Employment Court of New Zealand

Kids Republic Playland Limited v Lowe [2018] NZEmpC 22 (21 March 2018)

Last Updated: 29 March 2018

IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 22
EMPC 190/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KIDS REPUBLIC PLAYLAND LIMITED Plaintiff
AND	KYLIE LOWE Defendant

Hearing:	13 December 2017 (heard at Wellington)
Appearances:	S Smith, agent for the plaintiff No appearance of defendant
Judgment:	21 March 2018

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a non de novo challenge to a determination of the Employment Relations Authority (the Authority), brought by Kids Republic Playland Ltd (KRPL) against its former employee, Ms Kylie Lowe.1 Three discrete issues are raised. They relate to the conclusions of the Authority upholding Ms Lowe's claim that she had a disadvantage grievance and was entitled to remedies, and that the company should make bonus and penalty payments to her.

[2] In its summary of the employment relationship problem, the Authority recorded that Ms Lowe had been employed as assistant manager by KRPL of its after school and holiday programmes from 7 April 2014 to 8 October 2015. She had

1 *Lowe v Kids Republic Playland Ltd* [2017] NZERA Wellington 53.

resigned on notice in September 2015, to take effect from 9 October 2015, but was placed on garden leave by her employer on 2 October 2015 for the remaining week of her notice period. The circumstances in which she came to be placed on garden leave were controversial.

[3] Subsequently, Ms Lowe brought a number of claims relating to the final stages of her employment. These included a personal grievance which focused on events which led up to her being placed on leave. In addition, she alleged her wages were not paid in full on termination of her employment, and that KRPL had failed to pay and implement employer and employee KiwiSaver contributions and deductions during her employment.

[4] Ms Lowe sought compensation for her personal grievance, orders for wage arrears and holiday pay, and a penalty for

breach of good faith obligations under the Employment Relations Act 2000 (the Act) in various respects.

[5] The Authority recorded that KRPL denied all of Ms Lowe's claims. It had asserted that good faith is a mutual obligation which Ms Lowe had breached by sending abusive text messages to her employer when it made reasonable work requests. KRPL claimed it had no choice but to place Ms Lowe on garden leave because of a verbal tirade and abuse she had directed towards Ms Marie Smith and Mr Stefan Smith who were, at the time, the two directors of KRPL.

[6] After considering the issues, the Authority determined that KRPL should pay the following sums to Ms Lowe:

a. $3,000 compensation for humiliation, loss of dignity and injury to feelings, based on the unjustifiable actions of the employer;
b. $110 gross, being wage arrears for underpayment in the week 28 September 2015 to 2 October 2015;
c. $55 gross, being wages underpaid for the week of 5 to 9 October 2015;
d. $250 gross, being a quarterly bonus due on 30 September 2015;
e. $33.20 gross, being holiday pay on the sums in (b) to (d) above; and
f. a penalty of $5,000 for breaches of good faith under ss 4(1) and 134(1) of the Act; half was to be paid to Ms Lowe with the remaining balance to be paid to the Authority for payment to the Crown account;

Procedural issues

[7] KRPL challenged some but not all the orders made by the Authority in its determination. As already mentioned, it only contested the conclusions that were reached that it should pay compensation for humiliation, loss of dignity and injury to feelings, the quarterly bonus, and a penalty for breaches of good faith.

[8] On 2 November 2017, I held a telephone directions conference with the parties. Mr Smith appeared as agent for KRPL, and Ms Lowe attended in person. She told the Court that she wanted the matter brought to an end, but that she did not wish to take part in the hearing of the challenge.

[9] I then issued a minute recording the Court's pre-hearing directions. With regard to Ms Lowe's position, I recorded that it was her right to decide not to take part in the substantive hearing of the challenge, but that if she decided subsequently to participate in the hearing, which would be a respectful process, she should advise the Registrar to that effect. I indicated that if this occurred, there would be a further telephone directions conference to ensure that all necessary arrangements were in place. In the event, Ms Lowe chose not to participate further.

[10] In the same minute, I gave directions for the hearing of the non de novo challenge, stating that the Court would consider whether the Authority was correct, either in fact or in law, when it decided that the challenged amounts were payable. I recorded that because serious allegations were made as to the reliability of the information which had been tendered by witnesses to the Authority, careful consideration would need to be given to the conclusions which were reached on the basis of that evidence.

[11] At the hearing, the sole witness was Mr Smith, who also presented submissions for KRPL. He produced all the written material which had been placed before the Authority. In answer to questions from the Court, he explained how the investigation meeting had progressed; he also described the evidence given by the various witnesses who were called. The Court was thus able to obtain an accurate summary of the evidence which had been before the Authority.

[12] In this judgment, I deal with each of the topics of concern; I will summarise the Authority's conclusions in each instance, and then discuss the grounds of the challenge as raised by KRPL.

Applicable principles

[13] The following is a brief summary of the legal position which arises where a challenge is advanced which is not brought on a de novo basis.

[14] Section 179 of the Act relevantly provides for challenges to determinations of the Authority in these terms:

179 Challenges to determinations of Authority

(1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
(2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.
(3) The election must—

(a) specify the determination, or the part of the determination, to which the election relates; and
(b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing *de novo***).

(4) If the party making the election is not seeking a hearing *de novo*, the election must specify, in addition to the matters specified in subsection (3),—

(a) any error of law or fact alleged by that party; and
(b) any question of law or fact to be resolved; and
(c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full

advice to both the court and the other parties of the issues involved; and

(d) the relief sought.

...

[15] As a non de novo challenge, the present proceeding is one that falls within the parameters of s 179(4).

[16] A full Court discussed the applicable principles in respect of this type of challenge in *Extreme Dining Ltd t/a Think Steel v Dewar.*2 It said:

[16] Next, it is appropriate to refer to the relevant principles which apply to the hearing of a non de novo challenge since these differ from those relating to a de novo challenge:

a. A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.3
b. Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.4
c. Making such an election does not indicate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. The Court must make its own decision, as required by s 183 of the Act.5
d. Section 182(3) of the Act requires that where an election states that the person seeking the election is not seeking a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[17] One of the difficulties which parties must consider when electing to proceed on the basis of a non de novo hearing is the scope and extent of the evidence which will be before the Court on such a challenge. No transcript is kept of the evidence received at an investigation meeting, since there is no requirement on the Authority to do so. The Act also stipulates that in its written determination the Authority need not set out a record of all or any of the evidence heard or received, or record or summarise any submissions made by the parties.6 These features are consistent with the statutory intention that the Authority is required to dispose of problems and disputes promptly and without undue regard to technicalities. Consequently, when

2 *Extreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136, (2016) 10 NZELC 79-069.

3. *Counties Manukau District Health Board v Trembath* [2001] NZEmpC 222; [2001] ERNZ 847 (EmpC) at [9]; *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] NZEmpC 79; [2001] ERNZ 157 (EmpC) at [8].

4 *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84 at [24].

5 *Cliff v Air New Zealand Ltd* [2005] NZEmpC 14; [2005] ERNZ 1 (EmpC) at [7].

6 Employment Relations Act 2000, s 174E(b).

electing a non de novo challenge, careful attention should be given to the issue as to whether any additional information should be before the Court beyond that which is apparent from the determination under challenge.

[17] The broad directions as to the nature and extent of the hearing, to which I referred earlier, were given so that both parties could understand the way in which the hearing of the non de novo challenge would be conducted. As a result of those directions, the Court received the evidence which was presented to the Authority; on some points, it has received additional evidence which the company says supports its assertion that the Authority erred.

First issue: Ms Lowe's personal grievance

The Authority's findings

[18] Ms Lowe's personal grievance focused on events which occurred over the course of 2 October 2015.

[19] The Authority found that a sequence of text messages were exchanged between Mr Smith and Ms Lowe the previous evening, which concerned the removal of a particular child from a KRPL holiday programme. There was an issue as to whether that child had been bullying other children, particularly Mr Smith's daughter.

[20] Ms Lowe had requested a meeting to discuss these matters at 9.30 am on 2 October 2015. The Authority recorded that Mr Smith declined the request to meet on the grounds that he was busy at the time but would be available later in the day. Notwithstanding this indication, he and Ms Lowe in fact met at the public reception area of the premises, where Ms Smith was also present.

[21] The Authority recorded Ms Lowe's evidence that Mr Smith then accused her of spreading false rumours about a new employee, and of not treating that employee well. This assertion related, as the Authority later found, to a complaint brought by the new employee against Ms Lowe. She told the Authority she was shocked when she was told this as it was untrue; she asked Mr Smith for clarification.

[22] Ms Lowe said she also had an altercation with Ms Smith over a derogatory comment Ms Smith had allegedly made about another employee. Her evidence was that Ms Smith reacted angrily and yelled at her before storming off.

[23] The Authority summarised Mr Smith's evidence on these topics. He had said that the meeting was short: he asked Ms Lowe about a relevant text conversation she had with another person which had been accidentally forwarded to his phone. Mr Smith had texted Ms Lowe earlier in the morning of 2 October 2015 to ask her to forward the full thread of texts to him. Her response had included the sentence "You and [Ms Smith] have clearly decided that everything is my fault so fuck it forget it".7

[24] The Authority also recorded Mr Smith's evidence that when he raised issues in the meeting at the public counter, which included asking Ms Lowe about her treatment of a new staff member, she did not answer directly. He then told her that her apparent behaviour in respect of that staff member had to stop and again asked her to show the full thread of text exchanges. The Authority said that Ms Lowe, according to Mr Smith, became agitated and suggested that Ms Smith should do a better job of employing new staff which led to Ms Smith walking away.8

[25] Then the Authority said that according to Ms Lowe, at the time the exchanges between herself and Mr Smith and Ms Smith took place, parents were coming and going as they were signing in their children. The Authority noted that there was a dispute as to whether parents were indeed present.9

[26] After reviewing the relevant evidence which it will be necessary to consider in more detail shortly, the Authority concluded that there had been a relatively short and heated conversation between Mr Smith and Ms Lowe and between Ms Lowe and Ms Smith which was observed by others.

7 *Lowe v Kids Republic Playland Ltd,* above n 1, at [17].

8 At [18].

9 At [19].

[27] The second aspect of the chronology which the Authority considered concerned events which occurred during the afternoon of 2 October 2015, when Ms Lowe returned to the KRPL premises with children and other employees and Ms Smith asked to speak to her.

[28] Ms Smith's evidence was that she believed Ms Lowe was showing signs of stress so she raised the prospect of Ms Lowe taking garden leave. Ms Lowe's recollection was that Ms Smith told her she was stressed and that Mr Smith had decided to put her on garden leave. The Authority accepted this recollection since it accorded with KRPL's response in its statement in reply.10

[29] Ms Smith told the Authority that during their conversation, Ms Lowe was verbally abusive and swore at her. The Authority said Ms Lowe denied this, although she acknowledged she had sworn at Ms Smith once after she had followed her around as Ms Lowe was preparing to leave the premises. She had been prevented from saying goodbye to children on the children's programme. Ms Lowe said she had been upset and embarrassed, and conceded she had told Ms Smith to "fuck off". The Authority accepted Ms Lowe's evidence on this point.11

[30] The Authority concluded that KRPL had disadvantaged Ms Lowe by embarrassing and humiliating her when Mr Smith accused her of poor treatment of another employee, and later in the day when Ms Smith followed her around as she prepared to leave the workplace.12

[31] In considering remedies for this established personal grievance, the Authority found that in being escorted from the premises Ms Lowe was denied the opportunity to farewell employees with whom she had worked, and children whom she had cared for during her employment.

[32] The Authority did not refer to the morning events when determining what compensation was payable. Focusing on the afternoon events, the Authority determined there was an entitlement to compensation for humiliation, loss of dignity

10 At [24].

11 At [25].

12 At [30].

and injury to feelings at the lower end of the scale. This was assessed at $4,000, subject to a consideration of contribution conduct under s 124 of the Act.13

[33] The Authority found that Ms Lowe had contributed to the situation that led to her personal grievance by sending the "fuck it forget it" text message to Mr Smith on the morning of 2 October 2015. That was inflammatory and likely to have contributed to Mr Smith's combative approach at the public counter shortly afterwards.

[34] There was accordingly a reduction of 25 per cent in the compensation that would otherwise have been considered appropriate. In the result, the sum of $3,000 was payable.

KRPL's challenge as to the personal grievance findings

[35] KRPL's challenge in respect of the personal grievance was twofold.

[36] First, it alleged that the findings relating to the morning events were in error. Mr Smith submitted that the Authority had erred in its review of evidence given by Ms Natasha Print. She was a former employee who said she had observed the conversation between the parties in the kitchen and café area of the premises, and that there were a few people (that is, parents), around the public counter at the time who witnessed the heated exchange involving Ms Lowe.14

[37] Ms Print had said the conversation seemed quite intense and that she did not wish to get too close so she "hovered" in the kitchen and café areas until the discussion ended.

[38] The Authority also recorded Mr Smith's evidence on this point; he denied that parents were present at the time. He said his recollection was supported by the admission timesheet of that day. There were no entries in the timesheets recording the admission of children between 9.15 am and 9.55 am that morning. Mr Smith said the incident took place within this period. The inference was that if the

13 At [91].

14 At [20].

timesheet which was supposed to be signed by parents did not confirm their presence, then it was appropriate to conclude that they were not there.

[39] The Authority found that the document was unsworn and that it should be given little weight. It had been provided by the company after the investigation meeting; the Authority found there was no opportunity to sight the original or to question KRPL witnesses about it.15

[40] Then Mr Smith, in his submissions, pointed to the fact that Ms Lowe had sent an email to the Court on 11 October 2017, which supported his position. Ms Lowe said:

Just one more thing I would like to add if I can please. I stated [at the investigation meeting] that parents were signing their children into the holiday programme while the altercation between myself and [Mr Smith] and [Ms Smith] took place that morning. It would appear from the sign in sheet that I was wrong. I do however stand by my statement that people walked through us and everyone, including [Mr Smith] and [Ms Smith] is (sic) in agreement that there [were] people in the playland at the time. I am unsure why [Mr Smith] has only recently, in his appeal documents stated that it was a non disciplinary meeting. I do not believe it could be non disciplinary as both directors were present when one had previously stated he could not attend.

[41] Mr Smith submitted that Ms Lowe's concession that parents had not been signing in their children cast doubt on Ms Print's evidence that parents were in fact present.

[42] The conclusion which was reached by the Authority on this topic was expressed in these terms:16

It is clear from the evidence that there was a relatively short, heated conversation between Mr Smith and Ms Lowe and between Ms Lowe and Ms Smith on the morning of 2 October 2015, which was observed by at least one employee and may have been observed by some parents.

> [43] This was a credibility finding made by the Authority, after reviewing conflicting evidence. The Authority had to decide which of the two accounts was correct: the descriptions given by Ms Lowe and Ms Print to the effect that parents

15 At [19].

16 At [23].

were present and witnessed the heated conversation, or the descriptions given by Ms Smith and Mr Smith to the effect that those persons were not present at the time.

> [44] Judicial bodies such as the Authority and the Court frequently have to resolve credibility issues of this nature. There are well recognised principles which apply to such an exercise.
>
> [45] It is convenient to repeat a summary of relevant principles as given in

Lawson v New Zealand Transport Agency:17

[303] Briefly, when assessing credibility, the Court must carefully evaluate all the evidence, looking for inconsistencies between witnesses, and whether there are any external indications which can assist in a determination as to what occurred. As has frequently been observed in the past, the evidence has to be evaluated in a commonsense but fair way. All aspects of the evidence have to be assessed. A finding of credibility is unlikely to be based on only one element to the exclusion of all others, and will instead need to be based on all the factors by which it can be tested in a particular case.18 The Court must also bear in mind whether a given witness is correct on some matters and incorrect on others.

[304] This is not a case where the demeanour of witnesses when giving their evidence is determinative. There are well recognised difficulties in assessing credibility through demeanour alone. Important also are contemporary materials, objectively established facts and the apparent logic of events.19

> [46] The credibility issue raised by KRPL focused on the weight which should have been attached to the document which the company produced after the investigation meeting.
>
> [47] Although it appears now to be common ground that parents did not sign the admission sheet at the time, that does not necessarily lead to a conclusion that they were not present. Indeed, the Authority recognised this fact by finding that if the conversation was sufficiently intense for Ms Print to hold back, it is possible there were parents doing the same thing, waiting for the altercation to end.

17 *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165.

18. *Farnya v Chorny* [1952] 2 DLR 354 (BCCA) at [8] - [9]. See also the comments of O'Halloran JA in the same case.

19 *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 (HL) at 431 per Lord Pearce.

> [48] That is a finding which was open on the evidence, and one with which I respectfully agree.
>
> [49] The Authority also found that the conversation "may" have been observed by some parents. By contrast, the Authority was able to conclude that Ms Print herself had clearly witnessed these events, a fact which was not disputed at the hearing of the challenge.
>
> [50] I am not persuaded that the Authority erred in resolving the conflict of evidence which was before it, even in light of the evidence provided by the admission sheet.
>
> [51] The genesis of this incident is also important. When giving evidence, Mr Smith told the Court that a new staff member had laid a complaint asserting Ms Lowe had bullied her, and that she was creating negative rumours amongst other staff about Mr Smith and Ms Smith. It is apparent that the substance of the complaint was an aspect of the heated conversation.
>
> [52] The complaint was dated the previous day; it must have been in Mr Smith's possession by early 2 October 2015 at the latest, since he referred to it in the conversation which occurred in the public area of KRPL's premises.
>
> [53] In my view, the complaint was not dealt with as a fair and reasonable employer could have done. A proper process could, for example, have seen Mr Smith providing a copy of the complaint to Ms Lowe, giving her a reasonable opportunity to consider it, and then an opportunity to discuss what had apparently occurred either in writing or at a suitable meeting

convened on proper notice. The allegations contained in the complaint needed to be dealt with in a considered way. They were not. This, I find, was a significant contributory cause of the problems which arose between the parties on 2 October 2015.

[54] In short, the Authority was justified in focusing on these events, and to conclude that Ms Lowe was disadvantaged in the heated discussion which took place between the parties. I also find that the Authority did not err when it concluded that Ms Lowe was embarrassed and humiliated in front of Ms Print.20

KRPL's challenge regarding the afternoon events

[55] I turn now to the second aspect of the personal grievance, which related to the events of the afternoon of 2 October 2015.

[56] The first matter relates to the findings as to how Ms Lowe came to be placed on garden leave.

[57] As already mentioned, the Authority preferred Ms Lowe's recollection that Ms Smith had informed her that she was stressed and that Mr Smith decided to put her on garden leave. The Authority said this was because it accorded with KRPL's response in its statement in reply.

[58] In his submissions to the Court, Mr Smith submitted that Ms Lowe had been suspended because of the abusive language used towards Ms Smith, and that this was in accordance with the suspension provisions of Ms Lowe's individual employment agreement (IEA).

[59] There are two points to make regarding the Authority's findings. The first relates to the placing of Ms Lowe on garden leave. The Authority expressly recorded that there was no issue between the parties that Ms Lowe had been placed on garden leave; Ms Lowe had not taken issue with this development. There was no suggestion that Ms Lowe had in fact been suspended under the provisions of her IEA.

[60] The second point relates to the Authority's preference for Ms Lowe's evidence as to how she came to verbally abuse Ms Smith. She had said that this had occurred because Ms Smith had followed her around as she was preparing to leave the premises preventing her from saying goodbye to children on the holiday

20 *Lowe v Kids Republic Playland Ltd,* above n 1, at [30].

programme. Later in the determination, the Authority also found that Ms Lowe had been embarrassed and humiliated when Ms Smith followed her around as she prepared to leave the workplace;21 and that she was thereby denied the opportunity of making her farewells to other employees with whom she had worked and to children for whom she had cared.22

[61] Mr Smith submitted that statements of witnesses had been placed before the Authority which suggested Ms Lowe had a positive demeanour in the course of these events, so there was no basis for concluding she was embarrassed and humiliated.

[62] Again, the Authority needed to resolve a conflict of evidence. It had the opportunity of questioning Ms Lowe, Ms Smith and at least one of the makers of the statements relied on, Ms Print; it had to weigh the oral evidence it received together with the documentary evidence. It is clear that as a result of this process, the Authority considered Ms Lowe's evidence should be accepted; that evidence was preferred to information from other sources. Given the advantage the Authority had in assessing the reliability of the relevant witnesses, I am not persuaded that it erred; it made a credibility finding which was open to it.

The Authority's findings as to remedies

[63] The above conclusions also resolve the challenge to remedies brought by KRPL.

[64] The essence of Mr Smith's submissions was that because the Authority had erred on the factual matters which I have already discussed, it was wrong to conclude that Ms Lowe should therefore be compensated for hurt and humiliation.

[65] Because I am not persuaded that the Authority erred in its analysis of the facts giving rise to the personal grievance and assessment of remedies, there is no basis for setting them aside.

21 At [30].

22 At [91].

[66] Indeed, in my view the Authority would also have been entitled to award such compensation for the significant

procedural defects in dealing with the complaint which had been brought against Ms Lowe, which gave rise to the various incidents of 2 October 2015. Reference to those matters would only have reinforced the Authority's conclusions as to the unjustified actions of the employer, and as to the appropriate remedy for that grievance.

[67] The amount which was awarded is within the range that was open to the Authority. In *Robinson v Pacific Seals New Zealand Ltd*, the Court observed that

$5,000 appeared to be a relatively standard compensatory award in the Authority.23 The compensatory award which the Authority made in this case was, in my view, within the standard range for cases of this type. Nor did the Authority err when it concluded that the compensation should be at the lower end of that range.

[68] I have also considered the contribution assessment which the Authority made; it resulted in the compensatory sum of $4,000 being reduced by 25 per cent. In my view, such a reduction, which reflected Ms Lowe's inflammatory and abusive language was appropriate. There was no error on the part of the Authority when it fixed this remedy.

[69] Accordingly, I dismiss KRPL's challenge in respect of the personal grievance.

Second issue: bonus

The Authority's findings

[70] The background to the Authority's consideration of the bonus issue is found in the pleadings which were before it. In her statement of problem, Ms Lowe had claimed that she had not received pay rises as described in her IEA. She also said that she had been paid a bonus in April 2015, discovering this when it appeared on her payslip. She said that Ms Smith had told her that instead of a pay rise, she would be placed on a bonus scheme. She said there was never any agreement that such a scheme would operate.

23 *Robinson v Pacific Seals New Zealand Ltd* [2014] ERNZ 813 at [54].

[71] In its statement in reply, KRPL asserted that Ms Lowe was "offered in good faith the $1,000 pay bonus scheme to be paid out in quarterly payments". She was accordingly not offered a pay rise. She had received the bonus instalment as had been agreed, and actually requested that it be paid earlier, which duly occurred.

[72] In its review of these issues, the Authority determined that a discussion over Ms Lowe's pay had taken place between the parties around the first anniversary of her employment; at that stage the employment relationship was amicable, and although Ms Lowe may have preferred to receive a pay increase, she received and kept the first quarterly payment of a bonus. There was no evidence to suggest that she insisted her employer take back the sum of $250.24

[73] The Authority went on to conclude that Ms Lowe was entitled to be paid the second instalment of that bonus, which was due on 30 September 2015. KRPL had said that the second quarterly payment was due on 11 October 2015, but it was withheld due to her "unacceptable behaviour".25

[74] The Authority reasoned, however, that the behaviour that Mr Smith and Ms Smith considered unacceptable occurred on 2 October 2015; Ms Lowe's entitlement to the bonus for the second quarter had already crystallised on 30 September 2015.

[75] The Authority therefore concluded that withholding the bonus payment of 30 September was not an action which a good employer, as defined in the IEA, could have taken; and that it breached the relevant clauses of that agreement.26

KRPL's challenge on the bonus issue

[76] For the purposes of the challenge, Mr Smith raised a new argument.

[77] Mr Smith said that the quarterly payments ran from the anniversary of Ms Lowe's initial employment (7 April 2015), and not on the basis of calendar quarters as was indicated in the statement in reply and accepted by the Authority.

24 At [39].

25 At [71].

26 At [73].

[78] Mr Smith also submitted that the matters raised by the complaint which he had received concerning Ms Lowe clearly occurred within this period; the complaint related to inappropriate behaviour which it was appropriate to take into account in determining whether the bonus payment should be made. In essence, he said that payment of the bonus was

discretionary and dependant on Ms Lowe meeting KRPL's objectives, and as a reward for productive work which benefitted it.

Discussion

[79] On the basis of the evidence placed before the Court, I am not persuaded that the Authority erred.

[80] Although Mr Smith was correct to submit that the IEA required a pay review to be undertaken at the 12-month anniversary of the date of employment, the Authority also found that the parties' discussions did not result in a pay increase, but a bonus which was not an entitlement to which the IEA referred. The contractual provisions are not relevant, therefore, to the agreement to pay a bonus on a quarterly basis since the IEA says nothing about such a possibility.

[81] As to timing issues, the Authority relied on KRPL's statement in reply that the payment was to be made quarterly. The Authority found, obviously, that this meant payment according to calendar quarters. I have not been referred to any evidence which would establish that this was not what the parties agreed.

[82] I turn to the question of whether, and if so to what extent, payment of the bonus was discretionary. No evidence was given either to the Authority or to the Court as to what objectives had to be met for the payment to be made, and/or as to the scope of any discretion to pay.

[83] Even assuming, however, that any bonus entitlement was discretionary, the difficulty with KRPL's current argument is that it assumes the alleged inappropriate conduct, which was the subject of the complaint against Ms Lowe, was established and could therefore be considered in the exercise of that discretion. The allegations in the complaint were never investigated; and the Court received no direct evidence which would allow it to conclude that the complaint was justified and/or of such

significance as to justify non-payment of the bonus. In fact, the Authority recorded that the parties had agreed there was a good working relationship from the commencement of Ms Lowe's employment until sometime after she returned from annual leave on 21 September 2015 – that is, for most of the period to which the bonus apparently related.27 That is not to say that an entitlement could not be displaced by inappropriate conduct alleged to have occurred after this date, but as indicated above, the Court was not presented with any reliable evidence which would allow it to conclude that the granting of the bonus would have been inappropriate.

[84] In short, KRPL has not persuaded the Court that the Authority erred in its conclusion with regard to payment of the bonus to Ms Lowe.

Third issue:

Penalty

[85] I turn now to consider the third issue raised by KRPL, which is that the Authority erred in imposing a penalty of $5,000 for breaches of good faith under ss 4(1) and 134(1) of the Act. Half of that sum was directed to be paid to Ms Lowe with the balance to be paid to the Authority for payment to the Crown account.28

[86] The Authority found that there were five findings of breaches of good faith, three of which related to the accuracy of Ms Lowe's timesheets and calculation of final pay including a bonus instalment at the end of the employment relationship; the other two concerned KiwiSaver. The Authority described four of the breaches in this way:

> [81] The first three breaches directly affected Ms Lowe's remuneration to her detriment. I regard each of them as serious. The action of the employer in each instance was autocratic and executed without discussion or consultation with Ms Lowe. In changing the hours of work Ms Lowe had recorded in her last week at the workplace and in dishonouring a verbal and written agreement made with her over the hours she would be paid on garden leave KRPL showed complete disregard for its statutory obligations of good faith and its contractual obligation to act as a good employer. The decision not to pay Ms Lowe the bonus instalment to which she had become entitled

27 At [7].

28 At [99].

on 30 September 2015 was made on the basis of non-relevant considerations and demonstrated a similar disregard for those obligations.

[82] KRPL's fourth breach, relating to its failure to implement employer and employee contributions to KiwiSaver for Ms Lowe from the commencement of her employment until July 2015 may have been inadvertent. However, its decision not to

mitigate the error until after Ms Lowe's employment had ended and IRD pursued it for the unpaid contributions was deliberate.

[87] The fifth breach was because "termination pay" – that is, holiday pay – had been incorrectly calculated because it did not take account of underpaid wages.

[88] The Authority went on to assess the appropriate penalty with reference to the guidance provided by this Court in *Borsboom (Labour Inspector) v Preet PVT Ltd.*29 I shall outline the Authority's analysis shortly.

[89] I also observe that in respect of the first three breaches, the company has not challenged the underpayments which gave rise to the penalty; that is, the following sums which KRPL was ordered to pay to Ms Lowe:30

(i) $110 gross being wage arrears for underpayment in the week of 28 September to 2 October 2015.
(ii) $55 gross being wages underpaid for the week of 5 to 9 October 2015.
(iii) $33.20 being holiday pay due on the above sums.

[90] That being the case, the issue for the Court in respect of those particular breaches is whether it was appropriate to order payment of a penalty for the unchallenged failure to pay the sums. I deal with each separately in light of the criticisms made by the Authority.

29. *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072 at [139] – [151].
30. *Lowe v Kids Republic Ltd*, above n 1, at [98] and see para [6] above for a description of all the orders which were made.

Altering hours on timesheet

[91] The Authority, in its detailed consideration of this point recorded that Mr Smith acknowledged he had altered Ms Lowe's timesheet to show a finish time of 4.00 pm for three week days, thus overriding later times she had recorded. There was a conflict of evidence as to whether Ms Lowe was or was not present at the times she had recorded; the Authority accepted Ms Lowe's account.31

[92] At the hearing of the challenge, Mr Smith said the Authority erred when it stated he had made the changes "without discussion with Ms Lowe and without informing her of the changes he had made". He told the Court that Ms Lowe was effectively on notice of these changes because the time records showing the alterations were provided to Ms Lowe after the end of her employment via her daughter. Mr Smith said that Ms Lowe was thereby informed of the changes. It would appear the timesheets were forwarded well after they had been altered, and well after the incorrect wages had been paid. I find that the Authority did not err in concluding that the changes were not discussed with Ms Lowe; nor was she expressly informed of them in a timely way. I agree with the finding that this was a serious breach of the employer's good faith obligations.

Dishonouring a verbal written agreement made with Ms Lowe over the hours she would be paid on garden leave

[93] As already noted, the company does not challenge the Authority's conclusion that it had underpaid Ms Lowe for the garden leave period.

[94] The Authority recorded that Mr Smith had acknowledged that he and Ms Smith had told Ms Lowe she would be paid for 40 hours for the period of the garden leave; and that he had confirmed this in writing to Ms Lowe. It also recorded his evidence to the Authority that when the agreement was made he had not been aware that her IEA provided for 37 and a half hours of work per week, and he did not realise she was not entitled to be paid more than that.32 The Authority went on to conclude that the IEA did not in fact specify a maximum number of hours she could work in each week, and that she had frequently worked in excess of 37 and a half

31 At [57] – [58].

32 At [67].

hours per week. Furthermore, the confirmation in writing that she would be paid 40 hours per week would have constituted a variation of her IEA.33

[95] In his submissions, Mr Smith raised similar arguments as had been advanced at the investigation meeting; essentially, he contended that he had made a mistake by agreeing that she would be paid 40 hours for the garden leave period and that any apparent variation should not be regarded as effective.

[96] There are two problems with the submission made for KRPL. The first is that it has not challenged the finding that Ms Lowe was underpaid for the period, which must stand. Second, even if that was not the case, Mr Smith's reasoning would cut across an agreement which was reached with Ms Lowe; and there is no good reason to dishonour it now. The Authority's

conclusion was not incorrect. This too was a serious breach of good faith obligations.

Failure to pay bonus payment

[97] I have already dismissed KRPL's challenge in respect of the finding that Ms Lowe was not entitled to the bonus payment for the second quarter. When dealing with the application for a penalty, the Authority found that a failure to pay it was made by considering irrelevant matters, and with a disregard for good faith and good employer obligations.

[98] I agree. The Authority did not err in its findings on this point.34

KiwiSaver obligations

[99] The Authority found that KRPL had failed to make employer contribution payments for the first 14 months of Ms Lowe's employment, and failed to ensure her employee contributions were deducted from her wages and paid to the Inland Revenue (IR) during that time. It went on to conclude that the initial failure to implement KiwiSaver for her may have been inadvertent. Then the Authority said:35

33 At [68].

34 At [81].

35 At [53].

However, I am not satisfied it acted in good faith towards her between 5 July and 11 October 2015 when it made no attempt to address the issue of the missed contributions for the first 14 months of her employment.

[100] It was the Authority's concerns as to how the arrears had been dealt with that became a factor in the consideration of a penalty.

[101] At the hearing, Mr Smith placed emphasis on the chronology. First, he made reference to a letter of 19 July 2017 from IR to KRPL, which set out the basis on which the fact of the arrears had come to light, and then been dealt with.

[102] From that letter, it is evident that Ms Lowe had contacted IR in May 2015, querying whether KiwiSaver deductions were being made.

[103] The letter from IR recorded there had then been a discussion with Mr Smith on 23 June 2015 when "the returns were reassessed and also contact made to Stefan Smith advising of the updates done and the outstanding payment for the backdated

..." sum.

[104] Mr Smith told the Court that it was not until IR wrote to him on 16 October 2015 that he was informed of the amount which was overdue: $1,445.08.

[105] IR then agreed that KRPL could enter into a repayment programme. An automatic payment was provided by IR on 16 November 2015, which was returned by KRPL on 23 November 2015.

[106] According to a letter from IR dated 19 July 2017, there was at that stage an outstanding balance of only $109.23. After the hearing of the challenge and at the request of the Court, Mr Smith provided confirmation that this sum was paid to IR on 24 August 2017, thereby discharging the liability.

[107] Since the Authority's conclusion that the arrears arose initially through inadvertence is not challenged, and since the KiwiSaver liability was then repaid by the company under an agreed repayment programme with IR over a significant period of time, I do not think it is appropriate that this aspect of the matter be characterised as a breach of good faith of such significance as to warrant inclusion in

a penalty assessment. Whilst Mr Smith, as director of KRPL, once alerted to an error as to KiwiSaver deductions might well have taken it upon himself to address the error promptly, I cannot rule out the possibility that he was distracted from such a prudent course by the manner in which IR chose to deal with the issue.

Termination pay

[108] Also included in the assessment of penalty was the company's failure to pay holiday pay correctly on termination. The sum was $33.20, and was based on the underpaid wages. Since it is a consequence of that failure, I do not consider it appropriate to impose an additional penalty in respect of this liability.

Assessment of penalty

[109] As already indicated, the Authority's assessment of penalty proceeded on the basis of the *Borsboom* guidance. The steps it took were as follows:

a. The Authority noted that there were five separate statutory and contractual breaches with a maximum penalty available for each breach of $20,000, giving a potential total of $100,000. The Authority held that a global penalty was appropriate rather than five separate penalties, which also accorded with Ms Lowe's application.
b. The Authority assessed aggravating and mitigating factors; it noted Ms Lowe had been deprived of wages and a bonus for approximately 20 months as at the date of the determination, and the company had made no attempt to give reparation before then. With regard to the KiwiSaver obligations, KRPL had mitigated the breaches, albeit belatedly, by entering into and completing a payment arrangement. Since Ms Lowe would not be able to access her KiwiSaver scheme until she attained retirement age, she was unlikely to suffer any long- term effects of KRPL's breaches.36 Taking account of all these factors, the Authority fixed a provisional starting point of $30,000.

36 Although there is no evidence on this point one way or the other, Ms Lowe theoretically had a right to access KiwiSaver entitlements before the age of retirement for the purposes of purchasing or building a house, if she met the relevant criteria: KiwiSaver Act 2006, sch 1, r 8(3).

c. The means and ability of the company to pay the provisional penalty was assessed. The Authority concluded there were financial constraints, so that the starting figure was reduced by 50 per cent.

d. The final step was the application of a proportionality or totality test. Apart from the KiwiSaver amount, Ms Lowe had been underpaid by

$415 plus the $33.20 holiday pay. The Authority said this was a relatively small amount, and it was appropriate to reduce the provisional penalty to $5,000.

[110] As already explained, in my view there should be no penalty in respect of the KiwiSaver issue since it arose through inadvertence; and the failure to pay holiday pay was an arithmetical consequence of other breaches.

[111] Accordingly, I reduce the provisional starting figure to $15,000, the assessment on the basis of means to $7,500, and the final figure after considering proportionality to $2,500. I agree with the Authority that half of this should be paid to Ms Lowe, and the other half to the Crown account.

[112] To that extent, the challenge is allowed.

Conclusion

[113] I dismiss KRPL's challenge in respect of the Authority's findings upholding Ms Lowe's claim of a disadvantage grievance and that she was entitled to compensation of $3,000. I also dismiss the challenge in respect of Ms Lowe's bonus entitlement in the sum of $250. I allow the challenge in part relating to the penalty finding, which is reduced to $2,500. This sum is to be paid to the Registrar of this Court within 21 days. Half will then be paid to Ms Lowe, and half to the Crown account.

[114] I make no award as to costs.

B A Corkill Judge

Judgment signed at 3.10 pm on 21 March 2018