IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 159
3013453

	BETWEEN	DENISE HOLLINSHEAD Applicant
	AND	JOHN DAVEY First Respondent
	AND	CNR INVESTMENTS LIMITED Second Respondent

Member of Authority:	Vicki Campbell
Representatives:	David Hayes for Applicant Andrea Twaddle and Alex Shadbolt for Respondent
Investigation Meeting:	15 February 2018
Submissions Received:	15 February 2018
Determination:	14 May 2018

DETERMINATION OF THE AUTHORITY

A. Ms Hollinshead's employer was Mr John Davey personally.

B. Ms Hollinshead was unjustifiably dismissed by reason of redundancy.

C. Mr Davey is ordered to pay to Ms Hollinshead the sum of $5,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

D. Mr Davey breached section 63A of the Employment Relations Act 2000 and section 81 of the Holidays Act 2003.

D. Mr Davey is ordered to pay a penalty of $500 to Ms Hollinshead within 28 days of the date of this determination.

Employment relationship problem

[1] Mr John Davey is a director and shareholder of CNR Investments Limited which owned and operated the Firkin Sports Bar in Te Awamutu. Ms Denise Hollinshead worked at the bar. There was no written employment agreement and she understood she worked for Mr Davey personally. When Ms Hollinshead lodged her application in the Authority Mr Davey advised the Authority and Ms Hollinshead that she was actually employed by CNR and not him personally. CNR was then added as a respondent to this matter by way of amended statement of problem.

[2] The bar was sold on or about 29 May 2017 to MBD Trading Limited. Ms Hollinshead was offered an employment agreement to work for MBD but did not agree to its terms initially because they were significantly different to the terms she had been working under previously.

[3] Ms Hollinshead says the ending of her relationship with Mr Davey or CNR was unjustified and claims Mr Davey or CNR has breached the statutory duty of good faith, the Employment Relations Act 2000 (the Act), the Holidays Act 2003 and the Fair Trading Act 1986. Ms Hollinshead seeks various remedies including the imposition of penalties against Mr Davey or CNR.

[4] In her statement of problem Ms Hollinshead sought compensation for sick leave which she had accrued before the bar was sold. This claim was withdrawn at the investigation meeting.

Issue

[5] In order to resolve Ms Hollinshead's employment relationship problems I must determine the following questions:

a) Who was Ms Hollinshead's employer?

b) Was Ms Hollinshead unjustifiably dismissed and if so, what if any remedies should be awarded?

c) Did Ms Hollinshead's employer breach its statutory duties of good faith and if so what if any a penalty be imposed?

d) Did Ms Hollinshead's employer breach the Act and if so what if any a penalty be imposed?

e) Did Ms Hollinshead's employer breach the Holidays Act and if so what if any a penalty be imposed?

[6] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from Ms Hollinshead and the respondents but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Identity of the employer

[7] Ms Hollinshead says she believed at all times during her employment that Mr Davey personally was her employer and that she only came to know of CNR's existence after lodging her personal grievance with the Authority. Ms Hollinshead did not receive an employment agreement before or after she started working at the bar in 2014. Mr Davey denies he was Ms Hollinshead's employer personally and says she was employed at all times by CNR.

[8] The onus of proving the identity of the employer rests on the employee where the employee puts that fact in issue. The standard of proof is on the balance of probabilities. The question of who the employer was must be determined at the outset of employment. I must objectively assess the employment relationship at its outset and ask who an independent but knowledgeable observer would have said was the employer. Failure to notify or make an employee aware of the identity of the employer is not conclusive.[1]

[9] Mr Davey says that even if she did not know the name of the employing entity at the outset of her employment, Ms Hollinshead would have gained that knowledge during the course of her employment.

[1] *Colosimo v Parker* (2007) 8 NZELC 98, 622; *Wilson v Bruce Wilson Painting & Decorating Limited* [2014] NZEmpC 83 at [13], (2014) 11 NZELR 712.

[10] CNR and Mr Davey point to documents viewed by Ms Hollinshead during her employment and documents provided by ACC to CNR for claims made by her during her employment to show that Ms Hollinshead was always aware of who her employer was.

[11] During the course of her employment Ms Hollinshead was responsible for receiving, checking and signing receipt of deliveries from suppliers such as Lion Breweries.

[12] Mr Davey and CNR provided examples of the documents Ms Hollinshead would have been using on a daily basis. One example was a credit note and tax invoice for supplies delivered in September 2016. The handwritten credit note signed by Ms Hollinshead names Firkin Sports Bar as the customer.

[13] The tax invoice related to the same transaction as the credit note. The invoice records the billing party as Firkin Sports Bar. The second line of the address records the legal entity of CNR. Ms Hollinshead's evidence, which I accept, is that when she received tax invoices all she checked was that Firkin Sports Bar was noted as the receiver of the goods and that the goods supplied or credited including the quantity was correct. She would then sign these off for payment.

[14] Mr Davey and CNR provided copies of the On Licence for the bar which is displayed on the wall of the bar and records the owner of the licence as CNR. Ms Hollinshead knew the On Licence was displayed but never paid much notice to it. The writing on the On Licence was in a small font and it is logical that Ms Hollinshead would not spend time reading the document.

[15] Ms Hollinshead suffered two workplace injuries during her employment. In both cases she made claims to ACC. The ACC letter received by CNR records CNR as the name of the employer. I asked for and was provided with the documents completed by Ms Hollinshead when she attended her doctor on each occasion she suffered an injury.

[16] The first document completed on 31 January 2017 records Ms Hollinshead's understanding that her employer was Firkin Bar. The second document completed on 20 March 2017 records her understanding that her employer was John Davey, The

Firkin Sports Bar. This is consistent with Ms Hollinshead's evidence that she was not aware of CNR and did not know it was the legal entity that owned Firkin Bar.

[17] I was also provided with copies of documents showing Ms Hollinshead's pay for each pay period. Those documents do not record the name of the employer. Ms Hollinshead provided me with an extract of her bank statements showing all the payments of wages received during her employment. In each case the payer is recorded as being Firkin not CNR.

[18] I am satisfied that at the outset of Ms Hollinshead's employment she was unaware of who was employing her and this did not change during the employment relationship. The absence of a written employment agreement specifying the names of the parties to the employment relationship has compounded matters.

[19] I am satisfied the doctrine of undisclosed principle applies to this matter. If Mr Davey was contracting with Ms Hollinshead on behalf of a limited liability company then he had to make that clear to her. The facts establish that this did not occur. Mr Davey is therefore personally liable as Ms Hollinshead's employer.

Application to strike out

[20] Mr Davey applied to the Authority to have his name struck off as a respondent. For the reasons set out above that application is declined.

Unjustified dismissal

[21] Ms Hollinshead claims she was unjustifiably dismissed from her employment on 31 May 2017 when the bar was sold to MBD.

[22] A sale and purchase agreement was entered into between CNR and MBD on 2 May 2017 for the sale of the business of Firkin Bar. The agreement was signed by Mr Davey on behalf of CNR. On 25 May Mr Davey was notified the agreement had become unconditional. Mr Davey advised Ms Hollinshead of this on 26 May.

[23] In the agreement for sale and purchase of the bar Mr Davey on behalf of CNR warranted that it would comply with Part 6A of the Act. The warranty includes notice to MBD, as the purchaser that it may select any CNR employees to work for it and determine the terms and conditions to apply to those selected employees. CNR

warrants that all debts owing to its employees will be paid including any wages, holiday pay, redundancy compensation and sick leave.

[24] Part 6A of the Act provides protection to specified categories of employees if as a result of a proposed restructuring their work is to be performed by another person.[2] The specified categories are set out at Schedule 1A of the Act and includes employees who provide cleaning services or food catering services in relation to any workplace.[3] A restructuring includes the sale or transfer of a business.

[25] Part 6A requires employers to provide information to its employees affected by a restructuring about whether the employee has a right to make an election to transfer to the new employer.[4]

[26] MBD had made a warranty in the agreement that it was an exempt employer under the Act. This means Ms Hollinshead did not have a right to elect to transfer to the new employer.[5] In that case Mr Davey was required to provide the following information to Ms Hollinshead:

a) That the new employer had provided a written warranty that it is an exempt employer; and

b) That Ms Hollinshead did not have any right to transfer to the new employer; and

c) If the warranty was false, Ms Hollinshead could raise a personal grievance against the new employer as if she had elected to transfer and was unjustifiably dismissed.

[27] Mr Davey signed the agreement on behalf of CNR. He was therefore aware of his obligations under Part 6A of the Act. There is no evidence he provided the required information to Ms Hollinshead prior to the sale of the business being settled.

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[2] Employment Relations Act 2000, s 69A.
[3] Ibid clause (f) Schedule 1A.
[4] Ibid s 69G.
[5] Ibid s 69I.

[28] I have found on balance that it is more likely than not that Ms Hollinshead first became aware that the bar was being sold when she was asked about it by two bar patrons on or about 10 May.

[29] Ms Hollinshead made enquiries of Mr Davey about the sale who told her the bar had not been sold but there had been an offer and he wasn't sure if the bar was sold. At the time of this discussion the agreement had been signed but was subject to conditions that had yet to be met.

[30] It was not until Mr Davey had received confirmation that the sale had become unconditional that he advised Ms Hollinshead on 26 May that the bar had been sold. The bar was to be taken over by the new owners on 1 June.

[31] Mr Davey told me he had been assured by Mr Singh that the employment of Ms Hollinshead would be "business as usual" and that he wished to retain her services on the same or no less favourable conditions. He says he passed this information on to Ms Hollinshead.

[32] With that information in mind, on 29 May Ms Hollinshead spoke to Mr Jagdev Singh, a director and shareholder of MBD, and was given a copy of a written employment agreement. Ms Hollinshead was concerned that clauses in the employment agreement did not portray a "business as usual" approach. For example the employment agreement required Ms Hollinshead's employment with MBD to be subject to a 90-trial period in accordance with s 67A of the Act and reduced her guaranteed hours of work.

[33] At the investigation meeting there was a dispute about when Ms Hollinshead received a copy of the proposed employment agreement from MBD. I find it more likely than not that Ms Hollinshead received the employment agreement on 29 May. This is because Ms Hollinshead's lawyer wrote to MBD on 2 June setting out her concerns about aspects of the employment agreement. Sometime after meeting with Mr Singh on 29 May and the date the letter was sent Ms Hollinshead, would have needed to meet with her lawyer to receive advice and give instructions about the agreement.

[34] Ms Hollinshead did not work on 31 May which was the last day Mr Davey had ownership of the bar. She had previously told him she wanted to take a week off.

[35] During the first week of June Ms Hollinshead applied for an alternative position rather than accept the terms offered by MBD. She was not successful in that application and instead decided to relook at the possibility of employment with MBD.

[36] On 31 May Ms Hollinshead's role with Mr Davey was disestablished due to the sale of the business. She was technically redundant. I am satisfied the redundancy was for genuine commercial reasons, however, the process used by Mr Davey was inadequate.

[37] Despite the commitment under the sale and purchase agreement to adhere to the requirements of Part 6A of the Act Mr Davey failed to provide Ms Hollinshead with the information required under the Act.

[38] Further, where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment the employer has a duty to provide the affected employee with access to information, relevant to the continuation of the employee's employment about the decision and provide the employee with an opportunity to comment on the information before a decision is made.[6]

[39] Mr Davey has breached his obligations under Part 6A of the Act and his statutory duty of good faith. He failed to provide Ms Hollinshead with the information required under Part 6A and the information contained within the sale and purchase agreement relevant to the ending of her employment. Mr Davey did not advise Ms Hollinshead that MBD was entitled to offer selected employees terms and conditions of employment as determined by MBD.

[40] When she met with Mr Singh and reviewed the offer of employment Ms Hollinshead was acting under the misapprehension that she was to be offered continuous employment under the same terms and conditions. When she saw this was not the case she decided not to accept the offer and looked elsewhere.

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[6] Employment Relations Act 2000, s 4.

[41] I find the restructuring of the business was for genuine commercial reasons. Mr Davey had sold the business to MBD. In deciding whether Mr Davey's breaches led to an otherwise justified dismissal being unjustified must be assessed against s 103A which states:

> ... whether a dismissal is justified must be determined, on an objective basis ... [by considering] whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[42] In this case Mr Davey's breaches of Part 6A of the Act and of his good faith obligations were not the actions an employer acting fairly and reasonably could have done in all the circumstances. Ms Hollinshead has established a personal grievance for unjustified dismissal and is entitled to a consideration of remedies.

Unjustified disadvantage

[43] Ms Hollinshead claims that if she was not unjustifiably dismissed then one or more conditions of her employment were affected to her disadvantage by unjustifiable actions of Mr Davey. In her statement of problem Ms Hollinshead says she was disadvantaged because the employment agreement proffered by MBD contained a trial period clause, did not carry over sick pay entitlements and reduced her guaranteed hours of work.

[44] I am not satisfied any of the actions referred to in her claim relate to Ms Hollinshead's employment with Mr Davey. Rather the actions relate to the terms of employment offered by MBD. Mr Davey cannot be held liable for MBD's actions. Ms Hollinshead's application for a finding that one or more conditions of her employment were affected to her disadvantage by an unjustifiable action of Mr Davey is declined.

Remedies

[45] Ms Hollinshead seeks the payment of lost wages and compensation to remedy her personal grievance.

[46] Ms Hollinshead's redundancy was for genuine commercial reasons. Even if Mr Davey had engaged in a process that met his obligations under Part 6A of the Act and his good faith obligations Ms Hollinshead would not have remained in his

employment beyond 31 May. In these circumstances an award of lost wages is not appropriate. Ms Hollinshead's application for lost wages is declined.

[47] While the effect of losing one's employment for unjustified reasons is deeply personal, there is an inherent humiliation, loss of dignity and injury to feelings occasioned by such a loss. Ms Hollinshead told me she was left upset and disillusioned with Mr Davey. She believed she had been a faithful employee and felt she should have been treated better.

[48] Taking all the circumstances of this case into account, including that Ms Hollinshead secured employment with MBD within two weeks of her dismissal an appropriate award of compensation is $5,000.

[49] Mr Davey is ordered to pay to Ms Hollinshead the sum of $5,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Contributory conduct

[50] Having found Ms Hollinshead is entitled to a remedy for a personal grievance for unjustified dismissal, I am required by s 124 of the Act, despite this being a redundancy situation, to consider whether she contributed to the situation giving rise to her grievance.

[51] There was no evidence of any conduct by Ms Hollinshead which contributed to the termination of her employment by Mr Davey. Accordingly, no deduction for contribution is needed.

Breach of good faith

[52] Ms Hollinshead claims Mr Davey breached his obligations of good faith when he failed to consult with her about the sale of the business and when he failed to pay her any notice at the end of her employment.

[53] The Employment Court has held that where remedies have been awarded for a successful grievance claim then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of

the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.[7]

[54] The breach of the statutory good faith obligations, whilst serious, was one of the factors which formed part of Ms Hollinshead dismissal grievance. Separate remedies have been awarded to compensate her for her grievance, so the imposition of penalties on Mr Davey for this breach would amount to double dipping.

[55] The factors giving rise to the second limb of Ms Hollinshead's claim for breach of good faith have been addressed later in my determination under her claims that Mr Davey breached the Act. I have imposed a penalty to address that breach, so the imposition of a penalty on Mr Davey under this heading as well, would amount to double dipping.

Breaches of the Employment Relations Act 2000

[56] Ms Hollinshead claims Mr Davey breached aspects of the Act when he failed to and has asked the Authority to impose a penalty for each breach:

a) provide her with a written employment agreement as required by s 65 of the Act;

b) adhere to Part 6 of the Act; and

c) provide wages and time records in accordance with s 130 of the Act.

Employment Agreement

[57] There is no dispute that Ms Hollinshead was not given a written employment agreement. Ms Hollinshead claims Mr Davey breached s 63A of the Act when he failed to provide a written employment agreement.

[58] There is no evidence Ms Hollinshead asked for an agreement after she commenced employment in May 2014. The claim for a penalty was not raised until her claim was lodged with the Authority 25 October 2017. That is more than a year after the alleged breach occurred meaning the claim is out of time and its pursuit precluded by s 135(5) of the Act.

[7] *Xu v McIntosh* [2004] ERNZ 448.

Part 6A

[59] I have found Mr Davey has failed to adhere to his obligations under Part 6A as Warranted by him in the Sale and Purchase Agreement. The failure had a direct impact on Ms Hollinshead in that she received inadequate notice of her dismissal by reason of redundancy. Ms Hollinshead was entitled to reasonable notice of the termination of her employment. In all the circumstances of this case I have assessed reasonable notice to be at least three weeks. This period is consistent with the requirements under Part 6A of the Act which requires information to be provided to affected employees at least 15 working days before the date on which a restructuring takes effect.

[60] Mr Davey advised Ms Hollinshead on 26 May that he had sold the business and the new owner would take over from 1 June. This equates to four working day's notice.

[61] I accept Mr Davey was under the misapprehension that Ms Hollinshead would be working for MBD on similar terms and conditions of employment and that her employment would be deemed to be continuous. But this does not excuse his failure to meet his obligations under the Warranty to adhere to the requirements of Part 6A of the Act.

Breach of Holidays Act 2003

[62] Ms Hollinshead claims Mr Davey breached the Holidays Act when it failed to provide to her copies of her holiday and leave record. Section 81 of the Holidays Act requires employers to keep and maintain holiday and leave records. The record may be kept so as to form part of the wages and time record which is required to be kept under s 130 of the Act.[8]

[63] As part of his evidence Mr Davey produced handwritten notes which purport to indicate the hours Ms Hollinshead worked each week and days taken as leave days. At the investigation meeting Mr Davey accepted that the records were not accurate.

[64] Overall the records provided by Mr Davey do not meet the statutory requirements. The lack of a properly maintained holiday and leave record resulted in

[8] Holidays Act 2003, s 81(5).

the parties spending considerable time and energy resolving a dispute over Ms Hollinshead's leave entitlements and whether correct wages had been paid to her.

Breach of Fair Trading Act

[65] The facts giving rise to this claim are the same as those relied on for the breach of good faith. As I have previously addressed all of the factors relied on for this claim I have declined the application that Mr Davey breached the Fair Trading Act.

Penalties

[66] Having established Mr Davey has breached the Act by failing to adhere to his obligations under Part 6A of the Act and failing to provide holiday and wage records as required by the Holidays Act I must consider what if any penalty should be imposed for these breaches.

[67] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach.

[68] The Court in *Preet*[9] established a series of steps which the Authority must take in considering the imposition of penalties. The first step is to identify the nature and number of the statutory breaches. There were two breaches for which the maximum penalty amounts to $10,000 per breach which equates to total penalties of $20,000.

[69] Next I must look at the severity of the breaches. Mr Davey ran a small family business with himself and three employees with limited resources. The impact on Ms Hollinshead of the breaches was not overly significant. It is more likely than not that had she known MBD was entitled to offer her different conditions of employment she may not have waited until 13 June to accept MBD's offer of employment.

[70] The failure to maintain proper holiday and leave records resulted in a dispute over Ms Hollinshead's correct entitlements and led to her incurring increased costs when trying to recalculate her holiday entitlements based on the information supplied by Mr Davey.

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[9] *Borsboom v Preet Pvt Limited & Ors* [2016] NZEmpC 132 at [137] – [151].

[71] I have also taken into account that this is not a case where Mr Davey has a history of behaving badly and Ms Hollinshead did not present as being particularly vulnerable.

[72] I have concluded that a significant discount in the penalty that might otherwise be imposed, needs to apply. Mr Davey is no longer operating his business and I have no evidence of his ability to pay a penalty.

[73] Taking into account aggravating and ameliorating factors, and proportionality of the outcome I find a penalty for each breach of $250 to be appropriate in the circumstances. The penalties are to be paid to Ms Hollinshead.

[74] Mr Davey is ordered to pay penalties of $500 to Ms Hollinshead within 28 days of the date of this determination.

Costs

[75] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Hollinshead will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Davey will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[76] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority