

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 519  
3155741

BETWEEN	EMMA CHLOE MORGAN Applicant
AND	STAR CUTZ BARBERSHOP LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Ursula Nicholls, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	5 July 2022 at Palmerston North
Submissions received:	14 July 2022 from Applicant No submissions from the Respondent
Determination:	11 October 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Following an interview facilitated through Work and Income, Emma Chloe Morgan was engaged to work, purportedly on a trial basis, by Star Cutz Barbershop Limited (Star Cutz) at its barbershop in Palmerston North commencing on 28 April 2021.

[2] Ms Morgan claims that she performed worked for Star Cutz between 28 April 2021 and 11 May 2021, and that she did not receive training as had initially been discussed at the interview she attended. Ms Morgan claims that she was an employee during her engagement with Star Cutz and that she should have been paid wages for that period.

[3] Ms Morgan also claims that she was unjustifiably disadvantaged in her employment resulting from Star Cutz's failure to pay her wages, and additionally in not providing her with an individual employment agreement. Ms Morgan also seeks the imposition of penalties against Star Cutz for breaching minimum employment standards.

### **The issues**

[4] The issues requiring investigation and determination were:

- (a) Was Ms Morgan an employee and entitled to wages for the period 28 April 2021 to 11 May 2021?
- (b) Was Ms Morgan unjustifiably disadvantaged in her employment, having regard to the respondent's failure make required payments and to provide an individual employment agreement?
- (c) If Star Cutz's actions were not justified, what remedies should be awarded?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Employment Relations Act 2000) for blameworthy conduct by Ms Morgan that contributed to the situation giving rise to her grievance?
- (e) Has Star Cutz breached the Minimum Wage Act 1983 by failing to pay the applicant the prescribed minimum wage in accordance with section 4 Minimum Wage Act 1983, and if so, should a penalty be imposed?
- (f) Has Star Cutz breached minimum employment standards, and if so, should a penalty (or penalties) be imposed?
- (g) Should the respondent be required to pay costs associated with the application?
- (h) Should either party contribute to the costs of representation of the other party?

### **No engagement or appearance by Star Cutz**

[5] Star Cutz has not engaged at all with the Authority, no statement in reply has been lodged, and there was no appearance by it at the investigation meeting.

[6] I am satisfied that Star Cutz was appropriately served with the statement of problem lodged by Ms Morgan, in addition to relevant notices (including of the case management conference and investigation meeting). Courier receipts confirm that the relevant documents and notices were delivered to Star Cutz's registered address and signed for.

### **The Authority's investigation**

[7] A written witness statement was lodged from Ms Morgan in advance of the investigation meeting and in accordance with directions issued. Directions issued at a case management conference on 19 May 2022 provided Star Cutz an opportunity to seek leave to reply or respond to the application and to lodge any witness statements. Star Cutz did not engage, and no such material was received by the Authority.

[8] Star Cutz did not appear at the investigation meeting held on 5 July 2022 and have not otherwise engaged with the Authority. As Star Cutz were not present at the scheduled commencement time, I delayed the start of the investigation meeting in order to allow for any late arrival. However, there was no appearance and the investigation meeting ultimately commenced at 9.47am.

[9] Ms Morgan was the only witnesses at the investigation meeting, and she answered questions under affirmation from me. I had the opportunity to ask her relevant questions and to test the veracity and credibility of her evidence. Ms Morgan's evidence is unchallenged by Star Cutz, and I accept her evidence.

[10] I afforded those present at the investigation meeting the opportunity to make oral submissions and further directions were issued providing the opportunity for written submissions. The investigation meeting concluded at 11.25am.

[11] Written submissions were lodged on behalf of Ms Morgan, and they were served on Star Cutz. Star Cutz were provided an opportunity to respond but have not done so.

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

### **Advertisement and interview**

[13] Ms Morgan gave evidence that she was referred for an interview with Star Cutz through Work and Income on 28 April 2020. She was told by a work broker that there was an opening for someone with no experience with Star Cutz, and that the job was to be on full wages. Work and Income set up an interview for her and she went straight to the interview the same day.

[14] Ms Morgan attended the premises of Star Cutz and met with Fetuoiga (known as Star) Fidow, the sole director and shareholder of Star Cutz. Ms Morgan's evidence was that the interview was short, it was agreed that she would be engaged for a two-week trial period, and that she would not be paid for that period but that she would receive training. She was told that if it went well it could lead to full time work at the end of the trial period, although specific pay rates were not discussed.

[15] Ms Morgan was not provided an individual employment agreement at the interview.

[16] Ms Morgan's evidence was that Mr Fidow, at the initial interview, explicitly told her not to advise Work and Income of the arrangement made as they would cancel her benefit. Ms Morgan's statement provided prior to the investigation meeting appeared to conflict somewhat with that evidence. However, I accept the oral evidence of Ms Morgan, noting that she also said that she brought the comment made by Mr Fidow to the attention of her case manager at Work and Income.

[17] Ms Morgan was asked to start immediately following the interview. She was provided a work shirt and then commenced work.

### **Ms Morgan's work at Star Cutz**

[18] From her first day at Star Cutz, 28 April 2021, Ms Morgan was assigned duties including sweeping and cleaning, operating the till, making coffee for customers and staff, and on one single occasion she was given some instruction as to a haircut being given to a client.

[19] Ms Morgan gave evidence that during her two weeks at Star Cutz she performed three haircuts, two for walk-in customers, and one for Mr Fidow's eldest daughter.

[20] Between 28 April 2021 and 11 May 2021, Ms Morgan claims she worked a total of 82.75 hours and was not provided any training during that time. Ms Morgan provided the Authority a table of the hours/days for which she claims payment of wages.

[21] Ms Morgan said that the two-week trial came to an end on 11 May 2021 and that there was no further discussion about ongoing employment at the end of the trial period. Ms Morgan has not claimed that she was dismissed from employment.

### **Request for payment of wages and subsequent events**

[22] On the evening of 11 May 2021, Ms Morgan attended the barbershop with her father. Mr Fidow was asked to make payment to Ms Morgan given she had been performing work and had not received any training. Mr Fidow declined to make payment.

[23] Following the two-week 'trial period', Star Cutz did end up making a payment to Ms Morgan of \$52.00. This followed an exchange of text messages between Mr Fidow and Ms Morgan. Ultimately, Mr Fidow sent a message to Ms Morgan stating that the amount to be paid would be \$52.00. Ms Morgan sent a further text asking Mr Fidow to review the situation given the payment would be less than one dollar for each hour worked. Mr Fidow responded by stating that there had been an agreement to pay a commission but not an hourly rate.

[24] Ms Morgan's evidence is that there was never any discussion about being paid on a commission basis.

[25] Ms Morgan, with the assistance of her counsel, sought to recover unpaid wages from Star Cutz. It is evident from the relevant correspondence, and the evidence of Ms Morgan, that Mr Fidow asserted that he had an arrangement with Work and Income whereby they would send him volunteers for work experience. It is also apparent from the correspondence that Ms Morgan's counsel engaged with Work and Income, that Work and Income denied there being a volunteer arrangement in place, and that the interview attended by Ms Morgan followed the advertisement of two positions for paid employment being advertised through Work and Income.

[26] Ms Morgan also raised the issue with the Labour Inspectorate. Ms Morgan provided the Authority with a letter addressed to her from Monique Williams, Labour Inspector, dated 23 September 2021. That letter indicates that Ms Williams had formed the view, after speaking to both parties, that Ms Morgan had performed tasks of commercial value to Star Cutz, and that she considered Ms Morgan was entitled to at least the minimum wage for time worked. The letter further states that Star Cutz had been provided a letter of expectation advising that they were required to make the necessary payment to Ms Morgan and that Star Cutz had undertaken to make that payment.

### **Was Ms Morgan an employee and therefore entitled to wages?**

[27] Ms Morgan claims that she was an employee and that she should have been paid at least the minimum wage for the time she worked at Star Cutz.

[28] The meaning of ‘worker’ under the Minimum Wage Act 1983 is the same as that given to ‘employee’ under the ER Act.<sup>1</sup> Section 6 of the ER Act provides for the meaning of an ‘employee’.<sup>2</sup>

[29] Ms Morgan, from her first day, performed a range of tasks including cleaning, sweeping, operating the till, and making coffee for customers. Ms Morgan also performed three haircuts during the period of her engagement. Ms Morgan contends that those tasks amounted to the performance of work.

[30] In *Salad Bowl Limited v Howe-Thornley* the Employment Court considered the issue of whether an individual was an employee when undertaking a work trial:<sup>3</sup>

Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may well be a requirement for payment as well as where other incidents of an employment relationship arise, is where the employer gains an economic benefit from the employee’s activity. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although the economic or other business or operational benefit to the employer may not have been optimal at that point due to the needs of the defendant to be shown what to do and to develop the necessary skills, the defendant was nevertheless performing work for the plaintiff and contributing to its business.

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<sup>1</sup> Minimum Wages Act 1983, s 2.

<sup>2</sup> Employment Relations Act 2000, s 6.

<sup>3</sup> *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152, at [27].

[31] This means, in determining the nature of Ms Morgan’s engagement, a significant relevant consideration is whether Star Cutz gained any economic benefit from the work Ms Morgan performed.

[32] The tasks performed by Ms Morgan were tasks that would ordinarily be considered work, they were tasks that would have been performed by Ms Morgan had she continued to work following the ‘trial period’, they were tasks that needed to be performed by someone for the business to operate, and they were of some value to Star Cutz. I conclude that Ms Morgan engaged in the performance of work.

[33] I must also determine whether Ms Morgan was employed “...for hire or reward under a contract of service”.<sup>4</sup> In doing so, I must determine the real nature of the relationship between Ms Morgan and Star Cutz. That in turn requires that I consider all relevant matters, including those that indicate the intention of the parties.<sup>5</sup>

[34] Star Cutz has not engaged with the Authority’s process and have not contested Ms Morgan’s claim that she was an employee. I find that, notwithstanding the initial agreement that Ms Morgan would be engaged on a trial basis without payment, that Ms Morgan was an employee. The expressed intentions of both Mr Fidow, on behalf of Star Cutz, and Ms Morgan at the interview, were not consistent with the real nature of the relationship that eventuated. Ms Morgan was engaged in the performance of work for Star Cutz, she was an employee of Star Cutz, and was not engaged on a legitimate unpaid work trial basis. Ms Morgan was not engaged as an independent contractor, nor was she engaged on a commission only basis. I find that Ms Morgan was engaged for hire or reward under a contract of service and was an employee.

[35] Ms Morgan was not paid wages for the hours worked, nor was she paid for annual holidays. She is entitled to both. Additionally, I consider that interest in accordance with the Interest on Money Claims Act 2016<sup>6</sup> is payable from the date the employment relationship ended calculated using the Civil Debt Interest Calculator.<sup>7</sup>

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<sup>4</sup> Employment Relations Act 2000, s 6(1)(a).

<sup>5</sup> Employment Relations Act 2000, ss 6(2) and 6(3).

<sup>6</sup> Interest on Money Claims Act 2016, s 10.

<sup>7</sup> Interest on Money Claims Act 2016, s 12 and 13.

[36] Star Cutz Barbershop Limited is ordered to make payment to Ms Morgan, within 28 days, of:

- (a) \$1,603.00 in unpaid wages (calculated on the basis of the 82.75 hours worked multiplied by the minimum wage at the time, with the \$52.00 paid subtracted);
- (b) \$132.40 in unpaid holiday pay; and
- (c) \$37.34 in interest.

**Was Ms Morgan unjustifiably disadvantaged?**

[37] Ms Morgan's employment ended on 11 May 2021. Counsel for Ms Morgan sent correspondence to Mr Fidow seeking payment on 14 July 2021. That correspondence clearly informed Star Cutz that there was a grievance, although I accept the grievance had also been raised earlier on both 17 June 2021, by counsel on Ms Morgan's behalf, and additionally via the text messages sent by Ms Morgan to Mr Fidow in May and June of 2021.

[38] Ms Morgan claims that there were two distinct actions of Star Cutz that caused her disadvantage in her employment. Firstly, she claims that she was disadvantaged in that she was not provided an individual employment agreement. Secondly, she claims that she was disadvantaged in her employment in that she was not paid for time worked.

[39] I accept that Ms Morgan was disadvantaged in her employment. I find that Ms Morgan was disadvantaged in her employment by the failure Star Cutz to provide her an individual employment agreement. Ms Morgan was deprived of certainty as to her terms and conditions of employment which left her, and her employment, in an unduly precarious and disadvantageous state. Ms Morgan was also disadvantaged by Star Cutz's failure to pay her wages. Both matters likely contributed to her being unable to easily take issue with Star Cutz and indeed to explore ongoing employment with Star Cutz as had been contemplated.

[40] Section 103A of the ER Act sets out the test for justification. The test requires the Authority to consider, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

[41] Once it is established that Ms Morgan was disadvantaged in her employment, the onus then turns to Star Cutz to justify its actions. Star Cutz have not engaged with the Authority and have not offered a justification for its actions. I do not consider any justification to be available on the evidence before the Authority. Therefore, I find that Ms Morgan has been unjustifiably disadvantaged in her employment.

## **Remedies**

### *Compensation*

[42] Ms Morgan has sought compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the ER Act.

[43] Ms Morgan had no job to go to once her employment ended. She gave evidence that it was her first real work experience, that she was stressed and embarrassed by the experience, and that she suffered anxiety as a result. She felt uncomfortable going places, felt taken advantage of, and the experience impacted her confidence.

[44] Ms Morgan suffered stress and anxiety as a result of Star Cutz's actions. This has been ongoing given it has been necessary for her to pursue this matter through the Authority. I accept that Ms Morgan suffered stress and humiliation and felt that she had had been taken advantage of, and that Ms Morgan's confidence was damaged as a result of Star Cutz's unjustifiable failure to provide an individual employment agreement and to pay her wages.

[45] Having regard to generally comparable cases and the impacts on Ms Morgan, I consider that an appropriate award of compensation is \$7,000.

### *Contribution*

[46] I have considered the extent to which any actions of Ms Morgan may have contributed towards the situation that gave rise to the personal grievance. I find that there is no basis for a reduction in remedies in terms of s 124 of the ER Act.

[47] Star Cutz Barbershop Limited is ordered to make payment to Ms Morgan, within 28 days, of \$7,000 for compensation for humiliation, loss of dignity, and injury to feelings.

## **Has Star Cutz breached the minimum employment standards?**

### *Star Cutz breached s 4 of the Minimum Wages Act 1983*

[48] As detailed above, I have found that Ms Morgan was an employee and therefore was entitled to be paid wages. Section 6 of the Minimum Wage Act 1983 provides as follows:<sup>8</sup>

**6 Payment of minimum wages**

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than the minimum rate.

[49] Every person who makes default in the full payment of any wages payable by that person under the Minimum Wage Act 1983 is liable to a penalty imposed by the Authority under the Act.<sup>9</sup>

[50] Ms Morgan was an employee and Star Cutz failed to make payment to Ms Morgan of the minimum wage. I find that Star Cutz breached s 6 of the Minimum Wage Act 1983.

### *Star Cutz breached ss 64 and/or 130 of the ER Act 2000*

[51] Section 64(1) of the ER Act provides that an employer must keep a copy of the employee's individual employment agreement or current terms and conditions of employment when s 63A applies. Sections 63A(1)(e) and (f) of the ER Act (in relation to individual employment agreements in the absence of a collective agreement, and in relation to where fixed term employment or a trial period is proposed) applied in the circumstances and Star Cutz did not provide Ms Morgan with a copy of the intended agreement under discussion in accordance with s 63A(2)(a) of the ER Act.

[52] Ms Morgan's evidence was that there was no signed employment agreement nor copy of her terms and conditions. Ms Morgan was not provided with any such documentation and Star Cutz have not disputed Ms Morgan's claims. I find that Star Cutz failed to retain a copy of those documents in breach of s 64 of the ER Act.

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<sup>8</sup> Minimum Wage Act 1983, s 6.

<sup>9</sup> Minimum Wage Act 1983, s 10.

[53] Ms Morgan also claims that Star Cutz breached s 130 of the ER Act in that it did not keep wages and time records for Ms Morgan in accordance with that section of the ER Act. Star Cutz has not engaged in the Authority's process and has not contested the breach claimed. I find that, having considered the evidence available to the Authority including as to the absence of an individual employment agreement and the failure to pay wages at all, that Star Cutz could not have kept the records required by s 130. I find that Star Cutz failed to retain a copy of the records it was required to keep in breach of s 130 of the ER Act.

*Star Cutz breached the Holidays Act 2003 by failing to make payment for annual holidays*

[54] Ms Morgan did not receive any payment for annual holidays. Given Ms Morgan was an employee and entitled to wages, Star Cutz were obligated to make payment in accordance with s 23 of the Holidays Act 2003. Star Cutz failed to do so and have breached s 23 of the Holidays Act 2003.

### **Penalties**

[55] Ms Morgan seeks penalties against Star Cutz for the following:

- (a) A breach of s 6 of the Minimum Wage Act 1983 in that Star Cutz failed to pay Ms Morgan at least the minimum wage;
- (b) Sections 64 and 130 of the ER in relation to an alleged failure by Star Cutz to provide an individual employment agreement and in relation to the keeping of wage and time records;
- (c) A breach of Star Cutz's obligations to make payment for annual holidays in accordance with the Holidays Act 2003.

[56] I have made findings in relation to each of the alleged breaches, and in each case, I have determined that Star Cutz acted in breach of its relevant statutory duties. Ms Morgan, in relation to the breached minimum employment standards, submits that Star Cutz breached the standards knowingly and intentionally.

[57] I have determined that Ms Morgan is entitled to a remedy in the form of compensation for her personal grievance. The Court in *Salt v Fell*<sup>10</sup>, following the approach in *Xu v McIntosh*<sup>11</sup> declined to award penalties where a remedy had already been granted in respect of the same conduct for a personal grievance where there were no “special facets of the breach calling for punishment of the employer on top of compensation for the employee”.<sup>12</sup>

[58] I do not consider that this is a case where the factual matrix is the same. Even if it were the case that, to an extent, the matrix was shared as between the personal grievance and the penalties sought, I consider that in this case there would be ‘special facets’ that call for punishment.

[59] Ms Morgan, as a young person new to the job market, and also having regard to the circumstances in which she was referred to Star Cutz, was especially vulnerable. The evidence Ms Morgan, which I accept, was that Mr Fidow explicitly told her that she should not advise Work and Income of the arrangements, I consider the breaches were not inadvertent, minor, or technical, and that they were, at the very least, reckless. I consider there is a special need for deterrence, both general and specific, in this case.

[60] The Authority has jurisdiction to award the penalties for the breaches claimed.<sup>13</sup> I must consider whether in each case a penalty is warranted. The considerations in regard to penalties<sup>14</sup> are as follows:

- (a) The object of the Act – the object of the ER Act includes recognition and the promotion of good faith behaviour, acknowledging and addressing the inherent inequality of bargaining power in employment relationships, and the promotion and effective enforcement of employment standards. The object of the ER Act supports the imposition of an appropriate penalty in this case.
- (b) The nature and extent of the breach – the breaches are significant in their nature in that Star Cutz failed to comply with a range of statutory duties and minimum standard as to the employment. This included a failure to

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<sup>10</sup> *Salt v Fell* [2006] ERNZ 499.

<sup>11</sup> *Xu v McIntosh* [2004] 2 ERNZ 448.

<sup>12</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [45].

<sup>13</sup> Employment Relations Act s 161(1)(m).

<sup>14</sup> *Nicholson v Ford* [2018] NZEmpC 132.

provide a written employment agreement, to pay the minimum wage, and to pay holiday pay, each being serious matters;

- (c) Whether the breach was intentional, inadvertent, or negligent – the breaches were more than inadvertent. Additionally, I have found that Star Cutz took deliberate steps to advise Ms Morgan not to inform Work and Income of the arrangements made. I consider this to support a finding that the breaches were, if not intentional, then at least reckless;
- (d) The nature and extent of any loss or damage – the applicant suffered loss of income and was subject to significant emotional damage. The employment was however of limited duration;
- (e) Compensation or other steps in mitigation – there have been no relevant steps in mitigation;
- (f) The circumstances of the breach, including the applicant’s vulnerability – Ms Morgan was particularly vulnerable given her age, her being new to employment, and having been referred via Work and Income;
- (g) Any similar conduct – there is no issue of past similar conduct;
- (h) Deterrence – there is a need for deterrence on a general and specific basis;
- (i) Degree of culpability – Star Cutz has failed to take responsibility, this is despite apparently initially advising the Labour Inspectorate that it would take corrective action as to wages;
- (j) Consistency – I have taken into account comparable penalty cases and consider this in the mid-range;
- (k) Ability to pay – Star Cutz has not engaged with the Authority’s process and there is no evidence as to an inability to pay.

[61] The decision made by Star Cutz to have Ms Morgan work, but to not make payment to her of the minimum wage, was of particular seriousness. It was a reckless decision that led to the other breaches.

[62] I now turn to the application of the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*<sup>15</sup>. In doing so, I have taken into account the relevant factors detailed above.

*Nature and number of breaches (Step 1)*

[63] There are four breaches across three different Acts. I consider it appropriate to globalise the breaches that relate to the failure to keep employment records under the ER Act. As such, the four initial breaches are reduced to three for penalty purposes. I consider the effective maximum penalties to be \$60,000.<sup>16</sup>

*Assessment of severity of breach (Step 2)*

[64] As to Step 2 of the *Preet* test, having weighed the aggravating and mitigating factors, including the seriousness of the breaches, Star Cutz reckless approach to the engagement, the vulnerability of Ms Morgan, the short duration of the employment and the absence of similar previous conduct, I consider the starting points to be as follows:

- (a) 50 per cent in relation to the Minimum Wage Act breach; and
- (b) 75 per cent in relation to the ER Act and Holidays Act breaches.

[65] On that basis, I find the provisional penalties having considered severity, to be \$20,000.

*Financial circumstances of the respondent (Step 3)*

[66] In relation to the financial circumstances of Star Cutz, the Authority's consideration is not assisted by the failure of Star Cutz to engage in the Authority's process. Given that lack of engagement, and absence of any evidence as to an inability to pay, no reduction is made as to financial capacity. As such, in terms of Step 3 of the *Preet* test, the provisional penalties remain at \$20,000.

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<sup>15</sup> [2016] NZEmpC 143.

<sup>16</sup> Minimum Wage Act 1983, s 10; Holidays Act 2003, s 75(1)(b); Employment Relations Act, s 135(2)(b).

*Proportionality of outcome (Step 4)*

[67] Applying the proportionality or totality test I consider the following factors relevant:

- (a) Proportionality in terms of the sums withheld by Star Cutz;
- (b) Ensuring that the final penalties are not so substantial as to incentivise non-compliance; and
- (c) Having overall regard to the circumstances and considering the vulnerability of Ms Morgan and the need to specific and general deterrence as a ‘special facet’.

[68] Taking all the above matters into account, Star Cutz is ordered to pay penalties totalling \$4,000. Having regard to the circumstances, including my findings and orders relating to Ms Morgan’s unjustified disadvantage claims, I order that the whole of the penalty be paid to the Crown account via the Authority.

**Costs**

[69] It is appropriate that I determine the issue of costs at this time given Star Cutz has failed to engage at all.

[70] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.<sup>17</sup>

[71] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party’s conduct.<sup>18</sup>

[72] The daily tariff is usually taken as a starting point,<sup>19</sup> although not used in a rigid manner, with principled adjustments made having regard to the to the particular characteristics of a case.

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<sup>17</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>18</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

<sup>19</sup> Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

[73] Ms Morgan was represented by counsel from the Manawatū Community Law Centre. Ms Morgan seeks a contribution of \$5,000 towards costs, calculated on the basis of time worked on her file. Counsel referred to the decision of the Employment Court in *Innovative Landscapes (2015) v Celia Popkin*<sup>20</sup> in support of its submission that an order for costs should be made notwithstanding Ms Morgan has not actually incurred legal fees.

[74] Whilst the decision in *Popkin* concerned the application of the Employment Courts discretion, I find the reasoning no less applicable to the discretion to be exercised by the Authority. That position is also consistent with the approach taken by the Authority<sup>21</sup> in relation to the same employment relationship problem that was subject to de novo challenge in *Popkin*. I find that making a costs order is consistent with the Authority's broad discretion informed by the underlying purposes and objectives of the statutory scheme.<sup>22</sup>

[75] I consider that an award of costs in the amount of \$1,500 is appropriate in the circumstances. I order that Star Cutz make payment of \$1,500 to Ms Morgan as a contribution towards costs. It is a condition of my order that the full amount of \$1,500 be paid by Ms Morgan to the Manawatū Community Law Centre within 14 days of payment being received by her.

[76] I also order Star Cutz reimburse the filing fee of \$71.56.

### **Summary of orders**

[77] Star Cutz Barbershop Limited is ordered, within 28 days of the date of this determination, to make payment of:

- (a) \$1,603.00 to Ms Emma Chloe Morgan for arrears of wages (calculated on the basis of the hours worked and the applicable minimum wage at the relevant time);
- (b) \$132.40 to Ms Morgan in unpaid holiday pay.
- (c) Interest on monies owed for wages and holiday pay to Ms Morgan in the amount of \$37.34.

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<sup>20</sup> [2020] NZEmpC 96.

<sup>21</sup> *Popkin v Innovative Landscapes (2015) Limited* [2020] NZERA 374.

<sup>22</sup> [2020] NZEmpC 96 at [21].

- (d) \$7,000 to Ms Morgan as compensation for hurt and humiliation under s 123(1)(c)(i) of the ER Act;
- (e) \$4,000 in penalties to be paid into the Crown account via the Authority;
- (f) \$1,500 in costs to Ms Emma Chloe Morgan (it is a condition of my order that the full amount of \$1,500 be paid by Ms Morgan to the Manawatū Community Law Centre within 14 days of payment being received by Ms Morgan); and
- (g) Reimbursement of the filing fee to Ms Morgan in the amount of \$71.56.

Rowan Anderson  
Member of the Employment Relations Authority