from taking them by Ms Devi.

[128] The Authority accepts the likelihood that Ms Potgieter did not take her full entitlement to meal and rest breaks during some of the eight days she worked. This was at the very beginning of what turned out to be a very short employment. In most employment this would be a settling in period of give and take, and breaks may not be regularly taken for a while an employee finds their feet.

[129] Ms Potgieter found the demands placed on her time exacting right from the start, as she demonstrated by resigning on her first day. Although there probably was a breach of the Act the Authority does not consider a penalty is warranted given the brevity of the employment and the major challenge Ms Potgieter faced in trying to work under the close supervision Ms Devi exercised over her from Fiji.

[130] The Authority declines to impose a penalty in the circumstances.

Summary of orders

[131] BBL is to pay Ms Potgieter compensation of $23,500 under s 123(1)(c)(i) of the ER Act.

[132] BBL is to pay $4,940 to Ms Potgieter in lost wages under s 123(1)(b) of the Act.

[133] Interest is to be paid on $4,940 from 22 March 2021, when the statement of problem was lodged, until the entire amount is paid, under clause 11(1) of Schedule 2 of the ER Act. The calculation of interest is to be made by BBL using the Civil Debt Interest Calculator available at www.justice.govt.nz/fines/civil-debt-interest-calculator

[134] BBL is to pay a penalty of $7,000 under s 135 of the Act. Ms Potgieter is to receive $5,000 of that sum under s 136(2) of the Act, and the balance of $2,000 is to be paid to the Authority for payment into a Crown Bank Account.

Costs

[135] Costs are reserved. The four parties have received mixed results from the Authority's investigation. As all parties are represented, the Authority requires them to confer with a view to reaching agreement as to the disposition of costs between them. The representatives will be familiar with the principles that apply to fixing costs in the Authority and the prominence the published notional daily rate or tariff often has in that exercise.

[136] If agreement cannot be reached, any application for costs must be made within 28 days of the date of this determination.

Alastair Dumbleton
Member of the Employment Relations Authority