Determination Number: CA 27/05
File Number: CEA 158/04

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH OFFICE**

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| **BETWEEN** | Amanda Kennard (Applicant) |
| **AND** | Le Bon Bolli Restaurant Limited (Respondent) |
| **REPRESENTATIVES** | O G Paulsen, Counsel for Applicant<br>A A Couch, Counsel for Respondent |
| **MEMBER OF AUTHORITY** | Philip Cheyne |
| **INVESTIGATION MEETING** | 8 December 2004<br>15 December 2004 |
| **SUBMISSIONS RECEIVED** | 15 December 2004<br>31 January 2005<br>16 February 2005 |
| **DATE OF DETERMINATION** | 25 February 2005 |

DETERMINATION OF THE AUTHORITY

***Employment Relationship Problem***

[1] Amanda Kennard worked for Le Bon Bolli Restaurant Limited, a company which operates a restaurant in Christchurch called Le Bon Bolli. Ms Kennard came to think that she was being underpaid. She was involved in several meetings and exchanges about that, following the last of which she resigned. By lodging her statement of problem, Ms Kennard seeks to recover arrears of wages pursuant to the Minimum Wage Act 1983, holiday pay, a penalty for an alleged breach of the Employment Relations Act 2000 regarding time and wage records, a penalty for the alleged failure to pay her final wages and holiday pay upon the termination of her employment and compensation for distress and lost remuneration arising from the termination of her employment by way of constructive dismissal.

[2] Le Bon Bolli says that Ms Kennard terminated her employment without notice and was not constructively dismissed. It says further that it believed it was paying Ms Kennard at least the legal minimum wage, that it provided the time and wage records and that Ms Kennard is not entitled to any final pay because of her failure to comply with the terms of the employment agreement about notice of resignation.

[3] The parties were not able to resolve their problem despite mediation assistance.

***Background***

[4] Philip Kennard is Amanda Kennard's father. Phillip Kraal is a shareholder and director of Le Bon Bolli Restaurant Limited and is the *Chef Patron* of the restaurant, the person *ultimately responsible for the whole operation.* Helen Kraal is employed by Le Bon Bolli as the general manager (administration). Her responsibilities include wages and salaries. Andrew Bain is employed by Le Bon Bolli as the chef de cuisine, reporting to Phillip Kraal. Mr Bain was Ms Kennard's supervisor. Anna-Louise Willcox is employed by Le Bon Bolli as front of house manager.

[5] Ms Kennard is studying at Christchurch Polytech for the City and Guild level 4 diploma in professional cookery. She commenced that course in 2003 and during 2004 when the relevant events mostly occurred, she was in her 2nd year of study towards that qualification. Ms Kennard was 18 when she started work and turned 19 during the employment.

[6] About November 2003, Ms Kennard phoned Mr Kraal looking for work and he referred her to Mr Bain as there was a vacancy for a full-time junior kitchen employee. Ms Kennard met with Mr Bain and filled in an application form. She was offered and accepted a position and was given a written individual employment agreement prepared in her name. The form of the agreement clearly provides for it to be signed by both parties. Ms Kennard says that she signed and returned the form but that document apparently was misplaced. However, nothing turns on that and it is common ground that the written agreement produced during the investigation meeting is applicable.

[7] The written agreement provides for full-time employment in the position of *Commis de Cuisine*. The hours of work clause requires the employee to work an average of 50 hours per week (or such greater or lesser number of hours as the employer may reasonably require) in accordance with the employer's roster for a salary of $19,350.00 gross per annum plus a further $527.28 per annum in non taxable allowances. These were Le Bon Bolli's standard rates and terms for a *Commis de Cuisine* at the time.

[8] Mr Bain and Ms Kennard talked about her intention to continue her polytech studies. Ms Kennard's evidence is that Mr Bain said that it *was not a problem and that when I started my classes I would only be rostered on to work on those days that I was not at Polytech.* Mr Bain's evidence is that *I said I could roster her so that she could still do her studies, that is that she would not be required to work when she had to attend Polytech. I thought she would be attending Polytech 2 or 3 days each week and I thought she could also work full time.* I accept Mr Bain's evidence and note that it does not materially differ from Ms Kennard's on the point. In essence they agree that Ms Kennard would work full-time except that she would be allowed unpaid leave to attend polytech.

[9] Ms Kennard actually commenced work on or about 27 December 2003 at Mr Kraal's request. For the first two weeks or so, Ms Kennard worked some kitchen-hand shifts commencing at 4.00pm and working until finish. Thereafter, she took up the normal duties of a *Commis de Cuisine* and worked in accordance with the roster prepared by Mr Bain. Except for weekends, that usually involved a split shift rostered from 10.00am to 2.00pm then from 6.00pm until close. She liaised with Mr Bain about the days-off she required for her polytech studies and she was not rostered to work on those days.

[10] Payment by salary usually means that the employee receives the same payment each pay period. That is not what happened to Ms Kennard. Her payment depended on the number of days that she actually worked in each week and the daily payment approximated the annual salary divided by 52 weeks and 5 days. During her tenure, Ms Kennard was paid for either 2½, 3, 4, 5 or 6

days work. The non taxable allowances were not similarly apportioned – Ms Kennard was paid $10.14 per week regardless of the number of days or hours worked. Ms Kraal organised the processing of the time-sheets and Ms Kennard was paid on the basis of the information she provided through her timesheets.

[11] Ms Kennard says (and I accept) that when she commenced working as a *Commis de Cuisine* co-workers told her that they normally started at 9.00am rather than the rostered 10.00am to ensure that all their prep work was done before the lunch service. She then commenced usually attending work at or about 9.00am. Ms Kennard filled out her own time-sheets and submitted them as is common. The time-sheets have columns for *TIME ON DUTY* (*FROM* and *TO*), *HOURS WORKED*, *OVER-TIME*, *MANAGER'S INITIALS* and *REMARKS*. Ms Kennard filled in the time-sheet to reflect her rostered start and finish times rather than her actual starting and finishing times. She says and there is no reason to doubt that she was told by co-workers how to fill in her time-sheets.

[12] Ms Kennard says and Mr Bain accepts that she performed her tasks diligently.

[13] Because she had signed and returned her employment agreement, Ms Kennard did not have a copy. In early March 2004 she asked for a copy and was given an unsigned version. Having looked over the agreement, she went to talk to Ms Kraal about some issues. The discussion was on or about Monday 22 March 2004. Ms Kraal made some typewritten notes after their discussion which Ms Kennard accepted as an accurate account. To summarise: Ms Kennard asked how her pay was calculated and pointed out that she was being paid at lower than the legal minimum wage; she also said that because she was full-time she should be paid for 5 days; Ms Kraal said that there had been a mistake and that, because she was attending polytech, she should be on a part-time contract and one would be drawn up; Ms Kennard asked about the study leave provision in the agreement; Ms Kraal asked if Le Bon Bolli had ever agreed to pay for her studies and Ms Kennard said that they had not; there was some discussion about whether a part-time contract would include study leave; the matter was left with Ms Kraal to check about the minimum pay rate, the full-time contract and paid study leave. The discussion was quite brief and civil. Ms Kennard spoke about these issues to Ms Kraal first because she felt she was more approachable than Mr Kraal. When Mr Kraal came into work that day, Ms Kraal told him about the conversation with Ms Kennard.

[14] Mr Kraal initiated a discussion with Ms Kennard when she returned to work that day for the second part of her split shift. Ms Kennard's evidence is that Mr Kraal was *confrontational in his manner*. I find that he was not intentionally *confrontational*. Mr Kraal is a well known and successful chef plainly confident in his abilities and used to being in control. In his evidence about the meeting, Mr Kraal said that he made it clear that Ms Kennard was paid enough given her value to the business and that he was not going to pay her more. It is unsurprising that a young person such as Ms Kennard experienced that approach as *confrontational*. During the meeting, Mr Kraal asked Ms Kennard to explain how she had calculated her hourly rate; he asked her what she thought she was worth to the restaurant and Ms Kennard said that she was entitled to at least the minimum wage; Mr Kraal said that he was running a business and that he had only so much money to delegate to Ms Kennard's position; Mr Kraal asked Ms Kennard what sort of car she drove; Mr Kraal also asked Ms Kennard some questions about cooking in order to demonstrate that she still had a lot to learn about the profession; Mr Kraal offered to meet with Ms Kennard's father in order to discuss matters.

[15] Mr Kraal's question about the car might appear to be a red herring but he said in evidence (and I accept) that he asked it to see if it was repeated back to him later by Mr Kennard in order to confirm his suspicion that Mr Kennard was behind the issues being raised by Ms Kennard. It supports the view that Mr Kraal felt fully in control of the situation.

[16] Arrangements were made for a meeting with Mr Kennard and Ms Kennard which was held on 23 March 2004. In the meantime, Mr Kraal and Ms Kraal did some research by checking the Department of Labour website and calling the Employment Relations infoline. Their inquiries revealed that they were paying Ms Kennard at less than the minimum wage although the extent of the underpayment depended on the view one took of several variables. If the paid working day was 9 hours long and the non-taxable allowances were included, then the underpayment was approximately one cent per hour. On a similar basis if the paid working day was 10 hours long, then the underpayment was eighty-six cents per hour. They also learnt that the minimum rate was due to increase by fifty cents per hour on 1 April 2004. Le Bon Bolli now accepts that the reimbursing non-taxable allowance should not be included for the purposes of calculating the minimum wage.

[17] The meeting on 23 March in the afternoon was held upstairs at Le Bon Bolli. Mr Kraal, Ms Kraal, Mr Bain, Mr Kennard and Ms Kennard were all present. Ms Kraal made some handwritten notes during the meeting and I accept that the notes correctly reflect the order in which matters were first discussed during the meeting. For reasons explained later, it is not necessary to resolve all the evidential disputes about what happened during the meeting. I should however set out findings on some of the more controversial points. Plainly, the meeting developed into a heated contest between Mr Kraal and Mr Kennard with them doing most of the talking. Ms Kraal gave evidence which I accept that *He* [Mr Kennard] *and Phillip tried to communicate but neither was willing to accede to the other*.

[18] One point of controversy is whether Mr Kraal said that they would commence paying at the minimum rate and pay any arrears. It is clear that Mr Kennard said that they were paying less than the minimum rate of $8.50 per hour. In response, Mr Kraal spoke about taking on young people at the salary they offered ($19,350.00) to help them with their career and to develop their knowledge at that level. Mr Kraal's first written statement of evidence reads *I said …we had worked it out and had come to the conclusion that we were* [paying] *about 20 cents per hour short. Having acknowledged the short payment I thought it was understood that we would pay the shortfall. I did not get an opportunity to voice this because Mr Kennard continued to attack me on various levels*. However, his second written statement asserts that he did expressly say they would correct the underpayment. Mr Kraal is not a man likely to be prevented from saying anything he thinks should be said, especially in his own restaurant and about the conduct of his business. Mr Kraal had every opportunity to say that they would correct the underpayment but chose not to. I do not accept that …*it was understood* …. Ms Kennard was entitled to a specific answer to the issue she raised. Instead, she got a repeat of the justification for the existing wage given the day before by Mr Kraal. She left the meeting without being given any assurance that the underpayment would be remedied.

[19] I should note that in her first statement of evidence, Ms Kraal said *We intimated that we would willingly make up the shortfall*. However, as with Mr Kraal and after seeing others' statements, that changed to *I recall clearly that, when Phillip put these figures forward, both he and I said that Amanda would be paid correctly*. Mr Bain's evidence is that *They said they were quite happy to get it sorted, to pay what was owed*. However, Ms Kraal's handwritten notes made during the meeting and the typed notes made soon after do not record either her or Mr Kraal conveying that the underpayment would be remedied. I conclude that Mr Bain is mistaken and the notes are accurate that no express undertaking to remedy the underpayment was given.

[20] During the meeting Mr Kraal said Ms Kennard should be able to complete her duties within the rostered hours but she could work longer and slower if she chose. That was not an offer to pay her for any extra time. That was the response to Ms Kennard's information that she had been starting work earlier than the rostered time in order to get her work done.

[21] There is further disagreement about what happened at the conclusion of the meeting. After some time, Mr Kennard brought it to a conclusion by saying that they would be seeking legal advice, that they should expect Ms Kennard's resignation and that she would not be at work that evening. As Mr Kennard and Ms Kennard were leaving, Ms Kennard said to Mr Kraal that she would be in to work that evening. Le Bon Bolli say that Mr Kennard told Mr Kraal to be sure to watch his back. It is unlikely that Mr Kennard would make such a threat at the same time as indicating an intention to invoke legal procedures so I find that the Le Bon Bolli witnesses are mistaken on this point.

[22] When Ms Kennard reported for work later on 23 March, Mr Kraal met with her again. He had with him Mr Bain and Ms Willcox. There are some typed notes taken from original notes made by Ms Willcox during the meeting which I accept as a substantially accurate account of what was said. They discussed the original employment arrangement. Ms Kennard said that she was being paid per shift rather than a salary and Mr Kraal indicated that she was being paid for time worked and was not being paid to attend polytech. Mr Kraal said that he had two options for Ms Kennard: she could remain full-time and actually work 5 days per week or she could become part-time until a different written agreement. Mr Kraal commented about it getting pretty heated in the earlier meeting and offered Ms Kennard the night off on pay to consider matters. He said they needed an answer by 10.00am the next day. Mr Kraal was saying that Ms Kennard would have to work the next day if she was to remain full-time even though she had not been rostered to work that day. Ms Kennard said that she could not *do that*, meaning work the next day because she had to attend polytech. Mr Kraal gave Ms Kennard contact phone numbers for her to ring after she had considered things. In evidence, Ms Kennard accepted that Mr Kraal's manner during this meeting was reasonable.

[23] The next morning about 9.00am Ms Kennard rang Mr Kraal. By that stage Ms Kennard had received some advice. She told Mr Kraal that she had been advised not to comment other than to say that she would be at work on Sunday in accordance with the roster. Mr Kraal referred to the two options mentioned the day before and Ms Kennard again said that she had been advised not to comment. Mr Kraal said that he was her employer and they needed to be able to discuss matters. Ms Kennard again said she had been advised not to comment, that she would work in accordance with her roster and that Le Bon Bolli could not change that roster. Mr Kraal said that they had to change the roster because the agreement that she would only be paid for time worked had been changed as a result of events the day before unless Ms Kennard agreed to a part-time contract. Ms Kennard again said that she had been advised not to comment and that she would be at work on Sunday. Mr Kraal asked her if she actually wanted to work at Le Bon Bolli and Ms Kennard said she had enjoyed working there but she did not know how it would proceed from here. Mr Kraal wished her good luck and the call ended.

[24] By fax dated 24 March 2004 from her solicitor to Le Bon Bolli's solicitor, Ms Kennard advised that she considered herself *constructively dismissed.* In response, Le Bon Bolli through its solicitor denied that Ms Kennard's employment had been terminated and advised that she was expected for work as rostered on Sunday 28 March. Ms Kennard's solicitor responded that she would not be attending. By letter dated 2 April 2004, Ms Kennard's solicitor set out her grievance and requested the time and wage records. Three reasons were given for Ms Kennard's constructive dismissal: that her employment agreement provided for payment at a rate lower than the minimum wage; that when Ms Kennard raised that concern Mr Kraal made it clear that he would not increase her rate of pay; and that Mr Kraal's behaviour thereafter was either designed to induce a resignation or a gross breach of the employer's obligations of fair and reasonable treatment.

***Terms of Employment***

[25] Sensibly, the first issue to be determined is whether Ms Kennard was employed full-time and entitled to the full salary each week. If the issue is resolved only by reference to the written employment agreement, the answer is straight forward: Ms Kennard would be entitled to at least the full salary even if called on to work less than full-time each week. However, I do not accept that either Ms Kennard or Mr Bain envisaged that outcome when they agreed on the employment. Ms Kennard wanted time off to attend polytech and Mr Bain agreed. Ms Kennard did not ask for paid time off and Mr Bain did not agree to that. He agreed to manage the roster to allow her the necessary (unpaid) time off. Ms Kennard had no expectation of receiving payment for the time off. I find that the written employment agreement must be read subject to that oral arrangement.

***Application of Minimum Wage Act 1983***

[26] Next, it is necessary to determine the effect of the Minimum Wage Act 1983 in the present circumstances. Ms Kennard was paid $74.44 per shift regardless of the hours worked. That payment approximates the specified annual salary divided by 5 shifts and 52 weeks. Le Bon Bolli argued for an averaging process on the basis that salaried staff worked more hours in the busy season and fewer hours in the quiet season for the same payment. There are problems with that approach. The salary is simply too low for the average hours specified. At an average of 50 hours, it should have been at least $22,100.00 pa to avoid a problem ($340.00 plus $8.50 times 10 hours per week times 52 weeks). In any event, payment by salary is not a license to breach the provisions of the Minimum Wage Act 1983 and its regulations. The applicable Minimum Wage Order provided for $8.50 per hour, $68.00 per day or $340.00 per week if paid by the hour, day or week respectively. Hours beyond 8 (per day) or 40 (per week) must be paid at an extra $8.50 per hour. Given the finding that Ms Kennard was not to be paid for time at polytech, her statutory minimum should be calculated by reference to the daily rate.

[27] On her timesheets, Ms Kennard usually wrote *close* to indicate her weekday finishing times. That mirrored the way shifts were indicated on the rosters. Le Bon Bolli has no other record of her hours of work. At the investigation meeting, Ms Kennard produced a personal diary in which she had recorded her rostered hours, but not for every week. Ms Kennard's evidence is that she wrote her roster in her diary when it became available and there is no reason to doubt that evidence. Her evidence is also that she then wrote her actual work times sometime after the completion of each shift. The diary also shows a summary of hours worked each shift and a weekly total.

[28] The wages and time records kept and produced by Le Bon Bolli are deficient. While the deficient time records were generated by Ms Kennard, Le Bon Bolli failed to give her any instruction except as she got from her workmates. The information provided by Ms Kennard was sufficient for the purposes of Le Bon Bolli's pay system since she was paid by the shift so the deficient time records are the result of Le Bon Bolli's pay system rather than any failure by Ms Kennard. The deficient time records have prejudiced Ms Kennard's ability to bring an accurate arrears claim. In that circumstance I am entitled to rely on section 132 and accept as proved the claims made by Ms Kennard as to her hours of work unless those claims are proved incorrect by Le Bon Bolli. I will apply section 132 but I find that Ms Kennard did take a half hour unpaid meal break in every shift longer than 5 hours as provided in the written employment agreement. At least some of the daily and weekly total hours noted in her diary will be inaccurate as a result. Where the diary shows actual start and finish times (generally in brackets) to the right of rostered times, the start and finish times should be treated as correct for the purposes of computing any arrears under the Minimum Wage Act 1983. Sometimes, usually on Saturdays and Sundays, only one set of times appears and those times should be treated as the actual hours of work, less the unpaid meal break. The hours worked on each day as recorded in the diary must be multiplied by $8.50 to

obtain the minimum legally payable to Ms Kennard for that day's work and that figure should be compared to the daily payment actually paid by the Le Bon Bolli. For any day that the minimum is higher than the daily payment that was made, Ms Kennard is entitled to the difference. Any day that the minimum is lower or equal to the daily payment that was paid is to be ignored for current purposes. Ms Kennard is to be paid the sum of the differences plus holiday pay. Ms Kennard is also entitled to holiday pay on the $3529.43 gross paid to her during her employment. The sum paid by Le Bon Bolli shortly before the investigation meeting is to be deducted from the total amount owing and Ms Kennard is entitled to judgment for the remainder. Le Bon Bolli is to pay Ms Kennard interest at the rate of 8.5% on the remainder, starting on 24 March 2004 until the arrears are paid in full. Le Bon Bolli is to calculate the arrears payable in accordance with the foregoing findings without delay and then seek Ms Kennard's agreement to those calculations. Leave is reserved to deal with any disagreement.

***Personal Grievance Claim***

[29] The personal grievance is a claim of constructive dismissal. It will be apparent from the earlier description of events during the first meeting on 23 March that I find that both Mr Kennard and Mr Kraal must take responsibility for the way that meeting proceeded. Despite those events, Ms Kennard elected not to resign at that point and made it clear that she would return to work that evening, which she did. The second meeting was a more civil affair and I find that the effect of Mr Kraal's earlier overbearing behaviour had receded somewhat by then. That conclusion is supported by Ms Kennard at first telling Mr Kraal during the phone call next morning that she intended to be at work on Sunday as rostered.

[30] I note the earlier finding that Le Bon Bolli did not give Ms Kennard any assurance that they would remedy the Minimum Wage Act problem. Rather, Mr Kraal had justified the existing rate of pay by reference to the career opportunity being provided and his view of the value of Ms Kennard's work to the business. In the second meeting on 23 March 2004, Mr Kraal sought to deal with the dissonance between the applicable written employment agreement and what had been agreed between Mr Bain and Ms Kennard. He gave Ms Kennard an ultimatum that either she actually work full-time commencing the following day or agree to a different written employment agreement. Ms Kennard said that she could not work full-time because of her polytech studies. During the phone call the next morning, Ms Kennard's response was perfectly reasonable but Mr Kraal persisted with his ultimatum. In doing that, I find that Mr Kraal was making it clear that Le Bon Bolli was no longer prepared to be bound by the oral arrangement made between Mr Bain and Ms Kennard. In that context, Mr Kraal asked Ms Kennard whether she actually wanted to work for Le Bon Bolli, she indicated some uncertainty about the future and Mr Kraal then wished her luck. That last action on Mr Kraal's part indicates that he then knew that Ms Kennard might not return to work on either of the options he had presented to her. Ms Kennard formalised her resignation later on 24 March 2004.

[31] In paying Ms Kennard less than the statutory minimum wage, failing to tell her that the underpayment would be remedied and then imposing the ultimatum about the employment agreement, Le Bon Bolli breached obligations owed to Ms Kennard, including the obligation to treat her in a fair and reasonable manner. Those breaches caused Ms Kennard's resignation. It was clear to Mr Kraal that Ms Kennard would not be prepared to continue working under the circumstances he created or at least that there was a substantial risk of her resignation. In those circumstances, I find that Ms Kennard was unjustifiably constructively dismissed. Ms Kennard has a personal grievance against Le Bon Bolli.

[32] It is always necessary to consider the extent to which the actions of a grievant contributed to the situation giving rise to a grievance. There was nothing blameworthy in any of the actions of

Ms Kennard. She properly raised her concerns and dealt with the situations she faced in a reasonable way. While it might be said that Mr Kennard contributed to the heated exchange between himself and Mr Kraal, the earlier finding that Mr Kraal's overbearing attitude during the meeting had receded as a cause of the resignation means that there is no link between Mr Kennard's behaviour and the situation giving rise to the grievance. In any event, I would not have attributed Mr Kennard's behaviour to Ms Kennard.

[33] Assessing compensation, some of Ms Kennard's evidence concerned her attitude towards Mr Kraal during the employment. That is not relevant for present purposes. That leaves her (and Mr Kennard's) evidence that she found it difficult to apply for other jobs and that her confidence was so shattered that she considered giving up her chosen career of being a chef. She also remarked about feeling belittled by Mr Kraal. The upset and distress caused by the grievance had clearly not ended even by the time of the investigation meeting. To remedy those effects, I order Le Bon Bolli to pay Ms Kennard compensation of $8,000.00.

[34] Ms Kennard claims 9½ weeks lost wages at 50 hours per week. There are some difficulties with that claim. First, Ms Kennard was rostered for only 3 or 4 shifts each week from 20 January 2004 consistent with the arrangement between her and Mr Bain. Second, Ms Kennard's diary reveals that she was out of New Zealand for about 2 weeks from 10 May 2004. Ms Kennard then commenced alternative employment on or about 29 May 2004. Mr Kraal also gave evidence about the industry shortage of chefs generally and at that time in particular. However, I accept that Ms Kennard did make more than 20 approaches to prospective employers before finding alternative employment.

[35] I find that Ms Kennard suffered lost remuneration as a result of the grievance starting on 24 March 2004 until Sunday 9 May 2004. That is a period of 6 weeks 5 days. However, that period must be broken into two parts to reflect the increase in the statutory minimum wage applicable from 1 April 2004. Ms Kennard is to be reimbursed for wages lost during the first part to 31 March 2004 at the rate of her average weekly earnings during the last 4 pay periods of her employment. The calculation of the average must take into account the effect of the arrears claim dealt with earlier in this determination. Similarly, Ms Kennard is to be reimbursed lost wages from 1 April 2004 until 9 May 2004 with the average adjusted to reflect the impact (if any) of the increase in the statutory minimum to $72.00 per day and $9.00 per hour. Le Bon Bolli is to prepare a schedule of these calculations and provide it without delay to Ms Kennard for her agreement. Leave is reserved if there is any dispute.

***Penalties***

[36] Two penalties are sought, one for failing to provide time and wage records requested under section 130 of the Employment Relations Act 2000 and another for failing to pay Ms Kennard her final wages. Ms Kennard is correct to say that the various documents eventually produced to counsel and then to the Authority do not include all the details set out in section 130 (1) of the Act. There is no note of her age, her address, whether she was employed under a collective or individual agreement or the method of calculation of her pay. The computer payroll record identifies 12 pay periods starting from the week ending 6 January 2004 and 10 timesheets and 2 roster sheets were eventually provided and produced. Only six of the sheets were dated at all and I have not been able to match all the timesheets/rosters with the payroll record. Assuming the 12 timesheets/rosters all relate to pay periods ending on or after 6 January 2004, there are no time records for work before 31 December 2003 although I accept Ms Kennard's evidence that she started work during the week ending on 30 December 2003. One of the timesheets provided has *03* written on it as well as *13/1/4* so if it does relate to work during the period ending 30 December 2003, there will be one timesheet missing for the remainder of the employment. In addition, Ms Kennard requested her time and

wage records by letter dated 2 April 2004 with a reminder dated 20 April 2004. What records existed were eventually provided on or about 13 May. The response falls short of the obligation to provide access to or a copy of the records *immediately*.

[37] In response, Le Bon Bolli says that a penalty cannot be imposed because what was claimed was a penalty for failing to produce wage and time records but records were produced. The point is about the way the claim was formulated in the statement of problem, but I do not accept it. Le Bon Bolli knew through the investigation process that it faced a claim for a penalty based on the inadequacy of its records and the lack of a timely response. The facts as found support those complaints. On this point, the substantial merits of the case lie with the applicant: see section 157 (1) of the Employment Relations Act 2000. There is more merit in the point that the slow response was mostly caused by Le Bon Bolli's solicitor who waited until its position on the grievance had been formulated before providing that and the records. I appreciate the frustration over the lack of a timely response no doubt felt by the applicant but I do not think the delay calls for a penalty.

[38] I have reached a similar conclusion in respect of the disorganised and deficient time and wage records. Le Bon Bolli attempted to keep records that it considered sufficient for its payroll purposes but these were incomplete and lacked some of the detail required by the Act. The critical failure is the incomplete records of Ms Kennard's hours of work. It was necessary to keep that information because of the impact of the statutory minimum wage depending on the hours of work. Conversely, if the daily payment had been set somewhat higher, there would have been no statutory need to record Ms Kennard's actual hours of work. In my view, the real problem here is the setting of a salary at $19,350pa based on an average of 50 hours per week, which if adhered to, would plainly be a significant breach of the Minimum Wage Act 1983. However, a penalty for breach of that Act can only be sought by a Labour Inspector. The other failure here is one of inadequate administration. It is not necessary to impose a penalty.

[39] The second penalty claim is in reliance on section 134 of the Employment Relations Act 2000 which makes a party to an employment agreement who breaches that agreement liable to a penalty. The breach is the failure to pay Ms Kennard her final pay, a breach of clause 27.1 (b) of the employment agreement. The employer withheld the final pay because it considered Ms Kennard had terminated her employment without notice entitling Le Bon Bolli to withhold an equivalent payment pursuant to clause 23.3 of the agreement. Le Bon Bolli argued that, construed strictly, clause 23.3 provides no exceptions. The effect would be that an employee who resigns without notice but who is constructively dismissed gives the employer the right to withhold final wages equivalent to the period of notice. That result would be absurd. The correct approach is to treat it as a termination at the employer's initiative (a dismissal) rather than a resignation. That interpretation must apply whether for a penalty action or any other problem. I therefore find that Le Bon Bolli did breach clause 27.1 (b) of the employment agreement. However, that conclusion has been reached only after the resolution of various factual disputes. Le Bon Bolli's position has turned out to be wrong but was not untenable or otherwise meriting of punishment. Ms Kennard has been restored to her original position by the orders for recovery and interest. In those circumstances I see no need to impose a penalty for the proven breach.

***Summary***

[40] Le Bon Bolli is to pay Ms Kennard arrears of wages and holiday pay and interest calculated as indicated above.

[41] Le Bon Bolli is to pay Ms Kennard compensation of $8,000.00 pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[42] Le Bon Bolli is to reimburse Ms Kennard for lost remuneration pursuant to section 123 (b) of the Employment Relations Act 2000.

[43] There will be no penalties for the breach of section 130 of the Employment Relations Act 2000 Act or the breach of Ms Kennard's employment agreement.

[44] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority