

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2026] NZERA 325
3386964

BETWEEN	DEVON WHITHAM Applicant
AND	BRUTALITEES LIMITED First Respondent
AND	CHRISTINE DAWSON Second Respondent

Member of Authority:	Alyn Higgins
Representatives:	Claudia Serra, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	23 April 2026 in New Plymouth
Submissions received:	From the Applicant at the investigation meeting and written submissions on 28 April 2026 None received from the Respondent
Determination:	26 May 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Devon Whitham says that she was employed by the first respondent, Brutalitees Limited (BL), which operates a tattoo and piercing shop called Brutal Ink that also sells clothes and ornaments from a site in New Plymouth. The second respondent is the sole director and majority shareholder of the first respondent. The job

involved initial training in providing face piercings to customers and some general shop duties.

[2] Ms Whitham claims that she was unjustifiably dismissed from her employment without notice following a heated meeting on 19 September 2024. At no point prior to her dismissal did Ms Whitham receive any verbal or written warnings about her performance or conduct or told that her employment might be at risk.

[3] Ms Whitham is seeking unpaid wages and holiday pay, wages lost as a result of the grievance and compensation for humiliation, loss of dignity and injury to feelings.

[4] Ms Whitham has further claimed that the second respondent was Ms Whitham's employer, either in her personal capacity or as a joint employer with the first respondent.

[5] Ms Whitham also seeks penalties against the first respondent for failing to provide a written employment agreement and wage and time records and for non-payment of wages and holiday pay and costs. Ms Whitham is also seeking leave to recover any unpaid wages from the second respondent personally under s142Y of the Employment Relations Act 2000 (the Act) and a penalty against the second respondent as a person involved in a breach pursuant to s142X of the Act.

[6] The respondents deny that Ms Whitham's termination was unjustified.

The Authority's investigation

[7] There has been little engagement from either respondent. The parties attended mediation in April 2025. A Statement in Reply (SiR) was also lodged in response to Ms Whitham's Statement of Problem.

[8] A case management conference call was held on 12 February 2026 at which timetable directions were issued for the lodgement of written witness statements and the convening of an investigation meeting. The notice of investigation meeting was sent to both respondents by email address for the respondent company listed on the companies register.

[9] In accordance with the timetabled directions a written witness statement was received from Ms Whitham. Ms Whitham also attended the investigation meeting in New Plymouth, confirmed her evidence and answered questions under oath.

[10] No witnesses or any other information was received from either of the respondents and neither did any representative of the respondents attend the investigation meeting.

[11] At the scheduled start time of the investigation meeting on 23 April 2026 the investigation meeting commenced 15 minutes after the advised start time to accommodate possible lateness on the part of the respondent.

[12] At my direction the Authority Officer attempted to contact the second respondent on two mobile numbers that had previously been supplied including on the SiR but a message said the first number called was no longer a valid number. On the second number the Authority Officer left a voicemail message about the scheduled investigation meeting, the venue details and that it was proceeding. I would have allowed the respondents to have given evidence had contact been made.

[13] I am nevertheless satisfied that the respondents were made aware of the proceedings, including the date and time of the investigation meeting. I accordingly decided to proceed with the investigation meeting in accordance with clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act). The notice of investigation meeting advised the respondents that if they did not participate in the investigation meeting then the claims would be determined in its absence.

[14] The investigation meeting then proceeded by way of formal proof.

[15] As permitted by s 174E of 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 but all information provided in the course of the investigation has been considered.

Relevant Background

[16] Ms Whitham says that she became aware of the opportunity to work at Brutal Ink through a Facebook post made by the second respondent, Christine Dawson

(“Chrissy”) on the Brutal Ink Facebook page in May 2024. At the time, Ms Whitham did not have a permanent job and was actively looking for work.

[17] After seeing the advertisement, Ms Whitham messaged the Brutal Ink Facebook account asking what qualifications were required for the role. Ms Whitham says that she was told in a response that no qualifications were required and that reliability was the main requirement, but that the role would be unpaid until trained.

[18] Ms Whitham said she was keen to learn and was asked to come in for a meeting on 17 May 2024. The meeting / interview was held by another employee of the business not Chrissy.

[19] After this meeting, Ms Whitham sent her CV by email to the second respondent, and on 21 May 2024 was asked if she wanted to come in the next day and do some piercings.

[20] Ms Whitham attended the shop the next day to carry out some piercings as part of what appeared to be a trial as Ms Whitham says that she hadn’t been offered formal employment yet. This was also the first time that Ms Whitham met Chrissy in person. Ms Whitham says that she would later speak to Chrissy about work through Facebook Messenger.

[21] Ms Whitham says that she didn’t get paid initially as she was advised that she was in training but says that she started getting paid after about a month. Ms Whitham was paid by bank transfer at the end of June 2024 and supplied records of her wage payments with her evidence. Prior to that, Ms Whitham says that she may have received one or two cash payments but doesn’t have records of these including the dates or amounts or what they were related to.

[22] Around this time Ms Whitham moved from Manaia to Waitara largely because of the new opportunity.

[23] After the initial day at the shop, Ms Whitham kept coming back and performing more work at the shop on Chrissy’s direction. Ms Whitham says that there was no formal communication about employment or what the role actually was, although the Facebook post Ms Whitham had responded to had said “Apprentice.” Ms Whitham says that she was not fully trained to perform piercings except for how to perform a

small number of piercings and it did not feel like professional training even though the role mainly involved performing piercings. Ms Whitham also had other responsibilities including preparing and wrapping tools used for piercings, mopping the piercing and tattoo areas, organising the piercing area, serving customers and selling other items in the shop (such as clothing and various items) through the point-of-sale system. Ms Whitham used the tools and equipment supplied by the business to undertake the work.

[24] Ms Whitham says that her usual working days were Tuesday to Saturday with hours generally from around 12:00pm until 5:00pm, but these were decided by Chrissy.

[25] On 10 July 2024, Ms Whitham was sent a Contractor Agreement by Chrissy. It was also around this time that Chrissy left to spend time in the United States and didn't return until mid-September 2024. Ms Whitham says that she didn't speak to Chrissy about the contract or its terms but Chrissy did ask her repeatedly to sign it before she signed it on 9 August 2024.

[26] Ms Whitham says that there was no clear system explaining how or when she would be paid and says that pay was calculated based on a percentage of the piercings performed. Ms Whitham would calculate the amount herself by reviewing the piercings completed and deducting 30 percent and would then message Chrissy and ask her to transfer the payment to her bank account. The Contractor Agreement stated that compensation was at the rate of 30% of the price of each piercing performed and that the compensation rate would be reviewed on 17 September 2024.

[27] At some point Chrissy told Ms Whitham to deal with a guy named Josh who was also at the shop regarding payments. However, Ms Whitham says that Josh didn't appear to have authority over employment matters and at times told her he would message Chrissy regarding payment. Ms Whitham also says that there were occasions when she was not paid for work she had completed and had to chase payment.

[28] Around September 2024 Ms Whitham had still not been paid for several weeks of work. Ms Whitham even asked if she could at least receive a small amount of cash and have the rest paid later. Ms Whitham says that the last payment she ever received was on 2 September 2024.

[29] Towards the end of her time Ms Whitham says that she started getting accused of tasks not done and says that the work environment got really uncomfortable. Ms

Whitham further says that during her time there were no formal meetings about her performance or behaviour, and no warnings were ever issued.

[30] Ms Whitham complained to Josh about what was happening including pay, and on 18 September 2024 said that he and Chrissy would have a meeting with her the next day. However, no details of what the meeting was to be about were provided or that Ms Whitham could have support or representation.

[31] The following day, on 19 September 2024, Ms Whitham attended the shop for the meeting. Chrissy and Josh were present. Sometime during the meeting Ms Whitham started recording the meeting and the recording was produced in evidence.

[32] During the meeting after some discussion about Ms Whitham's tasks in the business and her general unsatisfactory performance Chrissy told Ms Whitham that she wasn't getting paid and wasn't welcome back. Chrissy told Ms Whitham she wanted to smash her, that she was disgusting and a cunt of a person with a shit attitude. The meeting ended with Chrissy telling Ms Whitham to take her shit and fuck off.

The issues

[33] The issues requiring investigation and determination were:

- (a) Was Ms Whitham employed by either of the respondents?
- (b) If so, was Ms Whitham unjustifiably dismissed?
- (c) If Ms Whitham was unjustifiably dismissed, what remedies should be awarded, considering:
 - (i) Compensation for humiliation, loss of dignity, and injury to feelings;
 - (ii) Lost wages or any other entitlements (including any unpaid wages) lost as a result of any grievance and subject to Ms Whitham's duty to minimise loss.
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Whitham that contributed to the situation giving rise to his grievance?
- (e) Have either of the respondents breached any of the following:
 - (i) Failure to provide a written employment agreement;
 - (ii) Failure to pay any wages and holiday pay owed.

- (f) Should any penalties be awarded for any breaches and if so, what quantum and payable to whom?
- (g) Should either party contribute to the costs of representation of the other party?

Was Ms Whitham employed by either of the respondents?

[34] When determining the existence of an employment relationship, section 6 of the Act provides the starting point. Specifically, an employee is a person employed by an employer to do any work for hire or reward under a contract of service.¹

[35] In deciding whether or not a person is an employee the Authority must determine the real nature of the relationship between them.² This is intensely factual in nature and is objectively assessed.³ All relevant matters including the intention of the parties must be considered.⁴ The Authority must also not treat as a determining matter any statement by the persons that describes the nature of their relationship.⁵ In practice this requires the Authority to consider how the relationship operates, including the degree of control exercised by the employer, the integration of the work into the employer's business and whether the person is working on their own account.⁶

[36] The fact that all of the terms are not finalised does not necessarily preclude the existence of an employment relationship, as long as there has been offer and acceptance and a mutual intention to enter into the relationship.⁷

[37] In summary, Ms Whitham claims that an employment relationship existed because of the following:

- (a) Intention of the Parties: The initial advertisement was for a Piercing Apprentice, which implies a relationship of training and supervision inherent to employment and not an independent commercial contract;
- (b) The second respondent exercised a high degree of control inconsistent with a contractor arrangement. Ms Whitham's days and hours of work were set

¹ Employment Relations Act 2000 s6 (1) (a)

² Employment Relations Act 2000 s6 (2)

³ See *Pilgrim v Attorney-General (No 2)* [2023] NZEmpC 277, at [18] and [19]

⁴ Employment Relations Act 2000 s6 (3) (a)

⁵ Employment Relations Act 2000 s6 (3) (b)

⁶ See *Rasier Operations BV and others v E Tū Inc and another* [2025] NZSC 162

⁷ *Baker v Armorguard Security Ltd* [1998] 1 ERNZ 424

as was her compensation. The Contractor Agreement also contained restrictions preventing her from working for competitors, which are also strong indicators of control over an employee;

- (c) Ms Whitham was fully integrated into the business operations and performed tasks essential to the shop's daily function, such as preparing and wrapping tools, mopping floors, and serving customers at the till. Her use of the shop's tools and equipment further demonstrates that she was part and parcel of the organisation;
- (d) Ms Whitham carried no commercial risk and had no ability to generate a profit outside of the percentages dictated by the respondents. She also did not issue invoices or manage her own business affairs. The economic reality was therefore one of subordination and dependence and not of an independent business operator.

[38] I am accordingly satisfied that an employment relationship existed and that Ms Whitham was an employee and not an independent contractor.

[39] Ms Whitham has further submitted that the second respondent, Chrissy was Ms Whitham's employer, either in her personal capacity or as a joint employer with the first respondent. In support of this submission Ms Whitham relies on the following:

- (a) The second respondent personally managed every aspect of the relationship, from setting the terms and conditions to the dismissal;
- (b) The Contractor Agreement issued to Ms Whitham used only the business trading name, failing to identify the limited liability company as the employer;
- (c) The business's public identity is exclusively tied to the second respondent. The Facebook page links to a booking site using her personal name, not the trading or company name, representing to the public that she is the person operating the business;
- (d) Ms Whitham noted at the investigation meeting that the second respondent uses part of the limited liability company's name ("Brutalitees") for a separate online clothing business. Ms Whitham worked exclusively for the business operating under the trading name Brutal Ink and had no involvement with this separate online enterprise;

- (e) No PAYE was deducted or paid to Inland Revenue and this strongly indicates that a limited liability company was not, in reality, paying her wages;
- (f) The SiR names only the second respondent personally care of the business trading name as the responding party.

[40] Neither the first or second respondent attended the investigation meeting or made submissions. All I have from either respondent is a single SiR. The SiR states that Ms Whitham was taken on as a body piercing apprentice at Brutalitees Limited (the first respondent) and that the first respondent was its director. The SiR also states that most artists in the tattoo and piercing industry are self-employed contractors and that Ms Whitham was not an employee and was treated in line with industry norms, but no supporting evidence of this position was provided.

[41] Nevertheless, I must be satisfied of the real nature of the relationship between the parties to the relationship. Although neither respondent attended the investigation meeting I do not find that an employment relationship between Ms Whitham and the second respondent has been made out on the facts.

[42] As a starting point the SiR does refer to the first respondent (BL) and states that Ms Whitham was taken on as a body piercing apprentice at Brutalitees Limited.

[43] In regard to the second respondent personally managing the relationship, it is not possible for an artificial company to act without an agent acting. In the same vein it is also not uncommon for small businesses to provide personal contact details to the market as the first respondent is a limited liability company and their actions need to be undertaken by agents of the company.

[44] Further, Ms Whitham told me that while the second respondent was away in the United States that Josh appeared to have some ability as far as Ms Whitham's payment queries were concerned. Ms Whitham also complained to him the day before the final meeting where the dismissal occurred. Josh also appears to be a minority shareholder of the first respondent.

[45] I am also not persuaded by the submission that the second respondent uses part of the first respondent's company name for a separate online clothing business and that Ms Whitham worked exclusively for the business operating under the trading name

Brutal Ink and had no involvement with this separate online enterprise. Ms Whitham did say that her tasks also included selling clothing items in the shop. Even if the second respondent uses part of the first respondent's company name for a separate online clothing business this is not a very strong factor that the second respondent was the employer or a joint employer.

[46] Finally, Ms Whitham included some records of wage payments with her evidence statement. These clearly show payments from the first respondent. The fact that no PAYE was deducted or remitted indicates a potential breach of tax regulations rather than employment by the second respondent.

[47] In conclusion, I find that stepping back and assessing the overall evidence that the employment relationship was with the first respondent, Brutalitees Limited.

Was Ms Whitham unjustifiably dismissed?

[48] In the SiR, BL does not deny that Ms Whitham was dismissed. Instead, BL says that the decision to end Ms Whitham's employment was made based on repeated breaches of trust, failure to follow hygiene and safety protocols, misuse of business resources and behaviour that placed the business, its clients and its reputation at risk.

[49] Section 103A (2) of the Act sets out the legal test for justification for dismissal. Specifically, the Authority must consider, on an objective basis, whether BL's actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred.

[50] In applying the statutory test of justification, the Authority must consider the four procedural requirements set out in s 103A (3) of the Act. These set out the minimum standards of procedural fairness that need to be observed by an employer in order to justify an employee's dismissal and are:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[51] A fair and reasonable employer is also expected to comply with s 4 (1A) (c) of the Act, which provides:

without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made.

[52] The respondents did not attend the investigation meeting to proffer any evidence. Having listened to the recording of the meeting that took place on 19 September 2024 it was clear that BL's actions fell well short of the requirements of ss 4 (1A) (c) and 103A (3) of the Act.

[53] Specifically, Ms Whitham was not advised of the matters to be discussed to enable her to prepare prior to attending the meeting on 19 September 2024. Ms Whitham was also not advised that her employment was at risk as a possible outcome. There was no genuine consideration of Ms Whitham's explanation in response to the allegations before her dismissal. The concerns were raised and the outcome, Ms Whitham's dismissal, all took place in the same meeting. These are not the actions of a fair and reasonable employer.

[54] By putting Ms Whitham to the proof, I am satisfied that her unjustified dismissal claim is substantiated.

[55] Accordingly, I find that Ms Whitham was dismissed from her employment by the actions of BL on 19 September 2024 and that her dismissal was both procedurally and substantively unjustified.

Is Ms Whitham entitled to remedies?

[56] Having found that Ms Whitham has a personal grievance for unjustified dismissal she is entitled to remedies.

Compensation for lost wages pursuant to s 123 (1) (b) of the Act

[57] Ms Whitham claims lost wages of \$7,523.75 following the unjustified ending of her employment. This claim is based on 25 hours per week (12:00pm to 5:00pm, Tuesday to Saturday), at the applicable minimum wage rate at the time of \$23.15 gross per hour for 13 weeks following the termination of her employment. Pursuant to s 128 of the Act if an employee has a personal grievance and they have lost remuneration because of that grievance then they are entitled to the lesser of a sum equal to their actual lost remuneration or 3 months' ordinary time remuneration.

[58] Any claim for wages lost as a result of dismissal is also subject to the requirement to minimise loss.⁸ Ms Whitham described her efforts to find work following her dismissal and I am satisfied that she appropriately attempted to mitigate her loss and is entitled to an award of lost remuneration.

[59] I order Brutalitees Limited to pay to Ms Whitham the gross sum of \$7,523.75 as compensation for wages lost as a result of the grievance.

Compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123 (1) (c) (i) of the Act

[60] Compensation may also be awarded pursuant to s 123 (1) (c) (i) of the Act for the humiliation, loss of dignity and injury to feelings that an applicant suffers as a result of unjustified actions. The purpose of the award is to acknowledge the loss of dignity and the upset caused by the unjustified dismissal.

⁸ See *Argosy Imports Ltd v Lineham* [1998] 3 ERNZ 976.

[61] In assessing any amount of compensation that should be awarded, my task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of the unjustified actions. Various Employment Court decisions provide guidance on this exercise of quantification.⁹

[62] Ms Whitham says that her dismissal had a significant impact on her mental health. Ms Whitham says that she became anxious and distressed about encountering Chrissy in public and struggled to keep up social connections.

[63] Ms Whitham also says that she moved house twice after her dismissal. The first time was because Chrissy knew where she lived and Ms Whitham was scared she would show up at her house. The second time was because Josh had been told where she had moved to and Ms Whitham moved out of fear that he would tell Chrissy her new address. Ms Whitham also described feelings of general depression and trouble sleeping.

[64] I accept the plausibility of this impact considering Chrissy's threats of physical violence at the meeting on 19 September 2024 and the way in which Ms Whitham was dismissed and the language used.

[65] Taking all of these factors into account, I consider an award of \$15,000 as compensation for humiliation, loss of dignity, and injury to feelings is appropriate in the circumstances.

Contribution

[66] Having awarded remedies, s 124 of the Act requires that I consider the extent to which Ms Whitham's actions contributed towards the situation that gave rise to the grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.

[67] A list of alleged wrongdoings by Ms Whitham was provided in the SiR but no witness statements or any corroborating evidence were provided from the respondents and neither did they participate in the investigation meeting. I did nevertheless question Ms Whitham on the claims in the SiR and was satisfied with her answers. As I have

⁹ See *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

already said, Ms Whitham did not receive any verbal or written warnings about her performance or conduct or told that her employment might be at risk prior to her dismissal. It is significant that these matters were never discussed with her in a way that might have allowed Ms Whitham to potentially respond or remedy any concerns before the decision to dismiss was made.

[68] In the absence of any supporting evidence from the respondents there was no evidence before the Authority that Ms Whitham contributed to the circumstances giving rise to her personal grievance. Accordingly, I make no reduction in remedies for contribution under s 124 of the Act.

Is Ms Whitham owed any wage arrears including any outstanding annual holiday payments?

[69] Ms Whitham claims a gross amount of \$6,715.82, which comprises the amount of work undertaken but not paid for. This is based on her hours of work from 12:00pm to 5:00pm, Tuesday to Saturday (25 hours per week), over the 18 weeks of her employment, which also includes the training period.

[70] For the duration of her employment, Ms Whitham says that she should have received gross wages of \$10,417.50 at the applicable minimum wage rate at the time of the employment, which was \$23.15 per hour gross. Ms Whitham received payments totalling \$3,701.68 and seeks the balance of wages owing. This is the sum of \$6,715.82. In the absence of any evidence from BL rebutting Ms Whitham's claims I order Brutalitees Limited to pay to Ms Whitham the gross sum of \$6,715.82 for unpaid wages less the sum of \$231.50 for two days sick leave taken.

[71] Ms Whitham also claims that she did not receive any holiday pay during her employment. In the absence of any information from BL calculation of holiday pay must be based on Ms Whitham's total gross earnings. I accordingly order Brutalitees Limited to pay to Ms Whitham the gross sum of 8% of \$10,417.50 being \$833.40 gross.

Should any penalties be awarded for any breaches and if so, what quantum and to whom?

[72] Ms Whitham claims penalties against the respondents for failure to provide a written employment agreement and for failing to provide wage and time records and pay wages and holiday pay owed.

[73] I am satisfied that these breaches are made out and may give rise to penalties. These breaches attract a maximum penalty of \$20,000.00 against a company for each breach.¹⁰

[74] Section 135(5) of the Act provides the timeframe for a penalty action to be commenced. Recovery of a penalty must be commenced within 12 months after the earlier of either the date when the cause of action first became known to the person bringing the action or the date when the cause of action should reasonably have become known to the person bringing the action.¹¹ Ms Whitham notified BL of its liability for a penalty in the Statement of Problem lodged with the Authority dated 23 June 2025 and is within the timeframes for recovery of penalties under the Act.

[75] Even though a penalty is technically available, I also have to be satisfied that the imposition of any penalty would meet the purposes and principles of penalties. In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Employment Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.¹² The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour and deter any future non-compliance.

[76] In assessing the penalty, the Authority takes a broad evaluative approach, having regard to matters such as the nature and extent of the breach, the degree of culpability, any loss or damage caused, and the need for deterrence. Where there are multiple related breaches arising out of the same course of conduct, it may be appropriate to adopt a global approach rather than artificially disaggregating them.

¹⁰ Employment Relations Act 2000 s 135 (2)

¹¹ Employment Relations Act 2000 s 135 (5)

¹² *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

[77] Brutalitees Limited is a company incorporated in 2011 and has operated a business with other employees. In such circumstances, and in the absence of any explanatory information from BL for the breach, there appears no excuse for not meeting the minimum requirement to provide a written employment agreement. The same for the unpaid wages and holiday pay. Minimum employment standards are not optional.

[78] In this case and because there are three breaches, I consider that a penalty is appropriate and to send a message regarding the importance of compliance with minimum employment standards.

[79] Ms Whitham has also asked that some or all of any penalty be paid to her. Penalties imposed for breaches of employment standards are generally payable to the Crown, however the Authority has the discretion to order that all or part of a penalty be paid to any person, which includes an affected employee instead.¹³

[80] Where victims of breaches can be properly compensated and the party bringing proceedings can be reimbursed in costs for doing so, there will not be a strong case for payment of any of the penalties to anyone other than the Crown.¹⁴ However, in this case the non-payment of wages for work completed is not satisfactory and is perhaps the most fundamental breach that could occur and a penalty is appropriate.

[81] Stepping back to look at the matter objectively and taking into account the relative amount of unpaid wages and holiday pay, I consider an appropriate penalty in this case to be \$500 for each breach for a total of \$1,500.00 collectively for the employment breaches with half that amount (\$750.00) payable each to Ms Whitham and \$750.00 payable to the Crown.

Summary of orders

[82] Within 28 days from the date of this determination Brutalitees Limited is ordered to pay Devon Whitham the following:

- (a) Unpaid wages of \$6,484.32 gross along with \$833.40 (gross) being 8% for holiday pay;

¹³ Employment Relations Act 2000 s 136 (2)

¹⁴ Above n 12

- (b) Lost wages of \$7,523.75 gross;
- (c) Compensation for the humiliation, injury to feelings and loss of dignity of \$15,000.00.
- (d) A penalty of \$750.00

[83] Within 28 days of the date of this determination, Brutalitees Limited must pay to the Crown a penalty of \$750.00 for the statutory breaches referred to at [77] above.

Should Ms Whitham be granted leave to recover wage and holiday pay arrears from the second respondent personally?

[84] Ms Whitham seeks leave to be able to recover any wages or other money owed against the second respondent under s142Y of the Act.

[85] Section 142Y (1) of the Act sets out an employee's ability to be able to recover wages or other money payable from a person involved in a breach of employment standards if:

- (a) There has been a default in the payment of wages or other money payable; and
- (b) The default is due to a breach of employment standards; and
- (c) The person against whom leave is sought was involved in the breach within the meaning of section 142W.

(2) However, arrears in wages or other money may be recovered under subsection (1) only,—

- (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
- (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[86] In this case the only monies able to be recovered from the second respondent personally is the unpaid wages and accrued holiday pay that should have been paid. This is a total amount of \$7,317.72 gross.

[87] While the second respondent may have been a person involved in a breach of employment standards I decline to grant leave in this case. This is because Ms Whitham has not proved on the balance of probabilities that the first respondent is unable to pay the money owing. In submissions, Ms Whitham submitted that the first respondent is due to be removed from the Companies Register and submitted that this is an indicator that it cannot meet its financial obligations. However no supporting evidence of this

was provided and, at the date of this determination, neither is there any correspondence on the Companies Register to this effect. As a result, I cannot grant the leave sought.

Costs

[88] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. The investigation meeting lasted less than half a day.

[89] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Whitham may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondents will then have 14 days to lodge any reply memorandum.

[90] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁵

Alyn Higgins
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1