

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 71
3148325

BETWEEN	DARCY HARRISON Applicant
AND	KEITH BURMEISTER CONTRACTING LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Paul Matthews, counsel for the Applicant Keith Burmeister for the Respondent
Investigation Meeting:	28 October and 20 December 2022 at Palmerston North
Submissions received:	28 October and 20 December 2022 from Applicant 20 December 2022 and 6 January 2023 from Respondent
Determination:	16 February 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant worked for the respondent driving rubbish trucks. He was dismissed from his employment, after he wrote on a householder's rubbish bin. He claims he was unjustifiably suspended, and unjustifiably dismissed. He seeks remedies of lost wages, compensation for hurt and humiliation, penalties for failures to provide an employment agreement and keep and/or provide wage and time records, and payments for outstanding holiday pay and for public holidays worked, as well as a penalty for failure to pay these sums when due.

[2] The respondent denies the claims. It says that the applicant was dismissed after he failed to follow instructions not to write on bins, and that as a result of his actions, the head contractor refused to let the applicant carry out the work any more. The respondent also says that the applicant was provided with an employment agreement and paid out his annual leave in his final pay.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from the applicant and his partner, Ms Sally Lewis. Mr Keith Burmeister, director of the respondent attended the investigation meeting on behalf of the company. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably suspended?
- (b) Was the applicant unjustifiably dismissed?
- (c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to his grievances?
- (e) Did the applicant have a written employment agreement? If not, should penalties be awarded?
- (f) Was the applicant paid for his annual leave and/or any public holidays not worked? If not, what amounts might be owed?

- (g) Should penalties be awarded for any failures to comply with section 130 of the Employment Relations Act 2000 requiring the employer to keep and provide wage and time records, and/or any failures to pay in accordance with section 13 of the Wages Protection Act 1983?
- (h) Should either party contribute to the costs of representation of the other party.

Background

[6] The applicant, Mr Harrison, was employed by the respondent company, represented by its sole director and shareholder, Mr Burmeister in February 2019. Mr Harrison's job was to drive a recycling truck in Fielding. He performed residential curb side pick-up of recycling bins provided by the local council to households.

[7] Mr Burmeister, through the respondent company, contracted to a firm known as "Smart Enviromental". Mr Burmeister provided a recycling truck, which was driven by Mr Harrison, and the collected recycling was delivered to Smart Enviromental's yard for sorting and processing. Mr Harrison had limited dealings with Smart Environmental, as his work was directed by Mr Burmeister, but he was known to the staff, as he came to the yard daily.

[8] Mr Harrison initially worked four days per week, Tuesday to Friday. He was paid at a flat weekly rate of 30 hours per week, regardless of how long it took him to finish his set routes. Mr Harrison gave evidence that he was happy to be paid at a flat weekly rate. After a short time, Mr Harrison was asked to work on Mondays also, and from that time on, was paid at the rate of \$25.00 per hour, for 40 hours each week.

[9] Sometimes, Mr Harrison encountered recycling bins that could not be emptied. This could be for a variety of reasons, including when a bin had fallen over, was too damaged to be moved, was placed in such close proximity to a vehicle it could not be accessed without risk of damage to the vehicle, or (most commonly) recycling bins contaminated with non-recyclable waste. Picking up a bin filled with non-recyclable waste could be unsafe for Mr Harrison and others performing the sorting and recycling, particularly if the waste was for example, hot (such as ashes), flammable (such as building waste including bitumen products), sharp (building waste, broken glass), or even animal/carcass remains.

[10] When Mr Harrison encountered a bin that he could not properly or safely add to his recycling compactor, Mr Harrison was to put a pre-printed sticker on the relevant bin with the relevant notation indicating why the bin had not been emptied. He was also to take a photo of the bin and upload the photo to a portal run by the local Council. This served multiple purposes, including creating a record with the Council if the homeowner were to inquire with the Council why their bin had not been emptied.

[11] Mr Harrison was to obtain these stickers from the office at Smart Environmental. He explained that the stickers were kept in a small locked room together with other supplies, so he had to ask the office staff if they could give him a new roll of stickers when he needed them. He explained there was always a delay, and he would always be made to wait for the stickers to be brought to him, usually for between 15 and up to thirty minutes. Sometimes, if the delay was too long, he would need to start his round, and come back at the end of the day or the following day.

[12] On 16 September, Mr Harrison did not have any stickers for his daily round. He had asked to be provided with them, but after being made to wait for more than 20 minutes, he had to leave to start his round for the day.

[13] When he encountered a bin that could not be emptied, he wrote on it with a felt-tip pen with the reason the bin could not be collected. He explained that he always used felt tips that could be wiped off with a cloth, and never used permanent markers.

[14] When he got back to the yard at the end of the day, one of the yard staff told him that "he was in trouble". Mr Harrison said that he guessed it was about writing on the bins, as he had previously done this when he had run out of stickers, and had been warned not to by Mr Burmeister.

[15] Mr Burmeister then spoke with Mr Harrison on the phone. Mr Burmeister initially said "what have you done, I've just lost the contract". Mr Burmeister told Mr Harrison to take the next two days (which were a Thursday and Friday) off work while Mr Burmeister "sorted it out", or words to that effect. Mr Harrison agreed and arranged to get back in touch with Mr Burmeister over the weekend. He gave evidence, which was supported by the evidence of his partner Ms Lewis, that he was so stressed by this that he had to go to his doctor for mental health support, and his doctor gave him two

weeks sick leave. Ms Lewis then spoke with Mr Burmeister as had been arranged, and it was agreed that Mr Harrison would get two weeks off work on paid leave.

[16] After his two week's sick leave, Mr Harrison arrived at Smart Environmental's yard for his usual Monday round. He completed his round with no incident.

[17] On Tuesday morning, he arrived for work again, and was prevented from entering the yard by the Smart Environmental office manager, who told him in no uncertain terms that he was not to enter, or indeed, return. Mr Harrison was not even allowed to retrieve his belongings.

[18] Mr Harrison then called Mr Burmeister, who said that he was to go home, and that he (Mr Burmeister) would be in touch.

[19] Mr Harrison and Mr Burmeister were able to meet for a face-to-face discussion on Wednesday. According to Mr Harrison, Mr Burmeister explained to him that "Smart Environmental gave me two choices, [being] keep your employee or lose the contract, or keep the contract and lose your employee". Mr Harrison objected, saying that he himself had received no due process, nor any warnings in advance. Mr Burmeister then said "yes I know, I went up to the owner of Smart Environmental, but this is how it is, I've got no more work on the recycle trucks, I've got to keep this contract".

[20] Mr Harrison understood that his job was at an end. He retrieved his personal things from the truck, and when on his way. He was paid out wages and holiday pay, together with a hand-delivered letter setting out the calculation of his final pay. Mr Harrison makes claim for further holiday pay which he says remains outstanding.

[21] Mr Harrison and Mr Burmeister did have some discussions after this regarding other types of work that Mr Burmeister could offer that did not involve driving the recycling truck. Mr Harrison declined to accept these offers of other work.

[22] Mr Harrison was extremely upset by his dismissal. He is of the view that his dismissal was related to his writing on the recycling bins. He points out that Mr Burmeister required him to use the council stickers, but did not provide him with those stickers, leaving him in the unsatisfactory situation where he was beholden to Smart Environmental office staff. He also expresses that he feels let down because Mr Burmeister told him on the day that he (Mr Burmeister) would "sort it out", but it now

appears to him that Mr Burmeister had done nothing to resolve the apparent tension between Smart Environmental and Mr Harrison. Mr Harrison points out he was not in a position to know what Smart Environmental wanted from him as he was employed by Mr Burmeister, and reported to Mr Burmeister.

[23] Mr Burmeister says Mr Harrison's job came to an end because Smart Environmental "unapproved him to drive my truck"¹. He also says that Mr Harrison was aware of the need to use approved stickers on any uncollected bins, and had been told before in a formal way not to write on uncollected recycling bins. Mr Burmeister advises that the real problem was not just that Mr Harrison wrote on the bins instead of using the approved stickers, but that Mr Harrison wrote rude messages on the bins, including use of "the F-word", and that it was this language that caused the local council to decree that Mr Harrison was no longer allowed to work on the council recycling route².

[24] Mr Burmeister believed that Mr Harrison could have got the stickers from the Smart Environmental office, but he "didn't get on" with the office staff.

[25] In particular response to this last point, Mr Harrison acknowledges that one of the ladies working in the office appeared to have a dislike of him, and he felt she looked down on him, but says he had a working relationship with the other office lady.

[26] The impact of his dismissal on Mr Harrison was severe. He has suffered from depression and anxiety, and continues to receive support from his doctor, including prescribed medication. After some six months, Mr Harrison was effectively not able to work due to an unrelated physical health matter which has since resolved following surgery. Accordingly, he claims for six months lost remuneration, as well as compensation for hurt and humiliation resulting from his dismissal.

[27] In addition, he claims for what he says is unpaid annual leave in the amount of 132.53 hours, payment for 9 days in lieu for identified public holidays he worked on, and payment for working at those days at the statutory rate of time-and-a-half; plus annual leave calculated at the statutory rate of 8% and employer contributions to Kiwisaver calculated at the statutory rate of 3% on any wage arrears awarded.

¹ In the written statement of reply.

² This was what Mr Burmeister explained had happened in person at the investigation meeting.

Findings

Dismissal

[28] I must first consider whether Mr Harrison's dismissal, and how it occurred, was what a fair and reasonable employer could have done in all the circumstances at the time. I must consider:

- a. Whether, having regard to the resources available to him, Mr Burmeister sufficiently investigated the allegations against Mr Harrison before dismissing Mr Harrison; and
- b. whether Mr Burmeister raised the concerns he had with Mr Harrison before dismissing him; and
- c. whether Mr Burmeister gave Mr Harrison a reasonable opportunity to respond to his concerns before dismissing; and
- d. whether Mr Burmeister genuinely considered Mr Harrison's explanation (if any); and
- e. any other factors I think are appropriate.

[29] When considering each of these points, I acknowledge that Mr Burmeister was a sole owner-operator, and did not appear to have a large range of resources available to him. However, I must find that Mr Burmeister did not sufficiently investigate the allegations against Mr Harrison before dismissing him, nor did he properly raise all the concerns that he had before ending Mr Harrison's employment.

[30] This is shown by the way that Mr Harrison does not have a clear picture as to why he was dismissed. He says he was told by Mr Burmeister that Smart Environmental had forbidden Mr Harrison from driving the truck. Even if this had occurred, Mr Harrison was never told why in as many words. In contrast, Mr Burmeister's in-person evidence was that it was the council, rather than Smart Environmental, that issued the ultimatum to him that Mr Harrison was no longer to drive the recycling truck. There may be very little in this distinction, given that the council was effectively the head contractor, with both Smart Environmental and Mr Burmeister having the role of sub-contractors.

[31] Mr Burmeister was asked to provide evidence demonstrating that he had lost the relevant contract due to Mr Harrison's actions, but he has advised that he was unable to find the relevant email³.

[32] In addition, there is a conflict of evidence as to what the root of the problem was. Mr Harrison says that he thinks he was dismissed for writing on the bins in lieu of using the approved stickers. In contrast, Mr Burmeister says that it was not simply writing on the bins that was the problem, but it was the rude language (and use of the F-word directed at homeowners) that was the true or final cause of Mr Harrison's dismissal.

[33] In this respect, in-so-far as there is a conflict of evidence, I prefer the evidence of Mr Burmeister as to the use of rude language. Mr Harrison accepts that he had been spoke to about the writing on the bins in the past, and when he was told that he was 'in trouble', his immediate reaction was of extreme concern for his job. This is consistent with use of rude language in circumstances where he had already been told otherwise, rather than with a "first offence" without aggravating use of language.

[34] However, the failure to investigate, and to properly and clearly communicate to Mr Harrison what the problem was, means that Mr Burmeister was never in a position to fully and fairly discuss what had happened with Mr Harrison. This includes giving Mr Harrison a reasonable opportunity to respond, and taking the time to consider Mr Harrison's explanation, whatever that might have been.

[35] It also means that Mr Harrison and Mr Burmeister were never in a position to have a constructive or timely discussion about the position taken by the council and/or Smart Environmental. Mr Harrison is not sure what happened, as he was not present and was not told in any detail by Mr Burmeister what happened. Mr Burmeister refers to a meeting with the council, although he is unable to be precise as the date. What Mr Burmeister does say is that he was surprised that Mr Harrison was denied entry to the Smart Environmental yard on the Tuesday, and he had not been told about this in advance. He notes that Mr Harrison rung him promptly that morning, and by the time he had finished speaking to Mr Harrison, he had received a missed call, which he suspects was a late call to him advising that he had lost the recycling contract, which was confirmed later that day. If Mr Harrison had been properly appraised of the

³ By letter to the Authority dated 6 January 2023.

suddenness of this development from Mr Burmeister's perspective, it might have allayed some of Mr Harrison's concerns, but these discussions never occurred.

[36] Taking the minimal process, and lack of meaningful discussions and consultation with Mr Harrison prior to advising his job was at an end into account, I find that Mr Harrison was unjustifiably dismissed.

Remedies – lost wages

[37] I must now consider what remedies should be awarded in light of what I have found to be Mr Harrison's unjustified dismissal.

[38] Mr Harrison claims for 6 months of lost remuneration, being the time he was out of work up until the time he had an operation for an unrelated health matter. Mr Harrison gave verbal evidence that he did apply for some jobs, but he believed that being up-front about some mobility problems and being on the waiting list for an operation did not help his chances. In addition, Mr Harrison provided evidence indicating he had been placed on the equivalent of the sickness benefit.

[39] Section 128(2) of the Act provides that, where an employee has lost money as a result of a personal grievance, the Authority must 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. Although Mr Harrison has been out of work for more than 3 months, I consider it appropriate to award 3 months lost remuneration, for two reasons. First, my view is that it cannot be said for certain that Mr Harrison would have been able to work fully for the entirety of the 6 months he claims, or that his employment would have continued in light of the apparent disconnect between Mr Burmeister, Smart Environmental, and the local council. Second, both Mr Burmeister and Mr Harrison referred to other work offered by Mr Burmeister, which was turned down by Mr Harrison.

[40] Accordingly, orders are made for the payment of three month's wages to Mr Harrison. This is to be calculated at his weekly rate of \$1,000 gross, for 13 weeks, being \$13,000 gross. In addition, Mr Harrison is entitled to receive payment of annual leave at the statutory rate of 8% on this sum, being \$1,040 gross. As a member of Kiwisaver, Mr Harrison is further entitled to contributions on this sum at the statutory rate of 3%, being \$390 gross.

Remedies – compensation for hurt and humiliation

[41] I must also consider Mr Harrison's claim for compensation for hurt and humiliation in the sum of \$25,000. Mr Harrison and Ms Lewis gave compelling evidence of the impact the dismissal had on Mr Harrison. This evidence was supported by unambiguous medical evidence, confirming the severity of what Mr Harrison had suffered. Mr Burmeister also accepted that Mr Harrison had been badly, and clinically, affected by the dismissal. I accept this evidence. My view is that an appropriate amount of compensation is \$20,000, taking into account the severity of the impact on Mr Harrison, and the lack of process followed by Mr Burmeister, with some allowance made for Mr Burmeister's meeting in person with Mr Harrison, and accepting that Mr Burmeister's approach to all his employment dealings has been by way of in-person conversations rather than written correspondence.

[42] In addition, I must also consider the extent to Mr Harrison's actions contributed towards the situation that gave rise to the personal grievance; and whether Mr Harrison's actions require a reduction in the remedies that would otherwise be awarded to him. I must consider whether Mr Harrison's actions are both causative of the outcome and blameworthy⁴.

[43] Turning first to whether Mr Harrison's actions were causative of the outcome of dismissal, I have accepted that it is more likely than not that Mr Harrison wrote inappropriate messages on householder's rubbish bins, and that this did contribute to the ending of his employment, as it was this conduct in particular which was unacceptable to Smart Environmental and the local council.

[44] Mr Harrison's conduct was blameworthy. Such messages are offensive, and unnecessary, and clearly outside the scope of Mr Harrison's duties and obligations.

[45] However, my view is that this was not the only cause leading to Mr Harrison's dismissal. For example, some other outcome might plausibly have resulted if proper consultation had occurred, particularly in light of the evidence from both parties that Mr Burmeister offered other types of work to Mr Harrison, albeit after the relationship had ended.

⁴ [1] *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

[46] Weighing this, I consider that a reduction in remedies of 20% is appropriate. In reaching this conclusion, I have borne in mind the inherent inequality of power as between Mr Harrison and Mr Burmeister, as Mr Burmeister was at all times the person in control of not just the employment relationship, but was responsible for managing the “upstream” relationships that Keith Burmeister Contracting Limited held with both Smart Environmental and the council.

[47] Mr Harrison is therefore awarded the sum of \$16,000 in compensation for hurt and humiliation.

Unjustified Disadvantage - Suspension

[48] Mr Harrison has also raised a claim that he was unjustifiably suspended in the two weeks and two days prior to his dismissal, and that this amounts to an unjustifiable disadvantage.

[49] I find that no suspension occurred. Mr Harrison was asked by Mr Burmeister to take two days off at the end of the week, to allow Mr Burmeister to find out what had occurred that upset Smart Environmental and the council. Mr Harrison agreed to this. This is not a suspension, but is an agreed period of time away from work.

[50] After this, Mr Harrison went to his doctor, and was off work for two weeks on sick leave. He advised Mr Burmeister of this, and Mr Burmeister accepted that the sick leave was genuine. This is also not a period of suspension, but is a period of sick leave. Mr Harrison had sufficient length of service that he should have had paid sick leave available and should have been paid for this time.

[51] Mr Harrison is entitled to be paid for this period of 2 weeks and two days. He is also entitled to be paid for the last three days of his employment, being the Monday, Tuesday, and Wednesday of the last week, with dismissal occurring on Wednesday 7 October 2020 after Mr Burmeister and Mr Harrison were able to speak to each other in person.

[52] Following the investigation meeting held on 20 December 2022, at the request of the Authority, Mr Burmeister provided pay records from his accountant. These records show that Mr Harrison worked for, at first 30 hours per week, and then 40 hours per week. They show a weekly (rather than an hourly) rate of pay. At the time his

employment ended, Mr Harrison was earning \$1,000 per week gross. These records are not sufficient to comply with the requirements of section 81 of the Holidays Act 2003.

[53] The pay records provided by Mr Burmeister show that Mr Harrison was paid his normal wages for the 2 weeks he took as sick leave at the end of September 2020. They also show that Mr Harrison was paid his normal wages for the week previous, which included the 2 days taken off work by agreement, and that he was paid his normal wages for his last week of work.

[54] These payments are consistent with the circumstances described to me by the parties, and I can find no suggestion that wages are owing. Accordingly, no orders are made.

Payment for Annual Leave on the ending of employment

[55] The pay records show that Mr Harrison was paid for 2 weeks annual leave at the ending of his employment⁵. Mr Harrison gave evidence that he took 1 week off work in January 2020 as a paid holiday, but apart from this, had not taken any leave during his employment. Mr Burmeister accepted that this was likely correct. In addition, he provided no pay or time records to Mr Harrison at all. Having viewed the records that were provided, I am satisfied that the respondent has failed to comply with section 81 of the Holidays Act 2003, and that this failure has prevented Mr Harrison from being able to bring an accurate claim for wages and holidays entitlements owed.

[56] Accordingly, I accept as proved in the absence of evidence to the contrary, statements made by Mr Harrison as to the holiday pay or leave pay actually paid to him, and the annual holidays, public holidays, and sick leave actually taken by him, in accordance with section 83 of the Holidays Act 2003.

[57] Mr Harrison commenced employment on approximately 4 February 2019. This is shown by the pay records. This means that, as of his anniversary date on 4 February 2020, section 16 of the Holidays Act 2003 provides that he was entitled to 4 weeks annual leave less the week he advises he had already taken, a total of 3 weeks annual

⁵ The notation on the pay records shows a payment of \$2,000 net, being the equivalent of 2 weeks wages for Mr Harrison, and the notation describes this payment as states “2 weeks annual leave”.

leave. In addition, he is entitled to be paid for annual holidays accrued from then to the ending of his employment at the rate of 8%, as provided for in sections 24 and 25 of the Holidays Act 2003.

[58] The pay records provided by Mr Burmeister show that Mr Harrison was paid out only 2 weeks annual leave, meaning that Mr Harrison is still owed 1 week's annual leave calculated in accordance with section 24 of the Holidays Act 2003. He is also owed an additional amount calculated at the rate of 8% of Mr Harrison's gross earnings since 4 February 2020, in accordance with section 25 of the Holidays Act 2003.

[59] This amounts to the sum of \$1,000 gross for the 1 week of leave calculated at Mr Harrison's ordinary weekly pay, plus the additional sum of \$2,800, (being \$35,000 for 35 further weeks of work at \$1,000 per week, multiplied by 8%). Kiwisaver at the rate of 3% is also payable on this sum, at the rate of 3%, being an additional \$114.00 gross. Orders are made for payment accordingly.

Payment for work on Public Holidays and Alternative Days

[60] Mr Harrison advised that he worked on certain public holidays, and was not paid time-and-a-half for the work done, and did not receive any payment for alternative holidays not taken at the end of his employment. The pay records demonstrate that Mr Harrison's pay did not include any additional payments that might account for these entitlements.

[61] Specifically, Mr Harrison advised that he worked on the following nine public holidays:

- a. ANZAC Day Thursday 25 April 2019;
- b. Labour Day Monday 28 October 2019;
- c. Boxing Day Thursday 26 December 2019;
- d. Day After New Years Day Thursday 2 January 2020;
- e. Wellington Anniversary Day Monday 20 January 2020;
- f. Waitangi Day Thursday 6 February 2020;
- g. Easter Monday 13 April 2020;
- h. ANZAC Day Observed Monday 27 April 2020; and
- i. Queen's Birthday Monday 1 June 2020.

[62] He was not paid at the rate of time-and-a-half for work done on a public holiday, as required by section 50 of the Holidays Act 2003. Instead, he received his normal wages for the relevant weeks. The pay records support this, and show no increase in pay for those weeks, eg, Mr Harrison did not receive pay at the rate of time-and-a-half for working on a public holiday.

[63] When I put these public holiday dates to Mr Burmeister, Mr Burmeister accepted that Mr Harrison did work on those days, and said that if there were problems with payment, he would put this right.

[64] Mr Harrison is entitled to be paid at the rate of time-and-a-half for work done on a public holiday. Mr Harrison receives pay of \$1,000 gross per week, for a five-day week. This amounts to pay of \$200 gross per day.

[65] Mr Harrison has been short-paid by the “half” portion of the statutorily required time-and-a-half, that is, the pay records show that for the nine public holidays identified above, Mr Harrison received payment of \$200 gross per day, instead of \$300 gross per day. Over nine days, this amounts to \$900 gross, which remains outstanding.

[66] Holiday pay at the rate of 8% is also payable on this outstanding amount, being an additional \$72.00 gross. Kiwisaver contributions at the rate of 3% are also payable, being a further \$27.00. Orders for payment of \$999 gross to Mr Harrison are made accordingly.

[67] In addition, when an employee works on a public holiday, they must be provided with a paid alternative holiday (formerly called a day in lieu). This is set out at section 56 of the Holidays Act 2003. Mr Harrison gave evidence that he was never provided with any paid days off as alternative holidays, and the pay records such as they are, suggest that this is correct.

[68] Where employment ends before an employee has been able to take an alternative holiday as paid time off, any untaken alternative holidays must be paid out at the ending of employment, as set out at section 60 of the Holidays Act 2003.

[69] The outstanding alternative holidays must be calculated at the rate of the employee’s relevant daily pay for average daily pay as at the ending of employment, which is also set out in section 60 of the Holidays Act 2003.

[70] Mr Harrison is entitled to 9 alternative holidays, and his daily rate of pay is \$200 gross. Accordingly, he is entitled to receive pay for these nine days at the rate of \$1,800 gross. In addition, holiday pay at the rate of 8% is also payable, being \$144.00 gross. Kiwisaver contributions are also payable at the rate of 3%, being a further \$54.00. Orders for payment of \$1,998 gross to Mr Harrison are made accordingly.

Penalties for failures to keep and/or provide wage and time records

[71] Mr Harrison claims that he was not provided with copies of his wage and time records when he requested these records, and that penalties should be awarded for any failures to comply with section 130 of the Employment Relations Act 2000 requiring the employer to keep and provide wage and time records. Mr Harrison has also raised a claim for penalties for failures to make payment to him in accordance with section 13 of the Wages Protection Act 1983.

[72] Mr Harrison requested copies of his wage and time records formally, via a letter from his representative, on 12 November 2020. Mr Burmeister did not provide any such records to Mr Harrison. In the end, Mr Burmeister provided pay records to the Authority on 20 December 2022, at the request of the Authority. The pay records provided do not meet the requirements of either section 130 of the Act, or section 81 of the Holidays Act 2003.

[73] It is clear that the failure by the respondent to provide wage and time records to Mr Harrison has hindered Mr Harrison in the bringing of his claims for unpaid wages and Holidays Act entitlements, and complicated his claims around potential suspension and/or sick leave as he did not know for sure what payments he received, or how his employer had classified those payments. This is particularly shown by the concerns raised by Mr Harrison about payment for the two day's time he had off at Mr Burmeister's request, and how payment for the sick leave he took immediately prior to the ending of his employment was calculated and paid.

[74] The pay records have been prepared by an accounting firm. They also show that Mr Burmeister was involved from time to time in directing the various accounts from which payments were made to Mr Harrison. Yet, despite Mr Burmeister's regular involvement with how Mr Harrison was paid, and his seeking professional advice and

support from an accountant, Mr Burmeister did not provide records when requested, and the records he did provide were not fully compliant.

[75] When questioned about this, Mr Burmeister explained that the records had not yet been finalised by his accounting firm. This is not a reason for failure to comply, as the statutory requirement to keep and provide such records is on-going. In addition, this does not satisfactorily account the delay of some 2 years, from the request for records made in November 2020 through to their eventual provision to the Authority in December 2022.

[76] Taking all these factors into account, I find that the respondent has breached the statutory requirement to keep and to provide wage and time records. The failure to do so negatively impacted Mr Harrison's ability to understand what he had been paid and why, and has made it more challenging for him to bring a claim in the Authority for his statutory entitlements. In addition, the imbalance of power between the parties is again clear, with the records in the end only being provided to the Authority (rather than to Mr Harrison) after the Authority made specific orders on the matter. Mr Burmeister has provided no good reason as to why the records that do exist were not provided to Mr Harrison in a timely way.

[77] There is a need for general and specific deterrence of such conduct in the future. Accordingly, I award a penalty of \$4,000 against the respondent for this breach, taking into account that the records were eventually provided and were helpful to the Authority. Half of this penalty should be awarded to Mr Harrison, in recognition of the fact that he should not have needed to seek the assistance of the Authority in obtaining access to these records at all.

[78] Mr Harrison has also claimed penalties for breaches of the Wages Protection Act 1983. In the course of Mr Harrison's evidence, he indicated that there were occasions where his weekly wages were paid late, but that they were always paid. He also indicated that he accepted this, as payment was always made. As previously indicated, there were also some concerns about payments during the last 4 weeks of Mr Harrison's employment which have now been clarified by the pay records. The pay records indicate that Mr Harrison's wages were paid in full on a weekly basis. In these circumstances, I decline to award any penalty.

Was there a written employment agreement? If not, should penalties be awarded?

[79] Mr Harrison has claimed that he was never provided with a written employment agreement, and that penalties should be awarded for this breach of the Employment Relations Act 2000.

[80] There is a conflict of evidence on this point. Mr Burmeister gave evidence that he did provide Mr Harrison with a written employment agreement, but that Mr Harrison never signed or returned the agreement. Mr Burmeister was able to produce a hand-written draft agreement, which he said was then typed up by his daughter, and this typed version was given to Mr Harrison while Mr Burmeister retained the draft.

[81] In these circumstances, I prefer the evidence of Mr Burmeister. Equally, I am of the view that any failure to provide an employment agreement was not a material contributor to the ending of Mr Harrison's employment. In these circumstances, I decline to award a penalty.

Orders

[82] Keith Burmeister Contracting Limited is ordered to pay to Darcy Harrison within 28 days of the date of this determination:

- a. Three months' lost remuneration, being \$13,000 gross;
- b. Payment of annual leave on this sum, being \$1,040 gross;
- c. Payment of Kiwisaver contributions on this sum, being \$390 gross;
- d. The sum of \$16,000 without deduction, as compensation for hurt and humiliation;
- e. The sum of \$3,914 gross, as unpaid holiday pay owing on the end of employment (including payment for Kiwisaver contributions);
- f. The sum of \$999 gross, as short-payment for work done on nine identified public holidays (including payment for Kiwisaver contributions);
- g. The sum of \$1,998 gross, as short-payment for nine alternative holidays not taken as at the ending of employment (including payment for Kiwisaver contributions);

- h. The sum of \$4,000 without deduction as a penalty for the respondent's failure to provide wage and time records, half to be paid to the Crown Account, and half to be paid to Mr Harrison.

Costs

[83] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[84] If asked, the parties could expect the Authority to determine the matter of costs on the basis of the usual daily tariff for 1 day (eg, \$4,500), noting that the investigation meeting was held over two part days.⁶

[85] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Claire English
Member of the Employment Relations Authority

⁶ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>