

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 40  
5602973

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              BABU GRIFFIN  
Respondent

Member of Authority:      Andrew Dallas

Representatives:            Alastair Dumbleton, Counsel for the Applicant  
Rajendra Chaudry, Counsel for the Respondent

Investigation Meeting:     3 June 2016 at Auckland

Submissions                      27 June 2016, 14 and 24 November 2016 for the  
Applicant  
11 July 2016, 21 and 24 November 2016 for the  
Respondent

Determination:                20 February 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.      Babu Griffin ('Mr Griffin') must pay the Labour Inspector for the benefit of Gurbinder Kaur Mann within 28 days of the date of this determination:**
- (a) \$4,100.50 as unpaid wages;**
  - (b) \$328.04 as unpaid holiday pay; and**
  - (c) 5% interest on the amounts specified in (a) and (b) on and from 13 January 2016.**
- B.      Within 28 days of the date of this determination, Mr Griffin must pay the Authority, for subsequent payment into a Crown bank account, a penalty of \$2000 for failure to provide Ms Mann with an employment agreement under s 64 of the Employment Relations Act 2000.**

**C. Costs are reserved.**

**Employment relationship problem**

[1] In March 2015, Gurbinder Kaur Mann (Ms Mann) was distributing her curriculum vitae looking for work in the Manukau area.

[2] Ms Mann was on a student visa and entitled to work up to 20 hours a week.

[3] Babu Griffin of Xtreme Print, a local printing business, offered Ms Mann an interview. Ms Mann was subsequently offered training in Xtreme Print's processes for three days. After the three days training, Mr Griffin, on Ms Mann's account, then offered her permanent employment.

[4] Xtreme Print was the trading name for a company called 4 Seasons Tailors and Drycleaners Limited (Xtreme), which was, at that time, owned by Mr Griffin's wife, Saras Wati (Ms Wati). Mr Griffin was not a director or shareholder of this company.

[5] Ms Wati sold this company to another person unrelated to these proceedings on 22 April 2016.

[6] Ms Mann stated Mr Griffin never provided her with an employment agreement.

[7] Mr Griffin disputed that he offered Ms Mann permanent employment. He says she was a "volunteer". Mr Griffin would subsequently state that he was not Ms Mann's employer.

[8] On 19 November 2015, Mr Griffin's then representatives provided Labour Inspector, Jim Denyer with a document entitled "Xtreme Print Volunteer Agreement" dated 23 March 2015. Mr Griffin stated Ms Mann signed this agreement in his presence on 23 March 2015 and Steven Brock, a business associate of Mr Griffin, witnessed her doing so.

[9] Ms Mann refuted that the agreement was provided to her and said her signature was a forgery.

[10] Another person, Amritjeet Singh was offered and, on his evidence before the Authority, accepted, an identical voluntary agreement with Xtreme on 9 November 2015. The Labour Inspector did not take issue with this.

[11] The Labour Inspector stated that Mr Griffin did not advise him when he interviewed Mr Griffin, on 16 November 2015, that he was not Ms Mann's employer or that she was a volunteer. The Labour Inspector further stated that Mr Griffin did not show him the volunteer agreement dated 23 March 2015 or provide him with a copy during the interview.

[12] Ms Mann performed duties, which included administrative duties, operating printing equipment and customer service, as an employee (or volunteer) for Mr Griffin on a regular basis.

[13] On Ms Mann's account, after several weeks of not receiving wages she made enquiries with Mr Griffin. Ms Mann said that Mr Griffin's response was that she would be paid "next week". This was Mr Griffin's response every time she raised the issue of non-payment of wages with him.

[14] There were various interactions between Ms Mann and Mr Griffin including text messages about Ms Mann's duties and the payment of wages. Ms Mann and Mr Griffin had vastly different interpretations during the investigation meeting about what these meant.

[15] On Ms Mann's account she terminated her employment without notice on 30 June 2016 due to non-payment of wages.

[16] Ms Mann made a complaint to the Labour Inspectorate on 9 November 2015. This was followed up by a visit to the premises of Xtreme by the Labour Inspector on 16 November 2015. The Labour Inspector also issued a "Notice requiring supply of a Copy of Wages, Time and Holiday Records" (notice to produce) on 16 November 2016.

## **The Authority's investigation**

[17] By Statement of Problem lodged with the Authority on 15 December 2015, the Labour Inspector sought recovery from Mr Griffin of unpaid wages under s 6 of the Minimum Wages Act 1983 and unpaid holiday pay under s 23 of the Holidays Act 2003 on behalf of Ms Mann.

[18] The Labour Inspector also sought a penalty against Mr Griffin under s 64 of the Employment Relations Act 2000 (the Act) for failing to provide Ms Mann with an employment agreement.

[19] The Statement in Reply lodged on behalf of Mr Griffin on 11 February 2016 did not take issue with him being identified as the respondent. Indeed the Reply was prefaced with the words: “[w]e have taken *instructions* and respond as follows ...”. (emphasis added)

[20] Interestingly, the Reply asserted Ms Mann’s “personal grievance” was raised out of time. It also asserted Ms Mann was a “volunteer” of Mr Griffin.

[21] During a case management conference (CMC) convened with the parties on 8 April 2016, Mr Griffin’s then representative confirmed that the Labour Inspector had correctly identified Mr Griffin as the respondent to the proceedings in the Statement of Problem. This was recorded in paragraph one of the Member’s Minute issued to the parties on 8 April 2016 as:

The parties agree that Babu Griffin is the correct Respondent.

[22] During the CMC, the then representative of Mr Griffin advised that he believed that Steven Brock would be a witness relevant to the Authority’s investigation. Mr Brock had also been identified in the Statement in Reply.

[23] A witness statement was lodged for Mr Griffin on 20 May 2016. Mr Griffin’s then representative advised that Authority that he had been unable to lodge Mr Brock’s witness statement as he had been in court in an unrelated matter and it had not been finalised.

[24] On 30 May 2015, Counsel for Mr Griffin, who had by then assumed the conduct of the matter, lodged a supplementary witness statement on behalf of Mr Griffin. No direction had been given for the provision of this statement. In the statement, Mr Griffin stated that the Labour Inspector had “threatened” Mr Brock and he was now reluctant to give evidence.

[25] Counsel for Mr Griffin subsequently lodged a witness statement on behalf on Mr Brock on 6 June 2016. In the statement, Mr Brock outlined the alleged threat made by the Labour Inspector in or about February 2016. The Labour Inspector denied that any such threat was made.

[26] Given the serious nature of the allegation made by Mr Brock, the Authority issued a witness summons for him on 13 June 2016. Unfortunately, the Authority’s process servers were unable to effect service upon him. Mr Brock subsequently voluntarily attended the investigation meeting at the request of Mr Griffin.

[27] On 13 June 2016, Counsel for Mr Griffin, despite the previous acknowledgment made on behalf of Mr Griffin by his previous representative on 8 April 2016, raised an issue about who the proper respondent to the proceeding was.

[28] During the investigation meeting, I heard evidence from the Labour Inspector, Ms Mann, Tajinder Singh, Mr Griffin, Amritjeet Singh, Mr Brock and Saras Wati.

[29] In his evidence, Mr Brock stated that he was not threatened by the Labour Inspector as outlined in Mr Griffin’s evidence. He further stated he had sought advice from the Labour Inspector in relation to another matter after the alleged incident described by Mr Griffin had occurred. This is not the action of a person who has been “threatened”.

[30] Having heard and considered the evidence of Mr Brock and the Labour Inspector, I find the Labour Inspector did not threaten, or prejudice, Mr Brock in any way.

[31] Subsequent to the investigation meeting, the Authority, having formed a preliminary view that Ms Mann was an employee, re-opened its investigation under cl 4 of sch 2 of the Act, to further inquire as to who the correct Respondent to the proceedings was. A CMC was convened with counsel on 1 November 2016 and further submissions were sought.

[32] As permitted by s 174E of the Act this determination has not recorded all the evidence received from the Labour Inspector and Mr Griffin but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Issues**

[33] This issue for investigation and determination are:

- (i) Was Mr Griffin the employer of Ms Mann?;
- (ii) If so, did Mr Griffin fail to meet minimum employment standards by not paying Ms Mann:
  - a. wages; and/or
  - b. holiday pay;
- (iii) If Mr Griffin was Ms Mann's employer, is he liable for a penalty under s 64 of the Act for not providing her with an employment agreement and if so, in what quantum?;
- (iv) Whether either party should contribute to the costs of representation of the other?

### **Submissions of the parties**

#### *Labour Inspector*

[34] Counsel for the Labour Inspector said that an acknowledgment or concession that Mr Griffin was the correct respondent to the proceedings was made on his behalf during the CMC on 8 April 2016 and recorded in the subsequent Member's Minute. Counsel said the matter had then proceeded on the basis that if it was established that Ms Mann was an employee rather than a volunteer, then Mr Griffin was her employer.

[35] Counsel said Mr Griffin ought not be allowed to resile from this and that if Mr Griffin's then representative had exceeded his authority, then remedies in forums other than the Authority could be sought against the representative.

[36] Counsel's contention that while a company controlled by Ms Wati owned Xtreme, there was no reason in principle why Mr Griffin could not have personally been Ms Mann's employer. Counsel said the evidence in support of this contention was that Mr Griffin had recruited and selected Ms Mann and directed her to perform various tasks as, it was argued, disclosed through numerous telephone conversations and text message exchanges between the pair.

[37] Counsel further contended that because Mr Griffin claimed that he himself was a "volunteer" at Xtreme, he could not readily be found to be an agent of the owner of the business, his wife, Ms Wati.

[38] Counsel contended Ms Wati played no part in the employment of Ms Mann and the written agreement between Ms Wati and Mr Griffin dated 16 November 2016 authorising him to handle the engagement of "voluntary workers" was of no assistance, because the Labour Inspector contended that Mr Mann was an employee of Mr Griffin.

[39] Counsel referred to several decisions of the Court including *Hutton v ProvencoCadmus Ltd (in receivership)*<sup>1</sup> and *Orakei Group (2007) Ltd v Doherty*<sup>2</sup> where the Court said, in summary, in determining the real nature of the relationship, s 6 of the Act is to be applied, an objective assessment of the evidence is to be undertaken and the circumstances, as they existed at the time the employment relationship was entered into, need to be analysed.

[40] Counsel then went on to state that, unlike *Hutton* and *Orakei*, the circumstances here are " ... permeated with dishonesty, gross bad faith, cynical disregard for the rights of Ms Mann as an employee and a callous affront to her dignity as a person".

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<sup>1</sup>[2012] NZEmpC 207

<sup>2</sup>[2008] NZEmpC 65

[41] Counsel said Ms Mann had been misled and deceived into believing she would be paid and was not provided with an employment agreement before her employment commenced, in breach of s 63A of the Act, or any time subsequently.

[42] Counsel submitted it would be reasonable for the Authority to infer that, in all the circumstances, Mr Griffin was acting on his own account with a view to exploiting Ms Mann for her labour with no intention of paying her or affording her rights as an employee. Counsel said Mr Griffin presented himself as the owner of Xtreme who made decisions about who to employ, misleading Ms Mann as a result because she had no idea who owned the business.

[43] Counsel said Mr Griffin had full personal capacity to employ Ms Mann, the consent of a third party, such as Xtreme or Ms Wati, was not required and, in fact, there was no evidence that Xtreme through Ms Wati even knew that Mr Griffin had employed Ms Mann. Counsel said Mr Griffin effectively exercised 100% control over Ms Mann and this may be the most important factor in determining the real nature of relationship for the purposes of s 6 of the Act, even in circumstance where her work ultimately benefited Xtreme.

[44] Counsel submitted that Ms Mann must have had an employer and that after excluding Xtreme and Ms Wati, Mr Griffin was the only person capable of being her employer.

[45] Counsel said that even if the volunteer agreement could be evidence, in the absence of coercion or other impediment, of a “meeting of the minds” between Mr Griffin and Ms Mann, it was not legally enforceable because the agreement clearly said on its face:

This agreement is binding in honour only, it is not intended to be a legally binding contract between us and may be cancelled at any time at the discretion of either party.

[46] Counsel contended Ms Mann strongly refuted that she signed the volunteer agreement and denied all knowledge of the document. Counsel said, and this was confirmed by Ms Mann's evidence, the first time she saw the document was when the Labour Inspector provided it to her in November 2015.

[47] Counsel submitted Ms Mann had not dishonestly claimed she was employed by Mr Griffin or lied about either her knowledge or involvement in the making of the voluntary agreement. Counsel contended that if Ms Mann had concocted her story and known she signed the volunteer agreement, she had pursued her claim against Mr Griffin with remarkable tenacity from the outset. Counsel invited the Authority to prefer Ms Mann's evidence to that of Mr Griffin or Mr Brock.

[48] Counsel contended that the most likely explanation, and one that should be accepted by the Authority, was that the voluntary agreement did not exist before 16 November 2015 when the Labour Inspector commenced his investigation. Evidence supporting this proposition was said to be that Mr Griffin did not mention volunteers or training at this meeting. Further, Mr Griffin did not show or provide a copy of the voluntary agreement to the Labour Inspector when interviewed that day, despite subsequently claiming in his evidence he used the voluntary agreement to provide "documentation" for compliance issues.

[49] Counsel submitted Mr Griffin could not have forgotten about the volunteer agreement because he had executed an identical voluntary agreement with Mr Singh seven days before being interviewed by the Labour Inspector.

[50] Counsel submitted the most likely reason for the existence of the voluntary agreement for Ms Mann was that it was brought into existence in response to the Labour Inspector's notice to produce. Counsel said that when the Labour Inspector provided Ms Mann with a copy of the voluntary agreement, her rejection of the document was "plain, clear and emphatic".

[51] Counsel said that when Ms Mann and a friend visited Mr Griffin in October 2015 to recover the wages Ms Mann said she was owed, they were not presented with the voluntary agreement. Counsel also submitted that the weight of evidence pointed to this visit occurring in October 2015 rather than December 2015 as claimed by Mr Griffin. Counsel further submitted that any delay by Ms Mann in making a complaint about unpaid wages, must be considered in the context of her youth and “relative inexperience of employment and New Zealand life and culture”.

[52] Counsel referred to a series of text message exchanges that were said to be evidence of Ms Mann seeking payment of her wages from Mr Griffin. This, it was suggested, was evidence of Ms Mann not entering into a voluntary agreement with Mr Griffin.

[53] Counsel said while Mr Griffin’s evidence about the voluntary agreement was supported by Mr Brook, Ms Mann sat across from him during the investigation meeting and “[s]he looked at [Mr Brock] and without hesitation denied ever seeing him before”. Counsel said that Mr Griffin has also not been able to produce any evidence as to when the document was created. Mr Griffin appeared to be relying on the loss of files from the change of ownership of Xtreme. Counsel said this was “convenient”.

[54] Counsel said that if the volunteer agreement was found not to be genuine, there was nothing in the evidence to contradict Mr Mann’s evidence that she intended to enter into an employment relationship with Mr Griffin and she expected reward in the form of wages for the work she performed.

[55] Given the degree of control exercised by Mr Griffin in the performance of Ms Mann’s work and the lack of any evidence she was in business on her own account or self-employed, counsel said the real nature of relationship was between Mr Griffin and Ms Mann was one of employer/employee.

*Babu Griffin*

[56] Drawing support from the definition of employer contained in s 6 of the Act, Counsel for Mr Griffin said, an employer would have to have legal capacity deriving from a power, such as company articles of incorporation or delegated authority, to employ an employee. Counsel said to be the correct respondent to the Labour Inspector's proceedings, Mr Griffin had to be an employer or an employee of an employer with authority to act on the employer's behalf.

[57] Counsel said Mr Griffin denied being Mr Mann's employer and his former representative was wrong to advise the Authority Mr Griffin was the correct respondent.

[58] Counsel argued the correct identification of the employer is first a question of law and second a question of fact.

[59] Counsel drew support from the definition of "employer" as contained in s 2 of the Wages Protection Act 1983 until March 2016, when it was brought into line with the s 6 definition of "employer" in the Act. Counsel also referred to a decision of the Court in *Hixon v Campbell*<sup>3</sup> that extensively discussed the capacity of employers and employees to employ, dismiss and supervise employees.

[60] Applying *Hixon*, Counsel said for a person to act on behalf of an employer that person must first be employed by them and this was not the case here as there was no evidence Mr Griffin was employed by Xtreme. Consequently, Mr Griffin had no legal standing to hire, employ or supervise the work of any employee of Xtreme.

[61] Counsel contended that the Labour Inspector's argument that Mr Griffin cannot resile from the acknowledgment or concession made by his former representative to the Authority that Mr Griffin was the correct respondent, was not sustainable in law because Mr Griffin had to be either an employer or an employee of Xtreme acting under delegated authority to employ Ms Mann.

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<sup>3</sup>[2014] NZEmpC 213

[62] Counsel further submitted that the Labour Inspector did not thoroughly investigate enough and incorrectly identified the employer. This resulted in Mr Griffin being named as respondent to the proceedings.

[63] Counsel said 4Seasons Design Limited traded as Xtreme. However, that company has been sold to another person and it was now trading as 4Seasons Design Limited.

[64] Counsel said the Authority should dismiss the Labour Inspector's proceedings against Mr Griffin.

### **Was Ms Mann an employee?**

[65] Having heard and considered the evidence from Ms Mann, Mr Griffin and Mr Brock about the volunteer agreement, I find it was not a genuine document. I accept the submission of Counsel for the Labour Inspector that the most likely reason for the existence of the voluntary agreement for Ms Mann was that it was brought into existence in response to the Labour Inspector's notice to produce.

[66] Even if I am wrong about that, I further find, by its own terms, the volunteer agreement was of no legal effect.

[67] I accept the evidence of Ms Mann that she intended to enter into an employment relationship and she expected to be paid for the work she performed. In other words, she intended to be an employee. Persuasive evidence of this was Ms Mann's attempts to secure payment of wages from Mr Griffin (both during the time it was performed and afterwards), her complaint to the Labour Inspector and her complete refutation of the volunteer agreement both to the Labour Inspector and subsequently to the Authority

[68] I find then, on the balance of probabilities, that Ms Mann was an employee within the meaning of that term set out in s 6 of the Act. Having found Ms Mann was an employee, the next question becomes, who was her employer?

### **Was Ms Mann an employee of Babu Griffin?**

[69] From the outset, I accept the submission of Counsel for the Labour Inspector that Ms Mann, having found to be an employee, must have had an employer. Mr Griffin initially, through instructions to his first representative, accepted that he was correct respondent to the Labour Inspector's proceedings. In other words, he accepted he was Ms Mann's employer. However, he subsequently resiled from this.

[70] Counsel for Mr Griffin was adamant Mr Griffin had to be either an employer or an employee of Xtreme acting under delegated authority from Ms Wati to employ Ms Mann. Counsel said he was neither. Counsel for the Labour Inspector said there was no evidence that Xtreme through Ms Wati even knew that Mr Griffin had employed (or engaged) Ms Mann.

[71] However, in the absence of Xtreme or Ms Wati, who was Ms Mann's employer? I accept the submission of Counsel for the Labour Inspector that there was nothing to prevent him from personally employing Mr Mann (even in circumstances where Xtreme may have been the ultimate beneficiary of her labour). As an exercise in deductive reasoning then, the only person capable of being her employer was Mr Griffin. Mr Griffin appeared to accept he had been Ms Mann's employer until he changed his position.

[72] I do not accept the submission of Counsel for Mr Griffin that the Labour Inspector did not thoroughly investigate enough and incorrectly identified Mr Griffin as Ms Mann's employer as a result. Rather I find it is more likely than not that Mr Griffin directly or indirectly misled the Labour Inspector – in much the same way, I find, he directly or indirectly misled Ms Mann – into believing Xtreme was his business, rather than owned by Ms Wati.

[73] I find it is not credible for Mr Griffin to resile from the acknowledgment or concession made that he was the correct respondent. This, in combination with the discredited allegation made by Mr Griffin against the Labour Inspector and the complete refutation of the volunteer agreement by Ms Mann, raises serious questions about Mr Griffin as a reliable witness.

[74] Having considered the evidence – including the evidence that Mr Griffin selected, recruited and trained Mr Mann, controlled and directed her work and received and responded to her requests for payment of wages - I find, on the balance of probabilities, that Ms Mann was an employee of Mr Griffin, who acted alone and independently of Xtreme and/or through Ms Wati.

**Has Babu Griffin failed to meet minimum employment standards as identified in the Labour Inspector’s investigation?**

[75] A Labour Inspector has the power to bring an action on behalf of an employee under s 228(1) of the Act for recovery of any wages or holiday pay.

[76] Section 228 of the Act allows the Labour Inspector to seek to rely on s 132 of the Act. Section 132 relevantly provides:

132 Failure to keep or produce records

(1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—

- (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
- (b) that failure prejudiced the employee’s ability to bring an accurate claim under section 131.

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—

- (a) the wages actually paid to the employee;
- (b) the hours, days, and time worked by the employee.

[77] Mr Griffin did not provide wage and time records in response to the Labour Inspector’s notice to produce wages, time and holiday records.

[78] The Labour Inspector sought arrears of wages on behalf of Ms Mann. He calculated the total amount of arrears in wages as \$4,100.50. The Labour Inspector said the calculations were based on upon information provided by Ms Mann.

[79] The Labour Inspector calculated Ms Mann’s unpaid holiday pay as \$328.04. This was calculated under s 23(2) of the Holidays Act.

[80] I find that the Labour Inspector has demonstrated on the balance of probabilities that Mr Griffin failed to pay Ms Mann minimum wages in breach of 6 of the Minimum Wage Act 1983.

[81] I further find that the Labour Inspector has demonstrated on the balance of probabilities that Mr Griffin failed to pay Ms Mann holiday pay in breach of s 27 of the Holidays Act 2003.

[82] It is appropriate in all the circumstances of this matter to require Mr Griffin to pay the arrears of wages and holiday pay as calculated by the Labour Inspector under s 131 of the Act.

[83] Within 28 days of the date of this determination, Mr Griffin must pay the Labour Inspector on behalf, and for the benefit, of Ms Mann \$4,100.50 as unpaid wages.

[84] Within 28 days of the date of this determination, Mr Griffin must pay the Labour Inspector on behalf, and for the benefit, of Ms Mann \$328.04 as unpaid holiday pay.

### **Claim for interest**

[85] The Labour Inspector sought interest in the outstanding amounts owing to Ms Mann. He said interest should be payable from, at least, 13 January 2016 being the day the Statement of Problem was lodged with the Authority.

[86] The Authority has the power to award interest pursuant to cl 11 of the Second Sch of the Act at the rate prescribed under s 87(3) of the Judicature Act 1908, which is currently 5% per annum.

[87] I consider that it is appropriate that Mr Griffin pay interest on the outstanding amounts owed to Mr Mann.

[88] Mr Griffin must pay interest of 5% on the outstanding amounts owed to Ms Mann from 13 January 2016 until the date paid or within 28 days of the date of this determination, whichever is earlier.

**Should Mr Griffin pay a penalty for failure to provide Ms Mann with an employment agreement?**

[89] The Labour Inspector sought a penalty against Mr Griffin for failure to provide to provide Ms Mann with an employment agreement under s 64 of the Act.

[90] The Authority has jurisdiction under s 161(1)(m)(iii) of the Act to hear and determine an application by a Labour Inspector for recovery of a penalty under ER Act.

[91] In *Borsboom v Preet PVT Limited*<sup>4</sup> a full court of the Employment Court identified the factors for imposing a penalty under the Act and related Acts including the Holidays Act. The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.<sup>5</sup>

[92] The Court set out a “four step” process to be followed when assessing penalties in order to provide a consistent and reasonably predictable result.<sup>6</sup>

[93] Mr Griffin is liable for maximum penalty of \$10,000.

[94] The requirement to provide an employment agreement to an employee is important because, assuming it meets all the technical requirements, it enables the parties to, in most cases, readily discern and understand the scope of the employment relationship. In the circumstances of this matter, the breach by Mr Griffin warrants 20 per cent of the maximum penalty of \$10,000, which is \$2,000.

[95] There was no direct evidence of Mr Griffin’s ability to pay a penalty. Therefore no adjustment is made to the provisional penalty at this stage of the process.

[96] The Court in *Boorsboom* said the penalties imposed should be proportionate to the amount of money unlawfully withheld. There was no money directly withheld from Ms Mann as a consequence of this breach of the Act. However, a penalty should otherwise be proportionate to the level of wrongdoing or mischief by the party in default.

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<sup>4</sup>[2016] NZEmpC 143 at [67] and [68].

<sup>5</sup>*Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

<sup>6</sup>*Borsboom* at [151].

[97] In all the circumstances of the case, it is appropriate to impose a significant, but proportionate, penalty on Mr Griffin for breaching the Act. That penalty is \$2000.

[98] Having considered the submission of the Labour Inspector that the penalty could be made payable to Ms Mann (rather than the Crown), I have decided to not exercise my discretion under s 136(2) of the Employment Relations Act in this regard. Ms Mann has not suffered a direct loss as a consequence of Mr Griffin's breach of the Act. In the present circumstances, the failure to comply with the technical requirement to provide an employment agreement, in the absence of any discernible loss (financial or otherwise), is more properly characterised as a matter of public rather than private interest. The situation may have been different if penalties were sought by the Labour Inspector for breaches of the Holidays Act and Minimum Wage Act.

[99] Mr Griffin must pay the Authority, for subsequent payment into a Crown bank account, a penalty of \$2000 for breaching s 64 of the Act within 28 days of the date of this determination.

#### **Costs**

[100] Costs are reserved.

Andrew Dallas  
Member of the Employment Relations Authority