

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 58
5362016

BETWEEN	IAN HUME Applicant	
A N D	PIEFECTION LIMITED Respondent	FOODS

Member of Authority: David Appleton

Representatives: Robert Thompson, Advocate for Applicant
No appearance for Respondent

Investigation meeting: 29 March 2012 at Christchurch

Submissions Received 29 March 2012 from Applicant
1 April 2012 from Respondent

Date of Determination: 4 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Hume claims that he was unjustifiably dismissed by the respondent on 2 September 2011. He also claims an unjustified disadvantage in relation to an alleged failure to pay all outstanding wages and holiday pay. Mr Hume also seeks a penalty for an alleged failure to provide him with an employment agreement.

The non-appearance of the respondent

[2] All communications between the Authority and the respondent were through the respondent's director and sole shareholder, Mr Andrew McEwan. Mr McEwan did not lodge a statement in reply but indicated by way of various written communications with the Authority that Mr Hume had never been an employee of the respondent company but had been at all times a contractor.

[3] Mr McEwan failed to take part in two pre-arranged telephone directions conferences and indicated by email to the Authority prior to the investigation meeting that he would not be attending it for reasons of costs, as he lived in Auckland. Whilst the cost of flying from Auckland to Christchurch and back is reasonably significant, Mr Hume cannot be prejudiced because Mr McEwan lives in Auckland. The factory he owns, at which Mr Hume worked, is in Christchurch, and that is where it was appropriate for the investigation meeting to take place.

[4] Being satisfied that Mr McEwan had been given adequate notice of the telephone directions conferences and the investigation meeting, and that it was appropriate for the investigation meeting to be held in Christchurch because of the location of the workplace, I decided to proceed with the investigation meeting set down for 29 March 2012 without Mr McEwan being present.

[5] Mr McEwan had been previously warned in writing by the Authority that if he did not wish to attend the investigation meeting he should provide such evidence as he wished to by way of sworn affidavit, although such evidence would not carry as much weight as he would not be present to have his evidence tested by me and by way of cross examination. Mr McEwan did not provide a sworn affidavit but did write a number of emails to the Authority in the period leading up to the investigation meeting making various points in support of his contention that Mr Hume had been a contractor. All of those points were put to Mr Hume by me during the investigation meeting and his answers to those points form a part of this determination.

[6] It is regrettable that Mr McEwan chose not to attend the investigation meeting as there were various issues that were the subject of direct conflicts of evidence and Mr McEwan's participation in the investigation meeting would no doubt have assisted me in deciding whose evidence was to be preferred in each case. However, in the absence of Mr McEwan, and given that Mr Hume was present in person and came across as a credible and honest witness, in each case where there was a conflict, I must prefer Mr Hume's evidence.

[7] After the investigation meeting I gave Mr McEwan the opportunity to make submissions in response to the submissions of Mr Hume's counsel, provided at the end of the investigation meeting. Mr McEwan took advantage of the opportunity and provided written submissions to the Authority. In those submissions, Mr McEwan provided, inter alia, more details about why he terminated the arrangement with

Mr Hume, including that Mr Hume had caused the loss of a major customer. However, these details should have been provided before the investigation meeting, preferably as oral evidence. It is not appropriate, for reasons of cost, to reconvene another investigation meeting to put these details to Mr Hume. In any event, the main gist of the allegations relied on by Mr McEwan, that Mr Hume had ceased to perform his duties adequately or at all, were put by me to Mr Hume at the investigation meeting.

The facts and evidence

[8] Mr Hume answered an advertisement on the Seek website around June 2011 which reported that the respondent was seeking a General Manager for its Christchurch-based pie making business. Mr Hume said that Mr McEwan had recently acquired the business. Unfortunately, a copy of the advertisement was not available for the Authority to consider but Mr Hume's evidence is that it made clear that the role was a permanent part-time employment position.

[9] Mr Hume received an email from Mr McEwan in respect of his application and then took part in a telephone conversation with him, during which Mr Hume explained that he was seeking a challenging role, using his considerable experience in the food packaging industry. Mr McEwan, who was based in Auckland at that time also, agreed that Mr Hume should visit the factory and give Mr McEwan his views on the operation.

[10] Mr Hume visited the factory on Tuesday, 14 June 2011 and sent an email to Mr McEwan setting out his initial views of the business. In the body of the email, Mr Hume stated the following:

Anyway I thought why don't we start with an 8 week contract \$30.00 per hr 20 to 30 hrs per week with use of the car. I have my own phone and laptop.

After that we can review and talk about whether we go ahead with a more permanent arrangement with some bonus formula in place.

I would like to devote my remaining hrs in the week to overseeing the trusts activities and mentoring the key staff there

[11] The reference to the *trust* in the final paragraph above is to the charitable trust at which Mr Hume worked part time.

[12] Mr Hume and Mr McEwan had another telephone conversation following this email during which Mr McEwan told Mr Hume that he wanted him to take up the position.

[13] Mr Hume explained to the Authority that he had suggested an initial eight week contract as a courtesy to the company as he could see that it did not have a lot of money available and he regarded it as an effective trial period for both parties. He had suggested \$30 an hour because that was the rate advertised on the Seek website.

[14] Mr Hume said that he had initially suggested that he provide his own laptop because he was not aware whether a laptop would be available within the respondent company. As it turned out, he was able to use the respondent's pc but used his own laptop at home. There was also a company car available for Mr Hume, which he used regularly once he was appointed.

[15] Mr Hume said that, during the telephone conversation with Mr McEwan after he had sent his email of 14 June, Mr McEwan had accepted the terms suggested by Mr Hume. Mr Hume's evidence was that he himself had suggested he be taken on as a contractor because he had felt that would be easier and cheaper for the respondent company but that Mr McEwan had said that he preferred to take him on as an employee.

[16] On questioning Mr Hume, it was not completely clear whether Mr McEwan had been talking about Mr Hume being taken on as an employee or being paid as if he were an employee through the payroll system. In any event, it is common ground that Mr Hume was paid through the payroll system like the other employees.

[17] Mr Hume said that, during the first few weeks of his period of working for the respondent, he spent it learning the ropes and getting to know the business. He said that Mr McEwan only appeared at the factory once throughout his entire period of working for the respondent.

[18] Mr Hume gave evidence that he was the manager in charge of the whole operation, which consisted of an employee called Tania, who had been with the company for several years carrying out sales and admin; another employee called Dee, who supervised the pie makers but who also carried out administrative work; a packer; a driver; four bakers and one cleaner.

[19] Mr Hume's duties consisted of all the duties that one would expect a general manager of a small operation to carry out, including disciplining staff, hiring staff, staff management, sales, marketing, debt collection, purchasing, banking, administration, setting up proper recording systems, administrative assistance and setting up a food safety programme.

[20] Unlike the other staff, Mr Hume did not clock in and out but submitted timesheets. He explained that this was because he had often carried out duties for the respondent away from the factory first thing in the morning, such as picking up supplies or meeting with customers and potential customers (who preferred meetings before 11am). He also used to carry out work for the respondent after he had left the office at around 2.30pm from which he would not return to the factory until the following day.

[21] Mr Hume explained that he did most of his work, which did not involve visits or travelling, in the premises of the respondent and only worked from home in the evenings, for which he did not charge. He said that this had been his way of working throughout his working life (which consisted of around 30 years as a manager).

[22] Mr Hume said that he had not been given an employment agreement but had not let this concern him because he had felt he was protected by statutory law in any event. He said that many of the other employees did not have copies of employment agreements in any event.

[23] Mr Hume explained that he owned his own company but that it had never traded and he was not GST registered. He explained that he had never worked as a contractor in his life. He also explained that he did have another job which Mr McEwan had been aware of when he had started, which involved working for a charitable trust. Mr Hume said that his hours working for the charitable trust had varied in accordance with the demands of his work at the respondent company.

[24] Mr Hume said that he used his own personal email address when emailing for the company, but this had been on the instruction of Mr McEwan who had wished to prevent the other staff being able to see Mr Hume's emails on confidential matters.

[25] Mr Hume said that he had a business card which stated his name and the name of the company, although not his position, and that other staff who had business cards

also had no position shown on them. This business card had been obtained by Mr Hume with Mr McEwan's knowledge.

[26] Mr Hume said that he had never taken a holiday or sick leave whilst he had been working for the respondent company and had not discussed with Mr McEwan what would happen if he had wished to take a holiday or became sick.

[27] Mr Hume was paid a bonus along with other staff who were employees.

[28] Mr Hume explained that, whilst he would run critical issues past Mr McEwan, such as major purchases or issues to do with pricing, he ran the day-to-day affairs of the office using his own initiative and experience. He gave an example of disciplining one of the bakers for having left a strongly abusive message on his telephone during the period when Christchurch had been disrupted by heavy snow. He had also disciplined another staff member for failing to follow instructions, although that had been with Mr McEwan's knowledge and approval.

[29] Mr Hume explained that his hours varied from week-to-week because the demands of the job varied from day-to-day and week-to-week. He said that he did not have to get permission from Mr McEwan as to when he would finish work on any day or whether he decided not to work on a Friday, which was the quietest day for the business.

[30] Mr Hume said that the company had engaged one contractor to his knowledge; namely, someone who ran the payroll and collected debts on behalf of the company twice a month. This arrangement had been terminated when Mr Hume had commenced working for the respondent and he took over the tasks.

[31] Although Mr Hume had originally suggested that the arrangement be reviewed after eight weeks, to which Mr McEwan had agreed, it appeared that neither of them noticed when the eight weeks had passed and so no discussions took place with respect to how the arrangement would work going forward. The arrangement eventually lasted 11 weeks before it was terminated by Mr McEwan.

[32] On 2 September 2011, Mr McEwan sent an email to Mr Hume at 11.06am with the subject heading *Items* and which read as follows:

Ian,

Can you drop all PFL items back to the factory ASAP. It is not working out but thanks for your efforts.

*car
keys
cards x 2
phone
cash
door keys
etc*

*many thanks all the best
Andrew*

[33] Mr Hume's evidence was that this email had come completely out of the blue and that he had had no idea why the arrangement was being terminated. He sent an email in reply on Sunday, 4 September which included the following:

This is a most peculiar way to end our relationship! You obviously have a lack of experience in this area. Firstly you do this over the phone or face-to-face not by email so a departure can be organised in an orderly and professional manner. Why did you think it necessary to toll bar the phone? Do you think I am going to rip you off? You are obviously a poor judge of character.

[34] Mr Hume went on to say in his email to Mr McEwan that he would not be returning the company property until he was paid "*all wages, holiday pay etc*". Mr Hume then went on to explain in considerable detail what he felt needed doing in the company for it to continue trading successfully.

[35] Mr McEwan's reply addressed some of those issues in respect of the business, which indicated that he seemed to disagree with some of the business decisions that had been taken. He also stated that he had enjoyed working with Mr Hume, apart from "*the email inertia*". He then stated that he needed the company items returned before any payments would be made.

[36] Unfortunately, the content of the email exchanges that followed between Mr Hume and Mr McEwan then rapidly broke down with Mr McEwan threatening to go to the Police if the company items were not returned and Mr Hume saying that he would take "*an improper dismissal case*".

[37] On the advice of his adviser, Mr Hume had returned the property belonging to the respondent company, including the car, in the week commencing 5 September but

the respondent did not pay the wage arrears and holiday pay that Mr Hume claimed were owing.

Findings

[38] The law relating to the determination of whether an individual is an employee or independent contractor is well settled in New Zealand. The starting point is s6(2) of the Employment Relations Act 2000 (the Act) which states:

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.

[39] Section 6(3) of the Act states as follows:

For the purpose of subsection (2) the Court or the Authority –

- (a) Must consider all relevant matters, including any matters that indicate the intention of the parties; and*
- (b) Is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.*

[40] The leading case on determining whether an individual is an employee or an independent contractor in New Zealand is the Supreme Court case of *Bryson v Three Foot Six Ltd* [2005] ERNZ 372 which held that the starting point is to examine the terms and conditions of the contract and the way it operated in practice and then to apply the three tests (the control test, the integration test and the fundamental or economical reality test).

[41] Unfortunately, no written contract of any kind (employment or contractor) between Mr Hume and the respondent company exists and the apparent intention of the parties seemed to be completely at odds, with Mr Hume saying that he had always viewed himself as being an employee and Mr McEwan stating in his emails to the Authority that Mr Hume had always been an independent contractor. Therefore, it is necessary to step back and look at the overall nature of the relationship.

[42] The most immediately notable aspect of the relationship is that Mr Hume was paid through the company's payroll system, with Kiwisaver deductions being taken, Kiwisaver employer contributions being made and annual leave accrual being shown. Mr McEwan has stated in his emails to the Authority on several occasions that he had allowed Mr Hume to be paid via the payroll system to assist Mr Hume so that he

would not have to deal with the taxation complications of being a contractor. On this point, it is to be noted that the respondent company was struggling financially (having made another employee redundant shortly before Mr Hume commenced, and having stopped using the services of a contractor to do its payroll and debt collection). It therefore seems unlikely that Mr McEwan would have voluntarily agreed to put Mr Hume through the payroll system, showing the accrual of holidays and making Kiwisaver contributions, simply to assist him without any obligation. Despite Mr McEwan's protestations that this is a red herring, it appears to me that the fact of putting Mr Hume onto the payroll system with Kiwisaver employer contributions being made, is strongly indicative of Mr Hume being intentionally treated as an employee by the employer.

[43] However, I cannot take this fact alone as determinative of Mr Hume's status, and so I turn to the other factors which came to light during the Authority's investigation, applying the three tests referred to above as I am obliged to do.

The control test

[44] This test considers the degree of control or supervision exercised by the employer over the alleged employee's work. Mr Hume's evidence was that there was little or no day-to-day supervision of his work by Mr McEwan but that this was because Mr McEwan was based in Auckland and because Mr Hume was effectively the most senior person in the Christchurch operation. In this sort of situation, I do not find the control test particularly assists me in deciding one way or the other because, although there was little direct day-to-day control over Mr Hume (which, on the face of it, would indicate that he was working as a contractor), the position was a particularly senior one, being the general manager, and so one would not expect a general manager to be subject to day-to-day supervision in any event.

[45] I therefore set this test aside.

Integration test

[46] This test examines whether the work performed by the alleged employee is an integral part of the business. I find this test much more helpful in this particular case. Mr Hume carried out virtually every aspect of a classic general manager role. He did not have cheque-signing powers (Mr McEwan retained those), but Mr Hume said that this had not been unusual when he had held the role of general manager in previous

companies. However, he had a business card, drove the company's vehicle, used the company's computer when he was in the office, had the right (arguably the obligation) to manage and discipline staff, represented the company in his dealings with the company's suppliers, customers and potential customers and signed off the accounts. He also carried out numerous other day-to-day duties consistent with that of a fully integrated general manager. Indeed, in order to do his job effectively, he needed to be fully integrated into the respondent company.

[47] Therefore, I believe that the application of the integration test strongly favours an interpretation of Mr Hume being an employee of the respondent rather than an independent contractor.

The fundamental or economic reality test

[48] This test considers whether the alleged employee engaged themselves to perform the services with the employer as a person or business on their own account.

[49] Mr Hume gave evidence that, although he had his own company, it was not trading and that he was not GST registered. Mr McEwan, in his emails to the Authority and in his written submissions, pointed out that Mr Hume had another role which he carried out at the same time as he worked as general manager. However, this is not unusual in a part-time position and does not, in itself, indicate that Mr Hume was clearly a contractor.

[50] Unlike a self employed plumber or a carpenter, say, who would typically take on different jobs with different customers as they arise, Mr Hume worked every week day (and the occasional weekend) for the respondent, week after week, until the arrangement was terminated by Mr McEwan.

[51] Taking all this into account, I believe that the fundamental test shows that it is more likely that Mr Hume was an employee than an independent contractor.

The overall picture

[52] Stepping back and reviewing the overall picture of this relationship, the evidence seems very strongly to indicate that Mr Hume was an employee and not an independent contractor of the respondent. The reference to the term *contract* in his email to Mr McEwan dated 14 June 2011 could equally refer to an employment

contract as easily as an independent contract and is not determinative either way in my view.

[53] The fact that Mr Hume and Mr McEwan agreed on a 8 week trial also does not mean that the arrangement could only be an independent contractor one. It is perfectly possible for an employee and employer to agree to an 8 week trial (although there are statutory requirements for them to be valid).

[54] Taking all these factors into account, I prefer the evidence of Mr Hume, and find that Mr Hume was an employee of the respondent, working on a part-time basis.

Was this a fixed term employment arrangement?

[55] Although the initial proposal was that Mr Hume would work for eight weeks and then have the position reviewed, this did not occur and Mr Hume continued working beyond the eight week point for a total of eleven weeks. In any event, the requirements of s66 of the Act, relating to fixed term employment, make clear that, before an employee and employer agree that the employment will be a fixed term, the employer must have genuine reasons based on reasonable grounds to specify that the employment of the employee is to end at the close of a specified date or period and advise the employee of when or how his employment will end and the reasons for ending in that way. It is established law that imposing a fixed term contract simply for the purposes of seeing whether the arrangement will work out or not is not a genuine reason pursuant to s66.

[56] I am therefore satisfied that this arrangement was not a fixed term agreement pursuant to s66 of the Act. Although there was an initial intention on both sides for the arrangement to be treated as an 8 week trial period, that period passed, and at that point became part-time permanent employment.

The claim of unjustified dismissal

[57] Having considered the employment status of Mr Hume and concluded that he was an employee, he is therefore entitled to raise a personal grievance of unjustified dismissal.

[58] Section 103A of the Act sets out the test for determining whether a dismissal is justifiable. As the termination of the employment of Mr Hume took place after 1 April 2011, the test to apply is as follows:

...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 occurred.

[59] Section 103A then goes on to set out the issues that the Authority must consider, including whether there was a sufficient investigation before dismissing, whether the employer raised concerns with the employee before dismissing, whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns and whether the employer genuinely considered the employee's explanation.

[60] It is clear from the email sent to Mr Hume by Mr McEwan on 2 September 2011 that none of those aspects of s103A were satisfied. Indeed, to the day of the investigation meeting, Mr Hume remained uncertain as to the true reason for the termination of the employment. Although allegations have been made by Mr McEwan in his submissions and emails to the Authority since Mr Hume lodged his statement of problem, the Authority has not been able to investigate them properly because of the absence of any independent evidence on the matter from Mr McEwan prior to the investigation meeting. Suffice to say that Mr Hume denied at the investigation meeting abandoning his employment and not communicating with staff, customers and Mr McEwan. As Mr McEwan's evidence is all unsworn and uncorroborated, I prefer Mr Hume's sworn evidence.

[61] It is clear that Mr McEwan's actions in terminating the employment of Mr Hume were procedurally unjustified by reference to s103A. I find, therefore, that Mr Hume succeeds in his personal grievance complaint.

Arrears of pay

[62] Mr Hume states that he is owed unpaid wages of \$1,350 gross, being pay relating to the last two weeks of his employment prior to his termination, amounting to 45 hours @ \$30 per hour. Mr McEwan has never asserted that Mr Hume has been paid for the final two weeks of his employment and I am therefore satisfied that the sum is owing to Mr Hume.

[63] Mr Hume also claims holiday pay of 8% which he calculates at a total of \$464.40. Although both Mr Hume's advocate had requested and the Authority had directed the respondent to produce time and wages records, these were not produced and so I am satisfied that it is appropriate to rely on Mr Hume's calculation in this respect.

Remedies in respect of the unjustified dismissal

Reimbursement of lost wages

[64] Section 123(1)(b) of the Act relates to 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. Mr Hume is, however, obligated to mitigate his loss by making reasonable efforts to find alternative employment.

[65] Mr Hume gave evidence that he was still unemployed, and had been trying to find an alternative position in the area of sales management, general management, operations and key account management. He said that he has applied for a small number of specific jobs and has had one interview since his dismissal. Although he is looking for part-time work ideally, he would be prepared to carry out full time work if necessary. He was restricting his search to the Christchurch area because he wanted to be near his 8 grandchildren.

[66] Whilst I am satisfied that Mr Hume has made efforts to find alternative employment, I believe that he may be restricting himself unduly by looking only for management level roles in Christchurch. He said he is looking for challenging work but there will no doubt be other employment available which would give him an income.

[67] For this reason, I do not accept that it is appropriate for me to exercise my discretion pursuant to s128(3) of the Act to order the respondent to pay to Mr Hume a sum greater than that set out in s128(2). Section 128(2) states that, whether or not the Authority provides for any other remedies, the Authority must, subject to subsection (3) in s124, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[68] Accordingly, I believe it is appropriate for the respondent to pay to Mr Hume the equivalent of 13 weeks' pay in respect of lost wages following from the

unjustifiable dismissal. Taking into account the hours set out in the timesheets supplied by Mr Hume, over a period of eight weeks he worked an average of 26 hours per week. In the absence of evidence that he would have worked less or more than these hours if he had not been dismissed, I award the sum of \$10,140 gross.

Compensation for humiliation, loss of dignity and injury to feelings

[69] Mr Hume gave evidence of the effect upon him of being dismissed. He said he had been shocked, he had been unable to speak to his family for three days due to his embarrassment, and had been prescribed antidepressants by his doctor. Whilst he had been made redundant on two previous occasions, on both occasions he had been taken through a proper process. On this occasion he had not been.

[70] I am satisfied that the manner by which Mr Hume had been dismissed was such that it would have caused Mr Hume a reasonably significant amount of humiliation, loss of dignity and injury to feelings and that it is therefore appropriate to award him compensation pursuant to s123(1)(c) of the Act.

[71] Mr Hume's advocate suggests that an appropriate sum would be \$10,000. He also asked me to take into account allegations that had been levelled at Mr Hume after the dismissal by Mr McEwan in various emails he had sent to the Authority. Whilst these allegations would no doubt have been upsetting to Mr Hume, I do not feel able to take them into account as they are completely untested, and they post date the dismissal, when the respondent's duty to Mr Hume as an employee had ceased.

[72] Therefore, I restrict myself to taking into account the manner and effect of the dismissal. I am aware that Mr Hume had only been working for the respondent between June and September and therefore believe that \$10,000 is excessive. I believe that an appropriate award is the sum of \$5,000.

Contribution

[73] Section 124 of the Act requires me to 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, to reduce the remedies that would otherwise have been awarded accordingly.

[74] Although allegations have been made by Mr McEwan against Mr Hume in his emails to the Authority which seek to persuade me that Mr Hume has been blameworthy, it has been impossible to test these allegations fully because Mr McEwan failed to attend the investigation meeting and they were mostly of a general nature. Mr McEwan had also asserted that Mr Hume had abandoned his employment and had failed in his duties. Again, it was impossible to properly test these allegations in the absence of Mr McEwan. Mr Hume was adamant that he had not abandoned his employment and had continued to communicate with both staff and customers until he was dismissed.

[75] On the evidence available, I do not see any justification in reducing the awards as I cannot find any cogent evidence that Mr Hume's actions were in any way blameworthy. Therefore I decline to reduce the awards pursuant to s124 of the Act.

Interest

[76] Mr Hume asks that interest be awarded on the holiday pay and arrears of wages. Paragraph 11 of schedule 2 of the Act provides that, in any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

[77] Accordingly, I order that the respondent must pay interest at the rate of 5% per annum on the sums of \$464.40 and \$1,350 to be calculated from 2 September 2011 until the sums are paid in full.

Penalty

[78] Mr Hume seeks a penalty against the respondent for breach of s130 of the Act. Whilst the respondent has failed to comply with a request for wage and time records, neither Mr Hume nor the Authority has been particularly handicapped by the respondent's failure to supply them. Arguably, as well, if the respondent had truly believed that Mr Hume was a contractor, no obligation to have kept wage and time records would have arisen in any event. For these reasons, I decline to order the payment of a penalty against the respondent.

Summary

[79] The respondent is to pay to Mr Hume the following sums:

- a. \$464.40 gross, plus interest at 5% per annum, to be calculated from 2 September 2011 until the sum is paid in full;
- b. \$1,350 gross, plus interest at 5% per annum, to be calculated from 2 September 2011 until the sum is paid in full;
- c. \$10,140 gross in respect of lost wages as a result of Mr Hume's unjustifiable dismissal; and
- d. \$5,000 in respect of compensation for humiliation, loss of dignity and injury to feelings.

Costs

[80] Mr Hume's advocate asks that I award costs against the respondent immediately. However, as Mr McEwan was not at the investigation meeting I believe that it would be in breach of the rules of natural justice to award costs against the respondent without giving him a chance to address the issue specifically. I therefore adopt the normal procedure and reserve costs.

[81] Any claim for costs by Mr Hume 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