IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 53
5602845

	BETWEEN	KYLIE LOWE Applicant
	AND	KIDS REPUBLIC PLAYLAND LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Russell Ward, Advocate for Applicant Stefan Smith, Advocate for Respondent
Investigation Meeting:	2 May 2017 at Palmerston North
Submissions Received:	18 May 2017 from the Applicant 29 May 2017 from the Respondent
Determination:	28 June 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kylie Lowe was employed as Assistant Manager by Kids Republic Playland Limited (KRPL) from 7 April 2014 to 8 October 2015. She resigned on notice in September, to take effect from 9 October 2015, but was placed on "garden leave" by her employer on 2 October for the remaining week of her notice period.

[2] Ms Lowe brings a number of claims relating to her employment. These comprise a personal grievance for being disadvantaged by an unjustifiable action of her employer and claims the employer breached its statutory obligation of good faith and its contractual obligations to act as a good employer.

[3] Ms Lowe says her wages were not paid in full on termination of her employment and her employer failed to pay and implement employer and employee KiwiSaver contributions and deductions during her employment. She queries whether she was paid the holiday pay due to her. She seeks remedies of compensation and wage arrears. She asks that a penalty be awarded against KRPL for breaching its good faith obligations under the Employment Relations Act 2000 (the Act).

[4] KRPL denies all Ms Lowe's claims. It notes that good faith is a mutual obligation which Ms Lowe breached by sending abusive text messages to her employer with regard to reasonable work requests. It claims it had no choice other than to put her on "garden leave" on 2 October 2015 because of a verbal tirade and abuse she directed towards Marie Smith and Stefan Smith who were, at the time, the two directors of KRPL.

[5] KRPL also makes other allegations against Ms Lowe arising from matters it says it discovered after the employment relationship had ended. It says it is following these matters up in a different forum. They are not within my jurisdiction to determine, and I make no further reference to them.

Relevant facts

[6] Ms Lowe was employed on terms specified in an individual employment agreement (IEA) she and her employer signed 8 March 2014. Among the terms of employment were hours of work which were specified as being full time, from 9.30 am to 6.00 pm Monday to Friday. Her remuneration was specified as $22 per hour, with a review to take place on the 12 month anniversary of the employment agreement and every 12 month anniversary thereafter.

[7] The parties agreed they had a very good working relationship from the commencement of Ms Lowe's employment until sometime after she returned from annual leave on 21 September 2015. Ms Lowe had submitted her resignation whilst on leave. It had been accepted by her employers who said they understood the reasons she was leaving and were supportive of her future plans.

[8] Ms Lowe referred to Ms Smith being cool towards her from the time of her return from annual leave. She said things came to a head on 2 October 2015 after her employer had texted her the previous day asking her to eject a child from the school

holiday programme. Ms Lowe had questioned her employer, seeking a reason for ejecting the child.

[9] KRPL's perspective is that the working relationship was problem-free until 2 October 2015 when Ms Lowe sent an abusive text to Mr Smith and directed a verbal tirade to Ms Smith. A discussion between Ms Lowe and her employer took place during the morning of 2 October in the public reception area of the KRPL premises. Later the same day, Ms Smith sent Ms Lowe home on "garden leave". Ms Lowe acknowledges subsequently swearing at Ms Smith after being followed by Ms Smith as she left the premises.

[10] Ms Lowe requested confirmation from her employer by email that she would be paid for her usual 40 hour week for the period of garden leave. Mr Smith confirmed by email that was correct and she would be paid 40 hours. In the event, Ms Lowe was paid for 37½ hours for the week of garden leave.

Issues

[11] The issues for determination are:

(a) Whether Ms Lowe was unjustifiably disadvantaged in her employment by actions of her employer; and, if so

(b) What remedies are appropriate.

(c) Whether KRPL breached:

(i) the terms of its employment agreement with Ms Lowe; and/or

(ii) the good faith provisions of the Act.

(d) Whether KRPL failed to make KiwiSaver payments throughout Ms Lowe's employment.

(e) Whether holiday pay is owing.

(f) Whether KRPL underpaid Ms Lowe in her final pay; and, if so,

(g) What wage arrears are owing.

(h) Whether a penalty should be imposed on KRPL if statutory and/or contractual breaches are established.

Was Ms Lowe unjustifiably disadvantaged in her employment?

[12] Some of the matters Ms Lowe claims as unjustifiable disadvantages are also claimed as breaches of good faith and of her IEA. They arise from the same factual situation. One such is her claim regarding her employer's failure to award her pay rises she says she was "promised" in her employment agreement. I will deal with this part of her claim under that heading.

[13] Part of her claim relates to the events of 2 October 2015 when she says she was bullied by her employer and embarrassed in front of parents signing in their children. The previous evening Mr Smith and Ms Lowe had exchanged text messages that began at approximately 9 pm and took place over several hours. It started with a request from Mr Smith that Ms Lowe remove a particular child from KRPL's holiday programme. Mr Smith noted in his first text that he had heard the child had been bullying other children. Ms Lowe queried when the bullying occurred and whom the child had bullied.

[14] Mr Smith named the child who had been bullied, who was his daughter, and stated his view that bullying was unacceptable and the child who had bullied her was no longer welcome on KRPL's premises. He said he would throw the child out if he turned up at all, ending his text with "I am watching = disappointed."

[15] Ms Lowe's response, sent at 2.28 am on 2 October 2015 asked for a meeting with Mr and Ms Smith that morning at 9.30 am. Her text noted her agreement that bullying was unacceptable and that she had some questions that required answers before she could approach the mother of the child Mr Smith wished to be removed from the programme.

[16] Although Mr Smith declined the request on the grounds that he was busy at that time, stating his availability later in the day, he was at the Play land in the morning. He and Ms Lowe met at the public reception area where Ms Smith was also present. Ms Lowe says Mr Smith accused her of spreading false rumours about a new employee and of not treating that employee well. Ms Lowe says she was shocked as this was untrue and she asked Mr Smith for clarification. She also had an altercation with Ms Smith over a derogatory comment Ms Smith had allegedly made about another employee. Ms Lowe's evidence was that Ms Smith had reacted angrily and yelled at her before storming off.

[17] Mr Smith's evidence of the event is that the meeting was short: he asked Ms Lowe about a text conversation she had had with another person which had accidentally been forwarded to his phone. Mr Smith had texted Ms Lowe earlier in the morning of 2 October to ask her to forward the full text conversation thread to him and her response had included the sentence "You and Marie (Ms Smith) have clearly decided that everything is my fault so fuck it forget it".

[18] Mr Smith says that, when he raised this in their meeting at the public counter, and asked Ms Lowe about her treatment of a new staff member, she did not answer directly. He then told her that her apparent behaviour to that staff member had to stop and again asked her to show the full text conversation thread. Ms Lowe, according to Mr Smith, became agitated and suggested Ms Smith should do a better job of employing new staff which led to Ms Smith walking away.

[19] According to Ms Lowe, at the time the exchanges between herself and Mr and Ms Smith took place, parents were coming and going as they were signing in their children. Mr Smith denies parents were around at the time. Following the Authority's investigation meeting he provided a copy of a document he said was the Admission Time Sheet for Parents for Friday 2 October 2015. This document suggests there were no admissions between 9.15 am and 9.55 am that morning. The document was an unsworn copy and I accord it little weight because there was no opportunity to sight the original or question KRPL about it.

[20] The evidence of Natasha Print, another former employee who observed the conversation from the kitchen and café area of the premises, was that there were a few people around the public counter at the time. Ms Print said she noticed the conversation seemed quite intense and did not wish to get too close so she hovered in the kitchen and café areas until the discussion ended.

[21] Following the investigation meeting Mr Smith forwarded the Authority a copy of Ms Print's timesheet for the period which disclosed that she commenced work at 9.30 am on Friday 2 October 2015. His purpose for doing so was unclear but, if it was to show that Ms Print's starting time coincided with the period in which the Admissions Timesheet showed no evidence of children being signed in, I do not find it persuasive.

[22] Even if Ms Lowe is wrong about parents signing their children in during the time of her discussion with Mr and Ms Smith, and I make no finding about that, it does not necessarily follow that there were no parents in the reception area at the time. If the conversation was sufficiently intense for Ms Print to hold back, it is possible there were parents doing the same thing and waiting for the altercation to end.

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

[24] Later in the day when Ms Lowe returned to the KRPL premises with the children and other employees, Ms Smith asked to speak with her. Ms Smith's evidence is that she believed Ms Lowe was showing signs of stress and she raised the prospect of "gardening leave". Ms Lowe's recollection is that Ms Smith informed her she was stressed and that Mr Smith had decided to put her on gardening leave. I accept Ms Lowe's recollection as it accords with KRPL's response in its statement in reply.

[25] Ms Smith's evidence is also that during their conversation Ms Lowe was verbally abusive and swore at her. Ms Lowe denies this and says she swore at Ms Smith only once. She says this was after Ms Smith had followed her around as she was preparing to leave the premises and prevented her from saying goodbye to the children on the holiday programme. Ms Lowe said she had been upset and embarrassed and had told Ms Smith to "fuck off". I prefer Ms Lowe's evidence on this matter.

[26] Ms Lowe made it clear in her answers to my questions that she did not take issue with the fact of being placed on garden leave, despite it not being provided for in her IEA, but was upset over her employer's treatment of her on 2 October. She raised other matters including an allegation her employer had texted her two days later telling her she could not enter the workplace to retrieve her last payslips and certificates and that she would be served with a trespass notice if she attempted to enter the building. She also alleges her employer told other employees she had been dismissed. Ms Lowe did not provide evidence of the text message she claimed to have received two days after her last day at the work place.

[27] Mr Smith denies making any threat of a trespass notice. He says he told Ms Lowe politely in a text that she should not access the workplace, other than the public reception area and that she responded to the effect that she had already made the decision herself not to return to the premises. Both Mr and Ms Smith deny telling their other employees Ms Lowe had been dismissed.

[28] I find there is no evidence KRPL threatened Ms Lowe with a trespass notice during her employment. Ms Lowe provided a copy of an email Mr Smith sent her on 15 October 2015 which ended with a request that she never enter the building or carpark belonging to KRPL again "otherwise you will be served with a trespass order." As that email was sent several days after the employment relationship had ended it could not be considered as an unjustifiable action that disadvantaged Ms Lowe in her employment.

[29] There was no evidence to support Ms Lowe's claim that KRPL informed its employees Ms Lowe had been dismissed from her employment and I dismiss that and the trespass notice threat aspects of her claim.

[30] I find, however, that KRPL disadvantaged Ms Lowe by embarrassing and humiliating her when Mr Smith accused her of poor treatment of another employee on the morning of 2 October and again, later that day, when Ms Smith followed her around as she prepared to leave the workplace. I will return later to the issue of remedies and whether Ms Lowe contributed to the situation that led to the personal grievance.

Did KRPL breach good faith and the provisions of Ms Lowe's employment agreement?

[31] Ms Lowe says she did not receive pay rises that were "promised" to her in her employment agreement. She says this was a breach of the good faith provisions of ss 4 (1) (a), 4 (1) (b) (i) and (ii) and 4 (1A) (b) (and (c) (i) and (ii) of the Act. She also claims breaches of Clauses 2.2, 2.3 and 2.4 of her IEA.

[32] The sections of the Act Ms Lowe claims were breached are reproduced below:

> **4 Parties to employment relationship to deal with each other in good faith**
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> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and

> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
> (a) …
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[33] Clause 2.2 of Ms Lowe's IEA provides that KRPL would, during the term of the employment, "act as a good Employer in all dealings with the Employee or her Employee representative in good faith in all aspects of the employment relationship". Clause 2.3 defines a good employer, for the purposes of the IEA, as one who treats employees fairly and properly in all aspects of the employment relationship. Clause 2.4 provides that the employer shall take all practicable steps to provide the employee with a safe and healthy work environment.

[34] Ms Lowe says she came to an agreement with her employer that, in lieu of receiving a pay rise, Mr Smith would provide surgery needed by her dog free of charge. After her employment ended Mr Smith's veterinary practice invoiced her for the surgery. Mr Smith, whose veterinary practice operates as a separate legal entity, denies entering into an agreement with Ms Lowe over her dog's surgery. He says she was entitled to the same discount for veterinary work that all KRPL's employees enjoyed.

[35] Ms Lowe's IEA provided for an annual review of her hourly rate on the 12 month anniversary of the employment agreement and every following 12 month

anniversary[1]. Ms Lowe was employed by KRPL for approximately 18 months and was therefore entitled to one pay review during her employment.

[36] The IEA stated that Ms Lowe would "not have any necessary entitlement to an increase, but the Employer agrees to conduct this review in good faith and to consult with the Employee during the review". This provision clearly makes no "promise" of a pay rise as Ms Lowe claims.

[37] The parties have different views of whether a pay review took place or not. Ms Lowe says it did not and that, when her employer raised the issue of a bonus arrangement instead of a pay increase, she made it clear she was not interested. Ms Smith says a bonus scheme was discussed with Ms Lowe and that she agreed to it.

[38] Ms Lowe was paid a bonus in May 2015, which she claims was paid without her agreement, and which she found out about only after it appeared on her pay slip. KRPL says Ms Lowe knew about the bonus, which was for $1,000 and was to consist of four quarterly instalments. It says she asked for the first instalment to be paid before the end of the first quarter. The first quarterly bonus payment of $250, which KRPL says was due on 30 June 2015, was made in the pay period ending 24 May 2015.

[39] From the evidence before me I conclude a discussion over Ms Lowe's pay took place between the parties around the first anniversary of her employment. The employment relationship was amicable at that stage and, although Ms Lowe may have preferred to receive a pay increase, she received and kept the first quarterly payment of the bonus. There is no evidence to suggest she insisted her employer take back the $250.

[40] I find KRPL did not breach its statutory obligations of good faith or its contractual good employer obligations or indeed the specific provisions of Ms Lowe's IEA with respect to her pay review. For completion I find it unlikely there was an arrangement with Mr Smith in his role with a different and separate company about substituting a pay increase for free animal surgery. There may have been an intention that the bonus payment would assist Ms Lowe to pay for the surgery but I make no finding about that.

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1 Clause 6.2 of Ms Lowe's IEA

[41] However, I find Ms Lowe is entitled to be paid the second instalment of the bonus which was due on 30 September 2015. I will return to this when considering Ms Lowe's claim regarding underpayment in her termination pay. I also find KRPL breached its obligations of good faith to Ms Lowe in respect of her termination pay and in respect of KiwiSaver. I will return to these matters when considering Ms Lowe's claims regarding both those matters.

[42] Ms Lowe provided no direct evidence about the breach she alleged of clause 2.4 of her IEA, which concerns the employer's obligation to provide a safe and healthy work environment. I infer from her evidence her claim related to the events of 2 October 2015 and the discussion with her employer in its public reception area. I have already considered this in the context of Ms Lowe's personal grievance claim. I find the discussion, ill-advised though the location of it was, did not render the workplace an unsafe or unhealthy environment.

[43] It was also Ms Lowe's contention that she had been able to take only two lunch breaks throughout the 18 months of her employment. She ascribed this to her employer not employing sufficient staff. KRPL denied this and said that, although it had always paid Ms Lowe for her lunch break, this was a good will gesture on its part and not an indication it expected her to work during that time.

[44] Ms Lowe's assertion is not compatible with another allegation she made regarding KRPL sending her and other employees home when business was quiet. Ms Smith's evidence, which I accept, was that there was time for Ms Lowe to take her lunch breaks and she usually did take them. I also note there was no evidence from Ms Lowe to suggest she had raised an issue over lunch breaks during her employment. As good faith is an obligation on both employer and employee, Ms Lowe could not expect KRPL to address an issue she did not make it aware of during her employment.

[45] I find the evidence does not support Ms Lowe's claim that her employer failed to provide her a safe and healthy work environment.

Did KRPL fail to make KiwiSaver payments in respect of Ms Lowe?

[46] KRPL acknowledges it failed, for the first 14 months of Ms Lowe's employment, to deduct the KiwiSaver employee contribution from her wages and to make the employer contributions. That changed from the pay period ending 5 July

2015 when KiwiSaver contributions commenced. Ms Lowe's payslips reveal both employer and employee KiwiSaver contributions were made from that pay period to her final pay for the period ending 11 October 2015. KRPL did not address the lack of contributions made over the first 14 months of her employment while Ms Lowe was still an employee.

[47] It was Mr Smith's evidence that KRPL's failure with regard to Ms Lowe's KiwiSaver had been inadvertent and that he had corrected it when his payroll provider had made him aware that KiwiSaver contributions were not being made. He attributed the error to his own naivety. He acknowledged it was a benefit Ms Lowe missed out on for the first 14 months of her employment and said he did not think about addressing that lost benefit at the time.

[48] Mr Smith provided evidence to the Authority in December 2016 that he had been contacted by the Department of Inland Revenue (IRD) on 16 October 2015 regarding the debt he owed in respect of the first 14 months' KiwiSaver employer contributions. The correspondence with IRD showed KRPL had entered into a repayment arrangement with it, starting on 6 December 2015 and due to finish on 23 April 2017.

[49] Mr Smith also provided a copy of a bank statement for KRPL showing payments it made between 7 December 2015 and 5 December 2016 with the transaction description "TFR TO INLAND REVENU KYLIE LOWEKIWISAVERCONTRIBUTION"(sic). Each debit was for $40.00.

[50] Following the investigation meeting Mr Smith provided, at my request, documentation showing that the last of the payments to IRD in respect of the employer's contributions to Ms Lowe's KiwiSaver was made on 24 April 2017, shortly before the Authority's investigation meeting.

[51] Ms Lowe provided documentary evidence that no contributions, other than member tax credits, were paid to her KiwiSaver fund between 4 July 2014 and 5 June 2015. I asked Ms Lowe in the course of the investigation meeting to provide evidence of contributions made to her KiwiSaver scheme from July 2015 to 2 May 2017. I provided the time for her to obtain the information during the lunch adjournment.

[52] Ms Lowe told me she was unable to access her KiwiSaver account at that time and she has not provided that evidence either during, or after, the investigation

meeting. She did acknowledge some payments had been made to her KiwiSaver account since the termination of her employment with KRPL. However, she said there was nothing to identify them as coming from her former employer and she therefore did not attribute them to KRPL.

[53] It is clear that KRPL failed to make employer contribution payments for the first 14 months of Ms Lowe's employment and failed to ensure her employee contributions were deducted from her wages and paid to IRD during that time. On the basis of the evidence before me I find it more likely than not that KRPL has now fully discharged its KiwiSaver obligations to Ms Lowe. KRPL's initial failure to implement KiwiSaver for her may have been inadvertent. However, I am not satisfied it acted in good faith towards her between 5 July and 11 October 2015 when it made no attempt to address the issue of the missed contributions for the first 14 months of her employment.

Was Ms Lowe paid all to which she was entitled in her final pay?

[54] Ms Lowe claims she was underpaid for the hours she worked in her final week of employment and for the week she spent on garden leave. She also queries whether she received all the holiday pay to which she was entitled, and whether she is owed bonus payments.

Pay for the last week worked

[55] Ms Smith sent Ms Lowe home on garden leave at 3.30pm on 2 October 2015. Ms Lowe's evidence was that she would normally have worked until 4.30pm. Ms Smith recorded and initialled Ms Lowe's finish time for 2 October as 3.30 pm. Under questioning in the Authority's investigation, Ms Smith conceded it had been unfair to deduct an hour from Ms Lowe’s pay when it was her decision to send Ms Lowe home earlier than normal. I agree and find Ms Lowe is entitled to be reimbursed for the hour that was deducted from her pay that day.

[56] Ms Lowe recorded her starting and finishing hours daily on a timesheet supplied by KRPL. For each of the days Monday 28 September to Friday 2 October 2015 she had recorded her starting time as 8.00 am. She had recorded her finishing time for Monday 28 September to Wednesday 30 September as 4.30 pm, and for Thursday 1 October, as 4.00 pm.

[57] Mr Smith acknowledged he had changed Ms Lowe's timesheet to show a finish time of 4.00 pm for each of the days from Monday to Wednesday. He did this without discussion with Ms Lowe and without informing her of the changes he had made. Mr Smith said he did it because he had arrived at KRPL premises from his primary job at around 4.15 pm on each of those days and Ms Lowe was not present.

[58] His statement was inconsistent, however, with KRPL's statement in reply which asserted Ms Lowe's hours for that week were 8.00 am to 3.30 pm. If that was what Mr Smith believed, he would have changed her timesheet for the week to reflect those hours. He did not. Ms Lowe was adamant that she recorded her starting and finishing times accurately. I prefer her evidence to that of Mr Smith, firstly on the basis of KRPL's inconsistency and, secondly, because there was no evidence the employer had ever previously queried the accuracy of Ms Lowe's recording of the hours she worked.

[59] Having reduced Ms Lowe's hours for the week ending 2 October from the 42 Ms Lowe recorded to 39½, Mr Smith then deducted a further 2½ hours from her time for the week. In a note written on Ms Lowe's timesheet he stated she was:

> "Not Paid 30 minutes/ day for After School accounts at home for this week as did not do them."

[60] Ms Lowe denied that she ever did KRPL account work at home. She said the only work she did from home was the staff rosters, which she did in her own time, not charging her employer. There was no evidence to support Mr Smith's assertion and I prefer Ms Lowe's evidence on this matter.

[61] When Ms Lowe's representative raised the issue of underpayment of termination pay in December 2015 Mr Smith's response was to put the onus on Ms Lowe to show what the underpayment was, stating she had been paid her contracted hours. The position he maintained up to and including the Authority's investigation was that Ms Lowe needed to produce proof she had been underpaid. In documentation filed in the Authority on 15 October 2016, Mr Smith stated Ms Lowe "needs to provide a day by day account for the week in question citing the hours worked per day. It is not up to KRP to assume hours worked".

[62] Ms Lowe had a payslip for the final period of her employment but she had no access to her timesheet until December 2016 when KRPL provided wage and time

records in response to an Authority direction. She therefore had no knowledge until 14 months after her employment had ended that her employer had made changes to her time sheet for her last working week. She believed she had been underpaid but, without access to the timesheet, had no means of furnishing the proof Mr Smith required.

[63] It was disingenuous of Mr Smith to state, as he did several times in correspondence, that if she provided proof of her underpayment KRPL would pay her the amount due to her. There is no evidence he ever told Ms Lowe, other than by means of the note he wrote on her timesheet for the last week she spent at the workplace, about the hours he had deducted relating to the After School accounts.

[64] I find Ms Lowe is entitled to be paid for the hours she claimed to have worked between Monday 28 September and Thursday 1 October 2015, in addition to being paid for the additional hour's pay she would have been entitled to on Friday 2 October 2015 if her employer had not sent her home one hour earlier than her finishing time. In total Ms Lowe was underpaid by five hours in respect of that week.

[65] I also find the alteration of Ms Lowe's timesheet and resulting underpayment to have breached KRPL's contractual obligation to act as a good employer and its statutory obligation of good faith.

Pay for "garden leave"

[66] Ms Lowe's final pay included payment for 37½ hours for her final week of employment when she was on "garden leave". The timesheet for that week records her total hours as "40", with an oblique line through that number and "To Contract 37½".

[67] This was in breach of an agreement Ms Lowe had with her employer that she would be paid for 40 hours work. Mr Smith acknowledged the undertaking, which both he and Ms Smith had made to Ms Lowe, that she would be paid for 40 hours. Mr Smith had confirmed this in writing to her. He said that when that agreement was made he had not been aware her IEA provided for 37½ hours work per week and he did not believe Ms Lowe was entitled to be paid for more than that.

[68] Ms Lowe's IEA, to which Mr Smith was a signatory, did not specify any maximum number of hours she could work. Her timesheets and pay records show

that she frequently worked in excess of 37½ hours per week. Even if her IEA had specified a maximum number of hours, which it did not, Mr Smith's confirmation to Ms Lowe in writing that she would be paid 40 hours for her week of garden leave would have constituted a variation to the IEA.

[69] I find there was no valid reason for the employer to dishonour an agreement it had made with Ms Lowe and it owes her the 2½ hour difference between the 37½ hours she was paid and the 40 hours the employer had undertaken to pay for the week of 5 to 9 October 2015. Again, I find the employer's action to have breached its contractual obligation to act as a good employer and its statutory good faith obligations.

Bonus payment owing

[70] I have earlier found Ms Lowe was entitled to the second quarter's bonus payment of $250. I now explain how I reached that view. KRPL's reply to Ms Lowe's amended statement of problem stated she would have needed to work the full year to receive the full $1,000 bonus it had awarded her. KRPL noted she worked six months of that year and "so at best is entitled to half the agreed bonus".

[71] It said Ms Lowe was paid for the first quarter "…(April 1st to June 30th 2015)" and was due to be paid the $250 bonus for the second quarter on 11 October 2015. KRPL's position is that it withheld the bonus payment, which Ms Lowe would otherwise have received in her termination pay, due to her "unacceptable behaviour".

[72] It was clear from the evidence of Mr and Ms Smith that the behaviour they regarded as unacceptable occurred on 2 October 2015. That was after the end of the second quarter in which the bonus had become due. Behaviour after 30 September 2015 could only be taken into account in relation to the bonus instalment for the third quarter, which Ms Lowe did not receive: her entitlement to the bonus for the second quarter had already crystallised on 30 September.

[73] I find that withholding the bonus payment due on 30 September was not an action a good employer, as defined in Ms Lowe's IEA, could have taken and it breached of clauses 2.2 and 2.3 of that agreement.

Is any holiday pay owing?

[74] After receiving her final pay from KRPL Ms Lowe was unsure whether she had been paid all the holiday pay to which she was entitled. KRPL's response in email correspondence with Ms Lowe's representative following the termination was to deny money was owing and to request evidence of any deficit. The company expressed willingness to make good any underpayment but placed the onus on Ms Lowe to substantiate her claim.

[75] As noted above, Ms Lowe had her final pay slip but did not have access to her time sheets until December 2016, 14 months after her employment had ended. That pay slip recorded payment of an amount of $724.79 gross as "termination pay". Mr Smith explained this was her holiday pay, and equated to 32.95 hours of holiday pay. In the course of the investigation meeting Ms Lowe confirmed the holiday pay looked "more or less correct".

[76] I have found Ms Lowe was underpaid in the period leading up to her termination of employment on 9 October 2015, as a result of her employer altering the hours on her timesheet for the first week and paying her for fewer hours in the second week than it had undertaken to pay her. She is entitled to holiday pay on those hours in the sum of $33.20.

Should a penalty be imposed?

[77] Ms Lowe seeks the imposition of a penalty against KRPL in respect of its failure to comply with its statutory and contractual obligations, and asks that part of the penalty be paid to her.

[78] A penalty may be imposed at the discretion of the Authority and is generally imposed for the purpose of punishment as well as discouragement to others. I have found KRPL breached its statutory and contractual good faith obligations to Ms Lowe in respect of altering her timesheet for her last week on the job and the following week in which she was on garden leave. I also find it breached its obligation of good faith and contractual obligation to act as a good employer in relation to her KiwiSaver membership, her termination pay and in denying her the bonus payment to which she had become entitled on 30 September 2015.

[79] The Authority is required by s. 133A of the Act to take a number of specified, but non-exhaustive, matters into account in determining the amount of a penalty. Ms Lowe's employment ended in October 2015 before s.133A came into force. However,

I will follow the approach of the Employment Court in *Lumsden v Skycity Management Limited*[2] and consider the matters as a useful guide, given that s. 133A confirms earlier case law.

[80] The matters include a consideration of s.3 of the Act which specifies as its first object the promotion of productive employment relationships through the requirement for good faith behaviour in all aspects of the employment environment and the employment relationship. Of the five findings of breaches of good faith I have made, three relate to Ms Lowe's timesheets and final pay and occurred at the end of the employment relationship. The other two relate to breaches concerning KiwiSaver; with one being a continuous breach from commencement of employment through to July 2015 and the other occurring from July to the end of the employment relationship on 9 October 2015.

[81] The first three breaches directly affected Ms Lowe's remuneration to her detriment. I regard each of them as serious. The action of the employer in each instance was autocratic and executed without discussion or consultation with Ms Lowe. In changing the hours of work Ms Lowe had recorded in her last week at the workplace and in dishonouring a verbal and written agreement made with her over the hours she would be paid on garden leave KRPL showed complete disregard for its statutory obligations of good faith and its contractual obligation to act as a good employer. The decision not to pay Ms Lowe the bonus instalment to which she had become entitled on 30 September 2015 was made on the basis of non-relevant considerations and demonstrated a similar disregard for those obligations.

[82] KRPL's fourth breach, relating to its failure to implement employer and employee contributions to KiwiSaver for Ms Lowe from the commencement of her employment until July 2015 may have been inadvertent. However, its decision not to mitigate the error until after Ms Lowe's employment had ended and IRD pursued it for the unpaid contributions was deliberate.

[83] I do not accept that Mr Smith's self-proclaimed naivety as an employer exonerates KRPL from the imposition of a penalty. I accept the employer's evidence of entering into an agreement for payment of arrears of employer contributions and

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2 *Lumsden v Skycity Management Limited* [2017] NZEmpC 30

also accept that KRPL had completed those payments in the fortnight immediately preceding the Authority's investigation.

[84] Following the Employment Court's process for the assessment of penalties[3], I note that all the breaches I have identified are of the "good employer" provisions of Ms Lowe's IEA and of the employer's duty of good faith under s.4 of the Act. Five separate statutory and contractual breaches with a maximum penalty available for each breach of $20,000 gives a potential total of $100,000. This is a situation where a global penalty is appropriate, rather than five separate penalties, and I note that accords with Ms Lowe's application.

[85] The next part of the process entails assessing the severity of the breaches to establish a starting point for considering provisional penalties. It includes a consideration of aggravating and mitigating factors. Remuneration is a basic component of an employment relationship and any breach relating to it, and resulting in an employee receiving less than her entitlement, is serious. In this instance Ms Lowe has been deprived of wages she earned and a bonus to which she was entitled, for approximately 20 months as at the date of this determination. KRPL has made no attempt to make reparation to Ms Lowe in respect of those matters.

[86] With regard to KiwiSaver, KRPL mitigated the breaches, albeit belatedly, by entering into and completing a payment arrangement with IRD. Ms Lowe will not be able to access her KiwiSaver scheme until she reaches retirement age and is unlikely to suffer any long term effects from KRPL's breaches. Taking these factors into account I find a provisional starting point to be $30,000.

[87] The next step is to consider the means and ability of the person in breach to pay the provisional penalty. I have no direct evidence of KRPL's financial capability but accept the evidence of Ms Smith that the volume of its business frequently is weather dependent which, not infrequently, results in low attendance of children and disproportionately high numbers of employees on duty. I also note KRPL entered into a repayment arrangement with IRD over the KiwiSaver debt rather than paying in a lump sum which could suggest financial constraints. Taking those matters into account I deem a 50% reduction to the starting point to be appropriate.

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[3] *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Tobacco Ltd* [2016] NZEmpC 143 at [139] to [151]

[88] The final step consists of applying the proportionality or totality test to ensure the amount of a penalty is just in all the circumstances and is proportional to the severity of the breach and the harm it occasioned. In monetary terms, Ms Lowe was underpaid by $415.00 plus the $33.20 holiday pay due on that amount. That is a relatively small amount and it is appropriate to reduce the provisional penalty to take that into account. I find $5,000.00 to be an appropriate penalty in all the circumstances. Half of that amount is to be paid to Ms Lowe to acknowledge the loss of enjoyment she sustained from not having the use of money at the time it was due to be paid and the efforts she has had to make to ensure payment of sums owing to her.

Remedies and contribution

[89] I have found Ms Lowe was disadvantaged by the unjustifiable actions of her employer on 2 October 2015. I now need to determine what, if any, remedies are appropriate and whether Ms Lowe contributed to the situation that led to her personal grievance.[4] If she did contribute, I am required to consider whether, and to what extent, a reduction in remedies is warranted.

[90] Ms Lowe seeks compensation in the sum of $15,000 for the hurt and humiliation she says she has suffered. She does not seek an award of wages, which is appropriate given that she had given notice of her resignation and her employment was due to end on 9 October 2015.

[91] I have no doubt Ms Lowe suffered some embarrassment and humiliation from both Mr Smith and Ms Smith's actions on 2 October 2015. In being escorted off the premises she was denied the opportunity for making her farewells to other employees with whom she had worked and to the children she had cared for during her employment. I find she is entitled to compensation, albeit at the lower end of the scale. I assess a reasonable sum of compensation to be $4,000, subject to findings as to contribution.

[92] In my view Ms Lowe did contribute to the situation that led to her personal grievance by sending the "fuck it forget it" text message to Mr Smith on the morning of 2 October. That was inflammatory and is likely to have contributed to Mr Smith's combative approach when he and Ms Lowe had a verbal altercation at the workplace's public counter shortly afterwards.

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4 In accordance with s.124 of the Act

[93] While Ms Lowe acknowledged swearing at Ms Smith later that afternoon, that occurred in response to Ms Smith's action of following her around and seeing her off the premises. The swearing at that point did not contribute to Ms Smith's actions that in part led to Ms Lowe's personal grievance.

[94] I consider a reduction of 25% in the compensation that would otherwise have been awarded to her to be appropriate.

Determination

[95] Ms Lowe was disadvantaged in her employment by the unjustifiable actions of her employer on 2 October 2015.

[96] KRPL underpaid Ms Lowe for her last week at the workplace and for the last week of her notice period when she was not required to work.

[97] For the reasons given above I find KRPL breached its statutory obligations of good faith to Ms Lowe and its contractual obligations to act as a good employer.

Orders

[98] KRPL is ordered to pay the following sums to Ms Lowe:

a. $3,000 compensation without deduction under s.123(1)(c)(i) of the Act;

b. $110.00 gross being wage arrears for underpayment in the week of 28 September to 2 October 2015;

c. $55.00 gross being wages underpaid for the week of 5 to 9 October 2015;

d. $250.00 gross being a quarterly bonus due on 30 September 2015;

e. $33.20 being holiday pay due on the sums in a. to c. above[5]

[99] KRPL is also ordered to pay, within 28 days of the date of this determination, a penalty of $5,000 for breaches of good faith under ss.4(1) and 134(1) of the Act. Half of that amount, being $2,500, is to be paid to Ms Lowe with the remaining $2,500 to be paid to the Authority for payment to the Crown account.

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[5] The quarterly bonus was described by the respondent as a productivity payment and therefore comes under the definition of gross earnings in s.14(a)(iv) of the Holidays Act 2000

Costs

[100] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority