

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 50  
5646345

BETWEEN                    GEORGE ROBERT COWAN  
Applicant

A N D                        KIDD PARTNERSHIP  
Respondent

Member of Authority:     James Crichton

Representatives:         Janet Copeland, Counsel for Applicant  
Sarah McKenzie and Mary-Jane Thomas, Counsel for  
Respondent

Investigation Meeting:    1 May 2017, 6 November 2017, 7 November 2017, 8  
November 2017 and 30 January 2018 at Invercargill

Date of Determination:    18 April 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Cowan) alleges that the respondent, Kidd Partnership (the Partnership), is guilty of a deliberate, serious and sustained breach of good faith by failing to pay Mr Cowan wages due and owing during the whole course of the employment and by unjustifiably dismissing Mr Cowan from the employment and unjustifiably disadvantaging him as well. A significant wage claim is made for the last six years of the putative employment.

[2]     The Partnership's opening position was that there was no employment relationship at all but after obtaining competent legal advice, the Partnership sensibly resiled from that position and argued instead that the extent of the work performed was not as great as Mr Cowan maintained, that Mr Cowan was provided with free accommodation during the totality of the employment and that Mr Cowan was gifted

a section on which he might build and that the aggregate value of the accommodation provided and the value of the section was adequate recompense for the amount of work actually performed by Mr Cowan.

### **History of employment relationship**

[3] Mr Cowan and one of the partners in the respondent partnership, Frank Kidd, were old friends.

[4] In March of 2009, Mr Cowan met up with Mr Kidd. Mr Cowan's second marriage had just ended and the matrimonial home had been sold in consequence. Mr Cowan needed somewhere to live.

[5] Mr Kidd had a flat above his home which was then vacant. It was agreed that Mr Cowan would occupy that flat. The basis on which that arrangement was made is in dispute.

[6] Mr Cowan maintains that he was given the occupation of the flat gratis in return for looking after the property (including the downstairs part where Mr Kidd and his partner lived) when Mr Kidd and his partner were away.

[7] Mr Kidd's evidence is that that was never proposed or agreed. He says that he had good neighbours who looked after the property when he was away and there was no need to have Mr Cowan perform the same service.

[8] Moreover, Mr Cowan says there was never any understanding between the two men that he would provide his labour in return for free accommodation. Mr Cowan's position is that there was never any expectation that he would pay for the accommodation and that there was a separate freestanding verbal agreement for him to be employed by the Kidd Partnership in its various business undertakings and that he would be paid, in the normal way, for that work.

[9] Conversely, Mr Kidd's view was that there was an informal arrangement between the two men, the effect of which was that in return for free accommodation, Mr Cowan would provide some part time work.

[10] Mr Cowan says that he worked full time for the Partnership for nearly seven years on a variety of different projects and to demonstrate this conviction, Mr Cowan

produced to the Authority timesheets which he says demonstrate the extent of his work for the Partnership.

[11] That evidence comes in two broad types. First there is logbook evidence. That evidence of course fulfils the normal criteria for such evidence providing date and time together with identification of the vehicle being driven. It is in a different category from the other evidence of a timesheet nature that is provided by Mr Cowan.

[12] That other evidence of a timesheet nature from Mr Cowan is quite simply timesheets that Mr Cowan created, on his evidence in 2016 or after, using as his only resource his memory and the logbook entries that I referred to earlier.

[13] In questioning at my investigation meeting, Mr Cowan was very clear that there was no other original source of information from which he compiled those timesheets. In particular, he did not keep a diary or any other contemporaneous written record.

[14] It follows that some of those timesheets that Mr Cowan created rely exclusively on his memory, assisted from time to time by the logbook entries, and potentially relate to events that he would have to remember that are over five years old.

[15] It is common ground that as part payment for some of the work done by Mr Cowan, Mr Kidd transferred to Mr Cowan a bare section at 53 Church Street, Winton. What is not agreed is what mutual arrangements were in place in respect of the erection of a dwelling on that property.

[16] According to Mr Cowan, Mr Kidd agreed that in return for future work that Mr Cowan performed for the Partnership, Mr Kidd would assist him by supplying a kitset house for erection on the property.

[17] There was then a dispute about the nature of the dwelling to be erected on the property with Mr Cowan alleging that Mr Kidd belittled the design that Mr Cowan had chosen and Mr Kidd saying only that he made suggestions about which way the master bedroom ought to face.

[18] As a matter of fact, the deposit for a kitset home to be erected on the property was paid for by Mr Cowan; after the contract was cancelled when the parties argued

about the plans for the dwelling, Mr Cowan obtained his deposit funds back from the supplier.

[19] Mr Kidd's evidence is that he was to help Mr Cowan with the erection of the dwelling by providing labour when that was available and sourcing materials at cost but Mr Kidd is very clear in his evidence that he did not "*agree to build him a house*".

[20] On 4 March 2012, Mr Cowan moved from the flat above Mr Kidd's residence to a cottage as part of a retirement village that the Partnership was creating in Winton. Mr Cowan claims that he was there as the site manager of the retirement village as it was created but that view is disputed by Mr Kidd. Mr Kidd says that he would describe Mr Cowan "*more as a caretaker*".

[21] Mr Cowan says that he started raising the issue of non-payment of wages in the second half of 2015 and he refers to raising the matter with Mr Kidd on 7 August 2015. He says he raised it again in February 2016 and on each occasion Mr Kidd avoided the discussion. Mr Kidd's evidence is that he has no recollection of either discussion.

[22] It is common ground that there was a discussion (albeit an acrimonious one) between the two men in May 2016. There is dispute about the actual date with Mr Cowan saying it was on 12 May 2016 and Mr Kidd being adamant it was on 13 May 2016. For the avoidance of doubt, I prefer Mr Kidd's recollection and think the meeting took place on 13 May 2016 although nothing turns on that date. As I say, it is common ground that the discussion did take place.

[23] What happened was that Mr Cowan turned up at Mr Kidd's home with a witness, Mr Davidson, who gave evidence to me at my investigation meeting. I am satisfied that Mr Kidd was irritated by the discussion and/or by Mr Davidson's presence to such an extent that he physically removed Mr Davidson from his property.

[24] I am also satisfied that having removed Mr Davidson, Mr Kidd went back inside and continued engaging with Mr Cowan but that engagement was hardly a cheerful one. Mr Davidson's evidence, which I accept, is that Mr Kidd shouted at Mr Cowan and while Mr Davidson could not hear what precisely was being said, he certainly heard Mr Kidd's raised voice.

[25] Unsurprisingly, there was no outcome of any sort from this discussion.

[26] Mr Cowan's evidence is that there were further attempts at resolution shortly after that acrimonious discussion. Mr Kidd denies that those subsequent discussions happened although he certainly acknowledges seeing Mr Cowan after the May discussion.

[27] It is common ground that after the May discussion, Mr Cowan provided no more work to the Partnership.

[28] Mr Cowan says the reason that no further work was performed after that date was that he was dismissed on 23 May 2016 by Jeffery Kidd, the other partner in the respondent partnership and Mr Frank Kidd's son.

[29] While Mr Jeffery Kidd acknowledges talking to Mr Cowan on 23 May 2016, he absolutely denies dismissing him. What he said to Mr Cowan, according to his evidence, was that until the matter of the hours had been sorted out, it would be prudent for Mr Cowan not to perform any work. This is for the very straightforward reason that it would simply add to the hours in dispute if indeed there was a dispute.

[30] Despite not continuing to work for the Partnership after 23 May 2016, Mr Cowan continued to live rent-free in the unit owned by the Partnership until October 2016 when he moved out and the relationship effectively came to an end.

[31] There was a meeting between the parties in August 2016 which did not resolve matters. At that stage, Mr Cowan was represented by able counsel while Mr Kidd for the Partnership was unrepresented. That meeting having been unsuccessful at resolving matters, proceedings were subsequently filed in the Authority and after an unsuccessful mediation the matter proceeded to hearing.

### **The investigation meeting**

[32] The matter was originally set down for investigation by the Authority in the week commencing 1 May 2017. The whole week had been allocated to the fixture.

[33] The first day of the investigation meeting, Monday 1 May 2017, proceeded to take the evidence of Mr Cowan together with some other of the applicant's witnesses.

[34] Sadly, on the evening of 1 May 2017, Mr Cowan suffered a heart attack and was admitted to the Coronary Care Unit at Southland Hospital where he remained the following day.

[35] By consent of both counsel, I then adjourned the balance of the investigation meeting until a new date was set.

[36] The matter proceeded again in the week commencing 6 November 2017 and the balance of the evidence was heard in that week.

[37] Then, by agreement with counsel, I convened a further and final meeting between the parties on 30 January 2018. There were two purposes for that meeting. The first was to allow me to present my oral indication of preliminary views and immediately thereafter, the parties engaged in mediation with a view to seeing if the matter might now be able to be resolved by agreement.

[38] That mediation was unsuccessful and accordingly it falls to me to complete this determination in the usual way.

[39] For the avoidance of doubt, this determination is based exclusively on the oral indications of preliminary views. In reflecting on the matter since I delivered those oral indications, I have not deviated in my view in any particular.

### **Issues**

[40] This matter is factually dense but the law relevant to the issues is by no means complex.

[41] Accordingly, I propose to consider the following questions:

- (a) Was there an employment relationship;
- (b) What were the terms of that employment relationship if any;
- (c) What hours were worked;
- (d) What pay rate ought to apply;
- (e) Is a set-off available;
- (f) Was Mr Cowan dismissed; and

- (g) Is the Kidd Partnership liable to a penalty or penalties?

**Was there an employment relationship between the parties?**

[42] While this matter commenced with a dispute between the parties as to whether there was an employment relationship or not, it became common ground that there was an employment relationship in place and the argument then turned to focus on the terms if any of that relationship.

[43] For the avoidance of doubt, I am satisfied on the evidence I heard that there was indeed an employment relationship between Mr Cowan as employee and the Kidd Partnership as employer.

**What were the terms of that employment relationship, if any?**

[44] While I am satisfied on the evidence that there was an employment relationship I am equally clear that there is no guidance at all in the evidence as to what the terms of that employment relationship might be.

[45] There is, for example no employment agreement, no relevant correspondence, and indeed only one source series of documents that were generated contemporaneously with the employment. These documents I referred to earlier are driver's log books relative to the driving by Mr Cowan of trucks belonging to the Kidd Partnership.

[46] Once the decision was taken to mount this claim, Mr Cowan set about creating time sheets. Mr Cowan did this, on his own admission, primarily in 2016 or later and it appears that the only source record that he had was the driver's log book.

[47] In particular Mr Cowan had no diary records or indeed any other source material to support his claimed for hours.

[48] So in the absence of any comprehensive record of the terms and conditions of the employment, the determination of all the fundamental elements of the employment is going to be problematic.

[49] In particular, in the absence of any agreement, hours of work and rate of pay are going to be difficult to fix with any degree of accuracy.

**What hours of work?**

[50] As I have already made clear, the only contemporaneous written record of the hours worked by Mr Cowan relate exclusively to his truck driving activities for the Kidd Partnership. Mr Cowan claimed hours significantly in excess of those truck driving activities but is unable to point to any contemporaneous written evidence to support that claim.

[51] Moreover, there is significant dispute from witnesses for the Kidd Partnership as to the hours claimed by Mr Cowan.

[52] I think it fair to characterise the efforts of counsel for the respondent partnership as mounting a successful challenge to Mr Cowan's evidence in two particular respects. The first of those is to simply challenge the days on which Mr Cowan claimed to be working by reference to other events that it was suggested he may have attended. In particular, counsel produced a string of funeral notices for various Southland identities who were known to both Mr Kidd Senior and Mr Cowan and in cross-examination, Mr Cowan had to concede he either had attended the funeral or that he may have attended the funeral. On that basis, he could not have properly claimed to be working for the whole span of the day of the funeral.

[53] Equally damning to Mr Cowan's claim was the evidence from witnesses for the Kidd Partnership as to the amount of work that Mr Cowan actually did. While Mr Cowan might claim to have been involved in particular pieces of work, evidence for the Kidd Partnership would suggest that that was not the position and that the work was done by somebody else.

[54] In a devastating period of cross-examination on 6 November 2017, counsel for the Kidd Partnership referred to over thirty occasions where a comparison of Mr Cowan's bank statements and his created timesheets suggested that Mr Cowan could not have been working the hours he claimed on the particular dates identified by counsel. Mr Cowan quite properly made appropriate concessions.

[55] However, the effect of those significant concessions together with the other attacks mounted by counsel for the respondent on Mr Cowan attending various non-work events on days when he claimed in his timesheets to be working, leaves a sense that the timesheets simply cannot be relied upon.

[56] Moreover, in his first day of giving evidence on 1 May 2017, Mr Cowan was unable to explain how he had determined what hours to claim and on what days. This was not an isolated issue but rather a predominant impression left with me from the totality of Mr Cowan's evidence.

[57] By way of example only in relation to a claim for six days work beginning on 21 January 2013 Mr Cowan was unable to explain how he knew, when he created the timesheet, that he had worked six days and he acknowledged that he did not know, that he kept no diary and that he had nothing to rely on except his memory. I was understandably keen to explore how Mr Cowan could be certain of the hours and days that he worked when he compiled the timesheets in 2016 but could not satisfy me that he was able to defend those claims in my investigation meeting.

[58] Of course all that evidence from the first day of the investigation meeting has to be treated with great caution because it was at the end of that day that Mr Cowan suffered a heart attack which appears to have been brought on by the stress of the first day of the investigation meeting.

[59] I was assisted in understanding the effect on Mr Cowan's behaviour of his health reverse by speaking with his general practitioner, Dr Matthew Sloane who advised that the cardiac event was Mr Cowan's first to his knowledge and that Mr Cowan had not previously been treated by him for anxiety.

[60] Dr Sloane indicated that Mr Cowan may have developed some measure of confusion in the lead-up to the cardiac event on the evening of 1 May 2017 and that that might explain why his evidence on that day was not particularly clear.

[61] Dr Sloane readily confirmed that he was not present at the investigation meeting and that all that he was able to say clinically was at the point at which Mr Cowan was admitted to the coronary care unit that evening, his heart rate was such that he could easily be confused. However, Dr Sloane could not confirm that that level of anxiety and/or confusion would have been present earlier in the day.

[62] Accordingly, I think it is appropriate to take the evidence that Mr Cowan gave on the first day of the investigation meeting with some care. Were it not for the fact that Mr Cowan's evidence in the rest of the investigation meeting some weeks later

was absolutely consistent with the evidence that he had given on 1 May 2017, I should be disposed to not rely on the 1 May 2017 evidence at all.

[63] However, the evidence that Mr Cowan gave in the subsequent days of my investigation meeting, where he continued to make admissions and concessions about the hours that he was claiming, was absolutely consistent with the evidence given on 1 May 2017. That suggests to me that, looking at the totality of the evidence given by Mr Cowan and the fact that all of his evidence seems to acknowledge that he is unable to justify any particular claim on any particular day unless it is supported by the log book entries, there is no proper basis on which the timesheets created by Mr Cowan can be relied upon as a definitive record of work Mr Cowan performed except where they are supported by the log book entries.

[64] But I have to mention also for the sake of completeness that there are some occasions where the log book entry provides for significantly fewer hours worked than the hours claimed in the equivalent day's timesheet.

[65] Indeed, looking at the totality of the log book entries against the totality of the timesheet entries, the total span of hours claimed for the log book entries is significantly less than the total span of hours claimed in the created timesheets.

[66] All of that discussion leads me to consider the effect of s 132 of the Employment Relations Act 2000 ("the Act") which provides that if an employer fails to keep proper wage and time records and that failure prejudices the employee's claim to be paid wages, the Authority may accept the employee's claim "*unless the defendant (employer) proves that those claims are incorrect*".

[67] I am satisfied this is just such a case where the proviso applies. It is not enough for an employee party to create a wage and time record and present that as conclusive evidence of hours worked. There must be some underpinning to that claim which gives it verisimilitude.

[68] In the present case, I have simply not been persuaded by Mr Cowan's evidence that the claims that he had made for hours worked stand up to any form of independent scrutiny.

[69] It seems clear to me on the evidence that Mr Cowan knew perfectly well that he was being treated differently from the other employees of the Kidd Partnership; in particular, I am satisfied that Mr Cowan knew that he was not being required to keep a timesheet while everybody else was so that fact in itself would have put him on notice for his status was being treated differently from other employees.

[70] This is not an employer who runs a messy disorganised wage and time record. The person responsible for the Kidd Partnership's payroll gave evidence at my investigation meeting and she impressed me as being very clear about her obligations and equally clear that Mr Cowan was a "special case".

[71] I am satisfied then that Mr Cowan cannot rely on s 132(1) of the Act because I consider that the Kidd Partnership has satisfied me that Mr Cowan's created timesheets simply cannot be relied upon.

[72] Nor am I much attracted by the quantum meruit argument because as I observed in giving my oral indication of preliminary views, all that legal principle does is require the fixing of a reasonable level of remuneration for the work performed. What it does not do is provide us with any greater insight into what amount of work was performed. To put that point another way, it does not bear at all on the number of hours that are supposed to have been worked.

[73] That leaves me in the invidious position of having to estimate the hours that might have been worked having regard to the evidence that I heard.

[74] I am satisfied that there was no viable attack on the quality of the log book records. So that represents the minimum that Mr Cowan can aspire to.

[75] Conversely, the created timesheets represent the maximum that Mr Cowan could aspire to in terms of hours worked.

[76] Counsel for the Kidd Partnership suggest that I apply a percentage to the totality of the claim and that that percentage should be 50%. I agree that there is no other appropriate course of action given my findings that the claim created by Mr Cowan cannot be relied upon. I am satisfied that the appropriate figure is as counsel for the Kidd Partnership suggests a figure of 50% of the total claim. The total claim is 12,683.3 hours and 50% of that is 6341.65 hours.

**What pay rate ought to apply?**

[77] Mr Cowan originally sought the hourly rate of \$25 per hour for all hours worked. That is the figure sought in the statement of problem. In the submissions for Mr Cowan, the figure of \$22 per hour is sought while the Kidd Partnership suggests that the only rate that can reasonably apply is the adult minimum wage.

[78] I heard a great deal of evidence about the value of Mr Cowan's work. I am satisfied that the consensus I can properly draw from that evidence is that Mr Cowan's worth as an employee cannot properly be evaluated at the sorts of hourly rates he is seeking.

[79] To the contrary fixing the hourly rate payable at the adult minimum wage would seem to be the only proper course.

[80] To implement that, submissions for the Kidd Partnership helpfully adopt the calculations provided for in the submissions for Mr Cowan which factor in the various changes to the minimum adult rate over the period of the employment.

[81] I am also encouraged in that view by the decision of the former Chief Judge in *Kidd v Beaumont* [2016] NZEmpC 158 where in a factually similar situation, Chief Judge Colgan identified that the rate of pay was never agreed and His Honour applied the adult minimum wage to the employment.

[82] In His Honour's judgment at paragraph [20] the Chief Judge has this to say:

Because a rate of pay for the work that he performed was not ever fixed ... this must necessarily be the then applicable rate under the Minimum Wage Act 1983.

**Is a set-off available to the Kidd Partnership?**

[83] Mr Cowan submits that there was no agreement between the parties that, in return for living rent free in effect, he would provide work. That submission is really of no real assistance because it could equally be said that there was no agreement that the Kidd Partnership would pay Mr Cowan wages either.

[84] The starting point has to be s 7 of the Minimum Wage Act 1983 which provides the basis on which deductions can be made by an employer for board or

lodging. I am satisfied no issue of board can be in issue. Board is the provision of regular meals often with accommodation in lieu of payment.

[85] Conversely, lodging is defined as *inter alia* a dwelling place.

[86] It seems to me to follow that given Mr Cowan was provided by the Kidd Partnership with a lodging over a period of years, it is available to me to offset the value of that accommodation, calculated in accordance with s 7 of the Minimum Wage Act 1983.

[87] In reaching that conclusion, I do not accept the submission made for the Kidd Partnership to the effect that the provision of the accommodation for Mr Cowan did not constitute lodgings within the terms of the 1983 Act. Nor do I accept the submission that there was agreement between the parties that Mr Cowan would get free accommodation in return for providing some work; my conclusion on the evidence is that there was no agreement about any aspect of the provision of work by Mr Cowan to the Kidd Partnership.

[88] The correct treatment of the Church Street section is much more challenging. It is incontrovertible that the Church Street section was initially in the ownership of the Kidd Partnership, that the Kidd Partnership transferred the ownership of the section to Mr Cowan at the partnership's cost in all things and that the parties had some form of understanding (I hesitate to call it an agreement) that the value of the section would somehow represent the equivalent of money wages for work performed by Mr Cowan for the partnership.

[89] While there is argument about the value of the section, I am satisfied on the evidence I heard that the section was worth \$80,000 at the time it was transferred to Mr Cowan.

[90] Whatever else is true, it is abundantly plain that the section is neither board nor lodgings and therefore it seems to me unlikely that it can be treated in the same way as the calculation of lodgings in terms of the 1983 Act.

[91] That notwithstanding, it is equally plain that the parties intended, on my reading of the evidence, that the value of the section be taken into account and I am not persuaded that in equity and good conscience I can simply ignore it.

[92] So I conclude that the parties' intention was that the value of the section be taken into account as if it were money wages paid while the value of the accommodation in terms of the provision in the 1983 Act, must be calculated as the statute sets out and deducted from the wages that would otherwise have been payable.

**Was Mr Cowan unjustifiably dismissed?**

[93] I am not much attracted by the suggestion that Mr Cowan was dismissed let alone unjustifiably. As I indicated in my oral indication of preliminary views, it seems to me that all that can be said is that Mr Cowan, by seeking payment for his services, effected a change in the nature of the relationship between himself and the Kidd Partnership and the latter simply said that until the wages issue had been resolved, no further work was to be performed.

[94] I agree with the submissions for the Kidd Partnership to the effect that until Mr Cowan raised the question of payment for hours worked, the parties had, treated the relationship as being fundamentally different from an employment relationship of the sort that Mr Kidd and his partnership were regularly involved with, in employing workers across their various enterprises.

[95] Even on Mr Cowan's evidence, he did not raise the question of payment of wages until the middle of 2015; the Kidd Partnership says it was fully a year later before that matter was first raised. But either way, the bulk of what we now know as an employment relationship had already happened before the question of payment of wages was even raised. Mr own view, which was borne out by the evidence that I heard, was that if the original understanding about the provision of a section and then some significant financial and labour and assistance to help Mr Cowan put a house on the section, were fully performed, then there would have been no dispute.

[96] But despite progress towards that goal being made, the prospect of the partnership helping Mr Cowan with the provision of the house to go on the section fell away after a dispute about the design of the proposed property between Mr Kidd Senior and Mr Cowan and the matter then appears to have been lost sight of.

[97] In any event, the short point is that I am not persuaded there was a termination of employment let alone an unjustified one.

**Are penalties due?**

[98] I have already indicated in my oral indication of preliminary views that it seems to me penalties are due and owing. There are clear breaches of the various minimum code statutes and in principle that means that the Kidd Partnership is liable for penalties.

[99] The factual matrix makes it plain that there has been no proper maintenance of wage and time records by the Kidd Partnership, no provision of an employment agreement, together with a failure to comply with the effect of the Holidays Act, the Minimum Wage Act, and potentially a breach of the good faith obligation in s 4 of the 2000 Act.

[100] While the default is plain, the reason for the default is equally clear. Until towards the end of the relationship, neither party saw the relationship as a traditional employment one. Indeed, as I already opined, if the implicit agreement between these parties for the transfer of land and then the erection of a dwelling for Mr Cowan had taken place, then it seems likely that the present proceedings would not have been on foot.

[101] Counsel for the partnership submit that the breaches are all linked and flow from the partnership's mistaken belief that Mr Cowan was a volunteer.

[102] I accept that submission, but it does not avail in acting as a shield for the purposes of the penalty jurisdiction of the Authority.

[103] While I am satisfied that issues of intention may be taken into account in formulating an approach to the imposition of penalties, I do not accept that an honest intention constitutes a complete defence.

[104] In terms of the two breaches of the Employment Relations Act 2000, the law provides a maximum penalty for each breach of \$10,000 so the total maximum penalty for breaches of this statute is \$20,000. The claims are brought within 12 months of the events complained of so do not infringe the rule in s. 135 (5) of the 2000 Act.

[105] In respects of the Holidays Act, the breaches are all linked together and the maximum penalty for the breaches under this statute is \$10,000 per breach.

[106] Mr Cowan seeks a total of \$80,000 in penalties.

[107] The leading case in the imposition of penalties in this jurisdiction is *Boresboom v Preet Pvt Ltd* [2016] NZEmpC 143 (*Preet*).

[108] In *Preet*, the full bench of the Employment Court sets out the principles that are to apply in the imposition of penalties for breaches of statutory obligations in respect to the minimum code.

[109] *Preet* makes clear that the focus of a penalty proceeding “*is on the conduct in the circumstances of the wrongdoer...*”: Para 51.

[110] This observation is underpinned by the effect of s 133A of the 2000 Act which lists a non-exclusive list of factors that the Authority must take into account which I am satisfied seeks to balance an assessment of the conduct of the wrongdoer and whatever she or he may have done to put right their wrongdoing with the damage done to the victim, and the nature of both the protagonists.

[111] In particular, I note that s 133A requires me to determine whether the breach was intentional, inadvertent, or negligent and also requires me to take account of the individual circumstances of the protagonists.

[112] *Preet* establishes a series of steps which the Authority must take in considering the imposition of penalties. The first step is to identify the nature and number of the statutory breaches. I agree with the submissions filed by Mr Cowan that the total liability of the Kidd Partnership, considering each of the breaches of each of the statutes in turn, amounts to \$80,000.

[113] Next I must look at the severity of the breaches and here I take a different approach from counsel for Mr Cowan. I do not accept the submission contending a high level of culpability for the Kidd Partnership. Indeed, I believe the position is otherwise. I am satisfied that the breaches are all inadvertent, based as they are on the conviction which I am satisfied both men had for the bulk of the employment relationship, that this was in truth no employment relationship at all but a relationship where Mr Cowan provided some assistance to the partnership at various times and in various different capacities in return for an implicit commitment to provide him with freehold land on which to build a home, the costs of the build to be shared. (See for instance paragraphs 2.7 and following in Mr Cowan’s statement of problem.)

[114] Insofar as I know neither party has any previous history in this jurisdiction; certainly all the evidence I heard about the Kidd Partnership suggested that and its upwards of forty other employees were all paid strictly in accordance with the law and given all of their lawful entitlements.

[115] So this is not a case where the employer has a history of behaving badly.

[116] Nor am I much persuaded by the suggestion that Mr Cowan was particularly vulnerable. He is a man of mature years and has had significant experience of life as well as a number of business enterprises. While it is true that he was not paid for the work that he did for the Kidd Partnership, I am satisfied that that is not the basis on which the parties entered into this relationship and it was not until the basis on which that relationship arrangement came unstuck that Mr Cowan, as it were, changed his position and sought to pursue wages rather than the provision of a home which had been the previous basis for the understanding between the two protagonists.

[117] It follows from the foregoing observations that I think a significant discount in the penalty that might otherwise be imposed, needs to apply.

[118] There is no evidence before the Authority to suggest that the Kidd Partnership is unable to pay a penalty.

[119] Finally, I need to consider the proportionality of the outcome.

[120] I have already observed that I do not think this breach is activated by wickedness but rather is inadvertent based as it was on a relationship that was quite different from one of employment. Nor have I accepted that Mr Cowan was particularly vulnerable.

[121] However, what is true is that at the point at which the parties fell out over the proposed land transfer and house building exercise, it should have been possible for these two former friends to engage with each other on an alternative basis and resolve matters by agreement.

[122] The reality however is that both of the principal protagonists are stubborn and proud and despite the earnest efforts of the employment institutions to encourage them to resolve matters by agreement, all of those efforts came to nought.

[123] I do accept then that there was some obligation on Mr Kidd Senior to resolve matters by agreement but I also think that Mr Cowan had obligations in that regard as well and on balance I am not persuaded that I can penalise one without penalising the other.

[124] Looking then at the proportionality of the outcome and setting the totality of the penalties that might be awarded against my considered view that the breaches were an advertent consequence of the original nature of the relationship, I think the proper course is to require that the Kidd Partnership pay a penalty of \$20,000 and all of that sum be paid to Mr Cowan, pursuant to my powers to so order that by s. 136(2) of the 2000 Act.

### **Determination**

[125] I have not been persuaded that Mr Cowan has a personal grievance but I do consider that he is owed wages for work performed by him for the Kidd Partnership during the period 27 July 2010 to 23 May 2016. For reasons that I have already identified, I am only prepared to order the payment of 50% of Mr Cowan's claim for unpaid wages and that span of hours is to be remunerated at the adult minimum wage rate relevant to the period the work was performed in.

[126] In addition, Mr Cowan is entitled to holiday pay on the total wage earned at 8% of that figure.

[127] The value of lodgings is to be set off against the wage entitlement in accordance with the provisions of s 7 of the Minimum Wage Act 1983.

[128] Mr Cowan has been provided with a transfer of a block of land by the Kidd Partnership free of cost in all things. I am satisfied that that piece of land was worth \$80,000 at the point at which the Kidd Partnership transferred the ownership of it to Mr Cowan. Mr Cowan has paid nothing for it and given the previous arrangement between the principal protagonists would have had the effect of providing that piece of land together with the further assistance in the construction of a dwelling on that land, as an alternative to the employment relationship which is now on foot, I am satisfied that in terms of the provision of s 161(1)(r) and/or the provision of s 162(1) of the 2000 Act, I have power to order that Mr Cowan pay to the Kidd Partnership the sum of \$80,000 free of any deductions.

[129] I am satisfied that this order can be made by virtue of the provision in s 161(1)(r) wherein the Authority may take “*any other action...arising from or relating to the employment relationship...*”.

[130] Moreover, that conclusion is supported by the effect of s 162(1) of the 2000 Act, which imports the provisions of the Contract and Commercial Law Act 2017, where by s 24 (1) (ii) relief may be granted when both parties have entered into a contract influenced by mistake. This is such a case. The Kidd partnership provided the allotment to Mr Cowan on the basis of an erroneous belief about the terms of the engagement between the parties, an erroneous belief shared by Mr Cowan.

[131] The Kidd Partnership is to pay to Mr Cowan the sum of \$20,000 being the penalty sum awarded against the Kidd Partnership for its failure to comply with the minimum employment code legislation. In terms of the power that I have pursuant to s 136(2) of the 2000 Act I direct that the whole of that sum is to be paid to Mr Cowan.

[132] To give effect to these decisions in this determination, I now direct that counsel are to engage with each other so as to agree the mechanics of this determination. In particular, I want counsel to agree on the wages amount based on paragraph 3.4 of the closing submissions for the applicant, and the calculation of holiday pay which will derive from the sum paid in wages.

[133] I also direct counsel to agree on a timeline for the payments by Mr Cowan to the Kidd Partnership and by the Kidd Partnership to Mr Cowan.

[134] I direct that counsel are to agree the terms of implementation for this determination and file a memorandum with draft orders in this Authority for my attention within four weeks of the date of this determination, time being of the essence.

### **Costs**

[135] Costs are reserved but I observe that both parties have had a measure of success in this determination and I would urge the parties to resolve the matter of costs on their own terms.

[136] If that proves impossible then one party may file a memorandum requesting the Authority to determine costs and the other party will have fourteen days to respond to that memorandum. I will then determine the costs on the papers.

**James Crichton**  
**Chief of the Employment Relations Authority**