IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 43
5345929

BETWEEN	SUSAN FROST Applicant
A N D	GARY CULLEN First Respondent and CULLEN'S FRUIT AND VEG LIMITED Second Respondent

Member of Authority:	David Appleton
Representatives:	Jessica Herd, Counsel for the Applicant Mr Gary Cullen, director, for the Respondents
Investigation Meeting:	17 February 2012 and 1 March 2012 at Nelson
Submissions Received:	1 March 2012 from the Applicant 1 March 2012 from Respondents
Date of Determination:	9 March 2012

DETERMINATION OF THE AUTHORITY

A. The Applicant was employed by the second respondent, on a permanent, part time contract.

B. The Applicant was unjustifiably dismissed and is entitled to remedies pursuant to s 123 (1) (b) and (c) of the Employment Relations Act 2000, although they are reduced by 75% pursuant to s 124 of the Act.

C. No employment agreement was issued to the Applicant, although this shall not attract a penalty against the respondents.

D. Costs are reserved

Employment relationship problem

[1] Ms Frost alleges that she was unjustifiably dismissed from her job as a retail assistant at the Victory Fruit and Veg Shop (the shop) on 11 January 2011. She also

alleges that she was never given a written employment agreement in breach of s.65 of the Employment Relations Act 2000 (the Act).

[2] In relation to the unjustifiable dismissal allegation, Ms Frost seeks an award of at least three months' lost wages at $12.75 per hour for 20 hours work per week, together with compensation pursuant to s.123(1)(c)(i) of the Act in the sum of $7,000. She also seeks that a penalty in the sum of $1,000 be awarded, payable to the Crown, for the alleged breach of s.65 of the Act.

[3] Ms Frost worked varying hours in the afternoons as an assistant at the shop from 12 August 2010, and gave evidence that she loved working there, giving good and faithful service. She says that for the first five months she never received any complaints or warnings, either from the first or second respondents, nor from the first respondent's sons, Jeffery and Brenton Cullen (called in this determination, Brenton and Jeffrey respectively). She believed that she had been employed by the first respondent, Mr Gary Cullen (Mr Cullen) personally.

[4] Ms Frost states that on Sunday, 9 January 2011 she received a text message from Jeffrey telling her that she could have the following Monday off work. The following Tuesday, Ms Frost worked from 3pm with a new employee called Jess whom Ms Frost believed was a sister of Brenton's partner. Ms Frost says that Jess informed her that she (Jess) would be working 12-13 hours in the shop every day. Ms Frost states that, later the same day, Brenton, berated her for the standard of her work and also made a comment that led Ms Frost to believe that he was accusing her of taking money from the till. Ms Frost states that later that same afternoon, Jeffrey told her that the shop had not been doing so well and that they needed to cut costs and so would call her if they needed her in the future. Ms Frost says that she was never called again and treated 1 January 2012 as the day she was dismissed.

[5] Ms Frost raised a personal grievance in writing dated 18 January 2011.

[6] The position of the respondents is that Ms Frost was employed by the second respondent, not the first, and that she had been engaged as a casual employee. The respondents also claim that Ms Frost had been charging too little or nothing for the produce, which had caused losses to the business. This was the reason that they decided not to use her services any longer. They say that no decision had been made on 11 January not to use her services anymore, but that Mr Cullen had formed that

view the following day after Ms Frost had allegedly been *yelling* outside their shop telling customers that she had been sacked and urging them not to give the shop their custom.

Issues

[7] The following are the issues that the Authority has to consider in investigating this employment relationship problem:

(a) The identity of the correct employer;

(b) Whether Ms Frost was employed under a casual arrangement or on a permanent part time basis;

(c) The date when Ms Frost was dismissed, 11 or 12 January 2012;

(d) Whether Ms Frost had been unjustifiably dismissed; and

(e) Whether there had been a failure to provide an employment agreement justifying the award of a penalty.

Who was the correct employer?

[8] Mr Cullen gave evidence that he employed other staff, both in the shop and in his other businesses, pursuant to a standard employment agreement that he had on his computer and that such staff were all employed by the limited company (the second respondent). He had not given Ms Frost an employment agreement simply as an oversight. The second respondent is the company under which Mr Cullen operates a number of businesses, the fruit and veg shop being just one example.

[9] On the odd occasion when a pay slip would be given to Ms Frost, or a statement of earnings to date, these documents bore the legend at the top "*Cullen's Fruit and Veg Limited*". It appears that the pay for Ms Frost came out of the cash takings of the second respondent rather than Mr Cullen's personal account.

[10] Counsel for Ms Frost draws my attention to the case of *Mehta v Elliot (Labour Inspector)* 1 ERNZ 451, which held that the question of who the employer was, is to be determined as at the outset of the employment. The question to be asked, the case held, was who would an independent, but knowledgeable, observer taking an objective view have said was the appellant's employer when he commenced

employment. Counsel for Ms Frost asserts that it should be Mr Gary Cullen personally, as that is who Ms Frost apprehended was her employer t the onset of the arrangement.

[11] However, the onus of proving the identity of the employer rests on the applicant, on the balance of probabilities, and the test is objective in nature. (*Mehta*, applied in *Colosimo v Parker* (Employment Court, Auckland AC 68/06, 6 December 2006, Judge Perkins). At [30] in *Colosimo* Judge Perkins states:

> *Much has been made in this case of the fact that Mr Parker was never made aware that Taffy's Bar Limited was the employer. However, the real issue is whether Mr Colosimo ever held himself out to be the employer and if so, the circumstances which would entitle the Court to say he personally entered into binding legal relations with Mr Parker. While it is desirable that the true identity of the employer should be made known to the employee at the outset, that unfortunately is not always the case. That is so in the present case. The Court is then placed in the position of having to make an objective assessment.*

[12] Judge Perkins then cites passages from various cases in which the courts have held that the correct approach is to focus on the objective evidence, not on the subjective perception of the employee.

[13] Taking in to account the fact that the limited liability company had been in existence for some time before Ms Frost had been engaged, that Mr Cullen had an employment agreement on his computer that he had intended to give to her which was in the name of the company, that Mr Cullen did not hold himself out to be the employer personally and that he paid Ms Frost's wages out of the takings, which were later accounted for in the company's accounts, I am satisfied that Ms Frost was employed by the second respondent, and not by Mr Cullen personally. Therefore, the application against the first respondent (Mr Gary Cullen) is dismissed and the personal grievance is against the second respondent only.

Was the employment a casual employment or a permanent part time employment?

[14] Mr Cullen gave evidence that, when he first decided to employ Ms Frost, it was because his son, Jeffrey, had been unable to work due to illness and because Mr Cullen himself had been too busy to cover the shop on his own. Mr Cullen said

that he had put Ms Frost on a 90 day trial period (despite the fact that this would not have been legally binding in view of no written employment agreement having been given to Ms Frost) and that he had had no intention of the arrangement ending at any particular time.

[15] Furthermore, the wages record shows clearly that, throughout the arrangement, apart from the first week when Ms Frost had worked 13 hours, Ms Frost had worked no less than 16 hours a week, and frequently more than 20 hours per week. She had worked every weekday (save one day when she had been given permission by Mr Cullen to attend a concert in Christchurch) and every week throughout the arrangement. Although she had been told each day what hours she would be required to work the following day, it appears that this was not because of a lack of certainty from one day to the next that she would be required, but rather because the requirement for her hours fluctuated from day to day as Jeffrey and Mr Cullen were not always available each day for the same hours. Ms Frost usually worked core hours from 12 until 4pm. Mr Cullen indicated that, if Ms Frost had not been able to attend work on any particular day, he would have covered for her or arranged cover, but from his evidence I infer that he would have required Ms Frost to have had a valid reason for not being able to work.

[16] Casual employment typically conforms to a pattern of characteristics which have been summarised as follows:

(a) Engagement for short periods of time for specific purposes;

(b) A lack of regular work pattern or expectation of ongoing employment;

(c) Employment is dependent on the availability of work demands;

(d) No guarantee of work from one week to the next;

(e) Employment as and when needed;

(f) The lack of an obligation on the employer to offer employment, or on the employee to accept any other engagement; and

(g) Employees are only engaged for the specific term of each period of employment.

Lee v. Minor Developments Ltd t/a Before Six Childcare Centre, EmpC Auckland, AC52/08, 23 December 2008 at para.[43].

[17] The Court at para.[45] also said:

> *The question of whether or not a person has been employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work including its regularity, its hours and the obligations imposed on the employee.*

[18] It appears that Mr Cullen regarded Ms Frost's employment as casual in the sense that the hours would fluctuate from day-to-day. However, this was not an engagement for short periods of time for specific purposes and there was a regular work pattern and expectation of ongoing employment.

[19] The Employment Court in *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225, made clear that, if there are truly no obligations to provide and perform work, other obligations indicating an ongoing employment relationship are unlikely to suffice. However, just as Ms Frost expected to be able to work from day-to-day and week-to-week, it appears that Mr Cullen expected her to turn up for work every day as well. Therefore, there was in existence mutual employment-related obligations throughout the period of the relationship between Ms Frost and the second respondent.

[20] My attention was drawn on behalf of the respondents to the guidance on the Department of Labour website about what constitutes casual employment and which, the respondent say, supports their contention that Ms Frost was a casual employee, whose employment could be ended by them whenever they wished. However, I am clear that the guidance is in accordance with leading case law cited above.

[21] Therefore, taking into account the above factors considered in *Lee*, it is clear to me that this was not casual employment in the legal sense of the word, but was rather a permanent part time contract with fluctuating hours. I therefore find that Ms Frost was employed on a permanent part time basis and was not a casual employee.

When was Ms Frost dismissed?

[22] Having found that Ms Frost was employed as a permanent part time employee of the second respondent, it is now necessary to examine the circumstances under which that employment came to an end.

[23] Mr Cullen gave evidence that, during a period in November or December 2010, whilst he had been working in the shop in the mornings before Ms Frost started her shift, or occasionally late afternoons after Ms Frost had gone home, customers would come into the shop and would leave again when they saw that Ms Frost was not working at that time. Mr Cullen said that one of them had said to him that he or she would return when Ms Frost was working as *"things were cheaper when Sue is here"*. Mr Cullen said that this had happened on several occasions and estimated it had happened around six times on one particular day.

[24] In addition, Mr Cullen said that he had noticed that turnover and profits had reduced since Ms Frost had started working in the shop. He estimated that, instead of profits of around 32%-35% per month, the profits on the shop were down to around 10%.

[25] Mr Cullen also explained that either he or Jeffrey would check the produce that was left in the shop at the end of each day so they would know what they needed to buy for the following day. He said that it had been noticed that when Ms Frost had been working in the shop, there would be a discrepancy between the produce that had apparently been sold and the money that had gone through the till, indicating that less money had been taken than would have been expected.

[26] Mr Cullen gave evidence that these issues had made him suspicious and that he believed that Ms Frost must have either been selling produce too cheaply or giving it away for free. He had been unable to deal with his suspicions immediately because he had had to go into hospital (his third such visit since September 2010) and have an operation on New Year's Eve 2010 which had resulted in him being confined to bed for several days afterwards.

[27] Mr Cullen had asked his son, Brenton, to go to the shop on the afternoon of Tuesday, 11 January 2011 to close it up. Mr Cullen explained that the till was linked to a computer in another room which effectively logged each transaction. Mr Cullen recounted what Brenton had seen that afternoon and had told him. However, as this

was hearsay evidence, and Brenton was not available on the first day of the investigation meeting, I decided to reconvene the meeting on 1 March 2012 to hear from Brenton directly.

[28] Brenton's evidence before the Authority on 1 March was that he had arrived at the shop about 5pm and had viewed the computer in the back room of the shop, which had a one way glass window onto the shop floor, had no door and which was about 5 metres from the till. Looking at the computer, Brenton had noticed that the takings for that day were, in his words, *very low*, and he looked back at the takings in the hours that Ms Frost had been serving. He noticed that the takings were a lot lower than other hours when Ms Frost had not been serving.

[29] Brenton also gave evidence that he had noticed before that day that the takings had generally been lower when Ms Frost had been serving in the shop compared to when she had not been on shift. On the 11 January 2011, when he had looked at the computer, the takings while Ms Frost that afternoon had been on duty had been around $700, which was much less than what he believed they should have been.

[30] Brenton's evidence was that, while he was in the back room, two customers came into the shop together, and he heard Ms Frost say quietly *I will have to charge you something this time because the boss' son is hanging around*. This prompted Brenton to pause and watch Ms Frost serve the customers. He recognised both of the customers and knew that at least one of them, whom he knew as John, was a friend of Ms Frost. Brenton's evidence was that he had seen Ms Frost put produce from the shop into the shop's white bags, and then saw the computer register a transaction for 79 cents.

[31] Brenton's evidence was that he had not wanted to jump to any conclusions immediately because it was possible that Ms Frost had not pressed the right button on the till so as to register the correct amount on the computer. As the customers left, Brenton had followed the customers out of the shop, had walked behind them and had seen that they had about $30 of produce in the bags. Brenton said that there had been no other customers or other staff in the shop when these customers had been in there. He returned to the shop and, when Ms Frost later went out the back, he checked the till tape and saw that the till had also registered only 79 cents for the transaction.

[32] Brenton said that, in order to check the till tape, he had had to take it out of the till, and that he had been in the middle of putting it back when Ms Frost had returned to the front of the shop, saw him looking at the tape, and had said *you know I wouldn't steal from you, I'm not like that honest*. Brenton said he had not said anything to prompt this remark, and that all he replied was *wow, where did that come from?*, meaning that he had not accused her of stealing. Brenton said that he did not want to confront Ms Frost himself as he was not Ms Frost's manager and did not want confrontation, and so had called Mr Cullen to tell him what he had seen, who had in turn called Jeffrey, who had then told Ms Frost that they would tell her when they needed her next.

[33] Mr Cullen's evidence was slightly different, in that he said that Brenton had told Jeffrey what had occurred and that Jeffrey had phoned Mr Cullen and a discussion had ensued between Jeffrey and Mr Cullen during which it had been agreed that Jeffrey would tell Ms Frost that she would not be required to come to work any more unless she was texted to tell her to do so. Mr Cullen had also stated that Brenton had seen around $20 of produce in the customer's bags. I do not regard these discrepancies as serious, as they are probably accounted for by the fact that Mr Cullen had been lying in bed, recovering from an operation at the time that the events occurred. I believe that Brenton's evidence was more likely to be accurate.

[34] Ms Frost's evidence was that Brenton had made comments to her earlier that same day about more money having been taken the previous morning than had been taken the entire day on Tuesday, 11 January. Ms Frost vehemently denied letting customers have produce cheap and said that she had sold John a lettuce on 11 January, which would have cost around 79 cents, and that the produce that Brenton had seen in his bags must have been purchased at another shop.

[35] Having heard the evidence from Brenton, I must conclude that his evidence is more credible than Ms Frost's on this point. I find it unlikely that Ms Frost would remember serving the customer John a lettuce over a year later. The evidence she had given the Authority on 17 February 2012, when the same customer John had been mentioned, was that she had accidentally let him have some leeks on discount, and that was all she could think of to explain how John may have been given some cheap produce (an allegation that had first arisen from Mr Cullen's evidence that John had told him after Ms Frost's dismissal that she had been giving him cheap produce). Ms

Frost's new evidence that she had sold John a lettuce, not mentioned to the Authority on 17 February, in concert with the unlikelihood that Brenton would have confused the bags used by the customers on 11 January 2011 with the bags used in his father's shop, or that customers had entered the shop carrying produce from another shop in the respondent's bags, together with the generally credible way in which Brenton gave his evidence, all lead me to conclude that Brenton did witness Ms Frost give produce to customers at significantly discounted prices without permission.

[36] Ms Frost also referred in her evidence to the new girl Jess starting work that day, who had told Ms Frost that she would be working 12-13 hours a day. From these facts, when Jeffrey had told her that they would contact her when they next needed her, Ms Frost had concluded that she was being dismissed on that day to make way for Jess.

[37] The evidence from Mr Cullen was that the decision to tell Ms Frost that she was not to come to work until she was called again had nothing to do with Jess' employment, who had been recruited in order to replace Jeffrey who was going to carry out other work. Mr Cullen also said that the reason that Ms Frost had been asked by text by Jeffrey not to come to work on Monday 10 January 2011 (the previous day) had been because Jeffrey and Jess would both have been in the shop that day so that Jeffrey could show Jess the ropes, and Ms Frost's presence would have been superfluous. I believe Mr Cullen on these points.

[38] Mr Cullen also gave evidence that, as of Tuesday, 11 January 2011, he had not at that point had the intention of dismissing Ms Frost but had intended to meet with her at some time in the following days in order to confront her with what Brenton had observed. However, he later heard that, on Wednesday, 12 January 2011, Ms Frost had stood opposite the shop telling customers not to go there, telling them that she had been dismissed. Mr Cullen gave evidence that he had been told by a local retailer that Ms Frost had been *"yelling"* and that this conduct by Ms Frost had caused him to decide that he would no longer employ her. He did not communicate this decision to Ms Frost at that time, however. Brenton's evidence was that he had also heard that Ms Frost had done this, and that he had been told this by customers, a local retailer and by Jess who, he said, had witnessed the events and texted him, asking him what to do about it.

[39] Ms Frost's evidence was that she had not been *"yelling"* at customers telling them not to go into Mr Cullen's shop but she did explain that she had been telling customers in Victory Square why she no longer worked there. Although Mr Cullen's evidence on this point was only hearsay, Ms Frost had indicated in evidence on 17 February 2012 that she *"did not recall telling customers not to go into Mr Cullen's shop"*, but on 1 March 2012 had denied it more strongly. This change in emphasis in Ms Frost's evidence leads me to conclude that an incident of some sort had occurred on Wednesday, 12 January 2011 which had involved Ms Frost telling customers of the shop her version of what had happened and which, on a balance of probabilities, did also include her *yelling* and telling customers not to frequent the shop.

[40] The last communication from the respondents with Ms Frost had been when Jeffrey had told her on 11 January 2011 that she had to wait until she was called back before reporting for work again. However, Mr Cullen did not reach the conclusion that he would not employ her again till the following day, after he had learned about her conduct outside his shop. It is my conclusion that the dismissal did not take effect till 12 January 2011, despite Ms Frost deciding on that day that she had already been dismissed the previous day.

Was the dismissal unjustified?

[41] The dismissal took place before 1 April 2011 when the s103A test set out in the Employment Relations Act 2000 was amended. The test to apply in determining whether the dismissal of Mr Frost was justified or unjustified is therefore the pre-amended test, as follows:

> *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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[42] Mr Cullen admitted that he had not spoken in any way to Ms Frost about his suspicions of her giving food away or selling it too cheaply, and had not instructed either of his sons to do so. Furthermore, Jeffrey had, in effect, misled Ms Frost as to the reason why she would not be required to attend work until she was called (that reason being purportedly that the shop was not doing very well any more).

Furthermore, the events of 12 January which had led Mr Cullen to decide not to employ Ms Cullen anymore had also not been discussed with Ms Frost.

[43] It has long been a basic tenet of fairness that an employee who is under suspicion of misconduct must be given the right to know the nature and basis of the suspicions harboured by the employer, and be given an opportunity to explain themselves, before any action is taken. Mr Cullen and his sons believed that Ms Frost had been employed on a casual basis and that they could simply stop employing her. However, I have found that Ms Frost was a permanent employee and, given that no fair process had been followed leading to the decision to dismiss Ms Frost, I must conclude that the dismissal was unjustified.

Remedies and contribution

[44] Section 123 of the Act provides for the provision of remedies following a finding of unjustifiable dismissal. Ms Frost gave evidence that she had tried to find work in shops in the area, but had become ill after her dismissal (for reasons unconnected with the dismissal) which had prevented her from seeking work for some time. I am satisfied that Ms Frost made such attempts to find alternative work as she reasonably could in the circumstances.

[45] Where the Authority has found that there is a personal grievance and that the employee has lost remuneration as a result of it, s 128 of the Act requires the Authority, whether or not it provides for any of the other remedies provided for in section 123, and subject to subsection (3) and section 124, to 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. Subsection (3) gives the Authority the discretion to award a greater sum than is set out in s 128. Section 124 deals with contribution, which I deal with below.

[46] I do not believe that the circumstances justify me exercising a discretion under subsection (3) to award more than three months' lost wages, and so will fix the award of lost remuneration at 3 month's ordinary time remuneration. Ms Frost's gross hourly pay was $12.75, and she has asked in her statement of problem for her hours to be averaged to 20 a week for the purposes of this calculation. I believe that this is fair basis on which to calculate her lost remuneration. The period of three months from

13 January 2011 expires on 13 April 2011. The National Minimum Wage increased to $13 an hour with effect from 1 April 2011, and so this needs to be taken into account. When calculating days (rather than whole weeks) I have assumed that Ms Frost would have worked 4 hours each day.

[47] Applying this calculation, Ms Frost would have worked 11 whole weeks of 20 hours a week at $12.75 an hour, one additional day of 4 hours at $12.75 an hour, and 9 days of 4 hours a day at $13 an hour. This comes to a total of $3,324 gross lost remuneration as a result of being unjustifiably dismissed, before any reduction for contribution.

[48] Ms Frost is also entitled to compensation for humiliation, loss of dignity, and injury to her feelings pursuant to s 123 (1) (c) of the Act. Ms Frost gave evidence of how greatly she had enjoyed her work, and I believe that I should take into account the fact that she has lost congenial employment in assessing remedies under this heading. Ms Frost also gave evidence that rumours had been spread about her which she had found untrue and insulting, and which had caused her hurt and embarrassment. However, I heard no cogent evidence that the rumours about Ms Frost had been started or spread by the respondents, or the sons of Mr Cullen, and so it is equally as likely that the rumours had been engendered by Ms Frost's conduct outside the shop on 12 January 2011 or by the customer who had had the benefit of cheap produce. However, Ms Frost's conduct on 12 January was evidence of her anger at at the way she had been treated and I am mindful of that reaction being a manifestation of her humiliation, loss of dignity, and injury to her feelings.

[49] All in all, though, the evidence of Ms Frost's feelings at being dismissed unjustifiably was somewhat exiguous, and I believe that a moderate award is justified, in the sum of $7,000 as requested by Ms Frost.

[50] Having assessed the remedies, Section 124 of the Act provides that, where the Authority determines 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:

a. consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

b. *if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[51] Mr Cullen admitted during cross examination by Ms Frost's counsel that, at the time Ms Frost had been working at the shop, both he and Jeffrey had been ill and that these factors could have impacted on the success of the shop, although Mr Cullen had believed that the impact would not have been great. I am of the view that the respective illnesses of Jeffrey and Mr Cullen were very likely to have had an impact on the efficient running of the shop, which would have been reflected in lower profits, although I am unable to ascertain the extent of the impact.

[52] However, having heard the following evidence:

a. Brenton Cullen's, who had witnessed the incident in which a customer had been given two bags of vegetables worth around $30 for 79c by Ms Frost,

b. Brenton's and Gary Cullen's about the reduction in takings during Ms Frost's shifts,

c. Gary Cullen's about remarks made to him by customers disappointed that Ms Frost was not on shift when they came into the shop because *"things were cheaper when Sue is here"* and

d. Brenton's and Gary Cullen's that Ms Frost had been discouraging customers to frequent his shop on 12 January 2011,

I am satisfied that Ms Frost had committed actions which had significantly contributed towards the situation that had given rise to the personal grievance and that those actions had been blameworthy.

[53] Having concluded that Ms Frost's actions had contributed to her personal grievance, I now need to assess the extent of the contribution, and hence the reduction. This is by no means a scientific process, but I am aware that Ms Frost' contribution was significant. Whilst she may have been giving away produce

belonging to the respondent to customers at a very low price out of the kindness of her heart, she had no right to do so, and her actions are likely to have damaged the business of her employer. In these circumstances, I believe that a reduction of 75% is in order.

[54] Applying a reduction of 75% to the award of $3,324 for lost remuneration gives a final award of $831 gross. Applying the same reduction to the award under s 123(1)(c) gives a final compensatory award of $1,750.

[55] S 123(2) of the Act provides that, when making an order under subsection (1)(b) or (c), the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it. The respondents did not request payment by instalments, but was unrepresented and did explain enough of the financial circumstances of the business for me to conclude that the second respondent's financial position does require an order for payment in instalments. For reasons of confidentiality I do not repeat that evidence here. Counsel for Ms Frost requested that I order the respondents to produce a financial statement on the basis that I had mooted that I might order payment by instalments if Ms Frost were successful. Mr Cullen explained in response that he could not afford to pay his accountant to produce such a statement but that he could produce one himself. As that statement is unlikely to contain anything more than the oral evidence he gave to the Authority, on which counsel for Ms Frost had the chance to cross examine Mr Cullen, I decline to order the respondents to produce such a written statement.

[56] Hence, I order that the total amount of $2,581 be paid to Ms Frost in 4 equal monthly instalments of $645.25 per month, the first such payment to be made on Monday 2 April 2012, and the following 3 instalments to be paid on 7 May 2012, 4 June 2012 and 2 July 2012 respectively.

Was an employment agreement provided and, if not, should a penalty be imposed?

[57] The final issue to consider was whether an employment agreement had been provided to Ms Frost and, if not, whether a penalty should be imposed pursuant to s.63A(3) of the Act. Mr Cullen readily admitted that no employment agreement had been given to Ms Frost when she had commenced working for him and that this had been an oversight. At the time when Ms Frost started working for Mr Cullen, he had

been under a lot of pressure, which included his son being unable to work in the shop through illness and he himself suffering from ill health. Therefore, I do not consider that this failure to give an employment agreement to Ms Frost was deliberate and I therefore do not believe that the imposition of a penalty is appropriate.

Orders

[58] I order the respondent to pay the applicant the gross sum of $831 under s 123 (1) (b) and the further sum of $1,875 under s 123 (1) (c), payable in aggregate instalments as follows:

$645.25 on Monday 2 April 2012

$645.25 on Monday 7 May 2012

$645.25 on Monday 4 June 2012 and

$645.25 on Monday 2 July 2012.

Costs

[59] Costs are reserved. Any claim for costs by the applicant should be made by lodging and serving a memorandum within 28 days of the date of this determination, and the respondent shall have a further 28 days to lodge and serve any reply

David Appleton
Member of the Employment Relations Authority