

witnesses answered questions under oath from me and the parties' representatives. The representatives also lodged written closing submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues identified for investigation and determination were:

- (i) Whether Mr Lanning was unjustifiably dismissed by Mr Swart?
- (ii) If Mr Swart's actions were not justified by dismissing Mr Lanning, what remedies should be awarded to Mr Lanning, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s 123(1)(c)(i) of the Act?
- (iii) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Lanning that contributed to the situation giving rise to his grievance?
- (iv) Did Mr Swart correctly pay Mr Lanning's wages and holiday pay under the Holidays Act 2003? If not, should the Authority order Mr Swart to pay Mr Lanning arrears for non-payment of any outstanding wages or/and holiday pay?
- (v) Should either party contribute to the costs of representation of the other party?

Context

[6] Mr Swart operated a butcher's shop which traded as "The Brown Bay Butchery". Mr Lanning initially started his employment with Mr Swart in June 2020 on a part time basis. Mr Lanning was not given a written employment agreement throughout his employment.

[7] Mr Lanning and Mr Swart agreed that Mr Lanning will be paid \$20 per hour for 20 hours work. Mr Lanning's employment eventually increased to full time work where

he worked 50 hours per week for five days a week at 10 hours per day. By the end of his employment, Mr Lanning's pay rate had gradually increased to \$25 per hour.

[8] Throughout Mr Lanning's employment he had at least one reduction of his work hours. This occurred during a quiet period of his employment and lasted for around five to six months in 2022. The parties dispute what was agreed between them in respect of the duration of the reduction to Mr Lanning's work hours.

[9] Both parties agreed the nature of the work relationship between them changed around November 2022. Mr Lanning said Mr Swart's attitude towards him became unfriendly, but he was unsure why Mr Swart's behaviour changed. During this time Mr Swart said he was becoming unhappy with Mr Lanning's behaviour in the workplace which included his work performance and the use of obnoxious language around customers.

[10] Due to concerns of workplace theft, Mr Swart installed video cameras in the butchery in April 2023. Mr Swart's staff were made aware of the installed cameras. Shortly after installing the video cameras Mr Swart observed Mr Lanning sitting down for long periods of time during the working day. Mr Swart spoke to Mr Lanning about what he saw and cautioned him about sitting down for extensive periods of time (instead of working).

[11] After Mr Swart cautioned Mr Lanning, he then observed Mr Lanning sitting and playing games on his phone for extensive periods of time. As a result, Mr Swart gave Mr Lanning a verbal warning.

[12] Mr Lanning's behaviour continued and on 8 April 2023 Mr Swart issued Mr Lanning with a written warning. Mr Swart observed Mr Lanning on two further occasions on Friday 21 April and Sunday 23 April 2023. On Monday 24 April 2023 Mr Swart issued Mr Lanning with two further written warnings.

[13] On the same day Mr Swart was also unhappy with the quality of Mr Lanning's work on Sunday 23 April 2023. This led to a conversation between them where Mr Swart informed Mr Lanning he was dismissed and was given one weeks' notice of his dismissal. Mr Lanning left the workplace for the rest of the day and the parties disputed whether Mr Lanning asked to finish for the day or was ordered home by Mr Swart. Mr Lanning did not return to the workplace for the rest of the week.

[14] Mr Lanning continued to contact Mr Swart after his dismissal and requested a written confirmation of his dismissal from him. This was never provided to him by Mr Swart. On 29 May 2023 Mr Lanning raised a personal grievance for unjustified dismissal and he also made claims for outstanding wages and holiday pay. On 15 January 2024 he lodged his claims with the Authority.

Mr Lanning's unjustified dismissal claim

Mr Lanning's claims

[15] In determining whether Mr Swart's actions in dismissing Mr Lanning were justifiable, the Authority must consider whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal had occurred.¹

[16] Mr Lanning said Mr Swart's actions leading to issuing of written warnings against him and his dismissal were not the actions of a reasonable employer. He claimed Mr Swart did not have a proper process leading up to issuing the written warnings and dismissing him. Mr Lanning also claimed Mr Swart did not provide any evidence to confirm:

(a) the reasons for the written warnings and confirmation of Mr Lanning's workplace behaviour; and

(b) whether Mr Lanning's alleged behaviour constituted serious misconduct.

Mr Swart's arguments

[17] Mr Swart disagreed with Mr Lanning and said his decision to issue a verbal warning and written warnings were all justified. Together with the warnings, Mr Swart also claimed he gave Mr Lanning previous warnings and had many discussions with Mr Lanning about his behaviour in the workplace.

[18] Mr Swart also intimated his process leading to Mr Lanning's dismissal was reasonable given the number of warnings given to Mr Lanning up until his dismissal. He also submitted that if the Authority found any defects in his dismissal process, these defects would be minor and not amount to an unjustified dismissal.

¹ Employment Relations Act 2000, s103A.

The Authority's assessment

[19] There were difficulties in assessing Mr Lanning's claims and Mr Swart's responses. This was largely due to very little written record evidence in respect of Mr Lanning's employment. Without an employment agreement or written records of follow up discussions with Mr Lanning, it was difficult to assess the reasonableness of Mr Swart's actions.

[20] Although Mr Swart had provided excerpts of statements from others, these were not signed and these witnesses did not attend the investigation meeting to allow their evidence to be tested by the Authority and Mr Lanning's representative.

[21] It was clear Mr Swart was unhappy with both Mr Lanning's performance and his workplace behaviour. Mr Lanning acknowledged his behaviour leading to his warnings. In terms of one specific issue relating to another employee, he said it was resolved after he apologised to the employee.

[22] Mr Lanning explained he was only asked about his performance or the quality of his work three to four times during his employment. In all cases, it related to difficulties which arose from instances where the shop was unusually busy. Outside of this evidence, there was little other evidence about Mr Lanning's conduct leading up to his written warnings.

[23] Mr Lanning's three written warnings were all issued after Mr Swart had installed a video camera in the workplace in April 2023. All three warnings were also issued for Mr Lanning sitting in the workplace on 8 April, 22 April and 24 April 2023. The parties disputed when each of these were given to Mr Lanning but Mr Lanning did not dispute his actions and he signed each written warning.

[24] The written warnings were also very brief and did not refer to any implications for Mr Lanning if his behaviour continued. As an example, Mr Lanning's first written warning was worded as follows:

Written Warning Kade Lanning

Monday the 8th of April

Sitting down and playing on your phone for 1 hour and 45 minutes outside of break times and not completing any work.

[25] Together with the written warnings, Mr Swart explained the final reason for dismissing Mr Lanning arose from Mr Lanning failing to properly carry out his work on Sunday 23 April 2023. Mr Lanning did not dispute Mr Swart's views about the quality of his work on 23 April 2023. There was little other evidence to determine what else was discussed between the parties apart from Mr Swart explaining he was not happy with Mr Lanning's work on 23 April 2023 and giving him one weeks' notice of his dismissal.

[26] Mr Swart said the conversations with Mr Lanning when issuing his written warnings and dismissing him were each relatively short. When asked whether he had ever warned Mr Lanning about the potential for more serious action if his behaviour continued, Mr Swart said he did not explain this to Mr Lanning and said the escalation to a dismissal was "quite obvious". Based on the available evidence before the Authority, the first mention of termination of Mr Lanning's employment occurred when he was dismissed on Monday 24 April 2023.

[27] There was no evidence to show Mr Swart was given an opportunity to respond or even seek advice regarding Mr Swart's decision to terminate his employment. This was especially given the second and third written warnings were communicated and issued to Mr Lanning on the same day the decision was made to terminate his employment. These were defects in Mr Swart's dismissal process which were more than minor and were not the actions of a reasonable employer. For this reason, Mr Lanning's claim for unjustified dismissal was successful.

Remedies

Lost wages

[28] Mr Lanning was successful in his grievance claim against Mr Swart and is entitled to an award of remedies. In terms of lost wages, Mr Lanning said he was out of work from 24 April 2023 until 15 May 2023 where he obtained casual employment. Accordingly, he sought lost wages of \$8490 consisting of:

- (a) \$3375 gross for three weeks when he was unemployed as a result of his termination; and
- (b) \$5115.21 gross which was the difference between what he used to earn for his employment with Mr Swart and what he earned as part of his casual employment (the difference of \$465 per week for 11 weeks).

[29] Mr Swart did not specifically address Mr Lanning's claims for lost wages but acknowledged Mr Lanning had obtained employment relatively soon after he was dismissed by Mr Swart.

[30] Mr Lanning had immediately looked for employment from 24 April 2023. Technically he was still employed by Mr Swart for a week after which takes him to 1 May 2023. Due to several reasons, Mr Lanning was unable to work during the last week of his employment. These reasons were legitimate reasons, and I am satisfied the final week of Mr Lanning's employment should not be included in his claim for lost wages. This leaves a gap of two weeks before he found new employment.

[31] His claim for lost wages should reflect the weekly gross amount he would have likely received if he was still employed by Mr Swart. His last payslip showed him working around 45 hours a week at \$25 per hour. Considering the two weeks between his employment with Mr Swart and his new employer, this amounted to \$2,250 gross.

[32] In terms of Mr Lanning's claims for shortfall payment of his earnings with his new employer and what he would have received during his employment with Mr Swart and his new employer, there is insufficient evidence to show what Mr Swart's payments were from his new employer. Mr Lanning IRD records were inconclusive as to whether he was earning less than what he was earning for Mr Swart. For this reason, no order is made in respect of the alleged shortfall wage claims by Mr Lanning.

[33] Before any assessment of possible contribution by Mr Lanning is made, he is entitled to a remedy of lost wages of \$2,250 gross.

Compensation for hurt and humiliation

[34] In terms of hurt and humiliation, Mr Lanning claimed a compensation amount of \$25,000. Prior to his dismissal, Mr Lanning claimed he had depression which was worsened because of his dismissal by Mr Swart. Mr Lanning claimed he also suffered financially when he was unable to pay a loan which he defaulted on.

[35] Mr Lanning did not provide any medical evidence to confirm his diagnosis of depression. However I do accept he suffered some form of distress as a result of his dismissal. In considering similar cases and Mr Lanning's own circumstances, an order for hurt and humiliation of \$10,000 is appropriate.

Contribution

[36] Mr Lanning argued his conduct did not meet the threshold of blameworthy conduct and relied on the lack of any evidence to show Mr Lanning was “sitting down on the job”.

[37] However, as previously stated Mr Lanning accepted his actions leading to his dismissal including his written warnings. Mr Lanning also accepted there were previous occasions where he was spoken to by Mr Swart about his workplace behaviour.

[38] Mr Lanning admitted to much of his behaviour in the workplace which meets the threshold of contributory conduct to his personal grievance. It is appropriate in this case to reduce Mr Lanning’s total remedies by 20 per cent in recognition of his contributory conduct.

Summary of order of remedies

[39] Mr Lanning initial awards for lost wages of \$2,250 and compensation of \$10,000 led to a total amount of \$12,250. Applying the 20 per cent reduction, Mr Swart is ordered to pay a total remedy to Mr Lanning of \$9,800.

Wages and holiday pay arrears

Wage and holiday records

[40] Mr Lanning claimed payment for outstanding wages and holiday pay. Mr Swart opposed Mr Lanning’s claims saying he had paid out all of Mr Lanning’s entitlements.

[41] As an employer, Mr Swart was required to keep appropriate wage and time records and to provide them to Mr Lanning upon request.² These same requirements are replicated for holiday records under the Holidays Act 2003.³

[42] Mr Swart was unable to produce Mr Lanning’s wage, time and holiday records because he claimed he no longer had access to the payroll service which held copies of Mr Lanning’s employment records and payslips. Mr Swart also claimed he had

² Employment Relations Act 2000, s 130.

³ Holidays Act 2003, s 80 and 81.

personal diary records which would help confirm Mr Lanning's workdays. He was unable to produce the copies of his personal diary records.

[43] In the absence of wage, time and holiday records, an assessment had to be made from the evidence provided by Mr Lanning in the form of his IRD records and a small incomplete set of payslips he had received from Mr Swart. The assessment also included a reference to Mr Swart's bank records which showed which payments were paid to Mr Lanning as wages.

Holiday pay arrears

[44] Mr Swart claimed he was owed 289 hours of outstanding annual holiday pay at his last wage of rate of \$25 per hour. Mr Swart calculated this amount based of his last payslip from Mr Swart which set out Mr Lanning's annual holidays balance from 29 March 2023. The payslip showed Mr Lanning was owed a balance of 160 hours of available annual leave and had accumulated a balance of 129 hours of annual leave since his last anniversary.

[45] There was insufficient evidence to show Mr Lanning had taken any further annual leave or paid any annual leave up to the end of his employment. Mr Lanning's IRD records show his last payment from Mr Swart was in April 2023. This aligned with Mr Swart's bank records which showed Mr Lanning's last payment was on 3 May 2023 (which was likely for work carried out in early April 2023).

[46] Both Mr Lanning's IRD records and Mr Swart's bank records appear to show consistent payment of wages to Mr Lanning but not a clear delineation as to whether any such payments were wages or annual leave payments. The only clear evidence is Mr Lanning's payslip which is accepted as sufficient evidence of any annual leave owing to Mr Lanning. For this reason, I accept Mr Swart owes Mr Lanning outstanding annual holiday of 289 hours at a rate of \$25 per hour which equates to \$7,225 gross.

Wage arrears

[47] Mr Lanning also made wage arrears claims for:

- (a) unpaid wages of \$80 relating to his last day of work where he claimed he was sent home early by Mr Swart; and

- (b) the last two weeks of his employment when he was not provided with his normal hours of work. He claimed he had lost \$412 over these two weeks.

[48] In terms of the wage arrears claim for Mr Lanning's last day of work, the parties disputed whether Mr Lanning asked to go home for the day or was sent home by Mr Swart. Given the dispute between the parties, there was insufficient evidence to support Mr Lanning's claim and no order is made against Mr Swart for payment of these claimed arrears (for Mr Lanning's last day of work).

[49] Although Mr Lanning referred to a reduction of his hours in the last two weeks of his employment, it was not clear how he calculated the reduction to an amount of \$412. Without any further evidence to clarify whether there was a reduction to his hours and if so, whether it amounted to \$412, I also make no order for this claimed amount.

Summary of orders

[50] Considering the findings reached in this determination, the following orders are made for Mr Swart to make the following payments within 28 days of the date of this determination:

- (a) a payment of \$9,800 to Mr Lanning as a total remedy for unjustified dismissal; and
- (b) a payment of \$7,225 gross to Mr Lanning for arrears of outstanding annual holiday pay.

Costs

[51] Having succeeded in his application, Mr Lanning is entitled to an order requiring Mr Swart to contribute to his costs of representation. The Authority has a clear statutory power to order costs and expenses to be paid as the Authority thinks reasonable.⁴ Costs are awarded at the Authority's discretion and it is well established for costs to follow the event.⁵ There was no basis for the Authority to depart from this approach.

⁴ Employment Relations Act 2000, Schedule 2, clause 15.

⁵ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

[52] The Authority uses a “tariff” based approach in awarding such costs. This approach has been approved by the Employment Court.⁶ The current tariff for a one-day investigation meeting is \$4,500. The investigation meeting for this matter proceeded for a part day and I am not satisfied that the tariff for a full one-day investigation is an appropriate starting point. The investigation meeting ended mid afternoon and included a morning and lunch break. Accordingly a reasonable starting point is a cost award of \$2,250.

[53] There were no grounds for an uplift of this starting point and therefore, Mr Swart is ordered to pay Mr Lanning \$2,250 to contribute to his costs of representation. Mr Lanning is also entitled to a payment of \$71.55 to reimburse the expense of paying the Authority filing fee of \$71.55. These payments are to also be paid within 28 days of this determination.

Alex Leulu
Member of the Employment Relations Authority

⁶ See: *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.