IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 151
3056473

	BETWEEN	KAREN LEONARD Applicant
	AND	FASTWAY GLOBAL LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Libby Brown, counsel for the Applicant Gary Tayler, advocate for the Respondent
Investigation Meeting:	10 October 2019
Submissions Received:	17 October and 1 November 2019 from the Applicant 24 October 2019 from the Respondent
Date of Determination:	15 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Karen Leonard brings a number of claims against the respondent to the Authority for resolution. They are for unjustifiable dismissal, constructive or otherwise; unjustifiable disadvantage arising from the employer's breach of the Holidays Act 2003; and a claim that her employer failed to act in accordance with its duty of good faith and in accordance with her individual employment agreement. Ms Leonard says those breaches were deliberate and sustained.

[2] She seeks remedies for her personal grievances and substantial payments under the Holidays Act. She also seeks the payment of outstanding KiwiSaver contributions to her KiwiSaver account. Additionally, Ms Leonard seeks the imposition of a penalty on the

employer for its breach of the Holidays Act and a further penalty for its sustained breaches of the statutory duty of good faith and/or for a breach of her employment agreement.

[3] Fastway Global Limited (Fastway) denies dismissing Ms Leonard, constructively or otherwise. It says she had left her employment without working out her notice period because she had been unable to procure a severance agreement and because she had secured alternative employment.

[4] An issue arose during the course of the investigation meeting over the correct naming of the respondent company. Fastway now trades as Aramex and the applicant says this should be recorded in the respondent's intitulement. However, as Fastway Global Limited, which was the employer party to Ms Leonard's employment agreement, remains registered on the New Zealand Companies Office Register, I see no need to change the identity of the employer for the purposes of this determination.

The Authority's investigation

[5] In the course of my investigation, I heard evidence from three witnesses for Ms Leonard, including herself, and one witness for Fastway. I am not required to set out a record of all evidence heard or received, as specified in s 174E of the Employment Relations Act 2000 (the Act) and will not do so. In determining this matter, however, I have carefully considered all the material placed before the Authority, including all evidence of the parties and the submissions of their representatives.

[6] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[7] The issues for determination are:

(a) Whether Ms Leonard was unjustifiably dismissed;
(b) Whether Fastway breached the Holidays Act 2003;
(c) Whether Ms Leonard is owed holiday pay and/or pay for public holidays.

(d) Whether Ms Leonard was disadvantaged by unjustifiable actions of her employer with regard to its treatment of holiday pay.

(e) Whether Fastway breached its duty of good faith to Ms Leonard.

(f) Whether a penalty, or penalties, should be imposed.

Was Ms Leonard dismissed?

[1] It is well established that an employee may be constructively dismissed by her employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

> (a) An employer gives an employee a choice of resigning or being dismissed.
>
> (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
>
> (c) A breach of duty by the employer causes an employee to resign. [1]

[8] Ms Brown submits Fastway conducted itself in a manner that had the deliberate and dominant purpose of coercing Ms Leonard to resign. Alternatively, she submits the third category applies and it was Fastway's breach of duty that caused Ms Leonard's resignation.

Discussion

[9] Ms Leonard was a long-standing employee whose role, at the time her employment terminated in October 2018, was Human Resources Coordinator/Accounts Support. She professed herself to have been very happy in her employment and described herself as a "*Fastway lifer*" who had planned to stay with the company until she retired.

[10] Her evidence is that this changed on 13 September 2018 as a result of a meeting requested by Fastway's Australian-based Group Financial Controller, Ryan Mahoney. Ms Leonard had received a Calendar appointment from him the previous day headed "*Karen/Ryan catch up*" at which Ms Leonard was the only required attendee. She emailed

[1] [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

Mr Mahoney after receiving the appointment to ask if there was anything he wished her to prepare for the meeting. Mr Mahony replied "*No, not really. Want to talk through payroll structure and how we can streamline and/or simplify the process*."

[11] At the meeting, also attended by a Napier-based Fastway Financial Controller, Caryn Lacey, Mr Mahoney informed Ms Leonard there was to be one payroll system for the Australia and New Zealand operations of all Fastway group companies. A new payroll position would be created that would replace Ms Leopard's current position and two other payroll positions in Australia.

[12] Ms Leonard made some handwritten notes at the meeting, which she provided to the Authority. She also provided an expanded version of her recollection of the meeting that she had typed up from her handwritten notes the same night. Ms Lacey recorded her memory of the meeting in a file note approximately four weeks later. There are some differences between the two accounts, but they agree on the following points:

a. Mr Mahoney informed Ms Leonard the payroll of all Fastway group companies in Australia and New Zealand was to be centralised, with one payroll person being responsible for all payrolls.

b. He said this would involve greater responsibility and longer hours than Ms Leonard's current role.

c. He asked her what support she would need, including training, to take on the role.

d. Mr Mahony said that if she did not wish to take on the new role there was no other position available at Fastway for her.

e. Mr Mahoney could not provide a job description or substantial information about remuneration for the new position at that time.

[13] Neither Mr Mahoney nor Ms Lacey gave evidence at, or attended, the Authority's investigation meeting, although both were based in Napier where the Authority heard the matter. Fastway's only witness, the Head of Human Resources, Kerry Downes, confirmed both Mr Mahoney and Ms Lacey were still employed by the company at that time.

[14] Where there were discrepancies between Ms Leonard's account of events and Fastway's, I have preferred Ms Leonard's. This is because her evidence, taken under oath and tested by questioning from the Authority and the respondent's advocate, was first-hand evidence from a participant at the relevant events. In contrast, Ms Downes was not present at

the meeting of 13 September and could give only second hand evidence about that meeting and about other matters in which she was not directly involved.

[15] I accept Ms Leonard's account that Mr Mahoney, in offering her the new position, made it sound unappealing by emphasising the longer hours, including weekends, she would be required to work for little or no more remuneration. I also accept he initially informed Ms Leonard she was required to make a decision by the end of that working day on whether she would accept the new role.

[16] When Ms Leonard protested the unfairness of that, Mr Mahoney told her she had until the following day to decide. Ms Leonard again protested that was still unfair to her as she needed information about the new role in order to consider it properly. At that point Mr Mahoney reluctantly agreed she could have until first thing in the morning of Monday 17 September to convey her decision to him.

[17] Ms Leonard had no prior notice of the subject matter of the meeting, other than Mr Mahoney's emailed response referred to above. Nor did she have any idea that her employer proposed to disestablish her position. I accept she felt Mr Mahoney was pressuring her into making a decision about a matter that affected her future employment, but about which he had provided insufficient information for her to make an informed decision.

[18] Ms Leonard reiterated her requests for further information in an email she sent to Mr Mahoney early in the morning of Monday 17 September. She said she had not been given a fair opportunity to consider the new position within the timeframe Mr Mahoney had specified, in the absence of that information. Ms Leonard also told Mr Mahoney she felt bullied to make a decision without having "a complete informed outline of this new challenging role".

[19] Mr Mahoney replied to her email on the evening of 17 September, after Ms Leonard had left work for the day. He apologised if she felt bullied into making hasty decisions, and set out the matters he had intended to bring to her attention. He said he had wanted her to think about the new role and come back to him with any concerns or thoughts, but he had not intended that she give him a definitive answer. Mr Mahoney said Ms Downes would contact her by the end of that week with all the relevant information about the new role.

[20] Ms Leonard, in the absence of a response from Mr Mahoney at the time she left the office that day, went onto the job seeker website "Seek" that evening. She sent an expression of interest for a role advertised on the site because, in her words, "…things were not looking good and I did not want to be left without an income or the ability to pay the mortgage". Ms Leonard's evidence was that she is the primary breadwinner for her family.

[21] On Tuesday 18 September, Ms Leonard received an email from Ms Downes providing further information about the new role, including a job description. Ms Downes described it as a "…cost saving initiative as well as having a central point where all queries can be funnelled through and all personnel files remain together maintaining consistency across the business …". Ms Downes did not provide any financial information to support the cost-saving aspect of the change.

[22] Ms Downes advised Ms Leonard in the email that, as it was a newly created role, it would be advertised internally and externally "…in line with company policy." She said Ms Leonard was welcome to apply for the position and invited her to "…feel free to reach out and ask any questions". She did not identify or provide a policy document that required the new role to be advertised. In evidence to the Authority Ms Downes said she thought it was "entirely appropriate" to make the new position contestable.

[23] Ms Leonard's oral evidence was that she felt offended at being advised she was welcome to apply for a position that was replacing her role and which she understood from Mr Mahoney was her role if she wanted it. She sought legal advice on her situation at this point and her legal representative contacted her employer in writing on 24 September. The letter identified flaws in the process Fastway had followed to date and conveyed Ms Leonard's disbelief and devastation at the way her employer was treating her. It ended by advising Fastway Ms Leonard could tell she was no longer wanted by her employer and wished to negotiate an exit/redundancy package.

[24] Fastway's response came on 28 September from its Legal Director. It denied the allegations made by Ms Leonard regarding a flawed process and characterised Mr Mahoney's discussion of 13 September with Ms Leonard as a "preliminary, transparent and collaborative discussion" with her over changes that were simply proposed at that point.

[25] The letter stated Mr Mahoney had made it clear to Ms Leonard that "managing a streamlined payroll process would be a natural progression of (her) role…..and that he would support her in relation to that role." It ended by stating Mr Mahoney was still awaiting Ms Leonard's response and he was "open to having further discussions in relation to how we can support Ms Leonard with the proposed increase in responsibilities…". The letter did not address the issue of an exit or redundancy package.

[26] Ms Leonard responded, through her lawyer, by letter dated 1 October. In it, she expressed her distress at the "false and misleading statements" in Fastway's letter; raised a personal grievance for unjustified disadvantage relating to the process her employer had followed; tendered her resignation; raised a further personal grievance for constructive dismissal; and suggested urgent mediation.

[27] The employer's response, through its New Zealand-based advocate, was to deny Ms Leonard had been constructively dismissed as she remained an employee. It noted she was a valued employee and she needed to provide the contractual notice period of her employment agreement. While neither admitting nor denying that procedural deficiencies had occurred, Fastway claimed any defects were capable of being rectified to prevent any disadvantage.

[28] Fastway's proposed correction was to offer Ms Leonard a variation to her existing position. This would entail her performing a completely different role from both her existing position and from the role Mr Mahoney had spoken about on 13 September. The variation would entail a pay increase of $2.64 per hour for Ms Leonard.

[29] Ms Leonard discovered subsequently, through disclosure of documents in preparation for the Authority's investigation, that Mr Mahoney, whose idea the variation had been, had originally proposed it on a nine-month fixed-term basis but was persuaded by colleagues to change it to a permanent basis.

[30] Mr Mahoney had emailed Ms Downes on 4 October 2018 advising her of the proposed role for Ms Leonard, which would entail accounts work relating to a franchise Fastway was about to take over but which it did not intend to own indefinitely. Mr Mahoney's email made clear that his reasons for wanting to offer the role to Ms Leonard were to avoid paying compensation to her, and to avoid the proceedings he anticipated would ensue after she had raised personal grievances.

[31] These matters were unknown to Ms Leonard at the time and played no part in the resignation she had already notified. The offer of the new role was formulated in response to the letter that conveyed Ms Leonard's resignation. Unbeknownst to Fastway at the time, Ms Leonard had already accepted an offer of alternative employment, which had resulted from the expression of interest she had made on 17 September, referred to earlier in this determination. Ms Leonard said in oral evidence she had been offered the position on 28 September and had accepted it on 1 October after taking the weekend to consider it and consult her family. I will return to this matter later in the determination.

[32] Fastway submits there were two related reasons for Ms Leonard's resignation: firstly, she had not been able to secure a severance package and, secondly, she had procured new employment.

[33] I do not accept that submission. Ms Leonard had long and stable employment with Fastway and I accept her evidence that she did not intend leaving that employment before the events that began with the destabilising meeting with Mr Mahoney on 13 September 2018. I accept Ms Leonard's evidence that she was informed at the meeting of the decision which had already been made to dispense with her position, and two Australian-based payroll positions, and to replace them with one new role.

[34] Fastway had not consulted Ms Leonard before making this decision. At the meeting of 13 September 2018 Mr Mahoney gave her general information about the new role but was unable to answer her questions about the detail she required to make a decision about it. I accept Ms Leonard's evidence that Mr Mahoney became annoyed and showed his frustration at her asking questions about the new role in that meeting. He asked her to make a decision quickly on whether she wanted it, while making it clear her current role would be going and there was no other position available for her in the company in New Zealand.

[35] Fastway's process up to this point was flawed. It had made a decision to disestablish Ms Leonard's role without first consulting her. It had failed to inform her properly in advance about the nature of the meeting she was asked to attend with Mr Mahoney on 13 September and it did not advise her of her right to bring a support person with her to the meeting. It pressured Ms Leonard to make a decision about a new position without giving her sufficient detail to enable her to make such a decision. I have accepted Ms Leonard's

evidence that Mr Mahoney described the new position in such a manner as to make it sound unattractive to her, by emphasising the longer hours that would be required for little more pay.

[36] Fastway's attempt to rectify those flaws on and after 17 September did nothing to dispel Ms Leonard's disquiet. Ms Downes' email of 18 September provided more information about the new role. However, in advising Ms Leonard she was welcome to apply for it on the open market, she was negating Mr Mahoney's message that the role was hers if she wanted it.

[37] Fastways's response, through its Legal Director, to Ms Leonard's lawyer's letter of 28 September attempted to ameliorate the damage caused by the employer's actions to date. It did so by characterising the meeting of 13 September as one in which Mr Mahoney intended to have a "preliminary, transparent and collaborative discussion with Ms Leonard" regarding proposed changes to the payroll system about which he wished to obtain her views.

[38] I do not accept the Legal Director's letter portrayed the tenor of the meeting accurately. It described the meeting very differently from the event as experienced by Ms Leonard, whose evidence I accept on that matter.

[39] I find the manner in which Fastway conducted itself in relation to the events I have referred to above, breached its duty to treat Ms Leonard fairly and reasonably. The 13 September meeting severely tested Ms Leonard and gave rise to significant concerns about her employer's actions and motives. The advice from the HR Director five days later that she could apply in an open market for the position she had been offered at that meeting not only offended Ms Leopard: it seriously undermined her trust in her employer of the last 20 years.

[40] The final step in the process that immediately preceded Ms Leonard's resignation was the Legal Director's letter. It characterised the 13 September meeting in a way that Ms Leonard perceived as dishonest, being so far from her first-hand experience of the event.

[41] I find the cumulative effect of those events damaged the trust and confidence between Ms Leonard and her employer to the extent she could no longer contemplate remaining in her employment. I am satisfied there was a causal connection between Ms Leonard's resignation and Fastway's actions. Her resignation in those circumstances was foreseeable.

[42] Fastway submits that Ms Leonard's claim to have been constructively dismissed is undermined by her remaining an employee after notifying her employer of her resignation. I do not find that submission persuasive. As noted earlier, Ms Leonard was the primary breadwinner. It was understandable, and not fatal to her claim to have been constructively dismissed, that she would resign on notice to avoid enduring a period without income that would cause hardship to herself and her family.

[43] I accept Ms Leonard's claim to have been constructively dismissed.

Did Fastway breach the Holidays Act 2003?

[44] Fastway employed Ms Leonard on a permanent basis from 1 April 2007 until the termination of her employment in November 2018. Immediately before that, she was employed by another of the Fastway group of companies, Fastway Couriers (NZ) Limited (Fastway Couriers) on the terms of a casual employment agreement. That employment was from 18 November 2005 to 31 March 2007.

[45] Throughout the period from 18 November 2005 to the termination of her employment in 2018, Ms Leonard's holiday pay entitlement was paid on a pay-as-you-go basis, firstly at six percent and then from 1 April 2007 at eight percent of her gross earnings. No wage and time records were provided to the Authority for the 17 months during which Ms Leonard was employed by Fastway Couriers. Nor was the employer obliged to provide those records as it was well outside the six-year period for which employers are required to keep such records.[2] I will return shortly to the 2005-2007 employment.

[46] Fastway does not dispute that Ms Leonard was entitled to four weeks' holidays per year from 1 April 2007 under the provisions of the Holidays Act 2003 (the HA). Schedule A to her individual employment agreement (IEA) recorded how that entitlement would be provided for as follows:

> The Employee has elected to have her annual leave paid out each month at 8% of gross, therefore any annual leave days taken will be taken as unpaid leave.

[2] HA at s 81

[47] The HA provides when payment for annual holidays must be made.[3] It also provides when annual holiday pay may regularly be paid with an employee's pay.[4] The situations in which that may happen are tightly defined in the HA. They include where the employee is employed on a fixed term agreement to work for less than 12 months, or where the employee's work for the employer is on such an intermittent or irregular basis that it is impracticable for the employer to provide the employee with annual holidays. Situations where an employee is employed beyond 12 months on a series of fixed term agreements of less than 12 months each are also included. None of those situations was applicable to Ms Leonard who worked regular hours on a permanent basis.

[48] The payment of holiday pay on this basis must be agreed between the employer and the employee in their employment agreement. The annual holiday pay must be an identifiable component of the employee's pay and it must be paid at no less than 8 percent of the employee's gross earnings. Ms Leonard's IEA appears to reflect that agreement, although it was her evidence she felt she had no choice but to agree to the arrangement her manager had put forward. She does not dispute that 8% of her gross earnings were paid and were identified in her payslips as "casual holiday pay".

[49] The HA also provides, at s 28(4) that:

> If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[50] Fastway has acknowledged in submissions, and by its actions subsequent to Ms Leonard's departure from its employment in paying her what it considered she was entitled to under s 28 (4), that it was wrong to have paid her holiday pay in the way it did from 1 April 2007.

[51] It is very clear Fastway breached the HA over an extended period in paying Ms Leonard her holiday pay entitlement on a monthly basis rather than in compliance with its statutory obligations.

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[3] HA at s 27.
[4] HA at s 28.

Is holiday pay owing?

[52] Fastway calculated Ms Leonard's holiday pay entitlement as $14,898.88 gross and paid it to her on 30 November 2018. It provided an analysis of Ms Leonard's annual leave records in the agreed bundle of documents. However, there are flaws in Fastway's methodology, which resulted in its calculation being inaccurate. One flaw is that it deducted from each year's calculation the days it said Ms Leonard had taken as leave in those years.

[53] The deduction of those days was not in accordance with s 28(4) of the HA. That section provides that, despite payments made by an employer who has incorrectly paid annual holidays on a pay-as-you-go basis to an employee, the employee becomes entitled to the annual holidays. Fastway was wrong to deduct any leave Ms Leonard took. Ms Leonard's evidence is that every time she took such leave it was unpaid.

[54] Fastway also took 2012 as the starting point for its calculation of holiday pay owing to Ms Leonard. It appears to have done so in reliance on the six-year limitation period for commencing actions other than personal grievances in the Authority or court.[5] That is incorrect as it fails to take into account the date of crystallisation of annual holidays.

[55] The Employment Court stated the correct position in *Vince Roberts Electrical Limited v Carroll & anor*[6] at [27]:

> The entitlement to payment for leave not taken before termination of employment does not crystallise until the date of termination. This has been confirmed in *Burns v Radio Pacific Ltd*[7] and *Napier Aero Club v Tayler*[8].

[56] Ms Leonard's entitlement to payment for annual holidays crystallised on the termination of her employment. She was entitled to payment for those holidays calculated in accordance with s 24 of the HA, which provides that an employer must pay the employee at a rate based on either the employee's ordinary weekly pay at the end of the employment or the employee's average weekly earnings during the 12 months immediately before the end of the

[5] S 142 of the Employment Relations Act 2000.
[6] [2015] NZEmpC 112.
[7] [1998] 3 ERNZ559 (EmpC) at 562.
[8] [1997] NZEmpC 309; [1998]1ERNZ241(EmpC) at 244.

last pay period before the end of the employee's employment. The rate paid must be the greater of those two options.

[57] As Ms Leonard's entitlement to payment for the annual holidays crystallised upon the termination of her employment, that is also when the timeframe commenced within which she could claim the payment. She made her claim well within the statutory six-year timeframe.

[58] I find Ms Leonard has a valid claim under s 28(4) to payment for annual holidays from 1 April 2007 until her last day of employment in October 2018. Orders will be made to that effect. The amount already paid by Fastway on 30 November 2018 will be deducted from the total amount owing.

[59] Ms Leonard has also claimed pay for annual holidays for the 17-month period from November 2005 to March 2007. During this time she was employed on the terms of a Casual Employment Agreement. Her hours of work were specified to be "as and when required and agreed upon between the employer and the employee, however, the ordinary hours are likely to be on any day between Monday and Friday 8am to 5pm."

[60] Ms Leonard claims three weeks' holiday pay for the first full year of that employment and a further six percent of her earnings for the part-year she worked until 31 March 2007. Ms Leonard acknowledges she started on a casual basis, working one day a week for the first few weeks. She claims the hours and number of days she worked increased rapidly after that. Ms Leonard did not provide sufficient detail about the hours or days she worked to persuade me that the 17 months during which she was employed on a casual employment agreement should be treated in the same way as her permanent employment from 1 April 2007 to 11October 2018 when her employment ended. I dismiss that part of her claim.

Is pay for Public Holidays owing?

[61] The HA provides that a public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.[9] Where an employee's employment ends and the employee is entitled to annual

[9] HA at s 40.

holidays, which s/he has not taken in full, the employee is entitled to be paid for a public holiday in some circumstances. The circumstances are where the public holiday:

> a. would have otherwise been a working day for the employee; and
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> b. occurred during the employee's annual holidays had the employee taken his/her remaining annual holidays entitlement immediately after the date on which the employee's employment came to an end.

[62] Fastway does not dispute that Ms Leonard was entitled to payment for public holidays following the termination of her employment. It paid her for the six public holidays it calculated she was entitled to when it made the post-termination payment of 30 November 2018.[10] As previously noted, its calculations were incorrect on the amount of holiday pay owing and, when correctly calculated, Ms Leonard was entitled to payment for an additional five public holidays in accordance with s 40 of the HA.[11] Orders will be made accordingly.

Did Fastway disadvantage Ms Leonard?

[63] Ms Leonard has claimed she was disadvantaged by her employer's failure to allow her to take holidays for rest and recreation. I am not persuaded by her evidence on this. Ms Leonard struck me as being a person who is not afraid to speak up if she believes she is being treated poorly or disadvantaged in her employment.

[64] This was evident in relation to the meeting she had with Mr Mahoney on 13 September 2018 when she did not accede to the pressure he placed on her to make a rapid decision. Ms Leonard clearly and firmly let him know that she had felt bullied in the meeting and was not prepared to make a decision about a new position without having all the necessary information.

[65] I therefore find it implausible that Ms Leonard would have tolerated an unlawful method of receiving payment for her annual holidays for 11 years without complaint if she believed it to be disadvantageous to her. She had a good relationship with her manager, whom she made clear she respected. When questioned about the steps she had taken to inform her employers of her dissatisfaction with the holiday pay situation, Ms Leonard

[10] Labour Day, Hawkes Bay Anniversary, Christmas Day, Boxing Day 2018; New Years Day and 2 January 2019.
[11] Waitangi Day, Good Friday, Easter Monday, Anzac Day and Queens Birthday 2019.

confirmed she had never raised an issue over it. She also said she knew it was legally wrong but it was easier to get her money that way.

[66] Fastway provided evidence of leave applications Ms Leonard had made over a number of years. This showed she could, and did, take leave from time to time. Ms Leonard confirmed any leave she took was without pay other than the long service leave to which she became entitled during her employment. While Fastway bears the responsibility for breaching the HA in paying Ms Leonard by the pay-as-you-go method, she has the onus of establishing that she was disadvantaged by it. She has failed to do so and I dismiss this claim.

Breach of good faith?

[67] Good faith is the underpinning tenet of the Employment Relations Act. The first object of the Act, as set out in s 3, is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship…". Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith and sets out specific actions that must be taken in certain situations. These include requiring an employer who is proposing to make a decision that will, or is likely to, adversely affect the continuation of employment of one or more employees to provide to the affected employees:

> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
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> (ii) an opportunity to comment on the information to their employer before the decision is made.[12]

[68] Fastway failed to do this in relation to the decisions it made about the operation of its payroll. Those decisions, which it informed Ms Leonard about on 13 September 2018, entailed disestablishing her position and those of two Australian-based payroll employees. Fastway breached its duty of good faith to Ms Leonard by not providing her with information in advance of making the decision and not giving her the opportunity for input into that decision.

[12] Section 4(1A) (b).

[69] Fastway also failed to comply with its duty of good faith in not providing Ms Leonard proper information about the purpose of the 13 September meeting and in describing it as a "catch up" in the calendar invitation sent to Ms Leonard. Section 4(1)(b) of the Act requires parties to an employment relationship not to do anything, directly or indirectly, to mislead or deceive each other. Describing the meeting Mr Mahoney held with Ms Leonard as a catch up, when its purpose was far more significant than would normally be understood by that expression, was at the very least misleading.

[70] It was also a breach of good faith for Mr Mahoney to lead Ms Leonard to believe the newly created payroll position was hers for the taking when, five days later, the HR Director told her the position was being advertised on the open market and she was welcome to apply for it.

[71] In short, I find Fastway did breach its duty of good faith towards Ms Leonard at the very least in relation to the three incidents cited above. I accept that Ms Leonard perceived the Legal Director's letter of 28 September 2018 as a further breach of good faith. However, I am inclined to view it as the result of poor communication internally within Fastway.

Penalties

[72] Ms Leonard seeks the imposition of a penalty of $10,000 for Fastway's breach of good faith in the process it followed leading up to her constructive dismissal. She asks that all of the penalty be paid to her.

[73] Ms Leonard also asks that a penalty of up to $20,000 be imposed upon Fastway for its breach of the HA in relation to its paying her holiday pay on a pay as you go basis. She asks the Authority to award 50 per cent of the penalty to the charity Riding for the Disabled in Napier, and the remaining 50 per cent to the Crown.

Breach of Good Faith

[74] I have found breaches by Fastway as recorded above but I note that those breaches also form the basis of Ms Leonard's personal grievance for constructive dismissal. I have found in her favour on that matter and will address the issue of remedies shortly.

[75] The Employment Court in *Xu v McIntosh* noted that a penalty was not a mechanism for topping up compensation for a personal grievance and that it seemed wrong to impose a penalty in that situation, unless there were special facets of the breach calling for punishment of the employer on top of the compensation.[13] I am not persuaded there are special facets in this instance and decline to award a penalty.

Breach of Holidays Act

[76] Under s 75 of the HA an employer company that fails to comply with specified provisions of the Act, including s 16 and ss 21 to 28, is liable to a penalty not exceeding $20,000. The Authority has the power to impose a penalty at its discretion. Generally, penalties are imposed for the purpose of punishment as well as discouragement to others.

[77] Fastway is liable for a penalty, having breached s 28 of the HA over more than a decade. In deciding whether it is appropriate to impose a penalty and, if so, the level of that penalty, I am required, under s 76A of the HA, to consider all relevant matters. These include the purpose of the HA; the purpose of the Act, to the extent it is relevant; and the matters listed in s 133A (b) to (g) of the Act. Those matters are:

> (b) the nature and extent of the breach or involvement in the breach; and
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> (c) whether the breach was intentional, inadvertent, or negligent; and
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> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
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> (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
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> (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and

[13] [2004] 2 ERNZ 448 at [45].

> (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[78] The Employment Court, in its Full Court judgment in *Boorsboom v Preet PVT Ltd,* considered the factors identified in s 133A and provided guidance on their application.[14] The Chief Judge provided further refinement of that guidance in *Nicholson v Ford.*[15]

[79] Ms Leonard submits Fastway's breach of the HA was neither unintentional nor inadvertent and that it was a deliberate and explicit business decision by the employer and one that warrants a penalty. Fastway submits it was Ms Leonard who requested the unlawful method of payment. It further submits no penalties should be imposed as Ms Leonard has already "enjoyed a double benefit" under s 28 of the HA.

[80] Having considered those submissions and taken the statutory factors and the Court's guidance into account, I find it appropriate to impose a penalty in this instance. I regard Fastway's ongoing breach of the HA over a prolonged period to be deliberate and serious. Its legal and human resources departments are based in Australia but that does not excuse the employer from compliance with New Zealand employment legislation. Regardless of whether Ms Leonard originally requested the arrangement or not, Fastway was wrong to have implemented it when it knew, or should have known, it was unlawful to do so.

[81] The starting point for the penalty is $20,000. Ms Leonard submits the penalty should be at the higher end of the range. She claims Fastway commenced the pay-as-you-go holiday pay arrangement at a time when she was vulnerable and needed the money, being a first-time mother of a new-born baby. Despite the wording in Schedule A to Ms Leonard's IEA, which attributes the method of payment of holiday pay to an election made by her, Ms Leonard submits she did not believe she had a choice with this arrangement.

[82] If I had accepted Ms Leonard's claim regarding holiday pay for the 17 months she was employed between 2005 and 2007, her claim of vulnerability would have had merit. However, I have rejected that claim and do not find it applicable to the IEA she signed in April 2007.

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[14] [2016] NZEmpC 143.
[15] [2018] NZEmpC 132.

[83] As I have earlier noted, I observed Ms Leonard to be an articulate person who had demonstrated by her reaction to the attempt to pressure her to make a decision on 13 September 2018 that she was not receptive to such tactics. I find it difficult to believe she tolerated for 11 years, without protest, a holiday pay arrangement she acknowledged she knew to be unlawful, unless it suited her to do so. That does not excuse Fastway from its extended breach of the HA but it is relevant to Ms Leonard's claim to vulnerability.

[84] Paying Ms Leonard her holiday pay on a monthly basis potentially deprived her of the opportunity for rest and recreation and the opportunity to balance her work commitments with other aspects of her life. In reality it appears, based on evidence from Fastway of applications for annual leave Ms Leonard made between 2010 and 2017, she was able to maintain that work/life balance and take periods of rest and recreation. I regard this as a mitigating factor in the assessment of a penalty.

[85] Another mitigating factor is that Fastway, as previously noted, tacitly acknowledged its method of paying Ms Leonard holiday pay was wrong, although this occurred after the event. It did this by calculating the annual holidays to which she was entitled, in its view, and paying her that amount after her employment had terminated. Its calculations were incorrect but that does not detract from its attempt to rectify the error it had perpetrated over an extended period.

[86] I also take into account that this appears to be a one-off situation. There is no evidence Fastway has engaged in similar conduct with other employees in the past.

[87] Taking these mitigating factors into account, I apply a deduction of 50 percent, which brings the adjusted total to $10,000. There is no evidence relating to the financial position of the company and no reason to believe it would have any difficulty in paying a penalty imposed on it.

[88] I make a further deduction having regard to proportionality and find a penalty of $5,000 to be appropriate. I see no compelling reason to award any part of the penalty to a charity nominated by Ms Leonard, no matter how worthy that charity is.

[89] The penalty in its entirety is to be paid to the Authority for depositing in the Crown account.

Remedies and contribution

Lost wages

[90] Ms Leonard seeks payment of two weeks' wages for the period she says she had no income from 12 October until she commenced her new employment. She has calculated this at $2,380.32. I find it reasonable that she is reimbursed lost wages for the period from 12 October to 22 October.

[91] I do not accept Ms Leonard's calculation, however. There was a period of five working days and two public holidays between Ms Leonard's last day of employment with Fastway on 11 October 2018 and her first day of employment with the new employer on 23 October 2018.[16] Fastway paid Ms Leonard for both public holidays on 30 November 2018. I find she lost one week's remuneration. Ms Leonard was employed for 37.5 hours a week and her hourly rate at termination was $29.36. I find she is owed $1,101 gross in lost wages for that week.

[92] Ms Leonard also seeks, for the ensuing period of ten weeks, the difference between the remuneration she earned in her new employment and the remuneration she would have earned if she had accepted the variation to her employment agreement that Fastway offered her on 6 October. Ms Leonard has calculated the difference as $5,180.32 gross.

[93] It is reasonable that Ms Leonard be reimbursed for the difference in wages over the 10 week period she has claimed but I do not accept the basis of her calculation. The calculation of what she would have been paid by Fastway should be based on her hourly rate of $29.36 at the termination of her employment. There is no justification for using a higher rate applicable to a variation of her IEA that she rejected.

[94] Ms Leonard would have been paid $11,010 gross had she remained on Fastway's payroll for the 10 weeks from 23 October 2018. Her evidence is that her hourly rate with her

[16] Hawkes Bay Anniversary Day on 19 October and Labour Day on 22 October 2018.

new employer was $25 and that she worked a 40 hour week. Over ten weeks she would have been paid $10,000 gross. The difference is $1,010 gross. However, the period includes three Public Holidays that Fastway had already paid Ms Leonard for on 30 November 2018.[17] The difference in pay over that period is therefore $349.40 gross.

KiwiSaver

[95] Ms Leonard joined KiwiSaver on 1 June 2016. She seeks the payment of KiwiSaver on holiday pay due from the date she joined the scheme. The employer's KiwiSaver contributions, which were made at 4%, are owed on that amount from the date of Ms Leonard's membership and orders will be made accordingly.

Compensation

[96] In her statement of problem dated 18 March 2019 and in her written brief of evidence filed in the Authority on 17 July 2019 Ms Leonard sought compensation of $15,000 for hurt and humiliation. She amended that amount to $40,000 on the day of the Authority's investigation meeting. When questioned about the reason for such a significant increase in the amount sought, Ms Leonard had no explanation other than that the matter had been ongoing; she was angry; and her career had been affected.

[97] I accept that Fastway's treatment of Ms Leonard was hurtful and distressing to her, particularly as she had been with the company for 20 years and hoped she would work there until she retired. However, I did not find her reasons compelling for the increase in the amount of compensation. I believe the amount she originally sought, closer to the events leading to her constructive dismissal, was a fairer reflection of her assessment of the level of hurt, humiliation and injury to feelings she experienced.

[98] The matter is ongoing only to the extent that Ms Leonard could not put the events behind her until her claims had been investigated by the Authority. She provided no details about the effect on her career, which appears to have continued with a new employer. Subject to any findings as to contribution, the original amount Ms Leonard sought in compensation will be the amount I order Fastway to pay her.

[17] Christmas Day and Boxing Day 2018 and New Years Day 2019.

Interest

[99] Ms Leonard seeks interest on the holiday payments made to her under s28(4) of the HA. The Authority has the power to award interest in any matter involving the recovery of money, pursuant to clause 11 of Schedule 2 to the Act. In this instance I find it fair to award interest from the date Ms Leonard lodged her statement of problem in the Authority to the date of the Authority's investigation meeting. An order will be made accordingly.

Other

[100] In the course of submissions, counsel for Ms Leonard sought payment for two events, one being sick leave and one being attendance at mediation following termination of employment. Neither of these claims was included in the statement of problem. No evidence was provided of either of the claims being raised previously with the respondent. Fastway had no opportunity at the investigation meeting to respond to the claims and accordingly I dismiss them.

Contribution

[101] I am obliged to consider whether, and to what extent, Ms Leonard's actions contributed to the situation that led to her personal grievance and, if those actions so require, accordingly reduce the remedies that would otherwise have been awarded.[18]

[102] I note Ms Leonard acknowledged under cross-examination she had, in correspondence with Fastway on 9 and 11 October 2019, conducted on her behalf by her lawyer, given the impression she was currently having to seek new employment as a result of Fastway's actions. Ms Leonard agreed this could have been perceived by Fastway as misleading and deceptive, when she had accepted new employment on 1 October. Ms Leonard was arguably under no obligation to disclose to Fastway that she had been offered and accepted that new employment, but she was not fulfilling her obligation of good faith in misrepresenting her current situation. However, this cannot be taken into account when

[18] Section 124 of the Act.

considering contribution as it occurred after the events that gave rise to Ms Leonard's personal grievance. Having considered all relevant matters, I find there was no contribution by Ms Leonard to the situation that led to her constructive dismissal.

Orders

[103] Fastway Global Limited is ordered to pay Karen Leonard the following:

a. Compensation of $15,000 without deduction under s 123(1)(c)(i) of the Act.

b. Lost wages under s 128 of the Act being:
   i. $1,101 gross for the period from 12 – 18 October 2018; and
   ii. $ 349.40 gross being 10 weeks' difference in wages earned.

c. Holiday pay of $35,747.12 gross for 1 April 2007 to 11 October 2018 under s 28(4) Holidays Act.[19]

d. Payment of $1,101 gross for five Public Holidays in accordance with s 40 Holidays Act.

e. Interest of $556.35 on the holiday pay at (c) above pursuant to Schedule 2, clause 11 of the Act and calculated in accordance with the Interest on Money Claims Act 2016.[20]

f. KiwiSaver contributions of $483.88 in respect of items (b), part of item (c)[21] and (d) above to be paid to IRD on behalf of Ms Leonard.

[104] Fastway is further ordered to pay a penalty of $5,000, under s 75 of the Holidays Act, to the Employment Relations Authority for depositing in the Crown account.

[19] A deduction has been made the partial payment made by Fastway on 30 November 2018.
[20] Calculated from 18 March 2019 to 10 October 2019.
[21] The holiday pay relating only to the period from 1 June 2016 when Ms Leonard became a KiwiSaver member.

[105] All of the above payments are to be made within 28 days of the date of this determination.

Costs

[106] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority