IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 78
3319580

	BETWEEN	LJB Applicant
	AND	EBD Respondent

Member of Authority:	Jeremy Lynch
Representatives:	Adrian Plunket, advocate for the Applicant RAC for the Respondent
Investigation Meeting:	11 November 2025, in Kerikeri
Submissions and Other Material Received:	At the investigation meeting, and on 12 and 14 November 2025 from the Applicant At the investigation meeting, and on 12, 13 and 24 November 2025 from the Respondent
Date of Determination:	13 February 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] LJB was employed by EBD as a marketing and events assistant from 14 November 2022, until her employment ended on 10 April 2024.

[2] LJB says she was unjustifiably dismissed, for which she seeks personal grievance remedies. She also says that EBD withheld pay from her, in breach of the Wages Protection Act 1983 (the WPA). She seeks a penalty in respect of this.

[3] LJB also says that EBD breached the duty of good faith it owed to her, and seeks an additional penalty in respect of this, together with a contribution towards her representation costs.

[4] RAC is the General Manager of the group of companies of which EBD is a part, and the Chief Executive of EBD's parent company. On behalf of EBD, RAC says LJB was not dismissed, rather she resigned, and that both parties agreed she would finish her employment earlier than her contractual notice period.

[5] EBD does not accept it is liable for penalties.

[6] This matter is related to Authority file 3367843 (*EBD v LHB* [2026] NZERA 77), which is a claim brought against LJB by EBD.

Non-publication

[7] LJB seeks a permanent non-publication order, in respect of her own name or any identifying details, and the names of her support witnesses.

[8] LJB does not seek non-publication in respect of EBD. She says that naming EBD will not lead to her identity being disclosed. LJB submits that suppressing EBD's name would undermine the public's confidence in the transparency and fairness of the authority's process.

[9] EBD opposed non-publication, citing (inter alia) the principle of open justice, the "public interest in understanding and monitoring employment law", and LJB's failure to establish undue hardship to herself or others.

[10] The principle of open justice is of fundamental importance and forms the starting point for determining whether the circumstances of any particular case justify an order for non-publication. An applicant for a non-publication order must establish that sound reasons exist for the making of such an order, displacing the presumption in favour of open justice.[1]

[11] In *MW v Spiga Limited*[2], the Employment Court considered the issue of non-publication and set out a two-step test. There must first be a reason to believe the specific adverse consequences could reasonably be expected to occur.[3] Second, the authority must consider whether the adverse consequences that could reasonably

[1] *Erceg v Erceg [Publication Restrictions]* [2016] NZSC 135.
[2] *MW v Spiga Limited* [2024] NZEmpC 147.
[3] Above n 2, at [88].

expected to occur, justify a departure from open justice in the circumstances of the case.[4]

[12] In this matter, LJB submits that serious allegations have been made about her, which if made public have the potential to have a lasting prejudicial effect on her life, including as to ongoing reputational damage, impact on her social standing, future employment opportunities, and relationships.

[13] I am not satisfied that the first limb of the *Spiga* test has been made out. LJB has not provided sufficient information in support of her belief that specific adverse consequences could reasonably be expected to occur.

[14] I decline LJB's request for non-publication.

[15] However, as also noted in *Spiga*,[5] the Authority may anonymise the parties' names, without the need for a formal order. The Court also noted that anonymising parties' names affords protection, especially in respect of internet searches.

[16] Given the relatively close-knit community in which EBD continues to operate, there is some risk that LJB may be inadvertently identified if details of her former role, or details of EBD are published.

[17] In the circumstances of this matter I consider it appropriate to anonymise party names. This goes some way to preserving the parties' positions in the event that either party wishes to challenge the outcome of the Authority's determination as to non-publication, or the substantive determination of LJB's claims (as EBD submits will be the case).

[18] A randomly generated string of three letters has been used in this determination to refer to the applicant and the respondent, as well as the respondent's representative. These letters have no resemblance to the parties' actual names, or the name of RAC.

The Authority's investigation

[19] For the Authority's investigation a written witness statement was lodged by LJB, together with a written witness statement from her partner, and from her former

[4] Above n 2, at [89].
[5] Above n 2, at [96].

manager (the marketing manager).

[20] LJB and the marketing manager also lodged comprehensive witness statements in reply.

[21] For EBD, witness statements were lodged by RAC, and the HR manager.

[22] Under oath or affirmation, all witnesses answered questions from the Authority and from the parties' representatives. The representatives made closing submissions at the conclusion of the evidence.

[23] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[24] The Authority has carefully considered all the material provided.

The issues

[25] The issues for investigation and determination are:

(a) whether LJB was unjustifiably dismissed from her employment by EBD?

(b) If so, is LJB entitled to a consideration of remedies sought, including:

(i) reimbursement of lost wages (or unpaid notice); and

(ii) compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings?

(c) Should any remedy awarded be reduced under s 124 of the Act for blameworthy conduct by LJB which contributed to the circumstances giving rise to her grievance?

(d) Did EBD breach the provisions of s 4 of the Wages Protection Act 1983 (the WPA), and if so, should it be liable to a penalty?

(e) Did EBD breach its obligations of good faith under s 4 of the Act, and if so should it be liable to a penalty?

(f) Did EBD breach its obligations under s 130 of the Act, and if so should it be liable to a penalty?

(g) Is either party entitled to an award of costs?

Background

[26] There is no dispute that LJB resigned from her employment on 29 March 2024, giving one month's notice. Her final day of work was to be 24 April 2024.

[27] Both parties agree that LJB was in the process of working out her notice, when on 10 April 2024, EBD's HR manager said he had "something unpleasant" to discuss with her and called her to a meeting.

[28] EBD's statement in reply sets out that:

> The applicant agreed to shorten her notice period and left the company on 17 April 2024, as per discussions with [the HR manager], on 10 April 2024. This was within the terms of her employment agreement.
>
> The applicant's decision to leave earlier was due to her own actions and conduct…
>
> The meeting [of 10 April 2024] was amicable, and [LJB] agreed to end her employment earlier that her resignation date…

[29] The written evidence of The HR manager is that:

> I was instructed by [RAC] to speak with [LJB] regarding her employment and the necessity to conclude her notice earlier due to new information that had come to light regarding her conduct.
>
> …
>
> It is important to clarify that [LJB] was never dismissed by EBD. Instead, we agreed to her early departure while ensuring she received payment for her notice. Along with all accrued holiday entitlements.

[30] In his evidence to the Authority, the HR manager said that LJB agreed to be paid out and not work out the balance of her notice, and that this was an amicable discussion. He said that the meeting lasted approximately 15 minutes, and LJB was given no advance warning. He also said that he did not consider the meeting to be a formal discussion, so did not see the need to provide LJB was with any advance notice of the allegations. Despite this, the HR manager accepted that the 10 April 2024 meeting was a disciplinary meeting.

[31] For her part, LJB says that at the meeting, the HR manager advised that he had received an email from RAC accusing her of various allegations, but despite her asking to see a copy of the email, this was refused. The HR manager accepts LJB was not provided with a copy of the email.

[32] LJB said that during the meeting, she asked if the marketing manager could be present, but this request was declined.

[33] LJB's evidence is that she did not agree to finish her employment early. Rather, she says that she was told she was to "clear my desk and leave immediately", and to "leave everything and just take my personal items". She said that when she protested:

> [the HR manager] began to usher me out, threatening me with "legal consequences" if I didn't leave.
>
> I did not resign or agree to shorten my notice at this 10 April 2024 meeting. I was willing to work my notice
>
> …I was escorted to my car by [the HR manager]…

Did a dismissal occur?

[34] A dismissal is the termination of the employment relationship at the employer's initiative.[6] A dismissal does not require an employer to tell an employee that they are dismissed, or write to an employee terminating their employment in order for there to have been a dismissal. A dismissal in law will occur where there has been a 'sending away' of an employee by an employer. In sending away the employee, the employment relationship is brought to an end at the employer's initiative.

[35] The HR manager's evidence that he had been instructed that there was a 'necessity to conclude LJB's notice earlier' due to concerns about her conduct, is consistent with a sending away for cause. Similarly, RAC's evidence that it was "made clear to [LJB] that the seriousness of the allegations warranted her departure from the workplace sooner rather than later", is also consistent with a dismissal.

[36] LJB says that during the meeting, she was in complete shock and could not believe what was happening to her. In the days following the meeting, she wrote to RAC about her situation. On 18 April 2024, the sent RAC an email saying:

> I am very upset about what has happened to be honest. I got called into a meeting with [the HR manager] on your behalf last week and was fired!?! You said that I was going around saying derogatory things about people and had a negative effect on staff morale. I really don't know what you are talking about. Before I could say much I was ordered to collect my things and leave the premises!? It was very humiliating for me to be escorted off in front of everyone.
>
> Also I need my pay to cope financially. [The HR manager] has talked about making deductions but I don't agree with any of that. Please pay out my final

[6] *Wellington, Taranaki and Marlborough clerical Etc IUOW v Greenwich (T/A Greenwich And Associates Employment Agency And Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC).

> pay without deducting anything by the end of this week. I need what is owed to me.
>
> Is any of this fair?

[37] EBD did not respond to this email on 18 April 2024.

[38] Having had no response from EBD, LJB sent another email to RAC the following day on 19 April 2024. In this email she writes:

> Further to my email yesterday I wish to add my thoughts.
>
> I remain very upset about what happened on Wednesday 10 April. It was most distressing to be called into a meeting by [the HR manager] last week and then just fired!?! I didn't know what was going on. He was reading from this email you had sent him that I was going round saying derogatory things…
>
> … Before I could say much he read out the last sentence of your email which ordered me to clear out my desk and leave the premises!? I asked to see the email and who had made the complaints against me but he refused! I was in total shock and completely embarrassed and humiliated as I was escorted off in front of everyone.

[39] Shortly after LJB's 19 April 2024 email, RAC responded by email. RAC's email is very brief, comprising only three lines:

> [LJB]
>
> I am fully informed. Look below.
>
> Let me know if you would like me to send you more.

[40] At the investigation meeting, RAC strongly disputed that this was evidence that he accepted that LJB had been dismissed. However, there is no evidence of EBD, in the days following the end of LJB's employment (to use a neutral term), taking any steps to disabuse LJB of the idea that she had been dismissed.

[41] EBD appears to have acted consistently with a sending away. Its response letter of 9 May 2024 appears to focus more on the issue of justifiability, rather than whether or not a dismissal had occurred. A considerable portion of this letter is devoted to various alleged shortcomings and performance issues (all of which are strongly denied by LJB). Allegations that "she achieved a minimal amount of results…", her alleged "indifference to the company", and her "unproductivity", are all consistent with a dismissal for cause, rather than a complete denial that any dismissal occurred.

[42] In addition, EBD's 9 May 2024 letter sets out:

> …[LJB] was not dismissed from the company she resigned, and it became evident that she had been toxic and creating negativities at the work place. She

> was not escorted from the premises in front of her colleagues. There was no one present at the time she left the premises. She walked out of the conference room into her car to which no one witnessed. She was told that she did not have to complete her notice time period.

[43] Despite the denial of a dismissal in the first sentence, the paragraph then appears to be an attempt to justify LJB's dismissal. Although it disputes that anyone saw this occur, EBD appears to accept that LJB was escorted from the premises at the end of the meeting. In addition, the last sentence of the paragraph is notable. The advice that LJB was told that she did not have to complete her notice period, in the circumstances of this matter, is consistent with a sending away.

[44] RAC's evidence is that at by the time of the 10 April 2024 meeting:

> It is critical to clarify that there was no dismissal; [LJB] had already resigned by the time she was spoken to by [the HR manager] on 10 April 2024. We have clear evidence of her resignation, and we decided to cut her notice period short by nine days due to her toxic behaviour… She was compensated for those nine days without the necessity to work during that period.

[45] Similarly, RAC says that:

> the evidence we present is solid, there was no dismissal; LJB had already resigned, and we simply requested and agreed to conclude her employment ahead of schedule while ensuring she was compensated for the time she did not work. Which she agreed.

[46] There is no dispute that LJB resigned on 29 March 2024. It was LJB's expectation that she would work out her notice period, as an employee, until 29 April 2024. LJB does not accept that she asked for, or agreed to, a shortened notice period.

[47] The HR manager's written evidence is that at the 10 April 2024 meeting, EBD "agreed" to [LJB's] early departure". Similarly, at the investigation meeting, his evidence to the Authority was that at this meeting, LJB "agreed" to be paid in lieu of notice, and end her employment, effective immediately. However, this is in conflict with RAC's evidence that "we decided to cut her notice period short…".

[48] The parties' employment agreement provides that:

> 15.3 If the employee resigns or the employer terminates this agreement on notice, the employer may pay the employee his/her pay in lieu of some or all of the notice period, in which case the employee's employment will terminate on payment.

[49] Upon receiving a resignation, the decision to make a payment in lieu of all or part of the notice period, is at the discretion of the employer. Notwithstanding this discretion, it is well settled that a fair and reasonable employer is required to exercise any such discretion in a principled manner.

[50] If, at the time of LJB's resignation, EBD had made the decision to pay LJB's wages instead of requiring her to work out the notice period (and actually made the payment), the ending of her employment would have been a genuine resignation, and she would have been unable to claim dismissal (unjustified or otherwise).

[51] However, I find that it is more likely than not that what occurred in this situation, was that LJB's employment was ended by EBD, following a disciplinary meeting. There was no mutual agreement that her employment would finish earlier than the end of her notice period. I accept LJB's evidence that she was willing to work out her notice period (that is, until 26 April 2024), but was dismissed summarily prior to the end of this period.

[52] As is discussed in more detail below, LJB's final pay was not paid correctly. EBD withheld payment of 40 hours' pay. Given this, EBD cannot rely on the 'payment in lieu of notice' provision of cl 15.3 of the employment agreement. LJB was sent home on 10 April 2024, and despite receiving payment for annual leave, EBD accepts that LJB was not paid her full weekly wages for the weeks ending 14, 21 and 28 April 2024.

[53] In *Weddel New Zealand Ltd (in receivership and liquidation)*,[7] the High Court held that if an employer elects to terminate the employment immediately via a payment in lieu of notice, the actual payment must accompany the termination.

[54] EBD did not comply with its obligations under cl 15.3, and as such cannot say it elected to pay wages in lieu of notice.

Was LJB dismissed unjustifiably?

[55] The test in s 103A(2) of the Act is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

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[7] *In the Matter of Weddel New Zealand Ltd (in receivership and liquidation)* [1996] 2 ERNZ 535.

[56] Section 103A(3) of the Act requires the Authority to consider a number of factors, including whether concerns were raised by the employer with the employee prior to the dismissal occurring, whether a reasonable opportunity to respond to those concerns was provided, and whether the employer genuinely considered the employee's explanations (if any) before the dismissal.

[57] EBD, as a fair and reasonable employer, could also be expected to comply with the good faith obligations set out in s 4(1A)(c) of the Act, and in particular the obligation to provide access to information relevant to the continuation of an employee's employment, and an opportunity to comment on the information.

[58] LJB's employment was terminated summarily by the HR manager, on instruction from RAC, at the 10 April 2024 meeting. EBD failed to comply with any of the minimum procedural fairness tests under the Act. The manner of LJB's dismissal was abrupt. The HR manager accepted that LJB was not provided with any advance notice of the meeting or the allegations, and was not told that she had the opportunity to be represented, despite accepting it was a disciplinary meeting. RAC's evidence to the Authority was that he had communicated to the HR manager, his decision that LJB's employment was to end immediately, and instructed the HR manager to give effect to this instruction, prior to the 10 April 2024 meeting. The effect of this was that by the time of this meeting, the decision to end LJB's employment had already been made. As such, LJB had no input into the process prior to the decision to dismiss her.

[59] There was no evidence EBD sufficiently investigated its concerns, in breach of s 103A(3)(a) of the Act. EBD failed to raise its concerns with LJB in breach of s 103A(3)(b) of the Act. EBD failed to give LJB any opportunity, much less a reasonable opportunity, to respond to its concerns in breach of s 103A(3)(c) of the Act.

[60] Instead, she was simply informed of her summary dismissal on 10 April 2024. Because of this, LJB was deprived of any opportunity to respond to EBD's concerns in breach of s 103A(3)(d) of the Act. The concerns EBD had were not put to LJB prior to the decision to dismiss her. EBD's failure to meet any of the minimum procedural fairness tests in s 103A(3), or comply with the obligations under s 4(1A)(c) of the Act renders LJB's dismissal unjustifiable.

[61] EBD's actions, and how it acted, were not consistent with what a fair and reasonable employer could have done in all the circumstances at the time of LJB's dismissal.

[62] EBD's 9 May 2024 letter sets out that:

> There is no breach of the Act, we have,
>
> 1. Acted at all times as a fair and reasonable employer of [LJB];
> 2. Acted at all times in accordance with its duty of good faith including by being active and constructive and responsive and communicative with [LJB];
> 3. Acted at all times in accordance with [LJB's] employment agreement;
> 4. Carried out a thorough and fair investigation into [LJB's] conduct;
> 5. Calculated and processed [LJB's] final pay, holiday pay, including the termination notice time period and therefore did not breach the Wages Protection Act 1987 (sic)…

[63] As set out above and below, I find EBD failed to do any of these things.

[64] It is noted that EBD's investigation into LJB's alleged conduct was far from fair or thorough. LJB was not even involved in the process until after the decision to dismiss had been made.

What remedies (if any) should LJB receive?

[65] LJB has established a personal grievance for unjustified dismissal. She is therefore entitled to a consideration of the remedies sought.

Lost wages or unpaid notice

[66] As set out below, LJB's unpaid notice was paid by EBD in November 2025.

Compensation for humiliation, loss of dignity and injury to feelings

[67] LJB's evidence is that she was shocked and upset at her dismissal. Her evidence was that she was dressed and traumatised by her dismissal, experiencing severe anxiety, insomnia (for which she was prescribed sleeping tablets), headaches, and other physical symptoms. She said she avoided going into town for fear of running into former colleagues or contractors.

[68] LJB's evidence establishes that she has experienced harm under each of the heads in s 123(1)(c)(i) of the Act. LJB's humiliation, loss of dignity and injury to feelings arising was likely compounded by EBD's decision to escort her out of the

building, in view of another employee and a contractor. In describing being escorted from the building, LJB says she felt "exposed, embarrassed, and devastated".

[69] In *Wikaira v Chief Executive of the Department of Corrections,* the Employment Court confirmed that it was desirable that awards of compensation pursuant to s 123(1)(c)(i) of the Act " … should be, although not over-generous, nevertheless fair, realistic and not miserly".[8]

[70] Having regard to the particular circumstances of this case, and in light of current awards of compensation by the Authority, an award of $16,500.00 under s 123(1)(c)(i) of the Act is appropriate to compensate LJB for the humiliation, loss of dignity and injury to feelings she experienced as a result of her unjustified dismissal.

Contribution

[71] Where the Authority determines an employee has a personal grievance, it is required under s 124 of the Act to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions so require, reduce the remedies that would otherwise have been awarded.

[72] No deduction from remedies awarded is to be made under s 124 of the Act. The unjustifiability of LJB's dismissal from her employment has been established in EBD's failure to follow statutory requirements. These obligations were not LJB's and there is to be no deduction from the monetary remedies for reason of contribution.

Penalties

Penalty for breach of good faith

[73] LJB seeks a penalty against EBD under s 4 of the Act, for what she says is a breach of the duty of good faith.

[74] It is not clear to the Authority how the alleged breach of good faith is distinct from her personal grievance for unjustified dismissal, or why a separate penalty should be ordered, payable to LJB.

[75] Although aspects of EBD's conduct in respect of LJB's dismissal can be said to be inconsistent with the duty of good faith under s 4 of the Act, a breach need not

[8] *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237].

necessarily result in a penalty. The Authority is satisfied that the compensation awarded in respect of LJB's personal grievance, adequately address EBD's failure to provide information and the opportunity to comment before its decision to dismiss.

[76] The Authority declines to exercise its discretion to order penalties in relation to the alleged breach of good faith.

Wages and time record

[77] LJB seeks a penalty under s 130 of the Act in relation to the failure to provide her wages and time record upon request. Section 130(2) provides that an employer must provide the employee's wages and time record immediately upon request. The Authority is satisfied a penalty against EBD should be contemplated for its failure to provide LJB's wages and time record.

[78] Contained in the personal grievance letter sent by LJB's advocate on 8 May 2024 was a clear request for LJB's wages and time record, together with notice that a penalty would be sought if this was not provided.

[79] EBD's failure to provide LJB's wages and time record is a breach of s 130 and a penalty is appropriate.

Wages Protection Act

[80] Section 4 of the WPA provides that an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[81] Copies of email correspondence between LJB and EBD in the days following her dismissal, show that EBD was contemplating making a deduction from LJB's final pay. LJB finally received her final payslip on 1 May 2024 (described by the HR manager as "full and final settlement"). She promptly contacted EBD to note that her pay for her final two weeks' notice had been omitted.

[82] The HR manager wrote to LJB on 2 May 2024 "There will not be any other further adjustment to the amount as indicated… This is a fair and reasonable outcome".

[83] Despite submitting that the claim that EBD had breached the provisions of the WPA was "nonsense" and that there was no evidence that EBD had withheld part of LJB's pay, this was contradicted by EBD's own evidence.

[84] After the conclusion of the investigation meeting, EBD provided evidence that it had not paid LJB correctly for her notice period, and that LJB was owed payment for 40 hours. EBD described this as "an oversight". LJB submits that the amount she had been claiming as unpaid notice, is almost identical to the amount EBD now says was withheld by way of an oversight, some 19 months earlier.

[85] Regardless of whether this was inadvertent or deliberate, it is difficult to see how EBD, in failing to pay LJB's full pay at the time it became payable, can maintain that no breach of the WPA has occurred.

[86] The Authority understands that any outstanding amount was paid in full to LJB on 12 November 2025.

Interest

[87] Although the withheld wages were finally paid to LJB in November 2025, this was a significant period after they should have been paid, and were only paid after LJB had commenced a proceeding in the Authority for their recovery. LJB lost the use of her own money for some 19 months. LJB is entitled to an award of interest on the withheld wages. This is to be calculated using the civil debt interest calculator.[9] Interest is to be calculated from the period commencing 27 April 2024 (being the day after what was to have been LJB's last day of employment), until the date on which EBD paid the withheld wages to LJB.

Penalties – general principles

[88] A breach of the requirements of s 130 of the Act, and/or the provisions of s 4 of the WPA, constitute breaches of *employment standards*.[10] In addition, the provisions of the WPA are all *minimum entitlement provisions*.[11] A breach of the provisions of the WPA is therefore a breach of a minimum entitlement provision.

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[9] https://www.justice.govt.nz/fines/civil-debt-interest-calculator/.
[10] As that term is defined under s 5 of the Employment Relations Act 2000.
[11] As that term is defined under s 5 of the Employment Relations Act 2000.

[89] Comprehensive legal principles apply when the Authority is required to determine an application for penalties. Those principles are set out at s 133A of the Act. In addition, the Employment Court has provided further guidance in recent decisions including *Labour Inspector v Preet Pvt Limited*,[12] *Labour Inspector v Prabh Limited*,[13] and *Labour Inspector v Daleson Investment Limited*.[14]

[90] The appropriate quantum of penalty is to be determined after considering the circumstances of each proven breach in light of the legal principles.

[91] A penalty may be awarded in any amount up to the maximum prescribed by s 135(2) of the Act, which for each breach or involvement in a breach is $20,000 in the case of a company such as EBD.

[92] Penalties are payable to the Crown. However, if a penalty is ordered by the Authority, under s 136(2) of the Act, all or part of it may be awarded to any person (such as LJB), instead of being paid to the Crown. LJB submits that a portion of any penalties ordered should be paid to her.

[93] The Employment Court, in the decisions referred to above, has considered the purpose of penalties.[15] When ordering penalties the Authority should seek to punish those who breach minimum employment standards, deter companies and individuals from committing employment breaches, compensate victims of such breaches, and eliminate unfair competition.

Consideration of penalties

Statutory consideration 1 – the object of the Act

[94] The object of the Act is set out at s 3. The stated objects include:

- promotion of good faith in all aspects of the employment environment and the employment relationship;
- to promote the effective enforcement of employment standards,
- to acknowledge and address the inherent inequality in employment relationships.

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[12] *Labour Inspector v Preet Pvt Limited* [2016] NZEmpC 143.
[13] *Labour Inspector v Prabh Limited* [2018] NZEmpC 110.
[14] *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.
[15] *Preet,* above n 12 at [49-63].

[95] EBD appears to accept it failed to pay LJB's entire wages when they became due[16], despite LJB's repeated written enquiries regarding her outstanding wages. The failure to pay wages is a serious matter.

[96] The record keeping obligations required under New Zealand employment legislation (and the requirements that such records are provided on request) is designed to promote and administer the enforcement of employment standards.

Statutory consideration 2 – the nature and extent of the breaches

[97] Two separate breaches are identified:

- one breach of s 4 of the WPA; and
- one record keeping breach, comprising of a breach of s 130 of the Act by failing to provide a copy of LJB's wages and time record.

[98] Globalisation of penalties is appropriate to meet the interests of this case, and in accordance with the Court's approach to penalties as set out in *Preet* and *Daleson Investment*.

[99] The breaches arise from a single period of employment involving a single employee, and both relate to issues to do with LJB's pay.

[100] The total maximum penalty against EBD is therefore $20,000.

Statutory consideration 3 – whether the breach was intentional, inadvertent or negligent

[101] EBD's breaches were clearly intentional, and not inadvertent. LJB's personal grievance letter contains a clear request for a copy of her wages and time record "showing [she] has been paid correctly". EBD was on notice that of a dispute as to wages, yet its written response to LJB's grievance is silent as to her wages and time record request, and no such information was ever provided.

[102] EBD's breaches reflect a sustained failure to comply with employment standards over a period of some 19 months following her dismissal, in which LJB's wages remained owing.

[16] However, EBD also strenuously rejects that it breached the provisions of the WPA, describing LJB's submission in this regard as "nonsense". No explanation is provided for EBD's contradictory positions.

[103] These were not isolated or mere technical breaches. Rather, (particularly in respect of the WPA breach), they represent a disregard for minimum entitlement provisions over a sustained period.

Statutory consideration 4 – the nature and extent of any loss or damage

[104] The breaches resulted in unpaid arrears of 40 hours' pay owing to LJB. As a result, LJB lost the use of this money to which she was entitled, at the time it became due.[17] This breach undermines the statutory protections designed to ensure timely and fair compensation for employees.

[105] The failure to provide LJB with a copy of her wages and time record can only have been the cause of additional and unnecessary work (including bringing this matter before the Authority for investigation).

[106] The Authority observes that in depriving LJB of her minimum entitlements, EBD has reduced its costs and gained an unfair advantage over its competitors through retaining funds that would otherwise have been paid in wages.[18]

Statutory consideration 5 – steps taken to mitigate effects of the breach

[107] In terms of the failure to provide LJB's wages and time record, EBD has taken no steps to mitigate this breach.

[108] The Authority notes that although the outstanding wage arrears have now been fully paid, this only occurred some 19 months after the end of LJB's employment, after the issue had been raised with EBD in writing on a number of occasions.

Statutory consideration 6 – circumstances of the breach and any vulnerability

[109] There is an inherent power imbalance in the employer/employee relationship, which was amplified by the fact of LJB's (unjustified) dismissal. In addition, LJB's personal grievance letter contains a clear request for her outstanding wages to be paid. EBD's response was to accuse LJB of being unproductive, and of unauthorised expenditure, together with the advice that the company would "be seeking restitution and be pursuing the matter further should LJB continue with this situation which may not be very pleasant for her…".

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[17] *Daleson Investment*, above n 14 at [31].
[18] *Daleson Investment*, above n 14 at [31].

Statutory consideration 7 – previous conduct

[110] EBD has come to the attention of the Authority (and the Court) on a number of previous occasions.

[111] In prior determinations, the Authority has found that EBD has breached the provisions of s 130 of the Act, and breached the provisions of s 4 of the WPA, including as to an unconsented withholding of wages.

[112] On a previous occasion, the Authority ordered a penalty of $2,500.00 in respect of EBD's breach of s 130 of the Act and a penalty of $4,000.00 for EBD's breach of s 4 of the WPA.

Additional consideration 1 – deterrence

[113] The breaches under this proceeding relate to minimum standards. As the Court held in *Daleson Investment*, there is a need to bring home to EBD, the employment standards it is required to meet. The Court also considered that it should be made plain to other employers that minimum entitlements are non-negotiable.[19]

[114] Any penalties to be imposed should be consistent with the objects of the Act, particularly those relevant to the upholding of principles of good faith, mutual trust and confidence.

[115] A penalty sends a message not only to EBD, but to other employers, that non-compliance will not be tolerated.

Additional consideration 2 – culpability

[116] Aggravating factors include the circumstances of the breaches (including the intentional conduct of EBD to its own commercial benefit, and the taking advantage of the inherent power imbalance in the employment relationship).

[117] Whilst these are serious matters, they are not the most serious breaches, and therefore the provisional starting point for penalties for this matter (before deductions) will not be the maximum penalty.

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[19] *Daleson Investment*, above n 14 at [39].

Additional consideration 3 – consistency

[118] Breaches of obligations under the Act and the MWA serious matters. The Authority and the Court have imposed significant penalties for such breaches. In *Daleson Investment*, penalties of $40,000.00 were ordered in respect of minimum wage arrears, holiday pay arrears, and the failure to provide a written employment agreement.

[119] A penalty should reflect the totality of the breaches, and not just the monetary amounts involved.[20]

Additional consideration 4 – ability to pay

[120] In *Daleson Investment*, the Court observed that " … Parliament has set out an exhaustive list of considerations and the financial circumstances of the defaulting party is not one of them."[21]

[121] EBD did not address the Authority as to the issue of ability to pay. However, the company remains in operation. There is no evidence of EBD having any funding constraints. As such, it is assumed that EBD will be able to meet any award.

Additional consideration 5 – proportionality of outcome

[122] Penalties should be proportional to the breaches, but not be reduced so as to create perverse incentives for employers, and inadvertently encourage non-payment.[22] The Court in *Daleson Investment* cautioned that overly reduced penalties would likely undermine the objectives of the Act.[23]

Penalties ordered

[123] EBD on analysis, and after globalisation as considered above, is liable for maximum penalties of $20,000.00. Having considered all matters, and the guidance provided by the Court in respect of penalties, The Authority makes the following orders.

[124] EBD is to pay penalties as follows:

(a) in respect of its breach of s 130 of the Act and its breach of the WPA, there needs to be a deterrent factor reflecting the egregious nature of such a practice. I consider the maximum penalty of $20,000.00 should be

[20] *A Labour Inspector v Pegasus Energy Limited & Anor* [2018] NZERA Wellington 26.
[21] *Daleson Investment,* above n 14 at [45].
[22] *Daleson Investment*, above n 14 at [44].
[23] *Daleson Investment*, above n 14 at [47].

reduced by 20 per cent to $16,000.00;

(b) in respect of ameliorating factors, there should be a further discount of 20 per cent to reflect EBD's eventual mitigation. No discount is applied in respect of the financial circumstances of the company. As EBD has previously been before the Authority, there can be no discount allowed for an absence of previous conduct .

[125] Having considered proportionality, the total penalty EBD Limited must pay is the sum of $9,000

Part of the penalty recovered to be paid to the complainant employee

[126] Under s 136(2) of the Act, the Authority may order that the whole or part of any penalty recovered must be paid to any person.

[127] LJB submits that it is appropriate that the Authority exercises its discretion under this section, and invites the Authority to award part of the penalties to her. I am satisfied that it is appropriate to do so in the circumstances of this matter.

[128] Of the total penalties payable by EBD, a total of 50 per cent (being $4,500.00) is to be paid to LJB, with the remainder to the Crown account.

Summary of orders

[129] Within 28 days of the date of this determination, EBD must pay to LJB the following amounts:

(a) Compensation in the sum of $16,500.00 (without deduction) under s 123(1)(c)(i) of the Act.

(b) Interest on the withheld wages, in the manner set out at [87].

(c) Total penalties in the sum of $9,000.00, of which the sum of $4,500.00 is to be paid directly to LJB, with the balance being paid to the Authority, for transfer into a Crown account.

Costs

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

[131] If the parties are unable to resolve costs, and an Authority determination on costs is needed, LJB may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum EBD will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[132] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[24]

Jeremy Lynch
Member of the Employment Relations Authority

[24] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1