IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 136
3165361

	BETWEEN	KAYLA BISHOP Applicant
	AND	CHARCOAL CHICKEN 2020 LIMITED First Respondent
		SAIF ISMAIL Second Respondent

Member of Authority:	Marija Urlich
Representatives:	Andrea Kelleher, advocate for the Applicant Eshan Gupta, advocate for the Respondents
Investigation Meeting:	16 June and 28 November 2023
Further information and submissions received:	2 February 2024
Determination:	7 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Bishop was employed by Charcoal Chicken 2020 Limited (CCL) in a part-time front of house/kitchen role at one of its restaurants operating from food court. This was Ms Bishop's first job after finishing high school. She worked there from 14 December 2020 until 30 January 2022 having tendered her resignation on 4 January 2022 during a meeting with CCL representatives at a café near the workplace.

[2] Ms Bishop brings claims to the Authority for unjustified disadvantage relating to her suspension from work on 1 January 2022 and unjustified constructive dismissal for which remedies are sought. She also brings claims for arrears of wages and holiday

pay and seeks awards of penalties for breaches of statutory obligations by CCL for failure to keep and retain a written employment agreement, making unlawful deductions from wages, failure to pay holiday pay and failure to act in a manner consistent with the duty of good faith as well as an order that a portion of any penalty to be paid to her. Ms Bishop also seeks leave under s 142Y of the Act to bring a claim against Mr Ismail as a person involved in any found breach of employment standards.

[3] CCL says Ms Bishop was treated fairly and reasonably throughout her employment and denies all the claims including any personal grievance.

The Authority's investigation

[4] The Authority received evidence from the following witness under oath or affirmation:

Ms Bishop

Valerie Leech

Nor Ali Haliza

Nislah Nijam

Gazala Begum

Karl Quinn

Vasiq Mohammed

Lucky Mankari

Kaajal Kumar (by audio visual link)

Vikas Dogra

Harpreet Kaur

[5] A number of the witnesses were unable to give direct evidence of events relevant to the matters for investigation. There is some procedural history with this matter to record. Investigation meeting dates in January 2023 were adjourned due to

COVID-19 related matters. The investigation was then rescheduled to March 2023. That investigation was unable to proceed and the adjournment was the subject of a costs order. The next scheduled investigation meeting adjourned part heard. When the matter was re-scheduled to 14 September 2023 it was unable to proceed due to an administrative error. 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 information received.

Issues

[6] The issues identified for investigation and determination are:

i. Was Ms Bishop unjustifiably disadvantaged in her employment by way of unlawful suspension on or about 1 January 2022?

ii. Was Ms Bishop unjustifiably constructively dismissed by CCL on or about 4 January 2022?

iii. If so, is Ms Bishop entitled to a consideration of remedies sought including:

   a. Lost wages (to be quantified in Ms Bishop's witness statement) under s 123(1)(b) of the Act;

   b. Compensation of $30,000 under s 123(1)(c)(i) of the Act;

iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Bishop which contributed to the circumstances which gave rise to his grievance?

v. Are arrears of wages and holiday pay owed (to be quantified)?

vi. Should interest be awarded on any arrears?

vii. Has CCL breached s 64(4) of the Act in failing to keep and retain a copy of the parties' employment agreement?

viii. Has CCL failed to provide on request wage and time records in breach of s 130(2) of the Act?

ix. Has CCL failed to pay Ms Bishop holiday pay entitlements as required by s 27(1)(b) of the Act?

x. Has CCL unlawfully deducted wages in breach of s 5(1)(a) and s 5A of the Wages Protection Act 1983?

xi. If so, should a penalty/ies be awarded any portion of which to Ms Bishop?

xii. Was Saif Ismail a person involved in any breaches of minimum employment standards? If so, should leave be granted under s 142Y(2)(a) of the Act to recover any qualifying arrears from him personally?

xiii. Is either party entitled to an award of costs?

Discussion

The parties' employment agreement

[7] Ms Bishop says she did not receive a written employment agreement when her employment commenced and was not shown any policy documents including one related to health and safety, food safety or evacuation. She said she had repeatedly asked Mr Ismail for an employment agreement and when she did not receive one thought it prudent to record her request in the WhatsApp chat, an invariable means of communication between the parties. Mr Ismail then presented her with a written individual employment agreement in December 2021 (the December 2021 IEA). After reviewing the December 2021 IEA Ms Bishop had questions including about minimum hours, which she discussed with Mr Ismail. She hand wrote 'minimum 25 hrs per week' on the document, signed and returned it to Mr Ismail and asked for a copy once it was counter-signed.

[8] CCL says it has met its obligations to Ms Bishop to provide an intended employment agreement. In its statement in reply dated 16 April 2022 CCL says, as with all staff Ms Bishop was provided with a written employment agreement when her employment commenced and she did not return her signed agreement. It also says copies of the relevant policies were kept in the workplace and Ms Bishop would have had her attention to those documents and ready access to them.

[9] Notwithstanding CCL's statement in reply that Ms Bishop did not return an executed written employment agreement, on 1 June 2023, during the course of the investigation of this employment relationship problem CCL filed an employment agreement dated 12 December 2020 containing Ms Bishop's signature, countersigned by a director of CCL and witnessed by a co-worker (the 1 June 2023 IEA). CCL relies on this employment agreement to demonstrate it met its obligation to provide Ms Bishop an intended written employment agreement when the parties entered the employment relationship.[1] CCL says the 1 June 2023 IEA was provided when it was located. It has provided no compelling explanation as to why the document could not be located and provided earlier or why the statement of reply makes a claim so significantly different to the one it seeks to make based on the 1 June 2023 IEA.

[10] In addition to the delay, the 1 June 2023 IEA itself is not consistent with it being provided to Ms Bishop at the outset of her employment. It is dated 12 August 2021 some 8 months after Ms Bishop commenced employment though it contains signatures including Ms Bishop's with handwritten dates of 12 December 2020. CCL has provided no compelling reason why the document appears to be back dated and its witnesses did not provide coherent evidence as to the circumstances of the apparent backdating. Ms Bishop says she did not backdate the IEA Mr Ismail provided her and she dated it the day she signed it, 12 December 2021. She says this is the only IEA CCL provided her during her employment. The document provided to the Authority appears to be a copy of the 1 June 2023 IEA. CCL did not provide the original 1 June 2023 IEA to the Authority.

[11] Further, CCL could not explain why, if the 1 June 2023 agreement had been provided to Ms Bishop at the outset of her employment, she was not paid the $20 per hour as recorded but rather $18.90. That both the 1 June 2023 IEA and the IEA Ms Bishop signed on 12 December 2021 record Ms Bishop's hourly rate as $20 per hour is further indication the documents were made well after Ms Bishop's employment commenced. For completeness Ms Bishop's hourly rate increased to $20 from $18.90 in early April 2021.

[1] Employment Relations Act 2000, s 63A.

[12] In addition the parties' contemporaneous communications corroborate that CCL did not provide Ms Bishop with an IEA until well after her employment commenced. The WhatsApp messages between Ms Bishop and Mr Ismail, on 25 November 2021, record Ms Bishop had asked for a "contract" before the COVID-19 lockdown, the most recent relevant one being 17 August 2021 when the whole country moved to Alert Level 4 and which date aligns with Ms Ismail then providing her an IEA dated 12 August 2021. There is no prior reference to a written employment agreement in the WhatsApp messages including at the commencement of Ms Bishop's employment when by contrast, CCL requested and Ms Bishop provided a range of information necessary for wage and time records.

[13] Given the above it is more likely than not the first time Ms Bishop was provided with a written employment agreement by CCL was December 2021 and that document is the one she signed on 12 December 2021 to which she made handwritten amendments. CCL did not provide Ms Bishop with a written employment agreement when her employment commenced as it was required under s 63A of the Employment Relations Act 2000.

[14] There is insufficient evidence to support a finding Ms Bishop and Mr Ismail negotiated and agreed minimum hours of 25 per week. While it is accepted Ms Bishop amended the employment agreement Mr Ismail presented her, there is no written confirmation CCL accepted her proposal. Ms Ismail denies such an agreement was reached. In addition, the amendment on its face does not expressly provide for a minimum of 25 hours work per week for Ms Bishop. What it provides are the opening hours of the business. This is not a matter the parties are likely to have negotiated or agreed to change.

Was Ms Bishop unjustifiably disadvantaged in her employment by way of suspension?

[15] Section 103A of the Act sets out the test for assessing whether an action including dismissal was justifiable. It requires an objective assessment of whether the employer's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the action and/or dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they

were minor and did not result in Ms Bishop being treated unfairly.[2] The Authority's task is to examine objectively the decision-making process and determine whether what CCL did and how it was done were steps open to a fair and reasonable employer.

[16] In addition to the statutory test of justification and any terms the parties have agreed as to how a suspension may be implemented, as with any aspect of or action taken within an employment relationship, the statutory obligation of good faith must apply and be met. That obligation includes being open and communicative in establishing and maintaining a productive employment relationship.[3]

[17] The following list of factors are also relevant in an assessment of the justification of CLL's suspension of Ms Bishop from her employment:[4]

> [74] It is appropriate, however, to reiterate a number of fundamental principles about suspensions from employment. They are not outcomes of a disciplinary process. A suspension is a temporary status determined by the employer where allegations of misconduct have been made, are being investigated, but have not been established or dismissed. It is the result of a decision by the employer that the usual employment relationship cannot function effectively while the investigation is continuing. It does not connote culpability and may benefit the employee as well as the employer in the sense of allowing the employee time to investigate and answer serious allegations. It is a serious step but its significance should not be overstated. To use a not entirely apt analogy, an employee suspended is entitled to the presumption of innocence of the misconduct being investigated.
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> [75] An employee should usually be provided with all relevant information on which a decision to suspend may be made and be given an opportunity to comment on or disabuse the employer of any views reached. All the circumstances should be such that the employer concludes, fairly and reasonably, that they are inconsistent with even temporary continuation of employment by the employee pending outcome of the investigation. The age and nature of the complaints and the strength of them will be factors to be taken into account in deciding whether to suspend.

[18] On 1 January 2022 Ms Bishop attended work at her rostered start time of 11am. She left before the end of her shift at about 3.45pm. Ms Bishop says she left because, although Ms Nijam was not her supervisor, she told her to finish her shift and go home. Ms Nijam says she told Ms Bishop she should go home because she was unwell. Ms Bishop accepts she told Ms Nijam she was not feeling well that day, she had had some alcohol the evening before and her stomach was sore but says she was able to work. In support of this she points to the timing of events – she started her shift at 11am that day,

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[2] Section 103A Employment Relations Act 2000.
[3] Employment Relations Act 2000, s 4(1A).
[4] *Tawhiwhirangi v Chief Executive, Dept of Corrections* [2007] ERNZ 652, [74] – [75].

Ms Nijam started after her and she (Ms Bishop) left, having been told to go, four and a half hours later at about 3.30pm.

[19] Ms Nijam then reported to Mr Ismail Ms Bishop had finished her shift early. She says she told him Ms Bishop was unwell and needed to go home. She denies telling Mr Ismail Ms Bishop was intoxicated.

[20] That evening Mr Ismail sent a text message to the all-staff group chat with a heading "Important points as per incident today". The first two points were – no one was to come to work intoxicated and no one was to leave work early or change their shift hours without his permission.

[21] At 6.22pm that evening Mr Ismail telephoned Ms Bishop. He raised the two above points with her and on his account, told her not to work the following day and to rest. He said he was concerned she may not be well enough to come to work and food regulations require a 24 hour stand down for any person vomiting at work. Ms Bishop said Mr Ismail was aggressive during the call. He told her she had been intoxicated at work and was not to work her next rostered shift the following day.

[22] Following the telephone call Ms Bishop texted Mr Ismail including that she was upset by his call because he had made assumptions and accusations, she had been willing and able to work but had been sent home by Ms Nijam and though not feeling "100%" strongly denied being drunk or hungover.

[23] Ms Ismail replied by text message by reply that all the staff who worked with her on that shift said she was "under the influence of alcohol". The text message also required Ms Bishop to attend a "management meeting 30 minutes before her next rostered shift to discuss "…few breached matters that should not happen again. No one is allowed to come to work intoxicated."

[24] They continued to exchange text messages which included Mr Ismail telling Ms Bishop "Don't send me anymore messages."

[25] On 2 January Mr Ismail messaged Ms Bishop moving the scheduled meeting to 1.45pm and adding her request for leave in February to the matter he wished to discuss. He then messaged her that he did not want any further texts until the meeting.

[26] CCL suspended Ms Bishop from her employment for a shift because, on an objective assessment of the relevant text messages Mr Ismail had formed a view that she was intoxicated at work, had vomited at work and was unable to work the next day which was her next rostered shift.

[27] The suspension was not compliant with the employment agreement which CCL provided Ms Bishop in December 2021 because clause 19 provides while the employer may suspend an employee from any standard duties for health and safety reasons or to allow an employment investigation to occur, the employer will first seek the employee's comments before the suspension decision is made. This did not occur. Ms Bishop was not given a fair opportunity to comment on the suspension before the decision was made – she was telephoned without warning and Mr Ismail told her the decision was made based on information he said he had received from other staff, that he had formed a view that she was intoxicated at work, not well enough to complete her shift and was not to work the following day. For completeness this was not a shift cancellation as described in clause 8 of the employment agreement because the circumstances the parties faced are not in a category described in that enabling provision.

[28] While it is accepted, it is a serious health and safety risk and potentially a disciplinary matter for an employee to be at work intoxicated in this case, CCL had no reasonable basis to form that view about Ms Bishop. Ms Nijam said in evidence she did not tell Mr Ismail Ms Bishop was intoxicated. Her evidence is accepted. The text message CCL seeks to rely on is, even on its face, unreliable.

[29] CCL has failed in its duty to Ms Bishop to treat her fairly and reasonably when it suspended her. This was in breach of express obligations contained in the employment agreement CCL had very recently provided Ms Bishop, breached the obligation of good faith to act in a manner which supports a productive employment relationship and has undermined Ms Bishop's confidence that she would be treated fairly. Ms Bishop has established a personal grievance for unjustified disadvantage.

Was Ms Bishop unjustifiably constructively dismissed?

[30] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

(a) An employer gives an employee a choice of resigning or being dismissed.
(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
(c) A breach of duty by the employer causes an employee to resign.[5]

[31] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.[6]

(i) Did Charcoal Chicken breach the terms of the employment agreement causing Ms Bishop to resign?

[32] Ms Bishop resigned from her employment on 4 January 2022 during the course of a meeting with Mr Ismail and Mr Patel. She says she was so upset by the meeting and Mr Ismail and Mr Patel's attitude that she felt she could not work there any longer. In particular, she says they had made up their minds that she was intoxicated at work, the public setting of the meeting was humiliating and Mr Ismail and Mr Patel were aggressive and threatening towards her and Ms Leech who was present as her support person. She described the meeting as chaotic, that she did not have an opportunity to speak and when Ms Leech tried to speak, she was prevented from doing so. Ms Bishop said she heard Mr Patel whisper to Mr Ismail "we will have to let her go" and Mr Ismail told her she would not get a reference and he knew people in Auckland which she understood to mean he would prevent her from finding another similar job.

[33] Mr Ismail and Mr Patel say the intention of the meeting was to clarify the issues around Ms Bishop being sent home from work on 1 January. They say this was not

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[5] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).
[6] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

possible because Ms Leech dominated the meeting. CCL says the meeting was called simply to clarify matters with Ms Bishop arising from the events of 1 January. That is not accepted. Ms Ismail's text message to Ms Bishop on 1 January makes it clear the meeting was to deal with "…few breached matters…" arising from Ms Bishop's attendance at work that day.

[34] It is difficult to know exactly what occurred in the meeting, however, the parties agree the meeting was highly charged and volatile and ended in Ms Bishop resigning and leaving the meeting in tears. In her resignation letter dated that day Ms Bishop said her resignation was due to the conduct directed towards her at the meeting by CCL. I am satisfied this is the case. Also in the resignation letter Ms Bishop asks for her notice to be paid out and repeats this request in a WhatsApp message to Ms Ismail. CCL declined the request. In the circumstances of this case including the nature of Ms Bishop's position, her young age and that two of the four-week notice period were taken as annual leave, that she gave contractual notice does not militate against a finding of unjustified constructive dismissal.

[35] CCL was obliged to ensure disciplinary processes it initiated were fair and reasonable. Even on its account of the meeting the obligations of how a fair and reasonable employer could conduct a meeting of that nature have not been met. Ms Bishop went into the meeting without reasonable notice of what was to be discussed other than "…some breaches" and CCL did not give her the opportunity to bring a support person or representative to the meeting. The context of the meeting and "some breaches" was CCL's actions in unlawfully suspending Ms Bishop, her clear concerns about Mr Ismail's conduct towards her during the suspension process and CCL's decision that Ms Bishop had conducted herself at work in a manner which was deeply upsetting to her and to which she had not had a fair opportunity to comment. CCL was fully aware of this context and failed to take any reasonable steps to address its clear breaches of employment obligations prior to or at the 4 January meeting.

[36] CCL was responsible for and wholly in control of the process which has resulted in the 4 January meeting. The deficiencies outlined above are not minor or technical and mean CCL cannot demonstrate it acted fairly and reasonably in its actions towards Ms Bishop that day. It is unsurprising, given this context, the meeting was chaotic. CCL's failures have tainted the meeting and I am not satisfied CCL took reasonable

steps to take control of the situation and ensure the process was fair and reasonable. I am satisfied these breaches of obligations owed to Ms Bishop by CCL were significant and caused her to resign.

(ii) If so, was Ms Bishop's resignation reasonably foreseeable given the nature of the breaches?

[37] Yes. CCL's failure to meet even the bare minimum of a fair process in the 4 January meeting coupled with the level of failure with which the suspension was implemented and Ms Bishop's expressions of upset prior to and during the meeting were breaches of duty of sufficient seriousness to make it reasonably foreseeable Ms Bishop would resign.

[38] Ms Bishop was unjustifiably constructively dismissed.

Remedies in relation to the personal grievance

[39] Ms Bishop has established personal grievances for unjustified disadvantage relating to CCL's decision to suspend her and unjustified constructive dismissal. She is entitled to a consideration of the remedies sought. The personal grievances are intertwined warranting a global approach to remedies.

Reimbursement

[40] Ms Bishop earnt $3,734.35 (gross) in the 3 months following her employment ending with CCL.[7] After reviewing the evidence of loss and Ms Bishop's attempts to secure employment, the Authority is satisfied she is entitled to reimbursement of lost wages arising from her personal grievance of unjustified dismissal of $2,265.65 (gross) being difference between what she earnt and what she would have earnt but for her dismissal. pursuant to section 123(1)(b) and 128 of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[41] The evidence establishes Ms Bishop's suspension and dismissal and the circumstances leading up to it were very stressful and upsetting. CCL published its harsh view of Ms Bishop's conduct on the work group chat that Ms Bishop felt was a public shaming. The allegation made against her was a serious one and CCL was

[7] Refer IRD summary of earnings for relevant period.

obliged to treat her fairly in raising the issue with her and the subsequent investigation. CCL's view that Ms Bishop had conducted herself as alleged has been found to be unreasonable because CCL has been unable to establish the process it followed was one a fair and reasonable employer could have in all the circumstances. Ms Bishop said her dismissal was humiliating and undermined her confidence she would be treated fairly by future employers.

[42] The Authority is satisfied Ms Bishop has experienced harm under each of the headings in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of $18,000 under section 123(1)(c)(i) is appropriate.

Contribution

[43] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[44] Ms Bishop did not contribute in a blameworthy way to the circumstances which gave rise to her personal grievances. It is not unreasonable for an employee to seek to assert their response to an allegation or seek to understand why they have been required to attend what is likely to be a disciplinary meeting. There is no reasonable basis for the Authority to find Ms Bishop's conduct at work was as alleged. There are no deductions from the monetary remedies for reasons of contribution.

Arrears

Are arrears of wages and holiday pay due and owing?

[45] Ms Bishop seeks arrears of wages and holiday pay as follows:

(i) back pay for minimum hours of 25 per week;
(ii) back pay for $20 per hour;
(iii) full time pay for the four weeks she received a COVID-19 wage subsidy;
(iv) $80.00 (gross) 4 hours pay last shift worked on 30 January 2022;

(v) $57.50 (gross) being time and a half rate for public holiday she would have worked but for her suspension on 2 January 2021; and

(vi) $455 (gross) in lieu day calculation.

[46] As set out above Ms Bishop has not established, she and CCL agreed to minimum hours of 25 per week. The 25 hours per week back pay claim does not succeed.

[47] The written employment agreement Ms Bishop was offered by CCL and signed was dated 12 August 2021. By then she had been paid $20 per hour since April 2021. The 1 June 2023 IEA is not relevant because it has not been established that Ms Bishop signed the document backdating it to before her employment commenced - it is not evidence the parties agreed to backdate her rate of pay to $20 per hour to the commencement of her employment. The back pay claim does not succeed.

[48] There is no dispute Ms Bishop did not work full time hours. Her employment agreement did not provide for minimum hours but indicates arrangements relating to hours of work. During the four weeks Ms Bishop received the COVID-19 wage subsidy she was paid for 25 hours per week. She claims the difference between those hours based on information received from MSD which indicates CCL received a fulltime wage subsidy for her. What may have been represented to MSD by CCL does not create an entitlement for Ms Bishop. This claim does not succeed.

[49] It is accepted Ms Bishop has not been paid for every hour worked on 30 January 2022 and that she is entitled to arrears of $80.00 (gross). She promptly drew the short pay to CCL's attention and it failed to address her concern. Charcoal Chicken Limited is ordered to pay Ms Bishop $80.00 (gross) in wage arrears within 21 days of the date of determination.

[50] It is accepted but for being suspended from work on 2 January 2021 Ms Bishop would have been entitled to $57.50 (gross) being time and a half rate for working on a public holiday. Charcoal Chicken Limited is ordered to pay Ms Bishop $57.50 (gross) in wage arrears within 21 days of the date of determination.

[51] Ms Bishop claims $455.00 (gross) in alternative holiday day pay for the five public holidays she worked while employed by CCL plus alternative holiday pay for 1 January 2022 having worked that day and not been paid alternative holiday pay. She says the pay she has received is incorrectly calculated and she is entitled to a full day's pay. Section 60 of the Holidays Act 2003 provides an alternative holiday is calculated at the greater of the employee's relevant daily pay or average daily pay. As found above, Ms Bishop did not have minimum hours of work and I am satisfied her alternative holiday pay has been calculated correctly. This part of her claim does not succeed. Ms Bishop is entitled to calculation and payment of alternative holiday pay for 1 January 2022 because she worked that day. Within 21 days of date of determination Charcoal Chicken Limited is ordered to calculate and pay Ms Bishop alternative holiday pay for 1 January 2022.

Should interest be ordered on the arrears?

[52] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[53] It is appropriate where a person has been deprived of the use of money to make an award for interest. Ms Bishop is entitled to an award of interest on the wage arrears awarded including the holiday pay component.

[54] Charcoal Chicken Limited is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:[8]

(i) Interest on the sum of $137.50 plus the sum of alternative holiday pay CCL has been ordered to calculate and pay Ms Bishop for 1 January 2022, being the total of arrears awarded, calculated from 30 January 2022 until the date payment is made in full.

[55] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

[8] www.justice.govt.nz/fines/civil-debt-interest-calculator.

Penalty

Is Charcoal Chicken Limited liable for a penalty?

[56] CCL failed to provide Ms Bishop with a copy of the parties' written employment agreement within a reasonable time of request. She first asked CCL for a copy of her IEA before the disciplinary meeting on 4 January 2022, Ms Leech requested a copy at that meeting and Ms Bishop asked again in her letter of resignation. The IEA was not provided until some weeks later following Ms Bishop raising a personal grievance. This failure was a breach of statutory obligation.[9]

[57] Ms Bishop also seeks a penalty for failure to provide wage and time records on request. Ms Bishop first requested the wage and time records from CCL on 21 February 2022. The record was produced on 22 June 2023. Such a delay is not compliant with the statutory obligation to provide immediate access to such documents on request.[10]

[58] CCL has been found to have failed to pay Ms Bishop holiday pay entitlements as required by s 27(1)(b) of the Act and failed to pay all wages when due and owing which is an unlawful deduction in breach of s 5(1)(a) and s 5A of the Wages Protection Act 1983.

[59] The maximum penalty against a company is $20,000 per breach.[11] There are four breaches of statutory obligations. It is appropriate to globalise the breaches given their interrelated nature. In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.[12]

[60] Where a breach is not a minor or a technical breach, the question of whether a penalty is warranted turns to whether the conduct was deliberate or negligent,

[9] Employment Relations Act 2000, s 64(4).
[10] Employment Relations Act 2000, s 130((2).
[11] Employment Relations Act 2000, s 135.
[12] *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

warranting the imposition of a penalty.[13] The level of harm occasioned by the breach is also relevant.[14]

[61] CCL's actions, particularly with regard to the failure to provide the employment agreement and wage and time records must be seen as intentional and its culpability high. As the employer it was responsible for providing a written employment agreement and producing wage and time records immediately on request. The failure to do so is, in all the circumstances of this employment relationship problem is a serious breach.

[62] There is compelling evidence of direct loss suffered by Ms Bishop as a result of CCL's breaches, including the consequences of not having a written employment agreement and she has spent time and resources seeking to enforce those statutory obligations.

[63] There is no specific evidence before the Authority of any financial difficulty CCL may have in paying any penalty.

[64] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is $6,000. Ms Bishop seeks an award of penalties, all or a portion of any paid to her. CCL is ordered to pay half the penalty to Ms Bishop to compensate her for the inconvenience and resources expended in pursuing these statutory entitlements. Charcoal Chicken Limited is ordered to pay the $6,000 penalty within 21 days of the date of this determination.

Person involved

[65] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or court) and, to the extent the employer is unable to pay the money owing. Money recoverable under s 142Y is that which involves a breach of employment standards.[15]

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[13] See *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151, [2019] ERNZ 438 at [169]; *Xu v McIntosh* [2004] 2 ERNZ 448.
[14] *Xu*, ibid.
[15] Employment Relations Act 2000, s 5.

[66] There is no evidence before the Authority that CCL will be unable to pay any award made in favour of Ms Bishop including any award involving a breach of employment standards. There are reasonable grounds for concluding CCL is unable to pay the awards ordered including the awards of wage and holiday pay arrears. The order sought against Mr Ismail is not granted.

Summary of orders

[67] The Authority orders as follows:

> Within 21 days of the date of determination Charcoal Chicken Limited is ordered to pay Kayla Bishop the following:
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> (i) $18,000 (gross) under s 123(1)(c)(i);
> (ii) $2,265.65 (gross) under s 123(1)(b);
> (iii) $137.50 (gross) in wage and holiday pay arrears;
> (ii) calculate and pay alternative holiday pay for 1 January 2022;
> (iv) calculate and pay interest on total arrears; and
> (v) $6,000 penalty half of which is to be paid to Kayla Bishop and half to the Crown.

Costs

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

[69] If they are not able to do so and an Authority determination on costs is needed Ms Bishop may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum CCL 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.

[70] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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.[16]

Marija Urlich
Member of the Employment Relations Authority

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