IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 73
5629438

	BETWEEN	JAIME FLANNAGAN Applicant
	A N D	PMR HOLDINGS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Alex Kersjes, Advocate for Applicant Peter Richardson, Advocate for Respondent
Investigation Meeting:	3 March 2017 at Christchurch
Submissions Received:	14 & 30 March 2017, from the Applicant 23 March 2017, from the Respondent
Date of Determination:	10 May 2017

DETERMINATION OF THE AUTHORITY

A. **The applicant was employed by Mr Richardson directly until 27 December 2015, after which date he was employed by the respondent on a permanent, not casual basis.**

B. **The applicant was unjustifiably dismissed by the respondent and is entitled to the remedies set out in this determination.**

C. **The applicant was unjustifiably disadvantaged in his employment by the respondent to the extent set out in this determination but is awarded no separate remedies.**

D. **The applicant is owed unpaid holiday pay and statutory holiday pay to the extent set out in this determination.**

E. **No penalties are imposed upon the respondent.**

F. **Costs are reserved.**

Employment relationship problem

[1] Mr Flannagan claims that he was unjustifiably dismissed from the employment of the respondent and that he was subjected to unjustified disadvantage in his employment. Mr Flannagan seeks an award of lost wages, compensation, arrears of holiday pay and statutory holiday pay as well as the imposition of penalties on the respondent for not providing an individual employment agreement and for not paying him holiday pay.

[2] The respondent does not deny that Mr Flannagan was dismissed, but states that this was after the issuing of three warnings for poor performance. The respondent denies that Mr Flannagan is owed any arrears of pay in respect of holiday or statutory holiday.

The key events leading to the dismissal

[3] The respondent company owns and operates the Springfield Hotel on the West Coast Road. Its directors are Peter and Michelle Richardson.

[4] Mr Flannagan was a friend of Mr and Mrs Richardson's son. Mr Richardson says that, in early 2015, he agreed to allow Mr Flannagan to stay in the hotel when his family circumstances left him without a stable home life. Mr Richardson says that the arrangement, which was made with him personally, was that Mr Flannagan would work for his keep, helping around the hotel and in the kitchen. Mr Richardson says that this arrangement lasted for about 9 to 10 months.

[5] Mr Richardson says that, even though the arrangement was not really working as Mr Flannagan was not doing what he expected of him, he still allowed Mr Flannagan to stay in the hotel as he had nowhere to go. Mr Richardson says that he paid Mr Flannagan cash out of his own pocket, calculated at the rate of $15 to $16 an hour, and that he took $150 a week out of these earnings to pay for the board and lodging he was providing to Mr Flannagan. It appears common ground that Mr Flannagan was expected to work around four hours a day, six days a week under this arrangement, although he also did the occasional extra odd jobs too.

[6] Mr Richardson explained that he allowed Mr Flannagan to run a tab at the bar so that the cost of the drinks consumed by Mr Flannagan would also be deducted from

the final pay. Mr Flannagan would write down the hours he had worked for the week, and Mrs Richardson would calculate the final pay due.

[7] Around December 2015 the respondent's housekeeper left the employment of the respondent for health reasons and the respondent offered Mr Flannagan a position housekeeping and cooking. This arrangement commenced on or around 28 December 2015.

[8] The position of the respondent is that, when Mr Flannagan was working for his keep prior to December 2015, he was doing so in the capacity as a WWOOFer (formally known as a Willing Worker on Organic Farm, although the term also describes an arrangement more generally where, typically, backpackers work for accommodation and food as they stay for a short period in an area). The respondent also says that when Mr Flannagan took over the housekeeping duties, he did so under a casual contract.

[9] The Authority saw a copy of the employment agreement which the respondent says was given to Mr Flannagan, accompanied by a letter to him dated 29 December 2015. The employment agreement stated:

> Casual Employment Agreement
>
> Nature of the agreement: The casual employment is on an "as and when" required basis at all times. The Springfield Hotel PMR Holdings Ltd ("the employer") is entitled to offer you casual employment at any time to meet its operational requirements. [The employer] is not obliged to offer you work at any time. Similarly, you are entitled to accept or reject any offer of work at any time. Each period of casual period is a separate engagement. Where more than one period of casual employment is undertaken, the employment ceases at the end of each period. The service is not continuous. Nothing in this agreement provides any entitlement to further employment beyond each period of casual employment. You should not have any expectation of further offers of casual employment. This agreement and its terms and conditions of employment replaces [sic] all prior agreements and terms and conditions that applied prior to its commencement.

[10] The copy of the employment agreement seen by the Authority was not signed by Mr Flannagan. Mr Flannagan says he was never given a copy of the agreement and that he never received the accompanying letter. Mr Flannagan says that he only saw the last page of the agreement, which contained a list of kitchen duties.

[11] The respondent says that Mr Flannagan worked well for a week or so, and then started getting up late, so that Mr and Mrs Richardson had to do the housekeeping duties themselves. The respondent says that Mr Richardson spoke to Mr Flannagan on several occasions, but there was no improvement. According to the respondent, Mr Flannagan became untidy and messy and the quality of the food was declining. In addition, the respondent says that Mr Flannagan became moody at times, withdrew into himself, and spoke to Mrs Richardson in a disrespectful manner, which was upsetting as he had been treated as part of the family.

[12] The Authority saw copies of a number of letters which the respondent produced. The first, dated 29 December 2015, stated that Mr Flannagan's rent would be $150 per week and that he was to pay $50 per week for food. Mr Flannagan accepted that this increase in the cost of board and lodging was agreed by him.

[13] On 6 January 2016 a letter was addressed to Mr Flannagan from Mr Richardson requesting him to attend a meeting to discuss his performance "and the duties you are performing are not to the standards that I request". Mr Flannagan denies he received this letter. He says that Mr Richardson could have met with him at any time to discuss concerns, and that they did in fact talk from time to time about Mr Flannagan needing to improve the cleaning he did.

[14] Mr Richardson produced to the Authority further letters that he says had been written by him, and handed to Mr Flannagan. Mr Flannagan denies receiving any of these letters. These letters stated as follows[1]:

[15] One letter dated 9 January 2016:

> To Mr Jaime Flannagan
>
> Re: First warning for not carrying out duties as required
>
> This is your first warning for not getting up and start cleaning at 8am each morning.
>
> If you receiver [sic] two more warnings you will dismissed and given 10 days notice and you will no longer be able to stay in the hotel.
>
> Regards,
> Mr Peter Richardson
> Director/Owner

[1] Each of the letters produced by Mr Richardson was written in capital letters. This style has not been replicated in this determination for ease of reading. In addition, typographical errors have been largely corrected.

[16] One letter dated 19 January 2016:

> To Mr Jaime Flannagan
>
> Jaime this is the second time I (Peter Richardson) have requested that we have a meeting to discuss the performance of your duties as you did not want to sit down and talk to me about it the first time that I requested (the letter dated 06/01/16). I had to give you a warning in writing dated the 09/01/16. I would like to discuss this matter further.
>
> As you are aware that I (Peter Richardson) am not happy with the way you are carrying out your duties and I feel this is getting serious and you will receive another warning and if you do not sit down and discuss this matter with me after you will receive another warning and then if I have to give you another warning after that I will have no choice but to dismiss you of you [sic] duties.
>
> Please take this letter into consideration.
>
> Regards
> Mr Peter Richardson
> Owner Director

[17] One letter dated 28 January 2016:

> To Mr Jaime Flannagan
>
> Re: Second warning for not carrying out duties as required
>
> This is your second warning for not getting up and start cleaning at 8am each morning.
>
> I have been more than understanding this time. You are not given me any reason or spoke to me why you are not doing the tasks that have been given to you.
>
> Furthermore you have stilled [sic] not signed your employment agreement and returned it. As you have been paying tax since the 28th December 2015.
>
> Regards
> Mr Peter Richardson
> Director/Owner

[18] One letter dated 2 March 2016:

> To Mr Jaime Flannagan
>
> Third warning for not carrying out duties as required.
>
> This is your third warning that I have given you and you are still not carrying out the duties I have set for you and the you agreed to do [sic].

> I have been more than understanding and the next time I have to re-evaluate this problem I will have no choice but to dismiss you and give you 10 working days notice.
>
> Regards
> Mr Peter Richardson
> Director/Owner

[19] On 9 March 2016 the following letter was given to Mr Flannagan, which Mr Flannagan does not deny receiving:

> Attention: Mr Jaime Flannagan
> I am writing this letter to let you know that I am giving you ten working days notice from the 9th March 2016.
>
> The reason for this is that you are not performing to the duties that have been out lined to you and shown to you many times.
>
> If these duties over the next ten [sic] are not performed as listed on the attached letter you will be dismissed before your ten days are up because this a food and hygiene area.

[20] The attachment to the dismissal letter was a list of rules involving work in the kitchen.

[21] Mr Flannagan says that he had been given a "to do list" a couple of months prior to his dismissal and that it was a complete shock when, on 9 March 2016, Mr Richardson handed him a letter in a sealed envelope. He said he walked out of the kitchen, and read it, and saw that it was a letter giving him ten days' notice. He said that he was totally stunned and had had no idea that there had been any issue.

[22] Mr Flannagan acknowledges that the relationship between him and Mr Richardson had become a bit strained as he had felt that he had been taken advantage of, which would have affected his work. This was because, he said, his pay had fluctuated so that, on some weeks, he would earn nothing extra even though he was working more hours, often over 30 hours a week. He also says that, for the entire time he worked for the respondent, he never received holiday pay or pay for working statutory holidays. Mr Flannagan said that, on one occasion, he received a net payment of $6 after having worked three weeks. Mr Richardson ventured that the reason for this had been that Mr Flannagan had not worked very much during the period in question.

[23] Mr Richardson says that the reason he had given Mr Flannagan the dismissal letter was because Mr Flannagan had failed to improve his performance in carrying out his duties despite several informal discussions, and the three written warnings.

[24] Mr Flannagan sought advice in respect of the letter of dismissal, and Mr Kersjes wrote a letter to Mr Richardson on 10 March 2016 stating, inter alia, that Mr Flannagan had been unjustifiably dismissed and raising a personal grievance on behalf of Mr Flannagan.

[25] Mr Flannagan says that Mr Richardson was then away from the hotel for a few days, and that, on the night of 15 March 2016, shortly after Mr Flannagan had arrived back after an evening with a friend, Mr Richardson approached him and said to Mr Flannagan something like "I got a letter from your f***ing lawyer", that Mr Richardson grabbed Mr Flannagan, pushed him against the wall and tried to punch and head butt him. Mr Flannagan said that Mr Richardson connected a couple of hits, but they were not very powerful. He said that Mr Richardson's son separated them, but then Mrs Richardson started screaming at him, saying that he had stolen from them and abusing him.

[26] Mr Flannagan says he then called the Police, at which point Mr Richardson told him to "grab [his] sh*t and f*ck off". Mr Flannagan then took some of his possessions from his room and left to stay with a friend. It appears that this is the day that the employment came to an end, as Mr Flannagan did not return to work. Mr Flannagan said it was well over a month before he was allowed to get the rest of his possessions from his room.

[27] Mr Richardson denies attacking or assaulting Mr Flannagan, and says that they just had a "gentleman's tussle", with each holding the other's arms and pushing the other. Mr Richardson says that the Police interviewed him the following morning and that no charges were laid as there had been were no injuries sustained. I note that Mr Flannagan is much taller and younger than Mr Richardson.

[28] Mr Richardson says that, whilst he was upset to receive a lawyer's letter, the reason he told Mr Flannagan to "f*ck off", and to vacate the premises, was due to him seeing the state of Mr Flannagan's room, which smelt of cigarette smoke (smoking in the bedrooms being forbidden) and was very untidy, with food left in bowls, and in an

unhygienic state. Mr Richardson says that he expected Mr Flannagan to return to work the next day or so, but he did not.

[29] Mr Richardson also asserts that Mr Flannagan was paid holiday pay as part of his weekly remuneration by way of an 8% payment and that he did not ever work on a statutory holiday.

The issues

[30] The Authority must determine the following issues:

a. The nature of the relationship between the parties up to December 2015;

b. If Mr Flannagan was an employee up to December 2015, the identity of the employer;

c. Whether Mr Flannagan was employed as a casual employee or a permanent employee from December 2015;

d. Whether Mr Flannagan was unjustifiably dismissed from his employment;

e. Whether Mr Flannagan is owed holiday pay;

f. Whether Mr Flannagan is owed statutory holiday pay;

g. Whether Mr Flannagan suffered unjustified disadvantage in his employment.

The nature of the relationship between the parties up to December 2015

[31] Mr Flannagan asserts he was an employee during this period, whilst Mr Richardson asserts that Mr Flannagan was a "WWOOFer", or someone working for their keep, but not an employee or a volunteer.

[32] Essentially, the legal status of such an arrangement is either one of employment or volunteer, depending on the facts of the case, as there is no formally recognised separate legal status of "WWOOFer" or "someone working for their

keep". The question of Mr Flannagan's status therefore requires an analysis of the facts and the law.

[33] The starting point is s 6 of the Employment Relations Act 2000 (the Act), which provides as follows:

> **6 Meaning of employee**
> (1) In this Act, unless the context otherwise requires, employee—
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
> (b) includes—
> (i) a homeworker; or
> (ii) a person intending to work; but
> (c) excludes a volunteer who—
> (i) does not expect to be rewarded for work to be performed as a volunteer; and
> (ii) receives no reward for work performed as a volunteer;
> …
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
> (3) For the purposes of subsection (2), the court or the Authority—
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[34] In the Employment Court case of *John Kirby v New Zealand China Friendship Society*[2], His Honour Judge Corkill stated that the analysis of whether a person does or does not expect to be rewarded for work to be performed as a volunteer must be carried out objectively[3]. Judge Corkill stated that it is necessary to consider the natural and ordinary meaning of the language used by the parties in any relevant oral or written agreement in determining whether an individual is a volunteer.

[35] In *Brook v Macown*[4], at [18], Her Honour Judge Inglis said:

> If the requirement of section 6(1)(c)(i) and (ii) are met it follows that they are not an employee. However it does not follow that they are an employee if these requirements are not met. That is because subsections (2) and (3) require a more expansive inquiry. The assessment is an intensely factual one, requiring consideration of all relevant matters, including material from which the intention of the parties can be gleaned.

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2 [2015] NZEmpC 188
3 At para.[14]
4 [2014] NZEmpC 79

[36] What this means, in effect, is that the Authority must inquire into the real nature of the relationship between the parties.

[37] There are a number of aspects of the relationship whilst Mr Flannagan was a cook that are worthy of note:

a. There was no formal position of cook at the time when Mr Flannagan began working, as Mr Richardson had done all the cooking up to then.

b. Mr Richardson paid Mr Flannagan out of his own pocket, rather than the revenue of the respondent;

c. Mr Richardson calculated how much was to be paid to Mr Flannagan at a hourly rate, so as to deduct the value of the board and lodging ($150 a week);

d. No PAYE was taken out of the payments;

e. There was an obligation on Mr Flannagan to do at least enough hours to pay for the board and lodging (ten hours per week, at $15 a hour);

f. The arrangement lasted around 10 months;

g. Mr Flannagan was told off for not cleaning the kitchen properly;

h. Mr Flannagan was not a traveller or back packer; and

i. Mr Flannagan was an experienced chef.

[38] Mr Flannagan said in evidence that he believed that he had been employed to work as a chef during 2015 as he and Mr Richardson had discussed him coming on board for around a month before he started. He said that Mr Richardson had been unwell around this time, which Mr Richardson agreed was correct. Mr Richardson, on the other hand, likened the arrangement to giving a son money to help out around the house, and described Mr Flannagan as a member of the family.

[39] Whilst relevant, the intention of the parties is not decisive[5]. It is the real nature of the relationship that is determinative. Where the factors signalling an employment agreement are finely balanced against those signalling a non-

[5] See *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585, at [27].

employment relationship, the parties' intention becomes more persuasive. I refer, for example, to the comments of His Honour McGrath in *Three Foot Six Ltd v Bryson*[6] in which he said in his dissenting judgement, at [23]

> [23] As indicated, s 6(2) requires that the assessment be of "the real nature of the relationship". The Act's emphasis on the real nature of the relationship requires that, in cases where the real nature of the work as constituted by the agreement's substantive terms and its objective features point clearly to an employment relationship, there will be little scope for the parties to agree that the relationship is nonetheless a contract for services. In cases where the real nature of the relationship is less certain, the parties will have greater freedom to constitute their relationship in either way.

[40] This approach was not disturbed by the Supreme Court[7] when it overturned the majority decision of the Court of Appeal.

[41] However, when I analyse the arrangements in place when Mr Flannagan was working as a chef in 2015, I do not believe that the elements in the current case are finely balanced. I believe that they strongly point to an employment relationship. In particular, I refer to the mutuality of obligation that was evident in the relationship. Mr Flannagan was obliged to work in the kitchen week after week in return for being allowed to live in the hotel. If Mr Flannagan had chosen not to work one week, he would have owed $150.

[42] The arrangement that Mr Flannagan entered into was of a fundamentally different character to the WWOOFer arrangements that are common in the back packer industry in New Zealand. These are generally short term, and confined to simple tasks, such as cleaning. By contrast, Mr Flannagan was an experienced chef who cooked more than simple bar food for the respondent. However, by contrasting Mr Flannagan's arrangements with a typical WWOOFer arrangement does not mean that the Authority necessarily accepts that a typical WWOOFer arrangement will not be an employment arrangement. It will depend on the circumstances of each case.

[43] More to the point, Mr Flannagan's chef duties can be contrasted with a typical volunteer arrangement. Not only did Mr Flannagan receive and expect to receive reward for his labour (room, and board, plus cash over $150 a week), but the arrangement also bore many fundamental hallmarks of a typical employment arrangement; namely:

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6 [2004] 2 ERNZ 526
7 [2005] NZSC 34

a. There was an expectation that he would do the work four hours a day for six days a week;

b. He expected to be given work to do each week;

c. He had a comprehensive written list of duties to carry out each night; and

d. He contributed in a non-trivial way to the success of the enterprise.

[44] Overall, I am satisfied that Mr Flannagan was an employee during 2015, when he was doing the cooking for the hotel, even if he was working principally for his keep. He was not a volunteer.

Was Mr Flannagan employed by Mr Richardson personally, or by the respondent?

[45] First, there was no documentation in place during this period of work which can throw any light on this question. I accept Mr Richardson's evidence that he paid Mr Flannagan out of his own pocket, and that Mr Flannagan was essentially doing the same job as Mr Richardson had been doing.

[46] I also note that it was only when the housekeeper left the employment of the respondent in December 2015 that Mr Flannagan's pay was treated as taxable, and was dealt with through the respondent's payroll system. It seems that it was also only then that Mr Flannagan was obliged to fill out timesheets (although he appears not to have done so every week after 28 December 2015).

[47] Whilst Mr Flannagan continued to work as a chef, doing the same cooking duties, he also took on housekeeping duties which had been carried out by a previous employee of the respondent.

[48] Analysing these facts, I note a sharp contrast between the way Mr Flannagan was treated by the respondent prior to 28 December 2015, and afterwards. I conclude that this difference was attributable to the respondent treating Mr Flannagan as an employee from 28 December 2015. I am satisfied that, prior to that date, Mr Flannagan was employed by Mr Richardson directly.

Was Mr Flannagan employed as a casual employee or a permanent employee after 28 December 2015?

[49] In *Bay of Plenty District Health Board v Wendy Rahiri*[8] the Employment Court stated[9] that an examination of the various cases decided by the Employment Court in this field indicates that they are very fact-specific and only very general guidance can be drawn from the leading cases.

[50] However, there is a key underlying principle that is well established in determining whether an employment relationship is causal or permanent. This was articulated by the Employment Court in *Jinkinson v Oceania Gold (NZ) Ltd*[10], at paragraphs [40] to [41]:

> [40] Against this background, it is also important to understand what is meant by the terms "casual" and "ongoing" or "permanent". Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.
>
> [41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[51] Applying this test, it is clear to me that there was clear and ongoing mutuality of obligation between the parties from 28 December 2015. Mr Richardson, on behalf of the respondent, clearly expected Mr Flannagan to do the same job each morning. There was no evidence that he asked Mr Flannagan each evening whether he was willing to do the work the following day, or at the end of each week whether Mr Flannagan was willing to work the following week.

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8 [2016] NZEmpC 67
9 At [9]
10 [2009] ERNZ 225

[52] I therefore find that Mr Flannagan was employed by the respondent on a permanent basis from 28 December 2015.

Was Mr Flannagan unjustifiably dismissed from his employment?

[53] When determining whether an employee has been unjustifiably dismissed or subjected to unjustified disadvantage in his or her employment, the Authority must take into account the statutory test of justification, as set out in s.103A of the Employment Relations Act 2000 (the Act). This provides as follows:

> **103A Test of justification**
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> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> (3) In applying the test in subsection (2), the Authority or the court must consider-
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> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
>
> (5) In addition the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
>
> (6) The Authority or the court must not determine a dismissal or an action to be justifiable under this section solely because of defects in the process followed by the employer if the defects were-
>
> (a) minor; and
> (b) did not result in the employee being treated unfairly.

[54] When I consider whether the written warnings shown to the Authority by Mr Richardson were actually received by Mr Flannagan, I conclude on a balance of probabilities that they were not. This is primarily because it is just not credible that Mr Flannagan would have refused to meet with Mr Richardson when they worked in close proximity day after day. It is clear that Mr Flannagan and Mr Richardson had several conversations over time. In addition, the letter of dismissal does not refer to the letters of warning, which is what one would have expected.

[55] I reluctantly conclude that the written warnings were not true and were created after the event to make it appear that Mr Richardson followed a process prior to dismissal.

[56] In any event, according to Mr Richardson's evidence, Mr Flannagan was dismissed during his notice period on 15 March 2016 after a "tussle" because he was unhappy that Mr Flannagan's room smelled of cigarette smoke and was untidy and unhygienic. This would have made the dismissal unjustified, even if a fair process had been followed before the letter of dismissal was handed over on 9 March 2016.

[57] I am satisfied on a balance of probabilities that the respondent did not follow the key requirements of a fair process required by s 103A of the Act in dismissing Mr Flannagan on notice on 9 March 2016, and in dismissing him summarily on 15 March 2016.

[58] As no procedure was followed at all by the respondent, I am unable to be satisfied that the dismissal was substantively justified, albeit procedurally unjustified.

[59] As no fair and reasonable employer could have taken the actions that the respondent took in all the circumstances, I find that the dismissal was unjustified.

Is Mr Flannagan owed holiday pay?

[60] Having determined that Mr Flannagan was not a casual employee, I also determine that the respondent was not entitled to pay him his holiday pay with his pay during his employment. Section 28 of the Holidays Act 2003 provides that this may

occur only when an employee is on a valid fixed term agreement, or when the employee works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16 of the Holidays Act. Neither of these situations arose.

[61] Therefore, Mr Flannagan was entitled to be paid final holiday pay pursuant to s 23 of the Holidays Act, which provides that, where employment ends within 12 months of commencement of the employment, the employer must pay the employee 8% of the employee's gross earnings since the commencement less any amount paid for annual holidays in advance and paid in accordance with s 28.

[62] Inland Revenue Department information provided by Mr Flannagan indicates that he received a total of $5,567.92 during his employment by the respondent. Applying 8% to this sum, results in a gross sum of $445.43 being owed to him by way of holiday pay.

Is Mr Flannagan owed statutory holiday pay?

[63] Mr Flannagan said that he worked on Waitangi Day 2015, Anzac Day 2015, the provincial holiday in November 2015, Boxing Day 2015, 1 and 2 January 2016 and Waitangi Day 2016. Mr Flannagan was only employed by the respondent from 28 December 2015, and so, if he was correct, he was only entitled to be paid statutory holiday pay by the respondent for 1 and 2 January 2016.

[64] Mr Richardson's evidence was that he could not recall whether Mr Flannagan worked on 1 and 2 January 2016. However, the Authority saw a copy of a time sheet for the week ending 3 January 2016 which shows that Mr Flannagan had 1 and 2 January 2016 off. Although this document was not signed, I have no reason to believe that it is not authentic and correct. I therefore decline to award any statutory holiday pay to Mr Flannagan.

[65] Mr Flannagan did work on Waitangi Day 2016, which fell on a Saturday. That day would otherwise have been a working day for Mr Flannagan so Waitangi Day 2016 is treated as falling on that day, according to s 45A of the Holidays Act. He is therefore entitled to be paid at time and a half for working that day, in accordance with s 50. The timesheet I saw showed that Mr Flannagan worked 4.5 hours on that day. He is therefore entitled to be paid for a further 2.25 hours, which at $17 an hour equates to a gross sum of $38.25.

[66] Mr Flannagan was also entitled to a paid alternative holiday in accordance with s 56. There is no evidence that he was provided with that alternative holiday. He is therefore entitled to be paid a further gross sum of $136 in respect of that day.

Did Mr Flannagan suffer unjustified disadvantage in his employment?

[67] It is not clear which of the respondent's actions Mr Flannagan says constituted unjustified disadvantage in his employment. Mr Kersjes does not address this part of Mr Flannagan's claims in his submissions. The personal grievance letter dated 10 March 2016 refers to the dismissal, as well as the following:

a. Not being offered an employment agreement;

b. Not being paid holiday pay or statutory holiday pay;

c. "conflict' arising from Mr Flannagan asking to be paid into his bank account; and

d. Being asked to leave his accommodation.

[68] The statement of problem also refers to Mr Richardson "head-butting and punching" Mr Flannagan. However, the statement of problem was served and lodged more than 90 days after the alleged assault[11], and so the Authority has no jurisdiction to investigate that allegation as a personal grievance.

[69] The Authority also does not have the jurisdiction to consider Mr Flannagan's allegation of "conflict" as that issue was not raised with sufficient specificity to enable the respondent to understand the grievance and address it[12].

[70] I also consider that the Authority does not have the jurisdiction to consider the alleged disadvantage of forcing Mr Flannagan of leaving his room. This is because the employment of Mr Flannagan by the respondent was not a necessary component of the agreement between Mr Flannagan and the respondent with respect to the provision of accommodation[13]. Mr Flannagan needed somewhere to live, and the respondent provided that. It was not necessary for Mr Flannagan to work at the hotel

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11 I refer to the requirement in s 114 (1) of the Act.

12 I refer to *Creedy v Commissioner of Police* [2006] ERNZ 517 at [35] to [37]

13 As set out in *JP Morgan Chase Bank NA v Robert Lewis*, CA587/2013, [2015] NZCA 255, [94] to [97].

as well. He could have worked elsewhere and paid the weekly room charge. Equally, it was not necessary for Mr Flannagan to have lived at the hotel to carry out his duties.

[71] There remains only the issue of the alleged non provision of the employment agreement and the non-payment of holiday pay and statutory holiday pay. I have little doubt that the non-payment of correct holiday pay and statutory holiday pay constituted an unjustified disadvantage in Mr Flannagan's employment, as no fair and reasonable employer could fail to correctly provide holiday pay and statutory holiday pay in all the circumstances.

[72] Did the respondent fail to provide an employment agreement? The respondent presented a copy of a casual agreement which it says was given to Mr Flannagan but which he did not sign. This is denied by Mr Flannagan. However, even if the respondent's evidence is correct, the agreement was not suitable for the type of employment under which Mr Flannagan was employed, as he was clearly not a casual employee. It is therefore not surprising if he did not sign it.

[73] I find that Mr Flannagan did suffer a disadvantage in his employment in not being given an appropriate employment agreement, as he thereby was deprived of a record of the terms of his employment. Furthermore, this disadvantage was unjustified, as no fair and reasonable employer could fail to give an employee the correct employment agreement in all the circumstances.

Should penalties be imposed?

[74] Section 65 of the Act provides that an individual employment agreement must be in writing and contain such terms and conditions as the employer and employee think fit. Section 65(4) provides that an employer who fails to comply with this section is liable, in an action brought by a Labour Inspector or the employee concerned, to a penalty imposed by the Authority.

[75] There is sufficient doubt in the evidence as to whether or not an employment agreement was provided, albeit an inappropriate one, to make the imposition of a penalty inappropriate. The statutory provision does not provide for a penalty when an inappropriate employment agreement has been proffered. I therefore decline to impose a penalty in this case.

[76] Section 75 of the Holidays Act provides for the imposition of a penalty where there is a failure to comply with, inter alia, ss 23, 50 and 56 of that statute. It appears that Mr Richardson believed that Mr Flannagan was a casual employee. I have already found that Mr Flannagan suffered an unjustified disadvantage in his employment due to the non-payment of holiday pay at the end of his employment, for which he is eligible to be considered for the award of compensation. The failure to pay statutory holiday pay was a one off failing.

[77] Whilst the failures to pay Mr Flannagan holiday pay under ss 23, 50 and 56 of the Holidays Act were unjustified disadvantages in his employment, I am not satisfied on a balance of probabilities that the failings were wilful on the part of the respondent, which is a very small employer. The Employment Court in *Tan v Yang and Zhang*[14] held that "the purpose of a penalty is … to punish and deter others from engaging in such conduct"[15]. I do not accept that it is appropriate or just to punish the respondent for these particular failings.

Remedies

[78] Section 123(1) of the Act provides as follows:

> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> …:
>
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
>
> (c) the payment to the employee of compensation by the employee's employer, including compensation for—
>
> (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
>
> (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[79] Section 128 of the Act provides as follows:

> **128 Reimbursement**
>
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
>
> (a) that the employee has a personal grievance; and
>
> (b) that the employee has lost remuneration as a result of the personal grievance.

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15 Paragraph [25].

> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[80] Mr Flannagan seeks 9 weeks loss of wages at $510 a week, and then reimbursement of a continuing loss for a further 14 months at a shortfall of $160 a week. I accept that Mr Flannagan took 9 weeks to find alternative employment and that he made reasonable efforts to mitigate his loss. However, I do not accept that his loss was a gross of $510 a week. Calculating his average pay received over 11 weeks works out at $500.33 a week. Multiplying this by 9 weeks results in $4,502.99. Deducting a further $64.26 later received from the respondent results in a gross loss of $4,438.73.

[81] Mr Flannagan seeks that the Authority exercises its discretion to award a greater sum, by including a continuing loss. However, I am not satisfied that this is just, given that the respondent was clearly dissatisfied with Mr Flannagan's performance, and that it may have ended up dismissing Mr Flannagan fairly, after having followed a fair process, well before the expiry of a further 14 months. I therefore decline to exercise that discretion.

[82] Mr Flannagan is entitled to an award of holiday pay in respect of the lost wages. That amounts to the gross sum of $355.10.

[83] Turning to compensation for humiliation, loss of dignity and injury to his feelings arising out of the dismissal, I accept that the sudden and unexpected giving of notice, and the later summary dismissal would have caused Mr Flannagan to suffer such an effect. He gave evidence that he suffered depression, although I infer that he was suffering this before he was dismissed.

[84] It is not possible to separate in any coherent way the effects of the dismissal from the effects of the unjustified disadvantage Mr Flannagan suffered. I believe that a global sum should be awarded. Mr Kersjes submits that a sum of $12,000 is an appropriate sum to award under s 123(1)(c)(i) of the Act. I believe that this is an appropriate sum in the circumstances.

[85] Under s 124 of the Act, where the Authority has determined that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[86] I am satisfied on a balance of probabilities that Mr Flannagan did often fail to get up in time to carry out his duties. I accept, therefore, that it is appropriate to reduce the remedies of lost wages and compensation to reflect Mr Flannagan's blameworthy actions in contributing to the situation that gave rise to his personal grievance.

[87] I believe that a reduction of 30% is appropriate. This results in an award of lost wages in the sum of $3,107.11, holiday pay on this sum of $248.57 and compensation of $8,400.

Counterclaim

[88] In his written submissions, Mr Richardson appears to have stated a counterclaim against Mr Flannagan in the sum of $31,500 comprising the loss of income on the rent of a hotel room, the costs of repairs to the room, and "hurt and humiliation".

[89] This was the first intimation of the respondent wanting to bring a counterclaim. It is frankly too late to do so in closing submissions. In any event, the Authority would have no jurisdiction to consider claims against Mr Flannagan arising from his occupation of a hotel room, as Mr Flannagan's occupation of the room was not a necessary component of his employment. In addition, an award of compensation under s 123(1)(c)(i) of the Act (which I understand Mr Richardson to be referring to when he refers to "hurt and humiliation") is only available to employees, not employers.

Orders

[90] I order the respondent to pay to Mr Flannagan the following sums:

a. Unpaid holiday pay in the gross sum of $445.43;

b. Unpaid statutory holiday pay in the gross sum of $174.25;

c. Lost wages in the gross sum of $3,107.11;

d. Holiday pay on the lost wages in the gross sum of $248.57; and

e. Compensation in the sum of $8,400.

Costs

[91] I reserve costs. I direct the parties to seek to agree how costs are to be dealt with. However, if they are unable to do so within 14 days of the date of this determination, then the advocate for the applicant may serve and lodge a memorandum in respect of costs within a further 14 days, and the respondent shall have a further 14 days within which to serve and lodge any reply.

David Appleton
Member of the Employment Relations Authority