

**Attention is drawn to the order
prohibiting publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 78
3017191

BETWEEN GARETH BALL
Applicant

AND BATTERSEA INVESTMENTS
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Michael McDonald, advocate for the Applicant
Laurence McLean, advocate for the Respondent

Investigation meeting: 14 December 2017

Submissions received: At the investigation meeting, and 24 January 2018 and
16 March and 2 May 2018 after Mr Ball supplied new
evidence.

Determination: 29 May 2018

DETERMINATION OF THE AUTHORITY

- A. Battersea Investments Limited unjustifiably disadvantaged Gareth Ball.**
- B. Battersea Investments Limited unjustifiably dismissed Gareth Ball.**
- C. Within 28 days, Battersea Investments Limited must pay Gareth Ball:**
- (i) \$1,475.05 less \$23.80 = \$1,451.25 for wages lost during suspension, and**
 - (ii) \$1,961.25 gross for wages lost due to the dismissal, and**

- (iii) **\$273.00 being the total of wages x 8% holiday pay, and**
 - (iv) **\$10,800 compensation.**
- D. Within 28 days, Battersea Investments Limited must pay a penalty of \$1,000 to the Employment Relations Authority for transfer to a Crown bank account.**
- E. Costs are reserved.**

Employment relationship problem

[1] Gareth Ball was a bartender at a bar in Christchurch owned by Battersea Investments Limited (BIL). Ms Q was the general manager of the bar, and until October 2016, was also a director of BIL. Robert McLean, a director of BIL, who did not live in Christchurch, was the effective owner of the business and was the person to whom Ms Q reported.

[2] **Under clause 10, Schedule 2 of the Employment Relations Act 2000 (the Act) I prohibit from publication the name of the bar and any information that could identify Ms Q, Ms G or Ms K.**

[3] Mr Ball says that BIL unjustifiably disadvantaged him by suspending and then unjustifiably dismissing him. He also says BIL should pay penalties for failing to give him a written employment agreement and for breaches of good faith.

[4] Ms Q also has a claim that she was unjustifiably dismissed. She was Mr Ball's manager. Her claim and Mr Ball's claim arise out of the same events, which began in the evening of 15 December 2016. Ms Q's personal grievance claim has been determined separately.¹

[5] BIL says that its dismissal of Mr Ball was justified because of his behaviour on 15 December 2016, his behaviour on 7 January 2017, and its business decision to restructure the bar's operations.

[6] At the investigation meeting, I heard sworn or affirmed evidence from Mr Ball, Mr McLean and Traan McLean. Traan McLean is Mr McLean's daughter, and was the person

¹ [2018] NZERA Christchurch 80

who managed the bar's payroll and undertook accounting work. She is now the bar's manager.

Issues

[7] To determine this matter I will need to consider the following issues:

- (a) In relation to the unjustified disadvantage claim, I need to ask if BIL acted as a fair and reasonable employer could have in all the circumstances at the time? If not, Mr Ball will be entitled to remedies.
- (b) In relation to the unjustified dismissal claim, I need to ask if BIL acted as a fair and reasonable employer could have in all the circumstances at the time?
- (c) If not, Mr Ball will be entitled to remedies. Is Mr Ball entitled to lost wages and other money lost as result of the grievance/s? As a part of that enquiry, I need to assess whether Mr Ball sufficiently mitigated his loss.
- (d) Is Mr Ball entitled to compensation for humiliation, loss of dignity and injury to his feelings?
- (e) Did Mr Ball's behaviour contribute towards the situation that gave rise to the personal grievance/s? If so, was his contribution so blameworthy that his remedies should be reduced?
- (f) Did BIL fail to provide Mr Ball with a written individual employment agreement? If so, should I impose a penalty?
- (g) Did BIL breach its duty of good faith to Mr Ball? If so, should I impose a penalty?
- (h) Did BIL breach its statutory duty to give Mr Ball not less than 14 days' notice of the requirement to take his annual holidays or to discontinue work under s 32(3) of the Holidays Act 2003 when it closed the bar on 15 December 2016?
- (i) Was Mr McLean complicit in any of the breaches and should he pay a penalty or penalties personally, as the sole director of the company?

What happened?

At the bar on 15 December 2016

[8] On 15 December 2016, Ms McLean came down from Wellington. She had planned her trip in order to meet with Ms Q and hear her views on two issues of concern to BIL.

However, Ms Q had requested a later date for the meeting and BIL had agreed. Ms McLean decided to come down in any event, as she had never been to the bar.

[9] Ms McLean and a female friend, with experience as a duty manager in bars with poker machines, attended the bar in the afternoon. While there, Ms McLean spoke to Ms G, another director of BIL, and was introduced to Ms K. Ms K, was the bar manager on duty that evening.²

[10] Mr McLean can monitor the bar in real time from Porirua using CCTV footage. A little before 7pm, Mr McLean rang Ms McLean and told her Ms Q was removing money from the poker machines in the gaming room. Ms McLean said that she would go to the bar and check that the money was correctly accounted for.

[11] Mr Ball and Ms McLean did not know each other. At 7pm, Mr Ball had only just started his shift. Ms McLean and her friend came into the bar and walked towards the gaming room, which had the curtain closed. That meant that the gaming room was closed to the public. Mr Ball said to the two visitors “excuse me ladies, you can’t go in there. The pokies are closed.” Ms McLean responded to him “talk to [Ms K].” Ms K was busy serving a customer. Mr Ball again told the women not to go into the gaming room. Ms McLean told him it was all right.

[12] Ms McLean followed Ms Q out of the gaming room to make sure she put the money from the poker machines into the safe. By then, Mr Ball knew who Ms McLean was and that she was there about an allegation that Ms Q had been responsible for money going missing from the gaming room.

[13] Ms McLean says that Mr Ball was verbally abusive to her. She says he was standing up, facing her and being aggressive towards her. She says he told her she was disrupting their workflow and asked “what [was I] fucking doing there?” She says she told him she was there to do a job for her father and that if Mr Ball had any questions he should ask Mr McLean.

² Ms G and Ms K were referred to in evidence at the investigation meeting but I did not hear evidence from them. It is not necessary to publish their names in this determination.

[14] Ms McLean says that Mr Ball told her Ms Q was doing “a great job running this place” and kept telling her to “fuck off”. Ms McLean says that she was scared of him and had never had a man talk to her like that before.

[15] Mr Ball admits he said “piss off because you are fucking with the chi of the bar and your old man doesn’t have a clue” to Ms McLean. He does not admit to saying anything else to her, although acknowledges that she and her friend may have been taken aback that he would speak to them in such a way.

[16] Mr Ball also spoke to Mr McLean on the phone. Mr McLean told him to stay out of the matter. Mr Ball says he told Mr McLean he could not stay out of it. He hung up on Mr McLean.

[17] Mr McLean instructed Ms McLean to shut the bar down for the night. He instructed Ms K to stop serving drinks. At some stage during the evening, Mr Ball served two drinks. BIL alleges that Mr Ball served the drinks after Mr McLean had told Ms K to stop serving drinks.

[18] Ms McLean shut the bar down early and Mr Ball and all other staff were sent home.

After the bar was closed

[19] Mr Ball says that he drove to the bar the following day expecting to work that day and on the two days after that. There was a sign on the door on each of those days saying “closed due to unforeseen circumstances”.

[20] Mr Ball says that no-one from BIL contacted him to tell him that the bar would be closed and he did not know how long it would be closed for.

The letters outlining allegations and the invitations to a disciplinary meeting

[21] Mr Ball says that he tried to call Mr McLean numerous times and texted him asking what was going to happen with his job. He says he had no response until nine days later on Christmas Eve 2016 when Mr McLean sent him an email inviting him to a disciplinary meeting:

On 15 December 2016 it is alleged you were rude and abusive to Traan. You made the following comment “your father doesn’t have fucking clue” in a very threatening manner. Traan felt scared, uncomfortable and overwhelmed. This type of conduct is unacceptable in any circumstances, especially to a female. ...

Such conduct is in breach of your employment obligations and has the potential to cause risk to the reputation, viability and profitability of the Company.

If proven, this misconduct may result in a written warning, a final written warning or the termination of your employment.

Prior to any decision being made, and to enable a full and detailed investigation of this matter, we request your attendance at a disciplinary meeting which has been specifically convened to provide a suitable opportunity for you to respond to this allegation.

This disciplinary meeting is to be conducted at 2:00pm on 30/12/2016 at [the bar].

You are expected to make every effort to attend this meeting and are placed on notice that the Company reserves the right to make a determination in your absence if you fail to attend this meeting for whatever reason.

[22] The letter advised Mr Ball he was able to bring a support person or representative with him.

[23] Mr Ball was unable to attend the meeting that day and a further date of 7 January 2017 was set.

[24] On 5 January 2017, Mr McLean emailed Mr Ball another letter setting out a second issue of concern:

On 15 December 2016, it is alleged that you continued to serve drinks to customers after [Ms K] took down her licence. Such conduct is in breach of liquor licence laws and is in breach of your employment obligations. Further to this such conduct is in breach of your employment obligations and has the potential to cause risk to the reputation, viability and profitability of the Company.

[25] Mr Ball says he did not see that second letter before the meeting because he had no data left on his phone and no money to buy any more data.

The disciplinary meeting

[26] Mr McLean recorded his meeting with Mr Ball, which took place on 7 January 2017. I have read a transcript of the meeting. Mr Ball accepts that the transcript is largely accurate.

[27] Mr McLean started by reading out the two allegations, which he called “charges”. He asked Mr Ball if he understood what was alleged. Mr Ball confirmed that he understood what Mr McLean read out.

[28] Mr McLean told Mr Ball the meeting was the opportunity for Mr Ball to give his version of what happened “and if [he did] not agree with what’s been read out to [him].”

[29] Mr Ball said he “agreed with what’s been read out.” He said he should not have sworn at Traan “at all” but that he was speaking his mind and thought that:

what was going on wasn’t being dealt with professionally in any way.

[30] Mr Ball said that the problem was that he had not been introduced to Traan which led to him telling her twice that she should not go into the gaming room. He said he was only doing his job as a bar person.

[31] Mr McLean disagreed with him and said that Ms K and Ms Q already knew who Ms McLean was and that Mr Ball was “just a bar person” and that Ms McLean did not have to come and introduce herself to “every person behind the bar.”

[32] Mr Ball told Mr McLean:

... maybe I shouldn’t have acted on impulse when I was telling Traan to just fuck off and just let us do our job and that you don’t have a fucking clue, and there was no intention of intimidation. .. the bar staff, which are majority female and the locals .. they know that when I’m doing my job I do my job well.

[33] Mr McLean then told him “that has nothing to do with it.” He then tried to move on to discuss the second allegation but Mr Ball asked how many drinks it was alleged he had wrongly poured because:

I don’t even remember pouring a drink after Ms K said no more pouring of drinks.

[34] Mr Ball asked to see the recorded evidence that Mr McLean told him BIL had. There was a discussion about the importance of that evidence and Mr McLean said:

Whether you poured 1 or 100 it doesn’t make any difference ... all the evidence is going to prove is that I’m right, that’s all it’s gonna do.

[35] Mr McLean acknowledged that Mr Ball had a right to see the evidence but again stressed that it was not going to make any difference because Mr McLean knew Mr Ball poured drinks after Ms K told him to stop.

[36] The discussion deteriorated and it became clear that Mr McLean believed that at the start of the meeting Mr Ball had agreed with the two allegations; that is, he agreed they were correct. Mr Ball made it clear to Mr McLean that he had only agreed that he understood the two allegations.

[37] At one point Mr McLean said the “onus is on you” to ask for proof from BIL that the allegations were true. He also said Mr Ball’s personality was “bombastic, confrontational and not listening and understanding the situation and the way things are required to be done.” They eventually agreed to end the meeting so Mr Ball could see the video footage.

[38] Mr McLean told Mr Ball to send a USB so he could send him the video footage. Mr Ball says he did not send Mr McLean a USB because he could not afford to buy one. BIL did not supply Mr Ball with the video footage.

Mr Ball’s allegedly acting in a threatening and aggressive manner to Mr McLean

[39] On 7 January 2017, Ms Q, Mr Ball and a small group of other staff waited outside the bar after Mr Ball’s meeting while another staff member attended a disciplinary meeting. Mr McLean came outside to get the work van key off Ms Q. Mr Ball says that all the staff wanted was for Mr McLean, on behalf of BIL, to tell them what was going to happen with their jobs. They asked, but Mr McLean did not tell them anything.

[40] At that stage, Mr Ball became very angry and aggressive towards Mr McLean and lunged towards him. Mr Ball says that he wanted to kick Mr McLean and he moved towards him with that intent. However, he stopped himself.

[41] Mr Ball and Mr McLean had no further communication until, on 20 January 2017, Mr McLean sent a letter terminating Mr Ball’s employment. The letter says BIL found the two allegations proved. That is, Mr Ball was rude and abusive to Ms McLean and Mr Ball breached the liquor licence laws and his employment obligations by serving drinks to customers after Ms K took her licence down.

[42] Mr McLean also noted that following the disciplinary meeting Mr Ball “behaved in a threatening and aggressive manner” towards him. Mr McLean wrote that for all three reasons Mr Ball was summarily dismissed. He also wrote:

Any evidence, minutes, and recordings will be sent to you in due course.

[43] In fact, Mr McLean sent no further evidence of any kind to Mr Ball until these proceedings were underway.

Mr Ball's suspension

[44] BIL stopped Mr Ball working out his shift on 15 December when it shut the bar early. That was clearly a suspension. At that stage, Mr Ball only understood that the bar was closed for the night. However, after that BIL decided to keep the bar shut indefinitely. That too was a suspension.

[45] Any suspension causes disadvantage to an employee, especially if it is an unpaid one. It is up to BIL to satisfy me that what it did and the way it did it was justified in all the circumstances at the time it made its decisions.

Did BIL act as a fair and reasonable employer could have when it shut the bar on 15 December?

[46] BIL has to prove that its decision to shut the bar, and the way it reached that decision, was what a fair and reasonable employer could have done in all the circumstances at the time it made the decision.

[47] Mr McLean was effectively acting as BIL. He had to have had a significant enough reason to shut the bar for the evening.

[48] In addition, s 103A(3) of the Employment Relations Act 2000 (the Act) sets out the minimum procedural requirements that I must consider in determining whether BIL's actions were justified.

[49] Because Mr McLean was able to view the video footage of the bar from Porirua, he was able to see that Mr Ball was challenging Ms McLean. In addition, Ms McLean telephoned him to report the negative atmosphere she experienced in the bar. Mr McLean attempted to manage the situation from afar by telephoning Ms K and Mr Ball to demand their cooperation.

[50] In my view, Mr McLean rightly concluded that the situation had escalated beyond what was constructive.³ However, generally a right to suspend an employee is contractual right. Mr Ball had no written individual employment agreement, therefore there was no contractual right to suspend him. In addition, even when a contractual right to suspend exists an employer must consult with an employee about a proposed suspension before deciding to suspend.

[51] In this case, there was no attempt at a fair process and BIL did not tell Mr Ball, Ms K or Ms Q that if Mr Ball did not calm down and co-operate BIL would suspend Mr Ball and/or close the bar for the rest of the night effectively suspending all rostered staff.

[52] In all the circumstances, including that BIL had no contractual right to suspend Mr Ball, I do not consider that closing the bar and therefore suspending Mr Ball, was a decision a fair and reasonable employer could have made in all the circumstances at the time. The suspension amounted to an unjustified disadvantage to Mr Ball in his employment.

Did BIL act as a fair and reasonable employer could have when it decided to keep the bar closed for a review?

[53] The ongoing closure of the bar was an ongoing suspension of Mr Ball. There had been no holiday closedown planned. Mr Ball expected to work on a number of shifts over the Christmas and New Year period, including extra shifts over that usually busy period in hospitality, and on into 2017.

[54] Mr McLean told me at the investigation meeting that after 15 December he and Ms McLean decided to do a thorough review of the business in order to decide whether to close the bar permanently or to re-open it, probably without some existing staff. BIL did not consult its staff or communicate its decision about the review and possible restructuring of the business to the staff.

[55] BIL had a duty of good faith to its employees, which means that it was required to be active and constructive in establishing and maintaining a productive employment relationship and being “constructive and communicative”.⁴ Mr McLean’s failure to tell Mr Ball what was happening with his work was unjustified.

³ However, I do not consider that was entirely or even substantially due to Mr Ball’s attitude to Ms McLean and her friend. See also [2018] NZERA Christchurch 80.

⁴ Section 4(1A) of the Employment Relations Act 2000.

[56] Again, I note that BIL had no contractual right to suspend Mr Ball. Again, there was no consultation with Mr Ball about the proposal to keep the bar closed indefinitely. Nor did BIL seek his input.

[57] BIL's failure to communicate with Mr Ball between 15 and 24 December was not a minor defect of process. The decision to keep the bar closed without any discussion or consultation with Mr Ball was not the action of a fair and reasonable employer. Mr Ball's suspension continued for over a month. BIL treated Mr Ball unfairly and unjustifiably disadvantaged him in his work.

The dismissal

[58] BIL is required to prove that in dismissing Mr Ball it acted as a fair and reasonable employer could in all the circumstances at the time. Part of that involves a consideration of whether BIL used a fair process in deciding to dismiss Mr Ball. Factors I need to consider in deciding whether the process was fair include whether BIL:

- sufficiently investigated the allegations against Mr Ball, having regard to the resources available to it?
- raised its concerns with Mr Ball before deciding to dismiss him?
- gave Mr Ball a reasonable opportunity to respond to its concerns?
- genuinely considered Mr Ball's explanation before deciding to dismiss him?

[59] I can also consider any other factors I consider relevant. However, I must not decide that BIL's action was unjustified if there were only minor defects in the process that did not result in Mr Ball being treated unfairly.

[60] Initially, BIL made two allegations against Mr Ball. Mr McLean had seen video footage of the events of 15 December. It did not supply that footage to Mr Ball before it held the disciplinary meeting. It did not supply that footage to Mr Ball after the disciplinary meeting despite the meeting having ended because Mr Ball had requested to view it in relation to the second allegation. BIL had a duty to supply that footage to Mr Ball because it formed part of the investigation it had made giving rise to the allegations, particularly the allegation that he had served alcoholic drinks after he had been told to stop pouring drinks.

[61] It is not open to BIL to blame Mr Ball's failure to supply a USB to it for its failure to supply the footage to him. BIL had a duty to supply Mr Ball with all the information it had that led it to make the allegations against him. It should have done that before the 7 January meeting. However, having failed to do that, and knowing that Mr Ball wanted to see the footage, it should have supplied the footage and provided him with a further opportunity to answer the second allegation.

[62] By failing to supply Mr Ball with the video footage relevant to the second allegation, BIL did not give Mr Ball a reasonable opportunity to respond to that allegation.

[63] At the investigation meeting, Mr Ball said that one of the drinks he served was a non-alcoholic drink and the other was a "staffie", a drink that he gave to a staff member and recorded for stocktake purposes but did not charge for. He said that he understood that even if Ms K had taken her manager's certificate down and told him not to pour any more drinks him pouring a non-alcoholic drink and not charging for the alcoholic drink he served did not contravene liquor laws. He was unable to give that explanation at the disciplinary meeting because he had not seen the footage and without that was unable to recall what drinks he had served and when.

[64] In addition, although Mr McLean knew that Ms K knew to stop serving drinks because he had told her to, he did not know if she passed that instruction on to Mr Ball. Mr McLean says he had not instructed her to do that but expected that she would have. However, Mr McLean did not investigate the sequence of events with Ms K by asking her about it.

[65] I do not consider BIL's insufficient investigation was because of a lack of resources. It would have been simple for Mr McLean to have shown Ms K the video footage and asked her about what she told Mr Ball and when.

[66] Because Mr Ball had not been able to give his explanation before BIL decided to dismiss him it was not able to take his explanation into account before deciding to dismiss him partly in reliance on that allegation.

[67] A fair and reasonable employer could not have acted that way, and so the reliance on the second allegation to dismiss Mr Ball contributed to the dismissal being unjustified.

[68] As part of its decision to dismiss Mr Ball, BIL relied on a third allegation that it had not put to Mr Ball. Therefore, it did not give him an opportunity to respond to that allegation.

[69] I appreciate that given the nature of the second interaction with Mr Ball on 7 January, that Mr McLean may not have chosen a face-to-face meeting to allow Mr Ball to give his response to the allegation that he had acted in a threatening and aggressive manner. However, that does not over-ride the responsibility BIL had to put the allegation to Mr Ball, give him a reasonable opportunity to respond and consider his response before using that allegation as one of the reasons for his dismissal.

[70] Overall, the process used by BIL was so deficient that the decision it made to dismiss Mr Ball was not one a fair and reasonable employer could have made in all the circumstances. Therefore, BIL unjustifiably dismissed Mr Ball.

Remedies

Compensation

[71] Mr Ball claims compensation for humiliation, loss of dignity and injury to his feelings from both the suspension and the dismissal.

[72] In relation to the ongoing suspension, he says he was gutted and demoralised and that it ruined Christmas for him. He did not have enough money to buy Christmas presents for his nieces and nephews, which he wanted to do. He felt inadequate because of that.

[73] Mr Ball's suspension also caused significant deterioration in his relationship with his father on Christmas Eve. Mr Ball's father blamed Mr Ball for the suspension and the disciplinary process, which Mr Ball felt was very unfair. Mr Ball says that this has had a wider effect on his relationship with other members of his family too.

[74] From 24 December 2016, Mr Ball knew that he was facing a disciplinary process, but the uncertainty of what the outcome would be lasted until 20 January 2017.

[75] In relation to the dismissal, especially following the uncertainty over the more than five weeks of suspension, Mr Ball said that it "completely shattered me." He said he felt "crappy and gutted". He said he became a wreck and was not in a fit state to search for work or to start work immediately. He said that he was aware that he could have sought help from

a doctor but he did not want to take prescription medicine so he did not consult his doctor. He said that he had to borrow money from a friend to get through the period when he had no income.

[76] I consider the effect on Mr Ball of the two personal grievances warrants compensation of \$12,000. This is subject to my consideration of his contribution, below.

Lost wages

[77] BIL paid Mr Ball for some hours during his suspension and prior to his dismissal, the last payment for wages being on 1 January 2017. There was no evidence from BIL to establish what the payments after the suspension were for. I take them to have been wages.

[78] On 22 January 2017, after the dismissal. BIL paid Mr Ball \$299.88 gross. I will not include the \$299.88 gross in my calculation of lost earnings as I take it to have been holiday pay.

[79] Mr Ball indicated that he could have earned between 30 and 40 hours per week over the summer period. I have had no wages and time records and no timesheets provided. However, I have seen BIL's payroll printout for Mr Ball. Based on that, I calculate that over the last 17 weeks prior to 15 December 2016 Mr Ball earned an average of \$462.25 gross per week for an average of 27.19 hours at \$17 per hour. In the ordinary course of events I am satisfied that Mr Ball would have continued to earn that amount.

Lost wages during the suspension but before the dismissal

[80] I consider Mr Ball's suspension, particularly given that it was unjustified, should have been a paid suspension. BIL suspended Mr Ball for 5 weeks and 2 days before it dismissed him. Any wages not paid over that time are properly conceptualised as lost wages arising from the unjustified disadvantage.

[81] When weekly gross wages of \$462.25 are multiplied by 5 weeks and 2 days (assuming a 5-day week), for the period 15 December 2016 to 20 January 2017, the total is \$2,496.15 gross. BIL paid Mr Ball \$1,009.10 gross⁵ during the suspension but prior to the dismissal. That means Mr Ball could have earned a further \$1,487.05 gross from BIL but did not as a direct consequence of the suspension. I do not consider that Mr Ball had a duty to mitigate his loss by looking for further work as he had not been dismissed by BIL at that stage.

⁵ Not counting the \$299.88 payment.

Lost wages after the dismissal

[82] Section 123(1)(b) of the Act allows me to order BIL to reimburse Mr Ball for any wages or other money lost as a result of his grievance. Section 128(2) of the Act provides that I must order BIL to pay Mr Ball the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. Mr Ball's employment ended on 20 January 2017.

[83] The three-month period after dismissal runs from 20 January 2016 to 19 April 2017.⁶ Mr Ball had no income from anywhere except BIL during December 2016 and January 2017. BIL argues that Mr Ball did not attempt to mitigate his loss because he says that he did not look for work until March 2017. Mr Ball's IRD Summary of earnings shows that in February 2017 he earned \$350 gross.

[84] In an affidavit received after the investigation meeting, Mr Ball deposed that during March 2017 and subsequent months he cared as an unpaid home helper for a person recovering from surgery on his leg after an accident. Mr Ball deposed that apart from the first week of caregiving work it was now possible he may be reimbursed for this care.

[85] Mr Laurence McLean, BIL's advocate, submits that any potential reimbursement for that period may end up unjustly enriching Mr Ball if I also award wages lost as a result of his unjustified dismissal for the same period.

[86] Mr Ball's attempts to mitigate his loss have been put into issue by his former employer. Therefore, I need to consider whether he acted in such a way as to mitigate his loss. Mr Ball did not provide specific or documentary evidence of attempts to look for work after 20 January 2017. However, he did give evidence of not being in any fit state to look for work or put himself forward for other jobs for some time after his dismissal. I refer back to my consideration above of the personal effect on Mr Ball of his dismissal. I consider that due to the combination of the proved personal grievances Mr Ball was not immediately in a fit state to seek alternative work.

[87] I consider that when Mr Ball made a decision to care for the person recovering from serious surgery he moved away from any attempt to seek replacement work for a number of months. It is commendable that he decided to provide care for someone, especially when not expecting any material reward. However, I consider that in doing so, he broke the chain of

⁶ That is 13 weeks.

causation from the unjustified dismissal causing his ongoing loss of wages to his decision to assist someone in need causing his ongoing loss of wages.

[88] Mr Ball's lost wages flowing from the unjustified dismissal are for a period of five weeks only, not three months. When he was working he earned \$462.25 per week x 5 weeks = \$2,311.25 in total. He earned \$350 gross over that time and I deduct that amount to come to an amount of \$1,961.25 gross that BIL must pay him to reimburse him for wages lost because of the unjustified dismissal.

[89] Mr Ball is also entitled to 8% holiday pay on his wage arrears and wages lost because of the unjustified dismissal.

Contribution

[90] Section 124 of the Act requires me to consider the extent to which Mr Ball's actions contributed to the situation that gave rise to his proved personal grievances of unjustified disadvantage and unjustified dismissal. If I consider his actions to have been sufficiently blameworthy, I may decide to reduce the remedies that I would otherwise have awarded.

[91] The situation that gave rise to Mr Ball's personal grievance of unjustified disadvantage was only partly due to his attitude to Ms McLean on 15 December 2016. The reason the bar was closed down and some staff were dismissed was also related to the situation that existed between BIL and Ms Q at the time, and how BIL had elected to approach its concerns about Ms Q.

[92] The kind of language Mr Ball used, in itself, could not be seen as a contribution to the closure of the bar that evening and certainly not to the ongoing closure of the bar. Mr Ball's attitude to Ms McLean was partly contributed to by Ms McLean's attitude to him when he told her not to go into the gaming room. However, Mr Ball's attitude and aggressive stance when combined with his language towards her and his refusal to "stay out of it" as Mr McLean requested and his hanging up on Mr McLean did contribute to the closure of the bar that evening. Mr Ball contributed to that situation on that evening by 20%, and I will take that into account when considering the appropriate level of remedies. However, I do not consider his behaviour was so blameworthy as to contribute to the ongoing closure of the bar prior to his dismissal. Therefore, the reduction in the amount of money owed to Mr Ball only

reduces by a possible 7 hours of work x \$17 per hour for 15 December being \$119 gross less 20% = \$23.80.

[93] In relation to his dismissal, I have already apportioned some blame to Mr Ball for his behaviour contributing to the closure of the bar on 15 December 2016. However, that is also one of the allegations relied on by BIL to dismiss him. I do not consider Mr Ball's behaviour towards Ms McLean was so blameworthy in all the circumstances to reduce any remedies he is otherwise entitled to for his dismissal.

[94] There was simply insufficient investigation and insufficient opportunity given to Mr Ball in relation to serving drinks once the bar manager's certificate was down, to establish BIL's conclusion that he had breached liquor licencing laws. Therefore, I cannot find that Mr Ball's behaviour was blameworthy.

[95] In relation to the allegation of behaving in a threatening and aggressive manner to Mr McLean, having taken into account Mr Ball's candour to me about the situation on 7 January and his behaviour towards Mr McLean, I consider his action so blameworthy that I reduce his remedy of compensation for unjustified dismissal by 10%, from \$12,000 to \$10,800. However, I do not consider that his lost wages should be affected as it is likely that BIL would have dismissed him for the other two reasons in any event.

Penalties

[96] Mr Ball claims that penalties should be imposed on BIL and on Mr McLean, as the director for:

- Failure to provide a written employment agreement,
- Closing the work premises and effectively suspending or terminating staff employment without consultation or notice
- Failing to give 14 days' notice of the close-down period as required by the Holidays Act 2003, and
- Breaches of good faith "on numerous occasions".

[97] Mr Ball claims that the above breaches could not have taken place without Mr McLean's involvement and that as the sole director I should also impose penalties on him personally.

Can I impose a penalty for BIL shutting the bar and effectively suspending the staff?

[98] I have dealt with this as a personal grievance claim, based on the same facts. Therefore, I do not consider it as being a matter that could render BIL liable for a penalty in addition to the remedies already ordered to be paid to Mr Ball.

Should I impose a penalty for failure to give 14 days' notice of the closedown?

[99] BIL's decision to close the bar on 15 December 2016 and to keep it closed after it dismissed Mr Ball was not a decision it made to under the Holidays Act 2003.

[100] BIL's closure of the bar amounted to suspending Mr Ball. I have already dealt with that and ordered it to pay remedies to Mr Ball.

[101] Therefore, BIL is not liable to a penalty for this.

Did BIL breach its duty of good faith to Mr Ball?

[102] As part of my consideration of Mr Ball's personal grievances, I have found that BIL did breach its duty of good faith to Mr Ball, for example, in its failure to communicate with Mr Ball during the suspension. Any breach of good faith is in relation to the same facts that have given rise to my findings of unjustified disadvantage and unjustified dismissal.

[103] I consider the failure to be responsive and communicative was deliberate, serious and sustained. The failure was intended to undermine the employment relationship between BIL and Mr Ball.

[104] I consider that a penalty should be imposed for this failure.

Lack of a written employment agreement – should I impose a penalty?

[105] Sections 63A and 65 of the Act require an employer to provide a new employee with a copy of an intended written employment agreement, and to keep a copy of all written employment agreements.

[106] Ms Q was the bar manager and she engaged Mr Ball. Mr Ball did not have a written employment agreement. There is no evidence that he was ever provided with an intended written employment agreement.

[107] BIL argues that Ms Q's failure to provide Mr Ball with an intended written employment agreement was not a failure of BIL, but was Ms Q's fault. BIL does not argue that Ms Q employed Mr Ball in her personal capacity. At the relevant time, Ms Q was a director of BIL.

[108] BIL employed Mr Ball and Ms Q's failure to provide the written employment agreement was an action of BIL. Therefore, BIL's failure to comply with s 63A makes it liable to penalty imposed by the Authority.

Quantum of penalties

[109] There has been a clear breach of ss 63A(2) and 65 of the Act and I find that this case is an appropriate case for the imposition of a penalty.

[110] Section 135 of the Act provides that every person who is liable to a penalty under the Act is liable, in the case of a company, such as BIL, to a penalty not exceeding \$20,000 for every breach of the Act.

[111] The purpose of a penalty is to punish the wrongdoer and deter them, and any other employers (in this case), from failing to provide written employment agreements to employees.

[112] In *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*⁷ the Employment Court set out a four-step procedure that the Authority should follow when assessing a penalty.

[113] Section 133A of the Act sets out factors that the Authority must take into account when considering the quantum of penalty for a breach of the Act. These factors are:

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and

⁷ [2016] NZEmpC 143

(e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and

(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and

(g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[114] Adopting the four- step approach of *Preet*, I find as follows.

Step 1

[115] As BIL was Mr Ball's employer, the maximum penalty that may be imposed is \$40,000. That is, for a breach of good faith and the failure to provide a written employment agreement.

Step 2

[116] The first part of Step 2 involves assessing the severity of the breach.

[117] The failure in relation to the employment agreement was not the most severe as there was no intention to deliberately deprive Mr Ball of the employment agreement. However, the failure did deprive Mr Ball of fundamental information about his terms and conditions of employment, such as a plain language explanation of the services available for the resolution of employment problems as required to be included in employment agreements by s 65(2)(a)(vi) of the Act.

[118] However, the failure to be communicative and responsive in good faith was relatively serious.

[119] The second aspect of Step 2 involves an assessment of whether there are any mitigating circumstances. I accept that there was no intent to deny Mr Ball an agreement and that its absence was inadvertent. My consideration of the two parts of Step 2 leads me to the conclusion that the penalty, at this point, should be \$10,000.

Step 3

[120] Step 3 requires me to assess BIL's financial position. I have received a copy of financial records. Without revealing details of BIL's financial position, its financial

statements for the year ended March 2017 show that the company made losses in 2016 and in 2017. It is in a poor financial position. That leads me to consider that the penalty should be reduced to \$2,000.

Step 4

[121] Step 4 involves an assessment of whether the resulting penalty is proportionate. Step 4 requires the Authority to step back and assess what would be a just penalty overall. One approach is to compare other decisions of the Authority that are comparable.

[122] In all the circumstances of this case, compared with other recent cases, including *Q v Battersea Investments Limited* [2018] NZERA Christchurch 80, and taking into account that I do not want to impose a penalty so high as to ensure it cannot be paid, I conclude that a penalty of \$1,000 should be imposed on BIL for the two breaches.

Should I impose a penalty on Mr McLean personally for BIL's failure to supply an employment agreement?

[123] Although this was pleaded in the Statement of Problem, Mr McDonald made no submissions on this claim. I imagine he meant that Mr McLean was a “person involved in a breach” of the Act and therefore liable to a penalty under ss 142W and 142X of the Act. However, an application for a penalty against a person involved in a breach may only be made by a Labour Inspector.

Costs

[124] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[125] The parties should seek to agree on costs. If I am asked to determine costs, I am likely to adopt the Authority's notional daily tariff-based approach. The daily tariff for the first day is \$4,500. This matter was heard within one day.

[126] If the parties cannot reach an agreement, the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply.

[127] The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority