

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 520
3135506

BETWEEN

MARLENE DESTEFANI
Applicant

AND

JOHN PYE t/a FLORETTE CAFÉ
Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, advocate for the Applicant
John Pye, representing the Respondent

Investigation Meeting: 14 September 2022 by Zoom

Submissions and/or further evidence: 16 September 2022 from the Applicant
30 September 2022 from the Respondent

Determination: 11 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Marlene Destefani, claims that she was constructively dismissed in her employment with the Respondent, Mr John Pye, trading as Florette Café.

[2] Ms Destefani also claims that she was unjustifiably disadvantaged in her employment, and owed monies in respect of unpaid annual and public leave entitlements.

[3] The Respondent denies all claims made by Ms Destefani whom he says was paid in respect of all entitlements.

The Authority's investigation

[4] The Authority received oral and written evidence from Ms Destefani, Ms Tamara Destefani, her daughter, and Mr Pedro Destefani, her son. Due to Ms Destefani's limited understanding of the English language, the services of a Spanish interpreter were used throughout the investigation meeting.

[5] Mr Pye also provided written and oral evidence. Due to his difficulty in physically attending an investigation meeting, it was agreed for the investigation meeting to be held by Zoom.

[6] I also received submissions from the representatives for the Applicant and from Mr Pye.

[7] 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.

Issues

[8] The issues requiring investigation are whether or not:

- Ms Destefani was constructively dismissed by Mr Pye?
- Ms Destefani was unjustifiably disadvantaged by Mr Pye?
- Ms Destefani is owed any monies in respect of:
 - annual leave entitlements?
 - of public holiday entitlements?
 - Kiwisaver entitlements?
- A penalty should be paid by Mr Pye in respect of any breach of the Holidays Act 2003; the Wages Protection Act 1983 and/or the Employment Relations Act 2000?

Background

[9] Ms Destefani applied for the position of Chef advertised on Mr Pye's behalf by a recruitment agency. She was interviewed and appointed by Mr Pye as a full-time permanent employee at Florette Café (the Café) between the hours of 7 a.m. to 4 p.m. at the rate of \$21.00 per hour Tuesday to Sunday. Ms Destefani commenced employment at the Café in April 2019.

[10] The Café was owned by Mr Pye and at the time Ms Destefani worked there the Café employed one other permanent employee and a number of casual employees as baristas and front-of-house.

[11] Ms Destefani said she was not provided with a written employment agreement although she requested one on a number of occasions.

[12] Mr Pye said his understanding was that the agreement he had entered into with the recruitment agency fulfilled the requirements of an employment agreement.

[13] Ms Destefani said initially she had a good relationship with Mr Pye and the other employees at the Café. However in June 2020 there was an incident between her and another employee, Ms Y, in which Ms Destefani claimed she had been verbally and physically attacked by Ms Y throwing a bottle in her direction.

[14] Ms Destefani had, with the assistance of her children who are fluent in English, written a letter to Mr Pye dated 16 June 2020 in which she set out her concerns and requested that she not be required to work the weekend of 20 and 21 June 2020 as she felt unsafe working with Ms Y.

[15] Mr Pye said he had spoken to both Ms Destefani and Ms Y and concluded that there had been a heated argument between them. He considered that Ms Destefani avoiding working with the other employee was not going to resolve the situation so he called a meeting at which both women were present.

[16] He said that during the meeting the two women had resolved the issues between them.

[17] Mr Pye said that there had been a previous issue between Ms Destefani and two other employees which had arisen because one of the employees, Mr Z, had criticised Ms Destefani and the other employee for not maintaining high hygiene standards by clearing tables and serving areas promptly and for food which had dropped on the floor not being cleared. However this also had been resolved by discussion with the employees.

[18] Mr Pye said there was limited space in the café preparation and serving area for three or more employees to work, and this sometimes lead to friction between them.

[19] Ms Destefani said she started to experience problems in her working relationship with Mr Z. whom she said was verbally abusive to her. She said she spoke to Mr Pye about the problem, but when he took no action her children wrote a letter for her.

[20] The letter dated 23 October 2020 stated:

I am writing to you to apologise for any part I might have had in any difficult situations that have arisen recently in the café. There may have been some misunderstandings from time to time that have been my fault. I do not want to cause any issues or problems and I want to continue to do my best as an employee.

I asked you on Saturday if was (sic) causing any problems because [Mr Z] had been getting angry with me. You reassured me it was not my fault the problem was between you two and nothing to do with me. You told me on Saturday that [Mr Z] was an employee just like me. I asked you yesterday whether I could make my own coffee and you said that was fine.

I knew that today you had a funeral. Once you left for the funeral I kept working as usual. Then [Mr Z] told me he was closing the café at about 11.00am and told me to

leave. [Mr Z] said that I am trying to start problems between the two of you. I assure you that I do not intend to get involved in your private life. He said that we couldn't work together anymore because we were not a team. He said that I was throwing things around, which is absolutely untrue. Then he asked me for the key. I said I would not give him my key but I would give it to you tomorrow if necessary because you gave it to me. He kept repeating that he was the boss too and the owner. He said that I was not a good person. I replied that he was a bad person.

I have been feeling unsafe in the workplace for a long time. This is not the first incident that has made me feel unsafe as you should be aware. [Mr Z] has behaved badly towards me on a number of occasions since last year shouting, screaming and throwing things even in front of you.

I understand the difficulties you must have faced this year as have many employers, However you still have duties as an employer and it is not an excuse for the treatment I have received. I just want to work in a safe environment. I want [Mr Z]'s wrongful behaviour towards me to stop from today.

I would like to discuss job descriptions for [Mr Z] and me, so that we can each know what each of us should be doing and how we should help each other e.g. when we are busy and when we are quiet. To avoid misunderstandings can we please have these written down?

I appreciate the opportunity you have given me to work in your café and do not wish to create any conflict and look forward to continuing to work for you.

[21] Ms Destefani said on one occasion Mr Pye had left her and Mr Z in charge of the Café while he attended a funeral. She said that on that occasion Mr Z started shouting at her and threatening to 'fire' her.

[22] Following an incident Ms Destefani asked her children to write a further letter for her on or about 20 November 2020. The letter reiterated her concerns with Mr Z and concluded:

If you do not comply with these requests. I will start the process with EMPLOYMENT NEW ZEALAND. I just want to work without stress, in a positive and safe environment and clearly knowing my tasks and responsibilities. Also, I want to have all the paperwork and payments in order as per the law.

[23] Mr Pye said that the issues Ms Destefani was raising about Mr Z mirrored previous concerns she had with Ms Y. Although Ms Destefani had referred to incidents with Mr Z which she claimed he had witnessed, Mr Pye said he had not seen any such incidents.

[24] He said that Mr Z, whose family were in Africa, sometimes talked very loudly when he was on the telephone to them, but he had not seen Mr Z shouting at, or speaking rudely to, Ms Destefani.

[25] He had spoken to Mr Z about the situation which had arisen on the day he had left the Café to attend a funeral leaving Mr Z and Ms Destefani to operate the Café. His understanding from Mr Z was that due to Ms Destefani behaving badly, Mr Z had considered that he had no option but to close the Café early.

[26] Mr Pye said he spoke to Ms Destefani when he returned from the funeral but she had wanted to record the conversation on her phone. Since they had previously had a good working relationship, this made him concerned and he considered that he could no longer trust her.

[27] He had told Ms Destefani that Mr Z would be returning to Africa in February 2021 at which time the situation would resolve itself.

[28] Ms Tamara Destefani and Mr Pedro Destefani said they would drive Ms Destefani to work. Tamara said she often had lunch with Ms Destefani at the Café and whenever she met Mr Pye or Mr Z on those occasions, they had been very nice to her.

[29] Pedro also said Mr Pye was always pleasant to him. Mr Z was pleasant too, however on occasion he would not be as friendly, although he was never rude to him.

[30] Ms Destefani when asked at the Investigation Meeting why she had not resigned during the period when she was unhappy at the Café, said that up until December she had been the sole breadwinner in the family, however once Christmas approached her children were able to work for longer and the family was no longer so reliant on her income alone so she had felt able to resign.

[31] Her children wrote a letter for her dated 8 December 2020 which stated:

I have not received any response from you, regarding the letter I gave you around 23rd October 2020 and the 29th of November, 2020.

- [Mr Z] has been insulting me not long after I started working at Florette Cafe, calling me names, cursing at me and he even yelled at me 'You need to speak like a human being' which this made me feel very upset by his humiliation, This behaviour has gravely been increasing in the last couple of months to the point he yells and throws things around in the kitchen.
- On Sunday 06th of December 2020, the bullying and insults continued even in front of the customer, which made the customer and I feel uncomfortable by his humiliating actions. He kept his bullying behaviours- He does not care anymore if there is customers present at the time when he starts yelling at me.

I informed you about the situation above, and there were no changes or actions taken. The Employment Relations Act 2000, specifies that employers are to act in good faith and you have consistently neglected my many requests to resolve these issues. As employer you SHOULD HAVE provided a safe environment. I have sought for legal advice, in which I am taking corresponding actions.

Due to not being provided with an Employment Agreement which I have asked for ever since I started working on April 2019, I am resigning from my role as a Cook at Florette Café effective immediately, I expect all my payments to be paid in the upcoming cycle: 2019 holidays left, 2020 holidays, days in lieu and 5 sick days. I cannot wait any longer until February 2021 for [Mr Z] to go back to his country, as you told me to be patient until his departure.

[32] Pedro said he had accompanied Ms Destefani to the Café on the morning of 8 December 2020. When they arrived Ms Destefani had gone into the kitchen area where she gave the letter to Mr Pye.

[33] Pedro said he could see that Mr Pye was upset and he had come out from the kitchen shouting and saying he would have him and Ms Destefani trespass from the Café. As a result, they had left the Café in a hurry, and Ms Destefani had not had time to collect all her personal items.

[34] Mr Pye said that he and Mr Z had both been in the Café when Ms Destefani arrived. He realised she was not intending to work as she was not wearing her work clothes. He denied he had been shouting but said he had been very disappointed with her decision to leave after the Café had experienced financial difficulties after Covid-19, and that situation was starting to improve.

[35] He had taken the key to the Café Ms Destefani gave him, and confirmed he had said he would have her trespass from the Café.

Was Ms Destefani constructively dismissed by the Respondent?

[36] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Ms Destefani claims that she was constructively dismissed as a result of Mr Pye failing to respond to her concerns. She regards this as an unjustifiable action by Mr Pye and a breach of duty which was sufficiently serious to give her no option but to resign.

[37] In examining whether a constructive dismissal has occurred two questions arise:

i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and

Second, if there was such a breach,

ii. was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation

Was there a breach of duty?

[38] The Café was a small employer with only one other permanent employee besides Ms Destefani. Mr Pye was the owner/operator but his health issues made it difficult for him to work full-time in the Café.

[39] The working area in the Café was relatively small and I consider this at times resulted in the working atmosphere becoming intense.

[40] Prior to Ms Destefani's issues with Mr Z, there had been a heated altercation with Ms Y, however this had been resolved by Mr Pye holding a discussion with both women.

[41] By mid-October 2020 Ms Destefani had become unhappy in the Café as a result of her relationship with Mr Z. She had made Mr Pye aware of her concern by letter dated 23 October 2020.

[42] In that letter she requested that job descriptions for her and Mr Z because these would assist the situation.

[43] Mr Pye's evidence was that he considered the concern raised by Ms Destefani to be similar in nature to the issue she had with Ms Y, and believed it too could be resolved through discussion. However when he commenced speaking to Ms Destefani, her wish to record the conversation had made him distrustful of her, and as a result he had terminated it and therefore the conversation did not resolve matters.

[44] Mr Pye did not provide job descriptions as requested on the basis that he no longer trusted Ms Destefani.

[45] The situation between herself and Mr Z not having improved, Ms Destefani raised her concerns again in late November 2020. In the letter she also requested paperwork and payments to be provided.

[46] Mr Pye did not respond to the letter, and no paperwork was provided.

[47] There was no attempt to engage with Ms Destefani when she raised her ongoing concern in November 2020.

[48] Employers and employees are expected to act in good faith towards each other. I find that Ms Destefani did act in good faith by alerting Mr Pye to her concerns by the letter dated 23 October 2020. The letter was not confrontational but set out clearly the concerns she wanted resolving, and made a constructive suggestion, namely that providing job descriptions would assist the situation.

[49] It is clear that the Café could at times be a challenging work environment due to the limited working space, and that on occasion tempers would flare but could be quickly resolved by discussion when the situation was calmer.

[50] I also take into consideration that fact that Mr Pye was not in good health and therefore was not as active in the Café management as he would otherwise have been, and that he did not have the benefit of specialist HR advice and support as would be available in a larger organisation.

[51] However even given these acknowledgments of the situation, I find that Mr Pye did not act in good faith by failing to actively engage with Ms Destefani about her concerns, either in October 2020 or in November 2020.

Reasonably foreseeable Ms Destefani would resign?

[52] To amount to a constructive dismissal, there must not only be a breach of duty on the part of the employer, but it must also have been reasonably foreseeable that Ms Destefani would resign as a result. Such resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

[53] Ms Destefani had provided Mr Pye with two opportunities in October and November 2020 to resolve the situation. His response was to suggest that the situation would be resolved when Mr Z left the Café in February 2021. Ms Destefani said that she did not feel she could cope with the situation until that date.

[54] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*¹ observed in describing this type of constructive dismissal:²

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[55] In the circumstances of this case, I find that Ms Destefani having raised her concerns in some detail, the lack of engagement by Mr Pye in attempting to resolve them because of his belief that the situation with Mr Z would be resolved when Mr Z left was dismissive behaviour. I find it was a reasonably sufficient to justify Ms Destefani's decision to leave her employment at the Café.

¹ [1983] ACJ 965

² at [975]

[56] I determine that Ms Destefani was constructively dismissed.

Was Ms Destefani unjustifiably disadvantaged by the Respondent?

[57] Ms Destefani claims that Mr Pye not addressing the issues she raised resulted in her being disadvantaged in employment.

[58] I find the circumstances giving rise to this claim have been considered in respect of Ms Destefani's constructive dismissal claim. I therefore make no finding that the unjustifiable actions of Mr Pye also constituted grounds for a separate claim of unjustifiable disadvantage.

Is Ms Destefani owed any monies in respect of unpaid annual leave entitlement?

(i) Annual leave entitlement

[59] Ms Destefani claims that she is owed annual leave entitlement.

[60] Records provided on behalf of Mr Pye are incomplete, and do not constitute a full wage and time record for the entire period Ms Destefani was employed. They are also complicated by the circumstances surrounding the payment of the Covid wage subsidy and a lack of documentation showing the dates the Café operated and Ms Destefani worked.

[61] Ms Destefani worked six days a week, Tuesday to Sunday and during her last 13 weeks of employment she was paid a gross amount of \$12,678.75, or an average of \$975.29 gross per week.

[62] Ms Destefani initially claimed that she had taken only three days of annual leave during the course of her employment, however during the course of the Investigation Meeting Ms Destefani accepted that she had taken more annual leave than she had initially stated. That number she now accepts was 7 days rather than the three days originally claimed.

[63] On the basis that during the period of Ms Destefani's employment she would be entitled to 33.33 days of annual leave, of which she took 7 days, I find that Ms Destefani is entitled to be paid for 26.33 days in respect of accrued annual leave.

[64] Mr Pye said that Ms Destefani's annual leave accrual was used to top up her wage subsidy payment during the 2020 Covid lockdown periods. Ms Destefani's evidence was that she had not consented to this, and therefore could not be held to have agreed to the deduction.

[65] I find that Ms Destefani is entitled to payment in respect of outstanding annual leave accrual for 5.26 weeks.

(ii) *Public Holiday Entitlement*

[66] Ms Destefani claimed initially that she worked on most public holidays, however when Mr Pye pointed out that Florette Cafe was not usually open on a Monday (I observe that Ms Destefani worked Tuesday to Sunday) she amended this to having worked on two occasions, being Anzac Day, 25 April 2019, and Waitangi Day, 6 February 2020.

[67] Ms Destefani claims that she did not work on Good Friday 2019 but that she was not paid for that day. Ms Destefani was unable to provide any evidence that she was not paid, however the wage and time records provided for the subsequent period do not indicate non-payment for the following Easter holidays. I do not find this aspect of Ms Destefani's claim substantiated.

[68] I find that Ms Destefani is entitled to be paid for 50 percent of her hourly rate for working on 25 April 2019 and 6 February 2020, and to two alternative holidays in respect of those days.

(iii) *Kiwisaver Contributions*

[69] Ms Destefani claims that from the commencement of her employment, Mr Pye failed to make any Kiwisaver contributions.

[70] According to Ms Destefani's IRD records, the employer contributions to Kiwisaver were being made from 30 March 2020 until 30 November 2020. This is consistent with the statement in the Statement of Problem that :”It is understood that Florette did not start paying into her Kiwisaver fund until around April 2020.”

[71] I find that Ms Destefani is entitled to a contribution to her Kiwisaver contributions for the period from 30 April 2019 until 31 March 2020.

Remedies

[72] Ms Destefani has been constructively dismissed and is entitled to remedies.

Lost wages

[73] Ms Destefani resigned with immediate effect from her employment at the Café on 8 December 2020. She did not provide any notice period. In the absence of any written employment I consider one week's notice would have been appropriate.

[74] Ms Destefani said that she started to look for work almost immediately, dropping off her CV at various cafes in the area, checking the Seek website and subsequently obtaining employment on 23 January 2021 with the company which had sold the Café to Mr Pye.

[75] I therefore consider that Ms Destefani is entitled to 5 weeks lost wages.

[76] **Mr Pye is to pay Ms Destefani the sum of \$4,876.45** (calculated as 5 weeks x \$975.29 per week) pursuant to s 28(3) of the Act.

Compensation

[77] Ms Destefani said she had suffered feelings of stress during her employment, and suffered from panic attacks and vertigo, although during the Investigation Meeting Ms Destefani clarified that she felt panicky when attending for work rather than having actual panic attacks.

[78] I accept that Ms Destefani suffered distress and injury to feelings resulting from the work situation at the Café.

[79] **I order Mr Pye to pay Ms Destefani the sum of \$8,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**

Contribution

[80] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[81] Ms Destefani alerted Mr Pye to the concerns she was experiencing in her employment at the Café, thereby giving him an opportunity to rectify the situation at an early stage, however he did not do so.

[82] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Destefani did not contribute to the situation which resulted in her dismissal and there is to be no reduction in the remedies awarded.

Annual Leave Entitlements

[83] I find that Ms Destefani is entitled to payment in respect of outstanding annual leave accrual for 5.26 weeks.

[84] **I order Mr Pye to pay Ms Destefani the sum of \$5,130.02 gross (calculated as \$975.29 per week x 5.26 weeks) as outstanding annual leave entitlement pursuant to s 24 of the Holidays Act 2003.**

Public Holiday entitlement

[85] I find that Ms Destefani is entitled to be paid for 50 percent of her hourly rate for working on 25 April 2019 and 6 February 2020, and to two alternative holidays in respect of those days.

[86] **I order Mr Pye to pay Ms Destefani the sum of \$189.00 gross (calculated as 2x 9 hours x \$10.50) plus the sum of \$189.00 (calculated as 9 hours @ \$21.00 per hour) in respect of two alternate holidays, a total payment of \$378.00 pursuant to s 50 of the Holidays Act 2003.**

Kiwisaver Contributions

[87] **I order Mr Pye to pay to Ms Destefani the employer's contribution towards KiwiSaver at 3% for the period 7 April 2019 until 29 March 2020 in the sum of \$1,469.99 (calculated as 3% of the total gross earnings from 30 April 2019 to 29 March 2020).**

Interest

[88] Ms Destefani has also claimed interest on sums owing to her.

[89] Pursuant to cl 11 of the Second Schedule to the Act, the Authority may, if it thinks fit, order interest on amounts due to a person to compensate them for the loss of use of monies.

[90] I order that Mr Pye pay Ms Destefani interest on the amounts ordered by way of annual leave and public holiday entitlements.

[91] Interest is to be calculated using the civil debt interest calculator and payment of that amount is to be made 28 days after the date of this determination.³

³ www.justice.govt.nz/fines/civil-debt-interest-calculator

Did The Respondent breach any requirements of the Holidays Act 2003 and/or the Wages Protection Act 12983 and/or the Employment Relations Act 2000, and if so should penalties be paid?

[92] The Applicant is seeking penalties in respect of: (i) the failure to provide a written employment agreement pursuant to s 65 of the Act,; (ii) the failure to provide wage and time records pursuant to s 130 of the Act, (iii) the failure to provide Ms Destefani with her final pay in breach of s 4 of the Wages Protection Act 1983, and (iv) breaches of s 27(1)(b) and s 50 of the Holidays Act 2003.

[93] Penalties for breaches of various sections of the Act render a company liable to penalties up to a maximum amount of \$20,000.00 per penalty.

[94] In deciding whether to impose a penalty and if I decide to, deciding how much that penalty should be, I need to have regard to the factors in s 133A of the Act and the approach as set out by the Employment Court in *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.⁴

[95] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[96] One of the objects of the Act is to promote the effective enforcement of employment standards. Provision of an employment agreement in a timely manner ensures both parties are aware of the agreed terms and conditions of employment,. There is a duty to maintain wage and time records and provide these on request, and an employee is entitled to receive written reasons for their dismissal.

[97] Failure to fulfil these requirements represents a failure to maintain minimum employment standards, prejudiced Ms Destefani's ability to calculate the holiday pay entitlements and wages owed to her following her .

Identify the nature and number of statutory breaches

[98] There are four statutory breaches identified, each merit a penalty to a maximum amount of \$20,000.00. This is a potential total penalty of \$80,000.00.

⁴ *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*. [2016] NZEmpC 143

[99] I consider this is an appropriate case for applying a global penalty.⁵

Step Two- assess the severity of the breaches

[100] The aggravating factors include the fact that Ms Destefani was not an English speaker although not new to the New Zealand workforce, and she was entitled to be provided with an employment agreement in a timely manner, and have access to the wage and time records for ensuring she could calculate payments due to her after she ended her employment.

[101] Ameliorating factors on the part of Mr Pye include the fact that he had engaged an accounting firm to assist with the Café payroll requirements, although not until partway through the term of Ms Destefani's employment.

[102] Partial wage and time records were provided for the investigation meeting and I take into account that the person providing them had not acted on Mr Pye's behalf until later in Ms Destefani's employment.

The Respondent's financial circumstances

[103] The Café is no longer trading and Mr Pye is no longer operating a business due to his health situation.

Proportionality

[104] In considering the level of penalties awarded in similar cases decided since *Preet* and considering the impact on the Applicant in this case, I consider the appropriate level of the penalty in this matter to be \$500.00.

Should any part of the penalty be paid to Ms Destefani?

[105] Ms Destefani has been compensated for all her losses. The purpose of penalties is to deter, not to compensate. The penalties imposed are to bring home to Mr Pye the importance of maintain the employment standards in New Zealand which should be well known to all employers given the length of time they have been in place.

[106] I accept that the penalty may not act as a deterrent to Mr Pye who no longer operates a business, but it may do to other employers.

[107] **I order Mr Pye to pay the full penalties amount of \$500.00 to the Authority for transfer to a Crown Bank Account.**

⁵ *Xu v Macintosh* [2 ERNZ 448 at [44]

Costs

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

[109] If they are not able to do so and an Authority determination on costs is needed the Applicant 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 the Respondent 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.

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

[111] 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.⁶

Eleanor Robinson
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].