

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 134
5341402

BETWEEN LEANNE COOKE
 Applicant

AND JKL ENTERTAINMENT
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Linda Ryder, Counsel for Applicant
 Aliza Eveleigh, Counsel for Respondent

Investigation Meeting: 10 February 2012, 15 & 16 March 2012 at Christchurch

Submissions received: 26 March 2012 & 26 April 2012 from the Applicant
 16 April 2012 from the Respondent

Determination: 2 July 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] It is common ground that the respondent should be solely JKL Entertainment Limited despite the written employment agreement identifying the employer as a different company.

[2] JK Entertainment Limited (JKLEL) owns and operates a video hire business called Blockbuster Papanui. Nigel Maynard is the principal of JKLEL. Leanne Cooke worked for JKLEL from October 2010 until 19 December 2010 when her employment terminated in accordance with notice of resignation given by her on 8 December 2010. Ms Cooke was employed part-time as a customer sales representative and mostly worked sole charge. Prior to the employment Ms Cooke

told JKLEL that she suffered from an anxiety disorder which was controlled with medication.

[3] There were two incidents on Sunday 5 December while Ms Cooke was in sole charge. Ms Cooke received a call from a customer's husband who rang to complain about alleged rudeness by Ms Cooke and who demanded her manager's home phone number. When Ms Cooke declined to give him that information, suggesting he ring the store the next day, the husband spoke to Ms Cooke in an angry and abusive manner. Ms Cooke was upset by this incident and suffered symptoms of anxiety. Later during that shift a customer returned to the store demanding a refund for a faulty item. Ms Cooke did not have the equipment to test the claim and referred the man to the store manager who would be available the following day. The man was dissatisfied with this and was joined by two other customers who pointed out that the demand for a refund was in accordance with the Consumer Guarantees Act. Ms Cooke attempted to explain that she was not authorised to give a refund but was told that their customer service *stinks* and that she had a *bad attitude*. Ms Cooke was not able to contact the manager by phone to deal with the situation. She became upset and had to give the man a cash refund to get him to leave the store. Ms Cooke again suffered symptoms of anxiety.

[4] Ms Cooke spoke to her manager in person (Scott Giddy) about these incidents the next day (Monday). They also had a phone discussion. There are some disputes about these exchanges. On the Wednesday Ms Cooke gave written notice of resignation, setting out a description of the two incidents and her exchanges with Mr Giddy and saying:

With no staff protection in effect and no viable solution forthcoming from the company I feel I have no alternative but to resign on health and safety grounds.

[5] Ms Cooke says that she was constructively dismissed and/or her employment was affected to her disadvantage by JKLEL's unjustified actions, giving rise to personal grievances. Ms Cooke says that she was not adequately trained, that there was a lack of operating procedures, that JKLEL (in breach of contract) failed to properly investigate the Sunday 5 December incidents, that JKLEL had no health and safety policy, and that JKLEL (in breach of obligation) failed to minimise harm, all of which gives rise to her personal grievances.

[6] Before dealing with these claims it is convenient to address several issues that arose after Ms Cooke gave notice of resignation. There was also a problem about a bonus payment which is now resolved. None of these matters are relevant to the personal grievance claims as they did not cause the resignation.

Wages Protection Act 1983

[7] On 11 November 2010 Ms Cooke signed up a new customer (Mr Pearson). She did not check the cellphone number given by Mr Pearson but otherwise completed the necessary form as required. Mr Pearson hired some items. A week later it became apparent that Mr Pearson had failed to return the items. Over the following several weeks Ms Cooke attempted to track down Mr Pearson but without success. It is not necessary to detail those attempts at present but Ms Cooke certainly did what she could.

[8] Ms Cooke gave notice of her resignation on 8 December 2010. Her last day of work was Sunday 19 December 2010.

[9] Wages were paid weekly and Ms Cooke generally received payslips by email. When Ms Cooke received the payslip on 15 December 2010 for the week ending 12 December 2010 she noticed that there was no student loan deduction. The payslip also included the following line as a deduction from the *TOTAL TAXABLE* figure:

Bonus -1.00 at 65.0000 -65.00

[10] It is common ground that JKLEL had said nothing to Ms Cooke about its intention to deduct \$65.00 from her wages. Ms Cooke queried matters by email and received the following response on 16 December from Mr Maynard:

*I can answer the \$65.00 deduction but the Student loan I am not sure.
The \$65.00 is half the cost of the Call of Duty Game that was stolen. The
balance will come out next Week. Total cost \$126.50.*

[11] Ms Cooke responded the next day pointing out that deductions require written consent, that she had not given consent either in writing or orally, that the situation had arisen from inadequate training and that no further deductions should take place without written consent.

[12] Mr Maynard responded to the effect that he had told Ms Cooke that staff would be held liable for any loss caused by the staff member not following the correct procedure when signing up new members and that a further \$61.50 would be deducted from the forthcoming week's pay unless the payment was received earlier. In response Ms Cooke denied that there had been such a conversation to the point of agreement, noted that the issue arose during the first few weeks of her employment when she was left in sole charge and reminded Mr Maynard that the law required written consent for any deductions. Ms Cooke asked for reimbursement of the unlawful deduction and repeated the instruction not to make any further deduction.

[13] JKLEL did not make any further deduction but nor did it repay the \$65.00. These proceedings were initiated in April 2011 and JKLEL then repaid the \$65.00 in May 2011 on a denial of liability basis. Despite that I am asked to impose a penalty for the breach of s.4 of the Wages Protection Act 1983.

[14] There is something of an argument for JKLEL that it was entitled to make the deduction of \$65.00 from Ms Cooke's wages. Clause 7.3 and 7.4 of the employment agreement, signed on 4 November 2010, refer to the company's entitlement to make deductions for time lost through default, *for any monies owing to the Company* and for till reconciliation shortfalls. Signing of the employment agreement is said to amount to written consent for the purposes of s.5 of the Wages Protections Act 1983. In addition I am referred to evidence to the effect that Mr Maynard personally and the company through policy manuals made it clear that an employee would be held liable for losses arising from failure to properly follow procedures. There are some disputes particularly about whether Ms Cooke was shown the policy manuals but it is not necessary to resolve those disputes at this point.

[15] JKLEL did precisely what s.4 of the Wages Protection Act 1983 prohibits. In *Amaltal Fishing Co Ltd v Morunga* [2002] 1 ERNZ 692 (EmpC), an employer paid a hotel the cost of making good the damage that had been done by employees and deducted that cost from their wages. Chief Judge Goddard held that the employer had breached the Act, saying at [35]:

Wages have to be paid in money and not partly in money and partly by discharging debts which seem valid to the employer but the existence or amount of which the employee may wish to dispute or at least to control the timing of their payment having regard to other commitments and needs.

[16] In the present case there was no third party involved but the principle applies nonetheless.

[17] Clause 7.3 of the employment agreement does not rescue JKLEL in the present situation because there was no acknowledged debt due to the company. The contest of evidence before me is testament to that.

[18] There is a submission that JKLEL believed it was entitled to make the deduction at the time. I am prepared to assume that to be the case. That does not properly explain the failure to forewarn Ms Cooke. JKLEL had plenty of time to do so. What was perhaps a mistaken reliance on a wrong view of the effect of clause 7.3 became a wilful retention of unlawfully deducted money as soon as Ms Cooke pointed out the legal requirements and asked for the money to be returned. I infer that JKLEL preferred to avoid the practical difficulties that can arise when claiming money from a person whose wages are no longer under your control. The amount deducted was more than 15% of Ms Cooke's wages for that week so it was not a minor matter, particularly for Ms Cooke as a person paid at the minimum wage and in light of her resignation. Ms Cooke had to initiate legal proceedings before she was repaid what she was always entitled to. The unlawful deduction added to her sense of grievance upon her resignation. I consider that the circumstances call for the imposition of a penalty, both to punish the unlawful action and to deter others.

[19] The breach of the Act occurred in December 2010. At the time the maximum penalty was \$10,000.00 for a company. I have canvassed the reasons for imposing a penalty. It should be a modest penalty since JKLEL eventually repaid the unlawfully deducted sum and there is no evidence of a history of similar breaches. I will set the penalty at \$1,000.00. I am asked to order the payment of any penalty directly to Ms Cooke. Ms Cooke was affected by the breach and that should be marked by having the whole of the penalty payable to her.

Minimum Wage Act 1983

[20] Ms Cooke resigned on 8 December 2010 and worked through her notice period. Her final day at work was Sunday 19 December 2010. The payslip for the period ending 26 December 2010 shows (my emphasis):

Annual Leave Taken 19.76 at 12.7000 250.95

[21] The specified minimum rate at the time was \$12.75 per hour. It follows that Ms Cooke was paid at a rate less than the legally applicable minimum rate of pay. The short fall was \$0.99.

[22] Ms Cooke did not raise the matter with JKLEL until July 2011. In January 2012 JKLEL paid \$6.00 into Ms Cooke's bank account on account of the shortfall.

[23] JKLEL uses a computerised payroll system. The evidence for JKLEL is that the underpayment was the result of an administrative error by the accounting computer system regarding the average used for holiday pay purposes. It is surprising that payroll software might permit such an error but the other possibility, that someone manually entered \$12.70 in the rate field so as to cause the underpayment only for holiday pay, seems even more unlikely. I accept that the underpayment resulted from some sort of administrative error and was unintentional.

[24] There was some delay in JKLEL remedying its default but it eventually did so and included an appropriate gesture to cover any inconvenience.

[25] There is a submission that the Employment Relations Act 2000 with its object of addressing inequality of bargaining power in employment relationships is designed to protect employees against situations such as this one. I do not agree with the submission. The Minimum Wage Act 1983 is the only statute relevant to this issue. That statute provides an absolute obligation to pay no less than the stipulated minimum and there are substantial penalties for a proven breach. The only question here is whether the circumstances of the breach warrant the imposition of a penalty to punish and to deter. They do not. The underpayment was an oversight, the amount involved was small, there was no impact on Ms Cooke and JKLEL remedied the matter appropriately before the investigation meeting.

[26] For these reasons I decline to impose a penalty on JKLEL.

[27] As noted the foregoing matters arose after Ms Cooke's resignation so are not relevant to the personal grievance claims to which I now turn. I will discuss the

claims using the headings provided by counsel for Ms Cooke but not necessarily in the same order.

Minimisation of harm

[28] There is an argument that JKLEL was obliged to minimise harm if it could not be eliminated or isolated. These words echo statutory duties set out in the Health and Safety in Employment Act 1992. The employer's obligations under that Act are not expressly incorporated into the employment contract but I accept that there is at least an implied contractual obligation to comply with these statutory duties: see *Gilbert v Attorney-General* [2000] 1 ERNZ 332 and *Attorney-General v. Gilbert* [2002] 1 ERNZ 31 (CA). The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks. The Court held that the foreseeability of harm and its risks are important in considering whether the employer has failed to take all practicable steps. As to the extent of the obligation the Court of Appeal said:

An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee.

[29] Employees such as Ms Cooke could approve an exchange of product but only a manager could authorise a refund. Sole charge employees such as Ms Cooke had to refer customers demanding a refund to a manager which usually meant that the matter could not be dealt with until the following day at the earliest. The argument is that this policy had the potential to place employees such as Ms Cooke in conflict situations; Ms Cooke suggested a way of minimising the risk of harm (displaying a refunds policy) but JKLEL refused to take this step.

[30] Ms Cooke's evidence is that she spoke to Mr Giddy about this on Monday 6 December. She asked if they could display a refunds policy but Mr Giddy said no because it would be contrary to the Consumer Guarantees Act. When Ms Cooke asked how to handle any customer dispute Mr Giddy told her to refer the customer to the manager and to contact Code 9 security if the customer got angry. Ms Cooke says that the policy as explained limited her ability to provide customer service, was different from her previous experience and was setting her up for a *bigger fall* and potential liability under the Consumer Guarantees Act. It is not suggested that Ms Cooke actually made any of these last points to Mr Giddy at the time although some of it is mentioned in the resignation letter. Ms Cooke's evidence is that she

looked up the Consumer Guarantees Act when she got home on 6 December and learnt that policies had to be consistent with the Act. She also felt that Mr Giddy trivialised her views by appearing to laugh at her and telling her to *toughen up* and that nothing bad would happen.

[31] Mr Giddy's prepared evidence differs to some extent. He says that he explained the store policy about refunds and credits which Ms Cooke had to comply with and for her to remain calm and firm and communicate this in a positive manner when dealing with customers. He also says that Ms Cooke appeared satisfied with these responses and that his mention of the Consumer Guarantees Act was to the effect that the company always complied with these legal obligations. When questioned Mr Giddy said that he would not have laughed at Ms Cooke, that he is not that sort of person and that he felt bad about what had happened to her. He thinks he may have said something like *You can get over it* as a way of encouraging her and not to trivialise matters.

[32] Mr Giddy no longer works for JKLEL but could not be considered a disinterested witness. There were some difficulties with the consistency of his prepared evidence in particular. However, Mr Giddy impressed as having been motivated by a genuine empathy for Ms Cooke's situation. I accept his evidence that he did not laugh at Ms Cooke when she was raising concerns with him and that he genuinely felt bad about what had happened to her. It is common ground that he explained JKLEL's policy about refunds which matched the way that Ms Cooke had responded to the customer. Ms Cooke probably misunderstood what was said by Mr Giddy about the Consumer Guarantees Act. Later, Ms Cooke checked the Act herself and learnt or should have realised that the Act's provisions override any policy and that the liability for any breach rested with the company, not her personally.

[33] JKLEL was entitled to have a policy, as do many businesses, restricting who can give refunds or credits in response to customer complaints. I agree with Mr Maynard's point that such a policy protects staff as they can simply deflect such demands by explaining the limits of their personal authority. Whether that is done by verbal response to a customer's demand or by pointing to a printed sign is immaterial. The issue is how to manage any threatening response from a disgruntled customer unhappy with the application of the policy. Mr Giddy made it clear to Ms Cooke that

her first line of defence was her customer management skills. Ms Cooke came to JKLEL as an experienced retail assistant and did not lack those skills. If that was not sufficient, JKLEL had an arrangement with a security firm which Mr Giddy told Ms Cooke about on 6 December 2010. Those are all reasonable steps taken by JKLEL to manage the risk that a threatening response from a customer might cause mental or physical harm to someone in Ms Cooke's position. There was no failure by JKLEL to take reasonable steps.

[34] What Ms Cooke seemed to be wanting was a guarantee of the absence of stress or upset, but as the Court of Appeal found, that is not something that an employer is obliged to do.

No Health & Safety policy

[35] Clause 16 of the employment agreement states that *The Employee is required to read and understand the Company's health and safety policy. This policy is available from the main office.* A subsequent clause in the agreement also refers but in a generic way to the availability of rules and policies.

[36] Papanui Blockbuster is operated by JKLEL under a franchise arrangement. Like many such businesses there are obligations on the franchisee (JKLEL) as to how it operates the business. That includes the form of its employment agreements. What had not been provided under the franchise agreement was an up to date health and safety policy document. The reasons for that are not material.

[37] During their phone conversation on 6 December 2010 Ms Cooke asked Mr Giddy for a copy of the company's health and safety policy. Mr Giddy agreed to provide this. At that point Ms Cooke assumed that there was such a policy which would be provided since the employment agreement referred to its existence. Ms Cooke resigned before there was any response from Mr Giddy to this request. The day after the resignation Ms Cooke saw saved as a favourite on the company computer a link to the Health and Safety in Employment Act 1992. Mr Giddy told her that this was the policy that the company went by. That was when Ms Cooke learnt that there was no separate health and safety policy developed specifically for her workplace. It follows that the absence of a company specific health and safety policy,

arguably in breach of clause 16 of the employment agreement, could not have been a factor in her decision to resign.

[38] If I assume that there was a contractual obligation to have a specific policy other than the text of the statute and JKLEL was in breach of that policy, there is no proof of any damage caused by such a breach. Ms Cooke accepted in evidence that a policy would not have prevented the angry and foul mouthed abuse suffered by her during the phone exchange on 5 December. No person should be subjected by dint of their employment to that sort of abuse but there was nothing either done or omitted by JKLEL that contributed to its occurrence. The second incident was unpleasant for Ms Cooke especially in that she felt somewhat ganged up on by the three customers but Ms Cooke was not abused by any of them. The absence of a specific health and safety policy made no difference to how that situation developed or how it ended.

[39] For these reasons, if there was a requirement for a specific health and safety policy, a breach of that obligation by JKLEL was irrelevant for present purposes.

Lack of proper investigation into 5 December incidents

[40] Ms Cooke says that JKLEL breached its obligations to her by not properly investigating the 5 December incidents or reporting back to her on the results of any investigation. I am referred to 2-27 of a document called *The Standard Operating Procedures* (SOP). The SOP includes comprehensive procedures and policies applicable to the store's operation. Pages 2-26 to 2-28 set out the company's policy prohibiting harassment including how to report it and how the company will investigate reports. The provisions are directed primarily at conduct between employees or between managers and employees but are drafted sufficiently widely to cover the conduct of customers towards employees. In particular there is a promise that the company will thoroughly and promptly investigate all claims of harassment and will meet with the complainant to discuss the results of the investigation. The case for Ms Cooke is that this was not done.

[41] Part of the case for Ms Cooke concerns the inadequacy of JKLEL's training and induction of her into company policies and procedures. It was put to JKLEL witnesses, particularly Mr Giddy and Mr Maynard, that Ms Cooke first saw the SOP

after her employment ended. That was vehemently denied by JKLEL. Mr Giddy told me that the SOP was in a cupboard at the store and that he specifically referred to it at times when training Ms Cooke. Ms Cooke's evidence is that when she asked about it she was told it was being updated. If it is correct that Ms Cooke never saw the SOP until after her employment had ended, as a matter of logic, the alleged failure to investigate in accordance with a policy set out in the SOP could not have caused her to resign. I note that the specific allegation about a breach of the SOP regarding the 5 December 2010 incidents was not contained in Ms Cooke's resignation letter. The 31 January 2011 correspondence raising Ms Cooke's grievance indicates that Ms Cooke was never shown the SOP and that other staff were unaware of its existence. The allegation was not raised in any formal setting until an amended statement of problem was lodged with the Authority in July 2011. Ms Cooke impressed as being quite meticulous in her approach to learning her job. If she had been given access to a copy of the SOP it is likely that she would have read it carefully. As a matter of probability I find that an SOP was never made available to Ms Cooke during her employment. It follows that a breach of a specific provision in such a document could not have caused Ms Cooke's resignation.

[42] If the matter is approached as a common law allegation of breach of contract, there is a different question of causation that has to be addressed: has a proven breach caused any loss or damage that is not too remote?

[43] I should briefly recap the two incidents. The first was a phone call received by Ms Cooke from the irate husband of a customer who became abusive when he did not get what he wanted. Mr Giddy accepted Ms Cooke's account of the phone call without demur. Ms Cooke wanted Mr Giddy to view any available video footage of the earlier interaction with the customer. Mr Giddy did so and again saw nothing improper in Ms Cooke's interactions with the customer. During their subsequent phone conversation, before Ms Cooke resigned, Mr Giddy told her that the video showed nothing untoward in her conduct. The second incident involved three customers in the store. One had a complaint about a faulty item. The other two were bystanders but joined in to support the complainant. The customers manner could be described as assertive and demanding but not abusive. Ms Cooke eventually gave the customer a cash refund which brought the situation to an end.

[44] SOP 2-27 states that:

If an investigation confirms that harassment has occurred, the Company will take corrective action, including such discipline up to and including termination of employment, if appropriate.

[45] Those words and following text confirm the point made earlier that the provisions are substantially directed at harassment by an employee. However I will assume that the word *including* means that the provision covers harassment of an employee by a customer. Ms Cooke raised her complaint with Mr Giddy on Monday 6 December and received a partial response that day. If there was a failure, it was in not responding more comprehensively prior to the resignation. However, there is no proof of any harm having been caused by such a breach.

[46] The additional difficulty with this part of the claim is that there were no further practicable but effective steps that JKLEL could have taken to minimise the risk of a further incident. The first was the more serious of the two incidents. When asked, Ms Cooke's evidence was that no policy could have stopped the abusive phone call. Ms Cooke handled the call as best one could in the circumstances. Although her evidence is that there was no or inadequate training on how to deal with a situation such as the second incident, Ms Cooke again handled it in accordance with JKLEL's policy at least up to the point that she felt so prevailed upon that she relented and provided the cash refund. It was not the lack of policy or even the inadequacy of training that created the problem for Ms Cooke. It was the fact of a customer interaction where the customer (with two bystanders) was challenging the adequacy of her response on behalf of JKLEL. Anything other than vesting total discretion in Ms Cooke to decide how to respond to the customer would always leave a risk of a similar incident. As noted before, vesting total discretion in an employee such as Ms Cooke would have created the risk of an angry confrontation to force her to comply with an unreasonable demand. That would have been a more serious risk.

[47] For these reasons I reject any claim by Ms Cooke based on the allegation of a breach of an obligation to properly investigate the 5 December incidents.

Lack of adequate training

[48] Ms Cooke was recruited to work mostly sole charge. I accept that JKLEL was required to provide training for her before leaving her in such a position. That arises from terms implied into the employment agreement. However, Ms Cooke was experienced in retail work. There was some discussion between her and Mr Giddy before the employment about her experience, her anxiety condition and the sole charge nature of much of the available work at Papanui Blockbuster. Ms Cooke assured Mr Giddy that she could handle this work. The extent of JKLEL's obligations must also be informed by those circumstances.

[49] Ms Cooke initially worked one half day a week at Papanui Blockbuster for three weeks. During at least part of this period Ms Cooke was working out the notice period at her previous position. In her evidence Ms Cooke describes the training and familiarisation she received in various aspects of the work. There is no dispute about that.

[50] In her evidence Ms Cooke refers to several parts of the SOP. It describes who is authorised to issue credits at 2-50. Ms Cooke's evidence is that, during one shift, Mr Maynard was present and she asked for help with a situation. He told her, in front of the customer, to think through what she would do if he was not there. Ms Cooke did so and that included giving a partial refund. Mr Maynard did not take issue with how Ms Cooke handled the situation even though it was in breach of the SOP restrictions about who can authorise credit. In general, there is no reason to doubt Ms Cooke's recollection of this incident, although I will return to the refund point. Her evidence is that Mr Maynard effectively belittled her in front of the customer. However, I do not accept that was his purpose. Mr Maynard was trying to get Ms Cooke to think through how to handle the situation and apply that herself without his intervention. That was a perfectly valid approach to teaching Ms Cooke how to handle a sole charge position.

[51] At 2-17 and following it sets out the procedure for hiring new staff including providing them with a *New Starter Kit* and filling in an *Orientation Checklist* and *Induction Checklist*. It seems that no such kit or form was provided for Ms Cooke.

[52] Ms Cooke makes the point that JKLEL did not follow its own policies in providing training as specified in the SOP. JKLEL was lax as regards following its SOP processes. However, the failure to strictly comply with the SOP cannot be relevant to Ms Cooke's decision to resign because she did not know of those procedures at the time of her resignation. Again, the real issue is whether a proven breach caused any loss or damage that is not too remote.

[53] It is clear from the way that Ms Cooke responded to the second 5 December 2010 incident that she knew that she should not give a refund and could ring Mr Giddy if necessary for help. That is what she did initially as a response to the customer's demands. Unfortunately she could not get hold of Mr Giddy and the customer wanted the matter resolved there and then. Ms Cooke felt pressured into giving the refund to bring the matter to a conclusion, which is what she did.

[54] Dealing with demands for refunds arising from faulty items is an important aspect of JKLEL's business. It is improbable that Ms Cooke would not have received some instruction from Mr Giddy and/or Mr Maynard about how to handle that sort of situation. Indeed Ms Cooke's evidence is that Mr Maynard had witnessed her dealing with a customer which included providing a partial refund and seemed satisfied with how she had handled that situation. Inevitably there would have been some discussion at the time about how the matter had been handled.

[55] The letter raising Ms Cooke's grievance, before going on to describe the 5 December 2010 incident, states:

Ms Cooke was not shown how to process a refund as that was not part of the stores normal operating procedure. Ms Cooke was told that if a customer wanted a refund she was to put her foot down and say that they would need to speak to the Manager. This was not satisfactory as Ms Cooke was often working on her own.

[56] As to the incident itself, the letter states (in part with added emphasis):

*Ms Cooke explained that she did not have authorisation to process a refund
...
The direction to simply refer customers to a manager who was not there was setting Ms Cooke up for a confrontation.*

[57] Two points emerge from these extracts. First, Ms Cooke knew before facing the 5 December 2010 incident that she could not authorise a refund. Ms Cooke had not seen the SOP so she must have learnt that policy from Mr Giddy and/or

Mr Maynard. While perhaps unstructured and not available in written form, that nonetheless comprises a policy. It follows that there was no breach of any obligation to train Ms Cooke. Second, Ms Cooke's concern was not the absence of a policy about refunds. Her view, as mentioned above, was that prohibiting a sole charge employee such as herself from authorising a refund was an inadequate policy. Customers were likely to be disgruntled when told the matter could not be resolved to their satisfaction there and then by her. Ms Cooke felt she was prevented from providing appropriate customer service and would probably face disgruntled customers again. Ms Cooke resigned to avoid that risk. However, the adequacy of the policy from a customer service perspective was solely a matter for JKLEL's business judgement.

[58] Given the foregoing finding based on Ms Cooke's evidence about the adequacy of training as far as the 5 December 2010 incident was concerned, it is not necessary to resolve all the evidential disputes about what training was provided, except as follows.

[59] Ms Cooke says when Mr Giddy told her on 6 December 2010 that she could contact CODE 9 security to deal with an angry customer that was the first time in her six weeks service that she had been made privy to that security procedure. I do not accept that evidence at face value. It is unlikely that nothing would have been said to Ms Cooke about the security arrangements. However, I do accept that Ms Cooke may not have been told that she could use CODE 9 if necessary to deal with a disgruntled customer. The 5 December 2010 incident did not escalate to the point that security was needed because Ms Cooke relented. Following the incident Ms Cooke learnt, on her evidence for the first time, that she could use security if need be. In other words, before resigning, Ms Cooke was given instruction about how to cope with a disgruntled customer.

[60] For the foregoing reasons Ms Cooke's resignation was not caused by any breach of obligation on the part of JKLEL. To the extent JKLEL fell short of fully instructing Ms Cooke in accordance with its SOP, none of that caused any harm to Ms Cooke. Ms Cooke resigned to avoid the risk to her of any future confrontation with disgruntled customers.

[61] Ms Cooke does not have any sustainable personal grievance.

Orders

[62] For the breach of s.4 of the Wages Protection Act 1983 and pursuant to s.13 of that Act and s.135 of the Employment Relations Act 2000 I impose a penalty of \$1,000.00 on JKL Entertainment Limited. Pursuant to s.136 of the Employment Relations Act 2000 the whole of that penalty is to be paid to Ms Cooke.

[63] All Ms Cooke's other claims are dismissed.

[64] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may lodge and serve a memorandum within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority