

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 109
5563929

BETWEEN BRENT HIGGINS
 Applicant

AND ALAN SAMSON LIMITED
 trading as Calendar Girls
 Respondent

Member of Authority: Christine Hickey

Representatives: Kevin Murray, Advocate for the Applicant
 Erin Locke, Counsel for the Respondent

Investigation meeting: 13 April 2016

Submissions: 21 April and 13 May 2016 from the Applicant
 3 May 2016 from the Respondent

Determination: 13 July 2016

DETERMINATION OF THE AUTHORITY

- A. Brent Higgins was an employee of Alan Samson Limited for the entire period of his engagement.**
- B. Brent Higgins' claims of unjustified disadvantage UDV 1-5 and 10 are struck out. The Authority has not granted leave for those claims to be raised outside of the 90-day period specified in s 114 of the Employment Relations Act 2000.**
- C. Alan Samson Limited did not unjustifiably disadvantage Brent Higgins.**
- D. Alan Samson Limited did not constructively dismiss Brent Higgins.**
- E. I have reserved my determination on costs and set a timetable for submissions, if necessary.**

Employment relationship problem

[1] Brent Higgins began working as a duty manager for Alan Samson Limited (ASL), trading as Calendar Girls nightclub, in Christchurch on 24 April 2014. He claims ASL subjected him to a number of unjustified actions that caused him disadvantage. He says ASL unjustifiably constructively dismissed him on 21 September 2015.

[2] Mr Higgins claims he is owed wages, bonuses, unpaid sick leave, under-paid public holiday hours and holiday pay on those un-paid and under-paid wages.

[3] He also claims that ASL breached its duty of good faith to him and that it failed to provide time and wages records. He claims penalties for those breaches.

[4] ASL denies all claims made. In addition, ASL has applied to strike out a number of the claimed personal grievances of unjustified disadvantage on the basis that Mr Higgins did not raise them within the 90-day period after the date on which the action or actions alleged to amount to a personal grievance occurred or came to his notice.

[5] ASL does not consent to any of those personal grievances being raised outside the 90-day time limit.

[6] ASL says that the first time any personal grievances were raised with it was by a letter dated 16 April 2015. Therefore, it says that the only claims of unjustified disadvantage that the Authority has jurisdiction to determine are those that occurred within the 90 days before 16 April 2015 and within 90 days prior to another letter of 21 September 2015.

[7] The parties agreed that if Mr Higgins made an application to the Authority for leave to raise the grievances out of time, ASL would have an opportunity to make written submissions in relation to that. I received those submissions before the investigation meeting. However, I decided that in the interests of efficiency, and because I needed to hear some evidence, I would determine the strike out application and the application for leave after the investigation meeting. Therefore, this document determines the preliminary and the substantive claims.

[8] I have not set out all the evidence given and every submission made by each party.¹ In addition, if either party mentioned another employee in evidence but that employee did not give evidence at the investigation meeting I have not named them in this determination.

[9] Mr Higgins, Scott McCormick, ASL's national operations manager, Aaron Greenwood, a director of ASL and Neisha Chapman, Christchurch Calendar Girls duty/venue manager, all provided written statements, confirmed their statements under oath or affirmation and were questioned and cross-examined on their evidence.

Issues

[10] The issues I need to determine are:

- (a) Was Mr Higgins an employee for the whole period at ASL?
- (b) What unjustified disadvantage personal grievance claims are made as part of these proceedings?
- (c) Of those, which were raised with ASL within 90-days?
- (d) Should I grant Mr Higgins leave to raise any personal grievance disadvantage claims outside of the 90-day period?
- (e) Are any of the unjustified disadvantage claims proved?
- (f) Was Mr Higgins unjustifiably constructively dismissed?
- (g) What, if any, remedies are due, taking into account Mr Higgins' mitigation of his loss and contribution to the situation giving rise to his personal grievance/s?
- (h) Is Mr Higgins due any unpaid wages, sick pay or holiday pay?
- (i) Costs

¹ Section 174E of the Employment Relations Act 2000.

Was Mr Higgins an employee?

[11] Mr Higgins began work on 24 April 2014. He did not have a written individual employment agreement (IEA) because he was being treated as if he was an independent contractor. Mr Higgins received cash payments for his work.

[12] Mr Higgins says he should have received a written employment agreement from at least 24 April 2014. ASL says that Mr Higgins asked to be treated as an independent contractor. ASL made cash payments to Mr Higgins from 24 April 2014. Mr Higgins did not render invoices and ASL did not pay him GST.

[13] In July or August 2014, Mr Higgins was presented with a written IEA, which was to take effect from 28 July 2014. ASL says it decided that his employment situation should be regularised. Mr Higgins signed the IEA on 20 August 2014.

[14] The IEA stated that Mr Higgins was a part-time duty manager in Christchurch. He was to be paid \$17 per hour.

[15] Mr Higgins says prior to having a written agreement, he was a full-time employee, rather than a part-time employee. Apart from that, the fundamentals of the relationship between the company and Mr Higgins did not change from the time that he signed his employment agreement.

[16] There are no wages and time records over the period Mr Higgins was treated as an independent contractor.

[17] Mr Higgins was not acting in any way as if he was running his own business. ASL treated Mr Higgins in the same way it treated its employed duty managers, apart from how he was paid.

[18] It was artificial to treat Mr Higgins as if he was an independent contractor from 24 April 2014 until July or August 2014. Mr Higgins is the one who asserts that he was an employee and I gave an oral indication at the investigation meeting that I considered that was probably correct. The company did not dispute this.

[19] I find that the real nature of the relationship between the company and Mr Higgins was always one of employee and employer.

[20] There may be tax and other implications for Mr Higgins because of my determination of this issue. During the period between 24 April and at least the week ending 1 August 2014, the company did not pay PAYE on Mr Higgins' wages. I understand from Mr Higgins that he did not account to the IRD for his tax on those earnings either.

[21] In addition, Mr Higgins' IRD summary of earnings shows that for the period of 1 April to 30 November 2014, he received a benefit from Work & Income. Mr Higgins tells me he did not account for his earnings from ASL to Work & Income at least over the period during which no PAYE was paid.

[22] My finding that Mr Higgins was an employee means that the Authority has jurisdiction over the employment relationship between the parties for its entire duration. However, there are other preliminary matters to be determined.

Claimed personal grievances of unjustified disadvantage

[23] It has been difficult throughout the proceedings, at least up until the investigation meeting, to understand exactly what unjustified actions amounting to disadvantage grievances were claimed. In order to identify the claimed unjustified disadvantageous actions, and identify any areas of disagreement between the parties, I set out a chronology.

[24] Mr Higgins asserted and described a number of actions by ASL, which I take are claimed as unjustified actions. However, the disadvantage to Mr Higgins' terms and conditions of employment was not always identified.

[25] As I found above, Mr Higgins began his employment without a written employment agreement. He was presented with one in late July but did not sign it until 20 August 2014. Mr Higgins claims his lack of a written employment agreement in the first instance was an unjustified disadvantage to him. This is Claim UDV 1.

[26] Mr Higgins told Mr A he was signing the IEA under duress. However, Mr Higgins did not note on the IEA or in any document, such as an email to Mr Greenwood, that he signed it under duress. He also says he was replaced with another duty manager and had his hours reduced to a minimum of 16 hours and he only worked Thursday to Saturday nights. These assertions of unilaterally imposed changes to his hours and duties form Claim UDV 2.

[27] The IEA contains the plain language explanation of the services available for the resolution of employment relationship disputes, as required by s 65(2)(a)(vi) of the Act. It includes a reference to the period of 90 days within which a personal grievance must be raised. Therefore, from 20 August 2014 at the latest Mr Higgins was aware of the 90-day limit.

[28] Mr Higgins agreed to move to Auckland, at least temporarily. On 15 September 2014, he began working for Calendar Girls' Auckland club for between 27.5 and 60 hours a week, as a duty manager. He was paid \$17 gross per hour.

[29] Mr Higgins says that while working in Auckland he was verbally offered, and accepted, \$20 per hour but was never paid this amount. This is Claim UDV 3.

[30] In early December 2014, and with his agreement, Mr Higgins relocated back to Christchurch because another duty manager had left. On 13 December 2014, Mr Greenwood presented Mr Higgins with a two-page document offering him an eight-week trial as a full-time duty manager working approximately 50 hours per week. The proposed position was a more responsible one managing all the bars in the venue rather than just one (venue manager).

[31] Mr Higgins accepted the offer and began working full time as the venue manager on or about 13 December. Therefore, the eight-week trial was due to expire on or about 7 February 2015. His hours during the trial period were from 7.30 pm to closing time from Tuesday to Saturday. ASL continued to pay him \$17 gross per hour. Mr Higgins claims ASL should have paid him \$45,000 gross per annum from 13 December. He calculates that would have been \$17.31 per hour. This is his Claim UDV 4.

[32] In December 2013, Mr Higgins says he asked for a new employment agreement recording that he was in a full-time position. He did not get a new IEA. This is Claim UDV 5.

[33] From 13 December 2014, Mr Higgins worked excess of 40 hours per week for 7 weeks.

[34] On 2 February 2015, James Samson, one of the management team, sent Mr Higgins an email stating that he was now to have a part-time contract at \$17 per hour and that Ms Chapman, then another duty manager, was to have a \$17.50 per hour full-

time contract if she was able to get a list of tasks *sorted and seamless*. Some of those duties, particularly those related to the dancers, appear to be ones Mr Higgins was required to undertake in his eight-week trial period.

[35] Mr Higgins says ASL unilaterally dismissed him from his full-time role as venue manager. This is Claim UDV 6.

[36] For the week ending 8 February 2015, Mr Higgins was rostered and paid for only 19 hours. That change in his hours was made without consultation, and for one week ASL employed another person to work Mr Higgins' longer previous hours. This reduction in hours for one week is Claim UDV 7.

[37] Mr Higgins first consulted Ms Boyce on 28 January 2015. It is unclear whether she told him about the 90-day period within which he needed to raise any personal grievance.

[38] From the week ending 15 February 2015, Mr Higgins resumed full-time hours until the week ending 15 March 2015.

[39] At the end of February 2015, Mr Greenwood moved to Christchurch from Auckland and took over the majority of duties Mr Higgins had performed. Mr Higgins' hours and duties were reduced considerably and he says without his agreement. He was directed to manage the upstairs bar and not the downstairs bar. This is Claim UDV 8.

[40] Mr Higgins had an appointment with Mr Murray on 19 March 2015 at which Mr Murray raised the possibility that Mr Higgins may have one or more personal grievances.

[41] On 14 March 2015, a special event took place at the club. A duty manager, who Mr Higgins considered junior to him, was asked to come in at 4 pm to assist with preparation for opening at 6 pm. Mr Higgins was asked to come in at 6 pm with the servers and junior staff. Mr Higgins considered that demonstrated ASL's intention to diminish or ruin his reputation in the eyes of his staff. He also considered that asking him to come in at 6 pm demonstrated the company wanted to create circumstances in which he would resign. This is Claim UDV 9.

[42] From the week ending 15 March 2015, Mr Higgins was rostered part-time hours (under 35 per week) until the week ending 11 May 2015. For the next six out of 7 weeks, he was rostered full-time. After that, he was rostered part-time for a period of 12 or 13 weeks until he resigned.

[43] Ms Boyce wrote a letter to the company on 16 April 2015. The letter purported to raise a number of grievances, and alleged a breach of good faith. Those grievances were claims UDV 1 to UDV 9 inclusive.

[44] On 15 July 2015 Scott McCormick, the operations manager, texted Mr Higgins an offer for him to fill in for Ms Chapman from that day until 23 August:

Was good to catch up. As discussed Neisha is away from today until the 23rd of August.

We would like you to step in and fill her position until then.

The offer effective of Tuesday 14th July is you act as Christchurch duty [manager] for the period listed above your hourly rate will be increased to \$19 P/H and while in this position you will receive a \$100.00 non taxable bonus weekly for filling this position while Neisha is on leave. Once she returns you will go back to the position you have currently been doing at the increased pay rate discussed above without the bonus.

Let me know if you want to accept the below and I'll get typed up and get Aaron to sign.

[45] Mr Higgins texted Mr McCormick a counter-offer, asking for more money. Mr McCormick re-offered the above terms instead.

[46] Mr Higgins says he later verbally accepted the offer in a call with Mr McCormick but was surprised and confused to see a new duty manager, from an agency, in the role for one week. He also says after that week he was not rostered to fill in for Ms Chapman. He was rostered on from 11 pm only, and again in the upstairs bar.

[47] ASL says Mr Higgins did not accept the offer and that is why they had to get in a duty manager from an agency. Mr Higgins says having accepted the role but not being engaged in it was another unjustified disadvantage to him and that ASL breached its duty of good faith to him. This is Claim UDV 10.

[48] The parties attended mediation on 1 September 2015 but did not resolve the grievances raised on 16 April 2015 or the ongoing problems between them.

[49] On 10 September 2015, Mr McCormick gave Mr Higgins a letter asking him to attend a disciplinary meeting to give his explanations to three allegations.

[50] Mr Higgins claims that ASL could not fairly have started a disciplinary process when it had not settled the claims of unjustified disadvantage that he raised in April 2015. This is Claim UDV 11.

[51] Mr Higgins says the starting of the disciplinary process led to his constructive dismissal.

[52] On 16 September, Mr Higgins went to his doctor and got a medical certificate that stated he was unable to work until 23 September 2015.

[53] On 21 September, Mr Higgins instructed Mr Murray to tender his resignation and raised a personal grievance of unjustified dismissal. The letter purported to raise further grievances of unjustified disadvantage:

Workplace stress has been caused through your long-term actions to financially punish and sully our client's reputation and the continuous under-mining of his role within Calendar Girls.

On 9 September you issued a disciplinary notice against our client for not acting as a Duty Manager when a personal grievance has been raised for the very reason that he had been demoted. Moreover that you had removed his general manager's certificate from public display which is a requirement by law for a Duty Manager certificate to be on display. ...

It is clear to our client that it is your intention to dismiss him as your actions during the grievance process have been punitive. Coupled with your threats our client has no faith in obtaining a fair hearing from you during your disciplinary process ...

On behalf of our client we have been instructed to tender his resignation due to the stresses and financial pressures that our client has had to suffer for a significant period coupled with your unwillingness to resolve our client's personal grievance in a timely manner or enter into constructive communication with our client but rather enter into a course of abusing our client. ...

[54] The new grievances raised in that letter are:

- unjustified constructive dismissal because of bullying, causing workplace stress, financial punishment and sully of Mr Higgins' reputation and
- claim UDV 11- ASL removed Mr Higgins' duty manager's certificate from public display in the downstairs bar; and

- claim UDV 12 – starting the September disciplinary process when ASL had demoted Mr Higgins.

[55] On 22 September 2015, Ms Locke sent an email denying that ASL intended to dismiss Mr Higgins and suggesting he take 24 hours to reconsider his position. She stated ASL hoped he would reconsider his decision to leave and it was open to further discussion to attempt to resolve his concerns.

[56] Mr Higgins did not return to work for ASL. However, for some of the time covered by his medical certificate, Mr Higgins worked at another bar not run by ASL.

What claims did Mr Higgins raise within 90 days?

[57] The grievances that occurred within 90-days prior to the 16 April 2015 letter are claims UDV 6-9 inclusive. These are the only ones that appear to have been raised within 90 days of their occurrence or when they came to Mr Higgins' notice.

[58] However, Ms Locke submits that the letter of 16 April 2015 was not clear enough to reach the threshold of giving ASL enough information to address any of the grievances.

[59] While the letter is written to convey the story of Mr Higgins' employment as he saw it in a roughly chronological order, I consider it did give sufficient detail to allow ASL to engage with Mr Higgins to try and resolve what he considered to be personal grievances. Claims UDV 6-9 were sufficiently raised to allow ASL to respond and address them with Mr Higgins on their merits in the informal way the Employment Relations Act 2000 (the Act) envisages. I will determine these claims.

[60] The claim of unjustified constructive dismissal and Claims UDV 11 and UDV 12 outlined in the 21 September 2015 letter were also adequately raised within 90 days and I will determine those claims.²

Did ASL consent to the out-of-time claims UDV 1-5 made in the April 2015 letter being raised out of time by its behaviour?

[61] Mr Murray submits that although ASL did not expressly consent to any grievances being raised out of time it conducted itself so that it can reasonably be taken to have consented to the grievances UDV 1-5 being raised out of time.

² The letter also raised a grievance of unlawful discrimination, which Mr Higgins has not pursued in the Authority.

[62] Mr Murray says that ASL appointed counsel shortly after the letter of 16 April 2015, who did not object to any “issues” in the letter being raised. He says that fact, coupled with ASL’s second counsel attending mediation in an attempt to address all the personal grievances raised in the letter, mean that ASL consented to all the grievances raised outside of the 90-day period being raised late.

[63] Ms Locke submits that the grievances relied on only became clear shortly before the investigation meeting as part of the Authority’s process. She submits that ASL understood the only grievances raised in the 16 April 2015 letter were those about what occurred in the 90 days before 16 April.

[64] Ms Locke submits that ASL understood everything else set out in the letter to be merely the background Mr Higgins considered relevant.

[65] Whether ASL conducted itself so it can reasonably be taken to have consented to an extension of time is a matter of fact and degree.

[66] Ms Locke submits that any matters discussed in mediation are confidential and should not be raised in submissions to the Authority. I agree that Mr Murray cannot rely on what was discussed at mediation to prove conduct amounting to consent by ASL. That is for two reasons. First, all matters discussed in mediation must remain confidential.

[67] Secondly, and especially in an ongoing employment relationship, at mediation parties may discuss not only what has been raised, or attempted to be raised, as personal grievances but any and all issues to try and resolve their employment relationship problems. That does not necessarily mean that in doing so the employer is accepting all matters written about in the letter as validly raised personal grievances, although raised out of time.

[68] Mediation took place some months after the 16 April letter. Over that time, the employment situation had been deteriorating and the parties attended mediation to try to save the employment relationship.

[69] In all the circumstances, I do not consider ASL impliedly consented to claims UDV 1-5 being raised outside of the 90-day limit.

Was claim UDV 10 raised within 90 days?

[70] Claim UDV 10 was not raised until an amended statement of problem was lodged on 11 April 2016.

[71] There is no suggestion ASL impliedly consented to it being raised out of time. ASL expressly noted at the time that it did not consent to it being raised out of time. This purported grievance was raised out of time.

Should I grant leave to allow the grievances to be raised outside of the 90-day limit?

[72] I examine claims UDV 1-5 inclusive and UDV 10 to decide whether I should grant leave for them to be raised out of time.

[73] The issues I need to consider for each of the claimed personal grievances are:

- Whether the delay in raising the grievance was occasioned by exceptional circumstances; and
- If so, is it just to grant leave to raise the grievance out of time? I need to consider:
 - a. the extent of the delay,
 - b. the reasons for the delay,
 - c. the ascertainable strength of the claim,
 - d. any prejudice to the respondent in allowing late raising of the claim,
 - e. overall justice.³

[74] The Employment Court has defined the word “exceptional” for the purpose of exceptional circumstances in ss 114 and 115 of the Act. It means unusual, outside of the ordinary course, special or uncommon.

UDV 1 - no employment agreement

[75] Mr Higgins first raised this as a grievance in writing in April 2015, which was one year after he began his employment. Was this delay occasioned by exceptional circumstances? Section 115 gives some examples of exceptional circumstances. Mr Higgins does not fit into any of those categories.

³ *Davies v Dove Hawkes Bay Limited* [2013] ERNZ 191

[76] Mr Murray submits that Mr Higgins did not know he might have a personal grievance or grievances until he consulted Ms Boyce on 28 January 2015 and/or Mr Murray on 19 March 2015. He submits the raising of the grievances was with 90 days of those consultations.

[77] However, an employee being informed that he might have a grievance or grievances is not the time from which the 90-day period for raising the grievance runs. Being informed of a potential cause of action is not the same as becoming aware of circumstances that allow the employee to form a reasonable belief that their employer's actions were unjustifiable.

[78] Mr Higgins knew he did not have a written employment agreement as soon as he began work. The grievance was not raised at all within 90 days of the occurrence of the lack of an IEA.

[79] Mr Murray submits that the lack of a written employment agreement itself contributed to the delay in raising that as a grievance in that Mr Higgins did not have a written IEA containing a plain English explanation of how to resolve his employment relationship problem. That may be so, however, I note that Mr Higgins did not raise his grievance within 90 days of getting the written IEA with the required explanation. The 90-day period must run from 20 August 2014, at the latest, with the 90-day period expiring in November 2014 some months before the 16 April 2015 letter.

[80] Mr Higgins' apparent ignorance of the law after 20 August 2014, although by then he did have a written IEA containing the required explanation, is not an unusual, special or uncommon thing. It is not an exceptional circumstance.

[81] This claim was not raised within 90 days and there are no exceptional circumstances that require me to consider whether it is just to grant leave to raise the grievance out of time.

[82] I accept Mr Murray's submission that in not providing a written IEA ASL breached s 65 of the Act. That is a breach of a legislative provision and need not have been brought as a personal grievance claim at all. However, that is how Mr Higgins and Mr Murray chose to plead it. There is no claim for a penalty against ASL for failure to provide Mr Higgins with a written IEA at the beginning of his employment.

UDV 2 – written IEA unilaterally reduced Mr Higgins’ hours

[83] Mr Higgins’ evidence is that up until he signed the IEA he had been working full-time hours. However, after he signed the agreement he got fewer hours.

[84] ASL says that Mr Higgins was always in a part-time role with variable hours depending on a roster that varied from week to week.

[85] Mr Higgins signed the IEA on 20 August 2014. I find he had been asked to sign it a number of times and finally did sign it at work one day when Mr A, another employee of ASL, asked him to sign it. It is possible that Mr A told him that he would not have a job anymore unless he signed the agreement. Mr A was not Mr Higgins’ superior.

[86] Mr Higgins says he signed the IEA under duress and said so to Mr A. I do not consider that to have been the raising of a grievance with ASL at least in part because Mr A was not Mr Higgins’ superior and Mr Higgins was aware of that. It is not sufficient for the purposes of raising a personal grievance to complain to a workmate.

[87] From at least 20 August 2014, Mr Higgins knew of his right to raise a personal grievance within 90 days. Mr Higgins did not attempt to raise this alleged grievance until the letter of 16 April 2015.

[88] There are no exceptional circumstances that explain why the alleged grievance was raised out of time. Because there are no exceptional circumstances, I do not need to consider whether it is just to grant leave to raise the grievance out of time.

UDV 3 - agreed increase to \$20 per hour not paid

[89] Mr Higgins has not been able to give a date when he says a conversation took place during which Mr Greenwood offered to raise his hourly rate to \$20 per hour. In his written statement, he says it was some months after ASL employed him. In his verbal evidence at the investigation meeting, he said that it might have been before he signed the IEA in August 2014.

[90] Mr Greenwood denied ever having offered to raise Mr Higgins’ hourly rate to \$20. He says that instead he may have talked about how if Mr Higgins progressed well at work his hourly rate could rise as far as \$20 in a duty manager’s role.

[91] Mr Higgins says he verbally complained a number of times about being paid \$17 per hour and not \$20 per hour.

[92] Mr Higgins has not been able to give any evidence of when, such as what month or months, he says any conversations took place with any representative/s of ASL about that complaint. It is more likely than not that any conversation about not being paid \$20 per hour occurred before Mr Higgins signed the IEA on 20 August 2014.

[93] However, being unhappy about your hourly rate and letting a representative of your employer know that does not amount to raising a personal grievance.

[94] I find that Mr Higgins did not raise his concern about not being paid \$20 per hours as a purported personal grievance until the letter of 16 April 2015.

[95] As I decided in relation to the claims above, Mr Higgins knew from at least 20 August what route to take to raise a personal grievance. Mr Murray's submissions rely on the same arguments as in claims UDV 1 and UDV 2. For the same reasons, I find that there were no exceptional circumstances causing the delay in Mr Higgins raising a personal grievance.

[96] Because there were no exceptional circumstances, I do not need to consider whether it is just to grant leave to raise the grievance out of time.

UDV 4 – should Mr Higgins have been paid more than \$17 per hour during the eight-week trial period?

[97] Mr Higgins was not paid more than \$17 per hour during the trial period. He has given no evidence of raising as a personal grievance the fact that he was not being paid \$45,000 per annum. He calculates that as being \$17.31 per hour for a 50-hour week.

[98] There was no attempt to raise a personal grievance about this within 90-days of Mr Higgins first noticing that he was not being paid \$17.31 per hour. Indeed, a grievance does not appear to have been raised even in the first or second statements of problem. It arose during the course of proceedings, although prior to the investigation meeting. There were no exceptional circumstances identified to explain the late raising of a grievance.

[99] Because there were no exceptional circumstances, I do not need to consider whether it is just to grant leave to raise the grievance out of time.

[100] However, below I determine what the appropriate hourly rate was, and Mr Higgins' assertion he should have been paid a bonus, as a wages arrears claim.

UDV 5 – no new IEA reflecting a full-time role

[101] Mr Higgins says he asked for a new employment agreement to reflect the trial that he was on but he did not receive one. That must have been sometime after 13 December 2014. However, Mr Higgins was not able to give any specifics about when he made such requests. I do not consider that asking for a new IEA, even if he did so a number of times, is the same as verbally raising a grievance about the lack of a new IEA.

[102] Mr Higgins did not raise his concern about not having a new employment agreement as a purported personal grievance until the letter of 16 April 2015.

[103] Mr Higgins knew from at least 20 August 2014 what route to take to raise a personal grievance. Mr Murray's submissions rely on the same arguments as in claims UDV 1 to UDV 3 above. For the same reasons, I find that there were no exceptional circumstances causing the delay in Mr Higgins raising a personal grievance.

[104] Because there were no exceptional circumstances, I do not need to consider whether it is just to grant leave to raise the grievance out of time.

UDV 10 – not appointing Mr Higgins to fill in for Ms Chapman in July/August 2014

[105] On 6 October 2015, Mr Murray lodged an amended statement of problem alleging constructive dismissal and a new unjustified disadvantage claim. That claim was not raised in either of the letters of 16 April and 21 September 2015, or in the first statement of problem lodged on 24 June 2015.

[106] Did Mr Higgins raise this as a personal grievance within 90 days of him realising that he had not been engaged in Ms Chapman's place?

[107] On 20 November 2015, I held a telephone directions conference with both representatives. I directed Mr Murray to clarify each of the claims of:

... unjustified disadvantage by identifying what each disadvantage was, why each alleged disadvantage was unjust, and when each alleged disadvantage occurred ... by 9 December 2015.

[108] Mr Murray filed a memorandum on 23 December 2015 that did not follow my direction. Ms Locke filed a memorandum on 29 March 2016 raising a number of concerns with the alleged disadvantage grievances raised. In Mr Murray's correspondence with the Authority, he said that Mr Higgins' evidence would be that he raised his concerns verbally at the time about not being put into Ms Chapman's position during his employment.

[109] Mr Higgins' later-filed written statements did not address this issue at all. I am not satisfied that this concern was raised as a personal grievance within 90 days of Mr Higgins realising that he had not been engaged to replace Ms Chapman while she was on leave.

[110] Even if Mr Higgins raised his dissatisfaction verbally, I am not convinced that he expressed it in a way that amounted to the raising of a personal grievance.

[111] There have been no exceptional circumstances raised and therefore I do not have to consider whether it is just to grant leave to raise a grievance outside of the 90-day time limit.

Did ASL unjustifiably disadvantage Mr Higgins?

[112] The only unjustified disadvantage claims that were raised within 90 days are claims UDV 6-9, 11, and 12.

[113] The test of justification under s 103A of the Employment Relations Act 2000 (the Act) applies to claims of unjustified disadvantage and unjustified dismissal. The test is whether what the employer did, and how it did it, were actions that a fair and reasonable employer could have taken in all the circumstances at the time.

[114] In applying the test the Authority must consider a number of factors set out in s 103A(3) of the Act that relate to the process followed by the employer and any other factors it considers appropriate.

[115] However, the Authority must not find a dismissal to be unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

Claim UDV 6 – unilaterally moving Mr Higgins from full-time to part-time hours

[116] The offer of a trial in the position of overall duty manager was set out in the offer letter:

Calendar Girls are pleased to offer you a trial in the position of Duty Manager of Calendar Girls Christchurch. This is a full time role of approximately 50 hours per week.

The remuneration for this position will be \$45,000 p.a. with a \$5,000⁴ (sic) paid quarterly if there are no licensing issues, breaches or misdemeanours.

This Offer is dependent on your successful completion of a trial periods lasting eight (8) weeks, during which time you will be trialled and assessed for ability to adequately fulfil the role. If you are not successful, you will not be offered a full-time role, and you will instead be returned to your position in Auckland.
[emphasis added]

Lastly regarding Calendar Girls standards, it has been noted that there is some room for improvement regarding your manner and conversation with staff and customers. Aaron and James would like to work with you to improve this.

[117] On 2 February 2015, James Samson wrote in his email that Mr Higgins was moving back to part-time hours. Mr Higgins says this was without warning.

[118] Mr McCormick says that the performance issues referred to in the offer document did not improve during Mr Higgins' trial period and it was clear by early January that the trial was not successful. He says he discussed what to do about that with Mr Greenwood. As they were preparing to discuss the matter with him, Mr Higgins approached Mr McCormick. He told Mr McCormick that he did not want to carry on as the full-time overall duty manager and wanted his old job back, but not in Auckland. Mr McCormick said that Mr Higgins found the role too stressful.

[119] Mr McCormick spoke to Mr Greenwood and they decided that Mr Higgins could remain working in Christchurch but that would likely mean him only having part-time hours guaranteed. Mr McCormick says he told Mr Higgins that and Mr Higgins accepted that arrangement.

⁴ The parties agree that the word "bonus" should have been inserted after "\$5,000".

[120] I find it more likely than not that the 2 February 2015 email from Mr Samson was a confirmation of the verbal arrangement already reached between Mr Higgins and Mr McCormick. One of the factors that makes that the more likely situation is the fact that Mr Higgins was not returned to his role in Auckland but was able to remain working in Christchurch.

[121] I have applied the s 103A(3) tests so far as they are applicable to this situation. If there were any procedural defects in how this state of affairs came about, I consider them minor and consider that they did not result in Mr Higgins being treated unfairly.⁵ ASL acted as a fair and reasonable employer could have done in all the circumstances. I dismiss this claim, as it has not been proved.

Claim UDV 7 - unilateral alteration of hours

[122] This claim is that in February 2015 Mr Higgins hours were unilaterally reduced for one week. Given my findings on claim UDV 6 this claim is not proved. The reduction in hours was a part of the new agreement between ASL and Mr Higgins that he would remain working in Christchurch, which meant that only part-time hours were guaranteed.

[123] I have applied the s 103A(3) tests so far as they are applicable to this situation. If there were any procedural defects in how this state of affairs came about, I consider them minor and consider that they did not result in Mr Higgins being treated unfairly. ASL acted as a fair and reasonable employer could have done in all the circumstances. I dismiss this claim, as it has not been proved.

Claim UDV 8

[124] At the end of February 2015, Mr Greenwood returned to Christchurch from Auckland and took over some of the duties Mr Higgins had undertaken during his trial period.

[125] For the same reasons given above in claims UDV 6 and 7, this claim is dismissed. Mr Higgins' trial in the full time role was ended by mutual agreement in January 2015 and by mutual agreement, he was returned to a part-time role in Christchurch.

⁵ The only course of action I might have recommended was to have the discussions and the variation of the trial period agreement, to allow Mr Higgins to remain in Christchurch and to move back onto his part-time agreement, recorded in writing.

[126] I have applied the s 103A(3) tests so far as they are applicable to this situation. If there were any procedural defects in how this state of affairs came about, I consider them minor and consider that they did not result in Mr Higgins being treated unfairly. ASL acted as a fair and reasonable employer could have done in all the circumstances.

Claim UDV 9

[127] The facts as alleged by Mr Higgins about the event on 14 March 2015 are probably correct. However, there is no disadvantage proved to Mr Higgins' terms or conditions of employment. It is not possible to connect the fact that he was rostered on two hours after Ms Chapman to any intention by ASL to diminish or ruin his reputation in the eyes of any staff subordinate to him.

[128] I have applied the s 103A(3) tests so far as they are applicable to this situation. There were no procedural defects. ASL acted as a fair and reasonable employer could have done in all the circumstances. I dismiss this claim.

Claim UDV 11 – duty manager's certificate

[129] Mr Higgins asserted that ASL had deliberately removed his duty manager's certificate from display rendering it illegal for him to be a duty manager. Yet he was still rostered on to work as the upstairs duty manager. He claims that this was of disadvantage to him as it rendered him in breach of his legal duty to ensure his duty manager's certificate was displayed at all times that he was working. That potentially rendered him liable to an action that could result in him losing his duty manager's certificate.

[130] Mr Higgins' evidence at the investigation meeting was that all duty managers' certificates were displayed in the downstairs bar. He went downstairs during a shift and noticed that his certificate was not on the wall. He asked what had happened and was told by staff they had been asked to clean the bar area and had taken the certificates down to clean the walls. I find that to have been the most likely explanation.

[131] Mr Higgins did not give any evidence about asking for his certificate to be put back up or about how long he says it had been removed for.

[132] ASL's witnesses' evidence was that ASL had not instructed any staff to remove Mr Higgins' duty manager certificate. ASL's evidence was that it understood that Mr Higgins removed his duty manager's certificate from the downstairs bar wall

himself. Mr Higgins denies that. ASL's witnesses' evidence was that it had a number of copies of his duty manager's certificate and the fact that it had been temporarily removed was not a problem.

[133] Mr Higgins has not addressed this issue at all in his written statements of evidence. There is insufficient evidence to prove that the temporary removal of Mr Higgins' duty manager's certificate amounted to any actual, as opposed to potential, disadvantage to Mr Higgins' terms and conditions of employment.

[134] I have applied the s 103A(3) tests as far as they are applicable to this situation. There were no procedural defects. ASL acted as a fair and reasonable employer could have done in all the circumstances. This claim is dismissed.

Claim UDV 12

[135] Mr Higgins claims that ASL disadvantaged him in his employment by beginning a disciplinary process in a letter dated 9 September 2015 by sending him a letter and asking him to attend a meeting to answer three allegations:

Not opening club until 9.35 pm 29 August 2015. No reason why this should [have] happened.

Poor attitude towards customers and staff.

Wanting to know about advising customers that a show was not happening when there was no cancellation at all. Causes people to ask for a refund.

[136] The letter also included the following, which was listed as an allegation but is clearly an aim, "working together with other staff to ensure we can provide a safe and happy environment."

[137] Mr Higgins did not participate in the disciplinary process and had a medical certificate or certificates stating that he was too unwell to attend work from 16 September to 8 October 2015 inclusive.

[138] Mr Higgins' oral evidence at the investigation meeting about the first allegation was that ASL had the date wrong. He agreed that he was there in time to open the club, but says it was not his job. He says Ms Chapman was late to work that night and it was her job to open the club.

[139] Mr Murray submits that having demoted Mr Higgins in February 2015, not putting him in Ms Chapman's role while she was on holiday and taking down Mr

Higgins' duty manager certificate, ASL could not make any new allegations against him because those claims arose out of the claims he made against ASL; that he had been demoted. At least I think that is what the submission is.

[140] I reject that reasoning. Mr Higgins had raised some personal grievances against ASL but that did not mean that ASL could not investigate any alleged misconduct that occurred after that. It was entitled to do so.

[141] In any event, none of the claims Mr Higgins relied on to show ASL's actions amounted to unjustifiable disadvantage up to that date have been upheld.

[142] I have applied the s 103A(3) tests as far as they are applicable to this situation. There were no procedural defects. ASL acted as a fair and reasonable employer could have done in all the circumstances in initiating a disciplinary process. I dismiss this claim.

Was Mr Higgins constructively dismissed?

[143] Mr Higgins bases his constructive dismissal claim on the same facts as his disadvantage claims, culminating with the initiation of a disciplinary process notified to him by the letter dated 9 September 2015.

The law on constructive dismissal

[144] A constructive dismissal is one where the employee resigns but does so effectively because the employer has caused them to do so. I need to consider whether Mr Higgins' resignation was really a dismissal.

[145] The legal principles applying to constructive dismissals are well established. In *Auckland Shop Employees Union v Woolworths (NZ) Limited*⁶ the Court of Appeal decided there are three main circumstances where a constructive dismissal may arise:

- (a) When an employer gives an employee an option of resigning or being dismissed;
- (b) When an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;

⁶ [1985] ACJ 963

- (c) When a breach of an implied or express duty, or duties, by the employer leads an employee to resign.

[146] Mr Higgins claim must be based on category two or category three. However, I do not consider that ASL carried out a course of conduct with the deliberate and dominant purpose of coercing Mr Higgins to resign.

[147] The third category of constructive dismissal is when an employer breaches an employee's employment agreement. Therefore, in examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer, which has caused the resignation.

[148] Secondly, if there was such a breach, was it sufficiently serious to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation; that is, would there be a substantial risk of resignation?

[149] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he had no other option. That is, the breach or breaches must have caused the resignation.

Did ASL breach a duty or duties it owed to Mr Higgins?

[150] The most significant implied duty in an employment relationship is to maintain a relationship of trust and confidence. For a breach by an employer to be of the kind that can lead to a constructive dismissal it must be a repudiatory breach.

[151] In respect of the third situation, I will also consider here Mr Higgins' claim that ASL breached its duty of good faith to him. Good faith obligations are set out in ss 4(1) and 4(A) of the Act 2000, which state:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

- (i) to mislead or deceive each other; or
- (ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and ...

[152] In *Wellington Clerical Workers IUOW v Greenwich Justice Williamson* observed in describing the third type of constructive dismissal:⁷

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[153] I find that trust and confidence between the parties was breaking down over the last few months of Mr Higgins' employment. Mr Higgins was clearly unhappy with ASL and his job. His evidence was that he was depressed because of work stress caused by ASL's behaviour towards him and that the disciplinary process was the last straw. However, while ASL's behaviour towards him overall caused him unhappiness and resentment it did not amount to dismissive or repudiatory conduct.

[154] I have not found any of Mr Higgins' claimed unjustified disadvantage grievances to be proved. Therefore, they cannot form a basis for the unjustified constructive dismissal claim.

[155] The breaking down of the parties' mutual trust was not the fault only of one party.

[156] I do not consider that ASL breached any express or implied duty towards Mr Higgins, including its duty of good faith to him.

⁷[1983] ACJ 965, at page 975

[157] Mr Higgins resigned for his own reasons, including that he was unhappy in his work for ASL and that he had found some other part-time bar work as a duty manager. He was not constructively dismissed.

Is Mr Higgins owed any wage arrears?

Wage arrears

[158] Mr Higgins claims that during his eight-week trial period for the fulltime job he should have been paid at \$45,000 per annum and that he is eligible for bonuses.

[159] I do not agree. The offer made to Mr Higgins was clearly and unambiguously a conditional one. It was dependant on his successful completion of the trial period. He did not successfully complete the trial period. He is not owed any wage arrears or bonuses related to the proposed ongoing full-time role.

[160] Because no wage arrears are due from the trial period, no additional pay to top up amounts paid for working on public holidays or for paid sick leave is due. Nor is any further amount due for paid annual leave taken.

Sick leave

[161] Mr Higgins claims that he is entitled to be paid for three sick days he took in September 2015 for which he has a medical certificate.

[162] Mr Higgins admits that he worked for some of the period he was certified as too sick to work at another bar. However, he told me that is because his unfitness to work was solely because of the stress he was under at the time working at Calendar Girls. In response to my questions Mr Higgins told me he had not told his doctor that he only considered himself too unwell to work at Calendar Girls but considered himself well enough to work elsewhere.

[163] The first medical certificate dated 16 September 2015 states:

[Mr Higgins] was seen by me today, and the history obtained is that the disability has been sufficient that the patient has been unable to attend work since 16 Sep 2015 and should be able to return to work on 23 Sep 2015.

[164] On 21 September 2015, Mr Murray's letter tendering Mr Higgins' resignation informed ASL, for the first time, that Mr Higgins' absence from work was "workplace stress".

[165] Mr Higgins has not provided me with what dates and shifts he worked for the other bar.

[166] Mr Higgins' doctor was unaware Mr Higgins considered himself well enough to work elsewhere. I am not satisfied that the same medical certificate or certificates would have been issued if the doctor knew everything about Mr Higgins' state of health. ASL is not satisfied that Mr Higgins was unable to work for it due to ill health. I cannot be satisfied either.

[167] In all the circumstances, I consider it unsafe to order ASL to pay any sick leave to Mr Higgins. I dismiss this claim.

Non-provision of wages and time records

[168] There were no time and wages records for the first part of Mr Higgins' employment, as already covered in paragraph [16].

[169] ASL did not supply any timesheets for Mr Higgins' employment and gave evidence it did not have any. They may have existed at some point but they do not now. ASL did supply full copies of Mr Higgins' timesheets and printouts from its payroll system recording gross earnings, taxable allowances, pre-tax deductions, PAYE, non-taxable allowances, post-tax deductions and net payments made. They also record the hours worked in the pay period, amount of annual leave accumulated and the date the net amount was paid.

[170] Because the records that ASL had were eventually supplied, and certainly before the investigation meeting, I do not consider this to be a suitable case to award a penalty to punish ASL for failure to supply such records. However, I suggest to ASL that it take advice on whether its systems for record keeping re wages and time and leave are compliant with the various acts giving employers obligations to keep such records. I also strongly suggest that it should be timelier in responding to employee requests for records.

Costs

[171] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[172] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting went for most of one day.

[173] If the parties cannot reach an agreement any party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority