

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 384
3176987

BETWEEN	LINDSEY ANN GRIFFITHS Applicant
AND	BOOST PROMOTIONS LIMITED First Respondent
AND	RICHARD WALTER KULUZ Second Respondent

Member of Authority:	Claire English
Representatives:	Johanna Drayton and Annah Casey-Solly, counsel for the Applicant Bridget Smith, counsel for the Respondents
Investigation Meeting:	19 and 20 March 2024 in Auckland
Submissions received:	2 and 16 April 2024 from Applicant 8 April 2024 from Respondent
Determination:	27 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By way of a determination dated 24 August 2023 I found that Ms Griffiths was employed by the first respondent Boost Promotions Limited (Boost) for three months from 1 January 2022 to 31 March 2022 in a sales role on a “commission only” basis. She was made redundant and brings claims in the Authority relating to the way in which Boost entered into its agreement with her, the ending of her employment with Boost,

and claimed failures by Boost to pay entitlements under the Holidays Act 2003, keep records, and pay commission. Ms Griffiths seeks compensation and penalties.

[2] Ms Griffiths also brings claims against Mr Kuluz, the director of Boost, claiming he is a person involved in breaches of employment standards, he should be subject to penalties in his own right, and should personally be required to pay any awards made against Boost to the extent it does not pay these in full.

[3] Boost denies the claims. It says that it fairly offered an agreement to Ms Griffiths, and that the redundancy process it later undertook was substantively justified and procedurally fair. To the extent that there may be breaches of matters such as record keeping or payment of holiday entitlements on the ending of Ms Griffiths' tenure with Boost, the respondents say that it believed Ms Griffiths was a contractor at all relevant times (until determined otherwise by the Authority) and as such, Boost and Mr Kuluz did not believe there was any obligation on them to treat Ms Griffiths as an employee in these respects. They say no awards are warranted.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged on behalf of Ms Griffiths by Ms Griffiths herself, and her former colleagues Ms Jane Hart and Ms Sascha Van Der Plas. Evidence by way of audio-visual link was given by a colleague who worked for a prior company, Ms Ursula Dawson without a witness statement, as she was only called by the applicant during the lunch break on the first day of the investigation meeting. Mr Kuluz and Boost's General Manager Ms Ngatuere gave evidence for the respondents. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was Ms Griffiths unjustifiably dismissed?

- (b) If the respondent's actions were not justified, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s 123(1)(c)(i) of the Act;
- (c) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Griffiths that contributed to the situation giving rise to her grievance?
- (d) Is Ms Griffiths owed entitlements under the Holidays Act 2003, and if so, should interest be awarded?
- (e) Did Boost breach its good faith obligations to Ms Griffiths?
- (f) Did Boost breach its duties to Ms Griffiths under either the Employment Relations Act 2000 or the Holidays Act 2003?
- (g) If so, should compensation be ordered, and/or penalties be awarded against Boost?
- (h) Was Mr Kuluz a person involved in a breach?
- (i) If so, should penalties be awarded against Mr Kuluz personally, and should he be required to pay any monies awarded to Ms Griffiths to the extent that Boost fails to pay any such awards?
- (j) Is Ms Griffiths owed commission by Boost?
- (k) Should either party contribute to the costs of representation of the other party?

Background

[7] Ms Griffiths first worked as an Account Manager for a company known as Signature, providing branded merchandise to clients. In brief, her job was to form and maintain sales relationships with clients. Ms Griffiths had worked for Signature and its owner Mr Bruce Judge since approximately 2016.

[8] In December 2021, Mr Judge told Ms Griffiths and the other Account Managers at Signature that the company had been sold to Boost. Mr Kuluz then met with the Account Managers as the new owner of the business. He presented Ms Griffiths (and the other Account Managers) a 2-page Offer of Engagement, with a one-page attachment dealing with the commission arrangement and setting out the various commission percentages she would receive dependant on the relevant margins and/or

clients. This was important to Ms Griffiths, as she was on a commission-only basis. She signed the letter of offer on 17 December, but she found the commission details inaccurate, so she hand-wrote further details on to this page.

[9] She then returned the signed document with her hand-written changes to Mr Kuluz, who accepted the changes she had made as being an accurate reflection of her past agreement with Mr Judge.

[10] Ms Griffiths says she felt stressed and pressured to sign this agreement, and did so without taking advice. She says that the reason for haste was that Mr Kuluz was flying back to Auckland, and although the document gave her until 20 December to accept, he asked if she would sign immediately so he could take the signed document with him. Ms Griffiths did so, and describes this as “pressure”. She accepts that during this interaction with Mr Kuluz, she had her “business face” on, which meant she was not showing any emotion. Mr Kuluz denies asking that the Offer of Engagement be returned early.

[11] The sale was completed as of 1 January 2022, and Ms Griffiths continued working as an Account Manager for Boost in accordance with the Offer of Engagement.

[12] Ms Griffiths recalls that almost nothing changed, and she continued her normal work with her existing clients.

[13] On 14 February 2022, Mr Kuluz sent all Account Managers, including Ms Griffiths, an email proposing to restructure the Account Managers as a team. The essence of the proposal was that the 6 Account Managers would be reduced to 4. Mr Kuluz made reference to the geographical location of clients as being the reason for this change. He also made reference to the idea that the Account Managers could be deemed to be employees, and proposed that the 4 selected account managers would be given offers of employment. Comments were requested over the next four days.

[14] Ms Griffiths said she was “devastated” and scared to lose her job. She felt that she had already drawn negative attention to herself by publicly asking Mr Kuluz inconvenient questions about the commission structure and her employment status on two occasions, so she did not respond to this email or bring up the criteria at any point as she did not want to look like she was “rocking the boat”.

[15] Ms Griffiths met briefly with Mr Kuluz on 16 or 17 February 2022 to discuss the proposed restructure. She told him she wanted to keep her job as she enjoyed it, and on a personal level she was undergoing a marital separation resulting in her supporting two children alone. She said that she didn't use this as an opportunity to talk about her sales success, client relationships, or other aspects of what she did in her job, but chose to focus on her personal situation.

[16] On 18 February 2022, Mr Kuluz sent a further email, confirming he had decided to proceed with the proposal to reduce the number of account managers from 6 to 4. He said: "I will assess the merits of each of you using the attached draft criteria and make the decision on a totally objective basis." He then invited the Account Managers to provide "feedback, questions, or disagreement" in relation to the draft criteria by 21 February 2022.

[17] Ms Griffiths points out that this was a short time to provide feedback, especially as two of those days were over a weekend. She said she felt "frightened" and assumed that Mr Kuluz would get his information about the Account Managers from Ms Shelley Ngatuere, as he didn't really know them. Ms Griffiths felt that Ms Ngatuere would not be objective or unbiased in her assessment, as she had "stood up to" Ms Ngatuere on previous occasions, and Ms Ngatuere had openly taken the position that she could not work with Ms Griffiths as a result. However, Ms Griffiths did not provide feedback.

[18] Mr Kuluz considered the 6 Account Managers against the criteria he had set out. His evidence was that he did so by reference to his own experience in the sales and promotions business, and by considering what performance he would consider acceptable from his existing staff employed in the same position. He acknowledged that he had limited knowledge of the Account Managers personally, having only recently taken over the business.

[19] Mr Kuluz relied on Ms Ngatuere's assessments of the Account Managers, including their reliability, performance, and other characteristics around how they worked in the absence of his own knowledge.

[20] Ms Ngatuere had worked with Ms Griffiths for some years. As part of her evidence, she freely acknowledged that she did not like the way Ms Griffiths worked, and that she had in the past had actively refused to work with Ms Griffiths or to provide support to her on key accounts. She also acknowledged that on at least one occasion,

she had actively lobbied the previous owner of the business to ensure that he did not assign Ms Griffiths large clients. This occurred when another Account Manager had resigned, and Mr Judge needed to assign her clients to other Account Managers. He had intended to assign a large and profitable national client to Ms Griffiths, which client was supported by Ms Ngatuere. When Ms Ngatuere became aware of this, she went to Mr Judge and told him that she would not work with Ms Griffiths, and that he should assign the client to someone else. As a result, Mr Judge assigned the client to the Account Manager suggested by Ms Ngatuere.

[21] The feedback Ms Ngatuere gave to Mr Kuluz about Ms Griffiths included her views that Ms Griffiths:

- a. did not perform her duties to a high standard consistently;
- b. was not successful in developing new opportunities;
- c. did not bring on any new accounts of her own efforts;
- d. would turn up to meetings late and unprepared;
- e. sales in 2021 were good, she was within the top 4;
- f. tended to rush her jobs into production; and
- g. we were constantly reviewing and cleaning up or checking on her job entries.¹

[22] None of these views were put to Ms Griffiths for response. There was no evidence to suggest that any of these issues were ever raised by Ms Ngatuere in a formal way when they occurred so that they could be dealt with in a timely and transparent fashion. In cross examination, it also became clear that the criticisms that Ms Griffiths did not successfully develop new opportunities and did not bring on new accounts were not factually correct.

[23] Mr Kuluz took Ms Ngatuere's views into consideration. By this time, he had promoted her to General Manager, and was reliant on her to help him assess the Account Managers in the absence of his own knowledge. Mr Kuluz also emphasised that he had considered Ms Griffith's sales in particular. Although Ms Griffith's sales figures placed her fourth out of the six Account Managers, Mr Kuluz explained that he considered an Account Manager with Ms Griffith's experience should have significantly higher sales,

¹ Ms Ngatuere's notes explaining Ms Griffith's score at pages 85 and 86 of the document bundle.

and he took what he saw as Ms Griffiths' low sales into account, as well as Ms Ngatuere's feedback when giving her a low score.

[24] Mr Kuluz never discussed with Ms Griffiths, at any point, that he considered her sales should have been at least a certain monetary amount. She was never aware that this was his expectation. Nor did he ever discuss Ms Ngatuere's feedback with her.

[25] On 22 February 2022, Mr Kuluz emailed Ms Griffiths with the outcome of his assessment of her against the criteria, and the outcome of the redundancy process. Ms Griffiths had received a score of "37/100", and Mr Kuluz accordingly terminated her engagement with Boost on the grounds that she was one of the 2 lowest scoring Account Managers.

[26] Ms Griffiths gives evidence that she was incredibly hurt and humiliated at being assigned such a low score after working as an Account Manager for some 7 years, with no performance concerns being raised with her during that time, and without Mr Kuluz even knowing her to make his assessment of her. She points out that no information was given to her at that time about why Mr Kuluz had scored her so low and she had only had one or two 1:1 meetings with Mr Kuluz in the entirety of their association.

[27] Ms Griffiths emailed Mr Kuluz on 23 February 2022, describing herself as having been "incredibly hurt and humiliated". She asked a number of questions, including seeking confirmation that she would be paid her full commission despite the ending of the relationship, whether Mr Kuluz would waive the 6 month restraint of trade he had imposed via the letter of offer now that she had been made redundant, and seeking an extended notice period. She mentioned that at that time she had committed to buying the family home from her former husband, and losing her job would jeopardise this. Mr Kuluz did not engage with these requests.

[28] Ms Griffiths' last day with Boost was on 31 March 2022.

[29] One of Ms Griffiths' clients contacted her once they learned she would no longer be working for Boost. They offered her a job, which she accepted. Ms Griffiths started this new job on 10 April 2022. She gives evidence that she could have started work immediately, but she chose to take 10 days out to rest and recover.

[30] Ms Griffiths did not earn salary or wages, but was remunerated on a “commission only” basis. When she left Boost, she was not paid out any annual leave or public holiday entitlements, and Mr Kuluz explained that this was because he understood she was not an employee and was not entitled to this.

[31] In addition, Ms Griffiths was not paid commission for any orders that were invoiced to her clients after her last day at work with Boost, that is, 31 March 2022.

[32] Ms Griffiths expressed the view that she became entitled to commission on the placing of an order in Boost’s internal system, not when the client was invoiced. She was unable to say what would occur when an order was placed by the client but then withdrawn, and said this had never happened to her.

[33] Boost and Mr Kuluz take the view that commission is only triggered on invoice being sent to the client, not at some earlier point. They also take the view that no commission is payable on invoices sent to clients after Ms Griffiths last day of 31 March 2022, as by then the relationship was already over. There were several jobs for which Ms Griffiths had placed orders in one form or another, but for which the clients had not yet been invoiced, at the time she left.

[34] Ms Griffiths claims payment of these orders which were placed by clients and recorded as jobs in the system on or prior to her last day of 31 March 2022, even though invoices had not been sent to clients. The respondent refutes these claims.

Unjustified Dismissal

[35] I first need to consider if the termination of Ms Griffith’s employment was what a fair and reasonable employer could have done in all the circumstances at the time. The test of justification set out in s 103A of the Act requires that I consider whether:

- a. Boost sufficiently investigated the allegations against Ms Griffiths before dismissing her;
- b. Boost raised the concerns it had with Ms Griffiths before dismissing her;
- c. Boost gave Ms Griffiths a reasonable opportunity to respond to its concerns; and
- d. Boost genuinely considered any explanation by Ms Griffiths before dismissal.

[36] In addition, I may consider any other factors that I think are relevant.

[37] The tests in s 103A of the Act apply to redundancy situations. In considering the first question, whether Boost sufficiently investigated the allegations against Ms Griffiths, I will consider both the rationale for redundancy as well as the specific matters raised against Ms Griffiths herself.

[38] Mr Kuluz's evidence was that after the completion of the purchase of the Boost business as of 1 January 2022, he took some time to consider the operations of the business. There had in essence been a merger between Mr Kuluz's existing business, which was more heavily focused in Auckland, and the company for which Ms Griffiths worked, based mainly in and around Wellington. Mr Kuluz explained that he formed the view that there were too many Account Managers, there were overlaps in the client base, and there was somewhat of a mismatch between the proportion of Account Managers based in Wellington, and location of clients, who were mostly in Auckland. These were the things that caused him to consider it was necessary to reduce the number of Wellington-based Account Managers from 6 to 4.

[39] I am satisfied that this was a reasonable position for Mr Kuluz to take, and that he put this to the affected Account Managers.

[40] Mr Kuluz then needed to consider which of the 6 Account Managers he would retain, and which he would make redundant. As discussed above, his process for doing this was to consider their sales over the previous year, and to consider Ms Ngatuere's views. Mr Kuluz formed the view that Ms Griffiths' sales were inadequate for an Account Manager with her length of service and accepts that this was based solely on his own perceptions of what was acceptable to him rather than anything specific to Ms Griffiths. He also accepted Ms Ngatuere's views without taking any steps to cross-check these views either with others or against other information such as client lists. In short, I am not satisfied that Mr Kuluz sufficiently investigated the allegations about Ms Griffiths before accepting them.

[41] Boost did not raise the concerns it had with Ms Griffiths before dismissing her. Mr Kuluz never told Ms Griffiths of his two key concerns about her, one, that he considered her sales too low for an Account Manager of her tenure and expected her to have achieved certain financial targets over the past year even though he had not been her boss or manager during the majority of that time, and two, that he had heard multiple

specific negative comments about her performance from Ms Ngatuere or what those comments were. Ms Griffiths did not find out about these matters until receiving information as a result of these proceedings.

[42] It follows that, having failed to tell Ms Griffiths of the concerns that Boost and Mr Kuluz had about her, her success in the role, and her suitability for continuing employment, Boost did not give her any opportunity to respond to its concerns, and nor did it genuinely consider any explanation by her in response to those concerns. Boost simply had no process for this to occur. Mr Kuluz formed his own views about Ms Griffiths' sales volume and accepted uncritically Ms Ngatuere's views on Ms Griffiths' performance. He took no further steps to verify, disclose, or discuss, with Ms Griffiths or anyone else. In considering this, it is particularly significant that despite relying on Ms Ngatuere, Mr Kuluz never told Ms Griffiths that Ms Ngatuere would be involved in his decision-making process or that he would be relying on her feedback. Ms Griffiths therefore had no opportunity to let Mr Kuluz know of her concerns that Ms Ngatuere held an adverse view of her, and ask for an alternative process.

[43] Accordingly, my view is that the termination of Ms Griffiths' employment did not meet the test of justification set out in s 103A of the Act. Ms Griffiths termination is unjustified.

Remedies

[44] Having established a personal grievance claim, Ms Griffiths is entitled to remedies. Ms Griffiths claims a variety of remedies, in accordance with claims filed at the beginning of the investigation meeting on 19 March 2024. By my count, this document sets out some 28 different claims for remedies including penalties against both Boost and Mr Kuluz arising from the same fact situation. I will assess these in turn.

[45] It is convenient that I record here that there is no indication of any contributing behaviour by Ms Griffiths which would require I consider any reduction in remedies as per s 124 of the Act.

Holidays Act 2003 entitlements

[46] Ms Griffiths claims for unpaid holidays as at the termination of employment, for the period of her employment with Boost being 1 January 2022 to 31 March 2022.

Although a sum is given, a dispute about whether further commission payments are owed to Ms Griffiths means the sum is also disputed.

[47] Ms Griffiths claims a sum for unworked public holidays between 1 January 2022 to 31 March 2022. Although a sum is given, this is also disputed for the same reason.

[48] Interest is claimed on these two sums in accordance with the Holidays Act 2003, calculated in accordance with the civil debt calculator.

[49] As it has now been determined she was an employee, Ms Griffiths is entitled to be paid for annual leave, and for public holidays in accordance with the Holidays Act 2003. The amount of these entitlements relies upon the amount of Ms Griffiths' gross earnings, which are also the subject of this determination. If there are difficulties calculating the amounts of these entitlements following this determination, the parties are to revert to the Authority for any further orders that may be needed.

[50] Although interest has been claimed, whether the amounts claimed were owing and the sums owed were the subject of dispute. Accordingly, I decline to award interest on these sums.

Failing to provide a complete written employment agreement

[51] Ms Griffiths seeks a declaration that Boost was in breach of s 65(1)(a) of the Act by not providing Ms Griffiths with a complete written employment agreement. This refers to the fact that Boost engaged Ms Griffiths by way of an Offer of Engagement, signed by her on 17 December 2021. This document did not purport to be an employment agreement, but referred to engagement on an independent contractor basis.

[52] Boost and Mr Kuluz did not intend to create an employment relationship by way of the Offer of Engagement. The intention was to be consistent with the key terms that Ms Griffiths had enjoyed with her previous company. It appears to me that Ms Griffiths accepts that the Offer of Engagement (as amended by her) did this. In addition, Ms Griffiths told Mr Kuluz at the time that she preferred to remain a contractor.

[53] Consistently with the wording used in the Offer of Engagement, Boost and Mr Kuluz maintained that Ms Griffiths was an independent contractor until her status was

determined to be that of employment by the Authority. There are some requirements of an employment agreement (eg an employee protection provision, a plain language explanation of how to raise personal grievances) that are missing from the Offer of Engagement, which might suggest that s 65 of the Act has been breached. However, this breach is one which was only able to be made out retrospectively after the Authority had made a determination of status, and at the relevant time, Ms Griffiths did not want to become an employee. In addition, none of the matters in dispute before the Authority rely on any of provisions of s 65 of the Act which might be said to be missing from the Offer of Engagement.

[54] In these circumstances, I decline to give a declaration of breach or to award any penalties claimed as a result of such a declaration.

Unfair bargaining practices

[55] Ms Griffiths seeks a declaration that Boost engaged in unfair bargaining practices in breach of s 63(2)(a) and (c) of the Act. As s 63 of the Act has been repealed, I will assess this claim with reference to s 63A of the Act. Subsection (a) refers to an obligation to provide an employee with a copy of an intended employment agreement under discussion, and subsection (c) refers to giving an employee a reasonable opportunity to seek advice.

[56] Mr Kuluz gave Ms Griffiths a copy of the Offer of Engagement in advance and gave her time to consider before signing. The Offer of Engagement stated that she was “welcome” to seek independent advice on it. In addition, Ms Griffiths did take time to read and consider the Offer of Engagement before signing it, as shown by the fact that she amended the commission details before signing.

[57] It is submitted for Ms Griffiths that she was “pressured” into signing the Offer of Engagement, and she felt this pressure because Mr Kuluz was due to fly back to Auckland. However, Ms Griffiths’ own evidence is that she briefly considered taking legal advice on the offer and decided not to. She also gave evidence that she did not discuss with Mr Kuluz whether she could take the full time the letter allowed to consider it (or longer), that she “kept her game face on”, and that her greatest consideration was in understanding and adjusting the commission rates to accurately reflect the terms she was on at that time, which she did.

[58] On the basis of Ms Griffiths' evidence, I am not persuaded that she was in fact subject to any pressure by Mr Kuluz, or what pressure there was (given that the Offer of Engagement did set a timeframe for response) was untoward. Rather, Ms Griffiths read the Offer of Engagement, took time to alter it which she knew at least some of the other Account Managers were also doing to reflect their own individualised commission rates, and having done this, decided to return it promptly to Mr Kuluz with those amendments. This did not take an excessive amount of time as it was a relatively short document written in plain English. Ms Griffiths' decision to return the amended Offer of Engagement to Mr Kuluz promptly rather than taking the time allowed in the document itself does not amount to unfair bargaining.

[59] On the facts, this claim is not made out. No orders for declaration or penalties are made.

Unfair bargaining practices are also a breach of good faith

[60] Ms Griffiths also claims that the unfair bargaining practices referred to above amount to a breach of its duty of good faith, and additional declarations and penalties should be awarded accordingly. As I have found that there were no unfair bargaining practices for the reasons set out above, this claim also fails.

Failure to keep and/or produce wage and time records

[61] Ms Griffiths claims that Boost failed to keep and/or produce wage and time records as required by s 130 of the Act. Boost accepts that it did not keep wage and time records, but says that this was because at the time Ms Griffiths was engaged by it, it believed Ms Griffiths was an independent contractor and no such obligation existed.

[62] As with the claim for failure to provide a complete written employment agreement already dealt with above, this breach is one which was only able to be made out retrospectively after the Authority had made a determination of status, and at the relevant time, Ms Griffiths did not want to become an employee. In addition, I cannot see that any of the matters in dispute before the Authority rely on any details which might be recorded in wage and time records but which have not been so recorded.

[63] In these circumstances, I decline to give a declaration of breach or to award any penalties claimed as a result of such a declaration.

Breach of Duty of Good Faith by reassuring Ms Griffiths "nothing would change"

[64] Ms Griffiths claims that on or around the time Mr Kuluz offered her the Offer of Engagement, he told her and other account managers that “nothing would change” or words to that effect as a result of Boost buying the company they were then employed by. This comment is said to be in breach of good faith obligations owed to Ms Griffiths, as when Mr Kuluz said this, he “must have known” about the impending restructure or at least to have contemplated it.

[65] It is said for Mr Kuluz that the words “nothing would change” could not be reasonably be taken as a literal promise that no aspect of business management would change from that point on, and that in any event, there was no contractual or employment relationship between Ms Griffiths and Boost at the time this statement was made, so no personal grievance can be made out.

[66] This claim is not made out on the evidence. Mr Kuluz’s evidence was that he did not make, and could not have made, any decisions about restructuring the Account Manager roles until after he had taken possession of the business and had had time to see how things operated and to access all of the relevant documentation which he was not able to do until after settlement. He also points out that he had in fact acted consistently with this statement at by offering all of the Account Managers including Ms Griffiths the ability to continue working for Boost on the same terms and conditions as they had at the previous company as best he and they understood those terms.

[67] I do not accept that there was any evidence to suggest that Mr Kuluz acted in an underhand way when making this statement, which is what is inferred. I also do not accept that a general statement such as this could reasonably be taken to mean no changes or restructuring would ever occur, or that there was any employment relationship between Ms Griffiths and Boost at the time which would support a personal grievance claim. For all these reasons, this claim is not made out. I decline to give a declaration of breach or to award any penalties as a result of such a declaration.

Breach of Duty of Good Faith as a result of the process followed in making Ms Griffiths redundant

[68] I have found that the ending of Ms Griffiths’ employment with Boost by reason of redundancy was unjustified, as a result of the flawed process followed. My reasoning for this is set out above. It is submitted for her that the flaws in the dismissal process

were sufficient to both make the decision to dismiss unjustified, and also to amount to a breach of good faith, for which a declaration of breach and penalties are sought.

[69] It is not clear exactly what acts or omissions of Boost are said to amount to breaches of good faith under this heading. I note that it is generally not appropriate to grant penalties for breaches where these are claimed in addition to remedies that are awarded for the same conduct, and the court has commented that this likely amounts to “double-dipping” which is wrong in law.

[70] I also consider that this is not a situation where the high threshold for an award of penalties under s 4A of the Act is met. Penalties for breach of good faith are only to be awarded where “the failure was deliberate, serious, and sustained”, (or where the failure was intended to undermine bargaining, an employment agreement, a pay equity claim, or related to passing on, none of which circumstances apply here). Failures of process during a restructuring are deliberate and serious only in that the employer intended to undertake a process and did so inadequately, rather than for any other reason, and are not sustained as they last only while forming part of the restructuring process. Even if I had found it proper to award penalties, which I do not, this is not a situation where the high thresholds for a penalty award would be met. No orders are made.

Is Mr Kuluz a Person Involved in a Breach of Employment Standards?

[71] It is submitted that Mr Kuluz is a person involved in a breach of employment standard in that he has “procured a breach of minimum entitlements”.² A declaration to this effect is sought, plus penalties against Mr Kuluz personally and an order that Mr Kuluz be made personally liable to pay any amounts awarded to Ms Griffiths in the event of default by Boost.

[72] For Mr Kuluz to be found to be a person involved in a breach of employment standards under s 142W of the Act, there must be:

- a. A breach of employment standards as defined in s 5 of the Act;
- b. A qualifying person, being in the case of a company, a director of that company; and

² As per para 1.5(a)(i) of the statement of problem dated 1 July 2022.

- c. Qualifying action, that is, the person must have aided, abetted, or procured the breach, or otherwise as set out in s 142W(1) of the Act.

[73] All of these factors must be present for Mr Kuluz to be found to be a person involved in a breach.

[74] It is submitted for Ms Griffiths that Mr Kuluz was either directly involved in or must have had knowledge of the employment standards breached by Boost; and that he should be made liable for any arrears of minimum entitlements that are not paid by Boost³. Accordingly, I have assessed this claim as a claim that the breaches of employment standards are the failures to pay holiday pay and public holiday pay as required by the Holidays Act 2003, as “the minimum entitlements and payment for those under the Holidays Act 2003” are employment standards as defined in s 5 of the Act.

[75] I have also found earlier in this determination, that Ms Griffiths is owed holiday pay as of the ending of her employment, and payment for public holidays falling during the time she was employed by Boost. Payment of these entitlements, or rather failure to pay these entitlements when required by the Holidays Act 2003 is a breach of employment standards. This means that there has been a qualifying breach.

[76] Mr Kuluz is a director of Boost, and as such, is a qualifying person as required by s 142W.

[77] I need to then consider whether Mr Kuluz has “aided, abetted, counselled, or procured the breach”, or has induced the breach, or has been in any way knowingly concerned in or party to the breach, as set out in s 142W(1) of the Act.

[78] Although it might be said that Mr Kuluz was by default aware that no holiday pay or public holiday pay had been paid to Ms Griffiths, this was because there was no indication at the time her engagement with Boost came to an end, that she was entitled to these payments. At that time, both Ms Griffiths and Boost were operating on the assumption that she was an independent contractor. Ms Griffiths’ employment status, which creates minimum entitlements under the Holidays Act 2003 was not established until determined by the Authority and even at the time of the investigation meeting, I

³ Paragraphs 171 and 172 of the Submissions of Counsel for the Applicant dated 28 March 2024.

was advised by the parties that the correct amounts of these entitlements could not be calculated (and therefore correctly paid) until disputes about payment of commission to Ms Griffiths had been resolved. Accordingly, my view is that Mr Kuluz did not procure, induce, or was knowingly concerned in, a breach. The breach that occurred was one that only became apparent in retrospect following the status determination by the Authority.

[79] For all these reasons, my view is that the evidence does not support the claim that Mr Kuluz was a person involved in a breach. In addition, I note that penalties against a person involved in a breach can only be sought by a Labour Inspector as per s 142W. Here the evidence suggests that no penalties should be awarded against Mr Kuluz even if they could be properly made, which in my view, they cannot be. I decline to issue a declaration that Mr Kuluz was a person involved in a breach or to award any penalties against under this head.

[80] Ms Griffiths has also requested that orders be made to the effect that Mr Kuluz be made personally liable for any default in the payment of wages or other monies payable to her by Boost. However, for such an order to be made against Mr Kuluz, I would need to first be satisfied that Mr Kuluz was a person involved in a breach of employment standards, which I am not. In these circumstances, I also decline to make any orders against Mr Kuluz under s 142Y of the Act, as the prerequisites for such orders are not made out.

Compensation for humiliation, loss of dignity, and injury to feelings

[81] Ms Griffiths claims compensation under s 123(1)(c)(1) of the Act for unjustified dismissal. Ms Griffiths says in her evidence that as a result of the termination and the low score given to her, she felt “depressed, anxious, undervalued, fearful, vulnerable, and isolated”. Ms Griffiths also indicated that she felt withdrawn and sometimes suicidal. She points out that she was terminated after only working for Boost for around eight weeks. I accept Ms Griffiths’ evidence as to the impact on her.

[82] When considering the quantum of compensation, it is submitted for Ms Griffiths that the sum awarded should be in excess of \$17,000. I consider that an appropriate amount of compensation is \$20,000, taking into account current awards, the impact on Ms Griffiths, and that not all of the distress she mentions (such as the stress caused by

her contemporaneous marital break up) can be properly attributed to the dismissal. Orders are made accordingly.

[83] Ms Griffiths also claims compensation under s 123(1)(c)(1) of the Act for what are said to be three unjustified disadvantage grievances. The first unjustified disadvantage claim is said to be “unjustified disadvantages flowing from the respondent’s breaches of the Act”. The second unjustified disadvantage is said to flow from breaches of good faith and unfair bargaining. The third unjustified disadvantage grievance is said to flow from breaches of the Holidays Act 2003.

[84] As will be apparent from the above, I have not accepted that the breaches of the Act referred to earlier in submissions, namely issues around the completeness of the employment agreement and the keeping of wage and time records, amount to breaches in all the circumstances, and I have declined to award penalties in respect of them. For those same reasons, I do not accept that these breaches have been made out such that they are able to support a claim of unjustified disadvantage. No orders are made.

[85] In respect of the second disadvantage for which compensation is claimed, I have found as set out above, that the claims of breaches of good faith and unfair bargaining are not made out on the facts. For those same reasons, I do not accept that these breaches have been made out such that they are able to support a claim of unjustified disadvantage. No orders are made.

[86] As will be apparent from the above, my view is that only the failure to provide minimum entitlements under the Holidays Act 2003 has been made out. Ms Griffiths claims compensation for humiliation, loss of dignity, and injury to feelings for Boosts’ breaches of the Holidays Act 2003, namely the failure to pay annual leave and public holiday entitlements. It is submitted on Ms Griffiths’ behalf that separate compensation should be awarded for this, as it gives rise to a separate unjustified disadvantage grievance.⁴ However, details of how this forms a separate unjustified disadvantage are not stated.

[87] While I have found that Boost has wrongly failed to pay Ms Griffiths certain entitlements, this stems directly from the same fact situation where Ms Griffiths’ employment status which gives rise to these entitlements was not appreciated by the

⁴ At paragraph 183 of the Submissions of Counsel for the Applicant dated 28 March 2024.

parties at the relevant time, and was only determined later by the Authority. There is no serious dispute that any lack of payment of these entitlements results only because the quantum cannot yet be calculated. Finally, Ms Griffiths did not provide any evidence as to how the lack of payment of her annual holiday entitlements caused her hurt and humiliation that is separate and distinct from the impacts of her dismissal. I also note that Ms Griffiths' original claim as set out in her statement of problem dated 1 July 2022 claimed just under \$4,000 in unpaid holiday pay and \$178.68 in respect of public holidays, with no compensation claimed in this respect.

[88] In the circumstances, I am not persuaded on the basis of Ms Griffiths' evidence that her claim for unjustified disadvantage or compensation flowing from it is made out, and I am also of the view that this amounts to "double dipping". No orders are made.

Claim for reimbursement of lost income pursuant to s 123(1)(b) of the Act

[89] Ms Griffiths has claimed for reimbursement of lost income arising from the dismissal, from the date of 1 April 2022 to 10 April 2022. Ms Griffiths' evidence was that she secured a new job before her last day of work on 31 March 2022, and she could have started new employment immediately as of 1 April, however, she chose to take 10 days off to have a break before starting in a new role.

[90] On Ms Griffiths' own evidence, the 10 days of lost remuneration that she is now claiming for has not resulted from her dismissal, but has resulted from her choosing to start her new role on a date convenient to her. While it is understandable that Ms Griffiths wanted to take some time off before starting her new role, this is not a decision for which Boost should be liable. Her loss for these 10 days when she made a conscious decision not to work even where work was available is not caused by her dismissal. This claim is not made out. No orders are made.

Commission

[91] Ms Griffiths also claims for commission arising from invoices issued to clients after her final day of work, which she says is owing to her in accordance with the Offer of Engagement, in the sum of \$43,899.30. This is disputed by the respondents, who say that the correct interpretation of the Offer of Engagement is that Ms Griffiths is only entitled to commission on sales that were invoiced while the contract was in place.

[92] Clause 5 of the Offer of Engagement states:

The fees for our services will be based on a percentage of invoiced sales, as detailed in the Appendix to this letter.

[93] The Appendix states:

Appendix – Commission Structure

Account Managers are paid commission on the invoiced net sales value achieved on a monthly basis.

[94] The Appendix then sets out five different commission rates in a bullet point form. Ms Griffiths amended two of these by hand, and has added in specific commission rates for two particular clients in addition to the list of rates. Mr Kuluz accepted her amendments.

[95] It is submitted for Ms Griffiths that she is entitled to be paid on the basis of invoiced sales, regardless of when invoicing occurred, and even when sales for which she was responsible were invoiced after her final day of work. It is submitted that the Offer of Engagement and Appendix does not specify that commission would only be paid during the continuation of the agreement, nor does it specify that sales must be invoiced by a certain date or time. Therefore, the plain and ordinary meaning of the words are said to be that Ms Griffiths is entitled to commission on all “her” invoiced sales regardless of the fact that some of these invoices were sent to clients by others after her final day of work. In addition, it is submitted that there was evidence suggesting that previous employees of Ms Griffiths’ previous employer had received payments after they had ceased work, therefore this amounts to a custom and practice that should be read in to Ms Griffiths’ contract with Boost.

[96] It is submitted for Boost that clause 4 of the Offer of Engagement is relevant, which provides:

The fees for your services will be based on a percentage of invoiced sales, as detailed in the Appendix to this letter.

[97] Boost agrees that commission is calculated and paid when a sale is invoiced, but states that when clause 4 is read in conjunction with clause 5 and the appendix, the effect is that the Offer of Engagement provides that commission is only payable while the Account Manager is providing the services to Boost, as the commission is the fee

for the Account Manager's services. Therefore, once employment ended and the services were no longer being provided, there is no requirement to continue paying commission.

[98] It is submitted for Boost that this is why Ms Griffiths is attempting to rely on a "custom and practice" argument, which Boost rejects on the basis that how the previous company conducted itself with persons other than Ms Griffiths cannot determine the terms of Ms Griffiths' contract with Boost, the evidence of a contractual entitlement to commission payments after employment ending was hearsay, and the evidence of Ms Dawson who said she was paid commission after the end of her contract with the previous company was to accept she was an independent contractor and the payment was not contractual.

[99] At the investigation meeting, Ms Griffiths' evidence was directed towards the idea that in fact, she became entitled to commission on the basis not of "invoiced sales" (which is what is referred to in the Offer of Engagement) but on the basis of jobs or orders that she had entered into Boost's system. She took the view that the "invoiced sales" wording was intended to clarify that commission was calculated on the basis of the sum actually invoiced to the client, which might be different to the sums or amounts entered into the system at the "job" stage, as jobs could change. My understanding of this is that this is Ms Griffiths' attempt at defining which sales invoiced to her former clients by others after she left she might properly claim an entitlement to. Evidence from the respondents was that a job or an order was not a sale that could be invoiced on, as it could be changed (eg, it had yet to become a binding contract).

[100] If I accept Ms Griffiths' argument that she was entitled to commission on "invoiced sales" where invoices were sent by others to clients after the ending of her employment with Boost, this does not make the terms of the Offer of Engagement clearer. Rather, it raises more issues, as this would require further implied terms be read into the Offer of Engagement, to define which invoices, sent to which clients, Ms Griffiths might be entitled to claim commission on, for how long after her last day of employment, and when the "trigger" for claiming commission occurred if that trigger was not, as stated in the Offer of Engagement, "invoiced sales".

[101] No additional terms need be implied into the Offer of Engagement if I accept as the plain wording suggests, that commission is a fee for services and therefore no fee is payable when those services are no longer being provided.

[102] In the absence of express provisions defining whether commission is payable on orders invoiced after employment ends, my view is the plain meaning of the Offer of Engagement is that the commission payable by Boost to Ms Griffiths is the fee payable by Boost to Ms Griffiths for her services as an Account Manager. Once the contract between Boost and Ms Griffiths comes to an end, there can be no obligation to continue to pay.

[103] I also note that I do not accept that there was an established custom and practice at Boost to pay commission after the ending of employment on the basis of some trigger other than invoiced sales. Firstly, Ms Griffiths had only been employed by Boost for a total of three months. All evidence, such as it was, about such a practice, was directed at payments made from the previous company, authorised by its owner Mr Judge. There was no evidence of any contractual term requiring such payments. What evidence there was, was either hearsay, or was accepted to be a payment made by Mr Judge for reasons of his own rather than because he was contractually obliged to. Mr Judge himself was not called by Ms Griffiths to give evidence, and nor was any claim made against him or his previous company (initial claims made against that company for holiday pay and similar matters were withdrawn). Overall, the evidence falls short of establishing any custom or practice, rather it suggests that payments made by Mr Judge were discretionary. I do not consider that there was sufficient evidence of any custom or practice which would require reading the Offer of Engagement in the manner contended for by Ms Griffiths.

[104] The claim for commission payments for invoiced sales after the ending of Ms Griffiths' employment with Boost is not made out. No orders (including orders for contingent interest which was requested) are made.

Penalties against Boost for breaching terms of Ms Griffiths' employment agreement

[105] It is submitted that Boost should be subject to penalties in accordance with s 134 of the Act for breaching the express and implied terms of Ms Griffiths' employment agreement (the Offer of Engagement). The terms said to be breached are Ms Griffiths' entitlement to commission, as well as good faith obligations, entitlement to annual

holidays and public holidays, and the obligation to keep and produce wage and time records.

[106] For the reasons set out above, I have found that these breaches are not made out. I note that the claim for penalties against Boost under this head was first made at the investigation meeting by oral application on 19 March 2024 almost 2 years after the ending of Ms Griffiths' employment, and therefore is out of time to be commenced in the Authority as set out in s 135(5) of the Act. Under s 135(5) of the Act, an action for the recovery of a penalty must be commenced within 12 months, and these penalties were only claimed against Boost on 19 March 2024, significantly more than 12 months since the ending of Ms Griffiths' employment on 31 March 2022. I do not take the view, as is submitted for Ms Griffiths, that I have any power to extend statutory time limits, and I decline to do so. For these reasons, this claim is declined.

Penalty against Mr Kuluz for breaching terms of Ms Griffiths' employment agreement

[107] In similar fashion, a penalty was sought against Mr Kuluz personally for instigating, aiding, or abetting Boosts' breaches of Ms Griffiths' employment agreement as set out above. The terms said to be breached are Ms Griffiths' entitlement to commission, as well as good faith obligations, entitlement to annual holidays and public holidays, and the obligation to keep and produce wage and time records.

[108] I have previously found that these breaches have not been made out. This claim was also first made at the investigation meeting by oral application on 19 March 2024 almost 2 years after the ending of Ms Griffiths' employment, and therefore is out of time to be commenced in the Authority as set out in s 135(5) of the Act. For these reasons, this claim is declined.

Orders

[109] Ms Griffiths has a personal grievance in that she was unjustifiably dismissed.

[110] Ms Griffiths is entitled to be paid for annual leave in accordance with the Holidays Act 2003 for the period of her employment with Boost being 1 January 2022 to 31 March 2022.

[111] Ms Griffiths is entitled to be paid for unworked public holidays in accordance with the Holidays Act 2003 for the period of her employment with Boost being 1 January 2022 to 31 March 2022.

[112] Payments should be made to Ms Griffiths within 28 days of the date of this determination.

[113] If there are difficulties calculating the amounts of these entitlements following this determination, the parties are to revert to the Authority for any further orders that may be needed.

[114] In addition, Boost Promotions Limited is ordered to pay to Lindsay Griffiths within 28 days of the date of this determination:

- a. The sum of \$20,000 without deduction as compensation for hurt and humiliation.

Costs

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

[116] If they are not able to do so and an Authority determination on costs is needed Ms Griffiths 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 respondents 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.

[117] 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.⁵

Claire English
Member of the Employment Relations Authority

⁵ Please note the Authority's Practice Note on costs available at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>