IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE

[2023] NZERA 367
3178839

	BETWEEN	MOHAMED IBRAHIM HASSAN MOHAMED Applicant
	AND	HARDY ST PHARMACY LIMITED First Respondent

Member of Authority:	Antoinette Baker
Representatives:	Lucy Ingham, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	13 April 2023 at Nelson
Submissions received:	On the day from the Applicant
Date of Determination:	12 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Mohamed was employed as a pharmacist by the respondent (H) from 27 April 2021 for just short of one year. The two directors of H are Fiona and John Handforth. Mr Mohamed resigned on 21 February 2022 and gave eight weeks' contractual notice. At the end of his employment H provided Mr Mohamed payslips showing his final pay and holiday pay would be a total of $5,675.31 (net). H paid none of this to Mr Mohamed, deducting the whole amount for recruitment costs ($5,809.44), and professional fees ($191.25 and $330.00) claiming the shortfall of $655.38 to be paid within 7 days otherwise a debt collector would pursue Mr Mohamed.

[2] H explained the deductions by relying on clauses in the individual employment agreement (IEA). One of those clauses referred to pro rata deductions if Mr Mohamed did not work for a total of 36 months.

[3] On 23 May 2022 Mr Mohamed communicated through his then representative that he challenged the deductions from his final pay under the Wages Protection Act 1983 (WPA) saying the costs for professional fees were not owed, and the deduction for recruitment costs was an illegal premium under s 12A of the WPA. He further said that none of the deductions were consulted before they were made, and this was in breach of s5(1A) of the WPA.

[4] On 17 June 2022 Mr Mohamed raised a grievance through his then representative based on the disadvantage to him because of the above deductions, a lack of staffing causing him workplace stress in his role as a senior pharmacist, the lack of communication to him generally about a covid-19 wage subsidy and sick leave entitlements, and a lack of explanation to him beyond messages from the co-director, Mr Handforth that he was taking unauthorised breaks and implying he was not recording them.

[5] Mr Mohamed claims compensation of not less than $15,000.00 for the grievance, recovery of his final pay, penalties under s 13 of the WPA and recovery of the final day of his employment which was an unworked statutory holiday. He also claims costs.

The Authority's investigation

[6] This matter was initially lodged against both H and Mr John Handforth. The claim against Mr Handforth was withdrawn at the commencement of the investigation meeting.

[7] H through Mr Handforth provided a response to the initial Statement of Problem. I have treated this as a Statement in Reply. Mr Handforth indicated through other emails to the Authority that Mr Mohamed needed to provide details of who he had talked to about this dispute and in another email that complaints after Mr Mohamed left were that Mr Mohamed had taken unauthorised breaks for prayer. Mr Handforth further indicated he was not available for a phone conference call because he needed to run his pharmacy business and there was a shortage of pharmacists. He was given multiple dates to make himself available and provided with information

about the purpose of the conference call. The Authority requested a phone number to contact Mr Handforth. He did not provide his phone number.

[8] The Authority proceeded with a phone conference call. Ms Ingham, counsel for Mr Mohamed attended. Mr Handforth did not attend. I am satisfied he was provided with an opportunity to attend.

[9] An investigation meeting date was set with a timetable for provision of evidence. This was included in Directions of the Authority sent to Mr Handforth[1]. A Notice of Investigation meeting was also sent to Mr Handforth. To communicate with Mr Handforth the Authority used the address for service showing for H on the New Zealand Companies Register as well as to the same email that Mr Handforth has used in all his communications with the Authority. H did not provide briefs of evidence and did not appear at the investigation meeting or give an explanation for this non-appearance.

[10] Mr Mohamed and his counsel, Ms Ingham appeared at the investigation meeting. Mr Mohamed gave affirmed evidence. I asked him questions about things that Mr Handforth had emailed to the Authority where this material appeared relevant to the issues for investigation. Ms Ingham gave brief oral submissions for Mr Mohamed at the end of the investigation meeting. The meeting lasted a half day.

[11] The Authority has the power to proceed if any party fails to attend an investigation meeting 'without good cause'[2]. I considered the above circumstances and continued with the investigation meeting. I now make this determination.

[12] The issues to be determined are:

a. Were the deductions made by H in the final pay in breach of the Wages Protection Act 1983 (WPA) and if so, what amount is to be paid back to Mr Mohamed?
b. Are penalties to be awarded for breaches of the WPA and if so, should any or all of this be paid to Mr Mohamed?
c. Did H breach the Holidays Act 2003 by not paying him for his final day of employment and if so, what is the remedy?
d. Was Mr Mohamed disadvantaged in his employment?

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[1] Directions of the Authority dated 3 November 2022.
[2] Employment Relations Act 2000, Schedule 2, Clause 12.

e. If so, what if any compensation is to be awarded to him?
f. Should any remedies be reduced because of employee contribution?
g. Should the Authority award interest for any money found owing?
h. Depending on the above is H to contribute to Mr Mohamed's legal costs?

Were the deductions made by H in the final pay in breach of the Wages Protection Act 1983 (WPA) and if so, what amount is to be paid back to Mr Mohamed?

[13] An employer cannot make deductions from an employee's pay without the employee's written consent. An employer seeking to make a specific deduction in reliance on a general deduction clause must first consult with the effected employee.[3] Holiday pay is also treated as 'salary and wages' earned by the employee and is to be paid as due subject only to deductions the employer is entitled to make from salary or wages.[4]

[14] Mr Mohamed's individual employment agreement (IEA) included at clause 6 under a heading 'Deductions from Renumeration':

c. Upon termination of your employment, we may make deductions from your renumeration in respect of any money you owe to us whatsoever.
d. We will consult with you on each specific deduction as referred to in this clause.

[15] Clause 6 of the IEA does not provide a specific reference to recruitment costs or costs for membership to professional associations, as has been deducted from Mr Mohamed's final pay. However, these things are generally referenced in Schedule 1 of the IEA:

> 10. Termination of employment:
>
> Eight weeks' notice will be given by either party of the termination of employment, unless a lesser period is agreed in writing between the parties. … Any annual professional fees, indemnity insurance, training costs will be recouped from the employee on a pro-rata basis. Any recruitment fees or costs incurred within 36 months of the termination date will also be recouped from the employee on a pro-rata basis.'

[3] Wages Protection Act 1983, ss 4 and 5.
[4] Holidays Act 2003, s 86.

[16] H was required to consult with Mr Mohamed before making the deductions it did from his entire final pay. The WPA requires it to legitimise deductions. Clause 6 of the IEA reflects this requirement. I find that H did not consult about the specific deductions made. The specifics could have been what the deductions actually were and the quantum. I am satisfied H did not consult. This is because while Mr Handforth says in written untested material that he told Mr Mohamed when resignation was discussed that he 'cautioned' Mr Mohamed that he would make deductions if he resigned, I prefer the straightforward affirmed evidence of Mr Mohamed when he says the specific deductions were not discussed with him. In any event, if I am wrong, Mr Handforth's description that he 'cautioned' Mr Mohamed that deductions would be made is inconsistent with consulting about the specifics.

[17] The following also weighs in favour of Mr Mahomed's evidence that he was not consulted. There are two payslips, one for wages and one for holiday pay. I accept Mr Mohamed's evidence that he received these payslips just after he finished his last working day of employment and then had to ask Mr Handforth why he had not been paid. This is consistent with the payslips saying nothing about deductions[5]. It is also consistent with the responsive tone of Mr Handforth's to Mr Mohamed, after he had ended his employment, on 18 March 2022 (just before midnight):

> Dear Mohamed,
>
> As per your employment agreement (6c) we have deducted money owing from your last pay and also holiday pay.
>
> Schedule One, clause 10 details that any recruitment fees or costs incurred within 36 months of termination will be recouped on a pro-rata basis.
>
> Accordingly, we have reduced recruitment fees by 30% given the 11 months worked and, we have reduced Pharmacy Defence Association & PSNZ Fees by 25% for the 3 months worked in 2022.
>
> This leaves a balance of $5,809.44 (recruitment) plus $191.25 (PDA) giving a total owing of $6,330.69.
>
> Your final fortnightly net pay was calculated at $2,420.56 and your accrued holiday pay was calculated at $3,254.75 giving a total of $5,675.31.
>
> Deducting these two amounts from the balance owing leaves an outstanding balance of $655.38.
>
> Please make payment of $655.38 within 7 days to [account number] Hardy St Pharmacy Ltd.

[5] The payslips refer to gross and net pay after deductions for tax and denote KiwiSaver contribution and leave balances.

> If no payment has been received from you by this time, we will pass on this amount plus any collection fees to a debt collector.
>
> Sincerely,
>
> John Handforth
> Hardy St Pharmacy Ltd

[18] I am satisfied this email was an explanation of what had been deducted after the deductions had occurred. I am further satisfied this email was not produced until after Mr Mohamed queried lack of his final payments as indicated on the payslips.

[19] Based on the above, I find H breached s 5(1A) of the WPA by not consulting about the specifics about the deductions before making them. It should be evident that the IEA was also breached because it imported the statutory duty to consult. Even if it might have been raised by H that the clause in Schedule 1 of the IEA mentions nothing about consultation parties cannot contract out of the legislative requirement to consult under s 5(1A) of the WPA.

[20] Mr Mohamed also disputes the validity of the monies deducted from his final pay. I will now deal with each of the three deductions against these claims.

Recruitment costs as a premium

[21] Mr Mohamed says that the deduction for recruitment costs amounted to an illegal deduction not just because he was not consulted about the specifics but because it was a 'premium' under s12A of the WPA. His oral evidence was that while he obtained the job through a recruitment agent, he was not charged for the service and in turn was not aware that H had been charged for this service.

[22] A premium has been interpreted as 'the price for an employment agreement being entered into or indeed being continued.'[6] In other words, at its basic level it means payment of money in exchange for obtaining a job. Section 12A of the WPA makes this illegal.

[23] The Employment Court[7] has considered that the definition of ' "premium" extends beyond those situations [of direct payment for a job] to apply to an employer

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[6] *Zonneveld v Maudaara Ltd* [2015] NZERA Christchurch 99 at [32]
[7] *A Labour Inspector of the Ministry of Business, Innovation and Employment* v *Tech 5 Recruitment Limited* NZEmpC 167 at [54].

recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer.' While the Court acknowledged that such agreements may be case specific it emphasised the lack of benefit to an employee other than getting a job.

[24] Mr Handforth wrote to the Authority explaining the reason for deducting the pro- rata 'recruitment costs' deduction. The explanation said that H was unhappy with the pre-employment checks for Mr Mohamed but because he was the only applicant and there was a shortage of pharmacists available, he was employed. The explanation continued that as a 'safeguard for the significant amount the employment agent was charging us, we would insert a clause in the employment contract to mitigate the charge by recovering that fee on a pro-rata basis over 36 Months. Mr Mohamed fully understood and agreed to that.'

[25] I have considered whether Mr Mohamed 'agreed to that.' He explained to me he knew about the 36-month clause but that he signed the IEA at a time when he intended to stay in Nelson. I also accept he was unaware of costs charged by the recruitment agent to H. In any event a premium cannot be 'agreed to'.

[26] Considering the above I am satisfied that there is some likelihood that H has paid a recruitment agent some form of 'finder's fee'. There seems to have been no benefit to Mr Mohamed from this payment other than him getting the job. That is consistent with a premium charged. Mr Handforth's apparent reasoning that the clause to deduct recruitment costs was to 'mitigate' risk seems to be directed at a concern that Mr Mohamed would not be suitable in his employment. Mr Mohamed was not dismissed, and I find the claims about him being unsuitable as an employee from commencement to be unreliable.

[27] Standing back from the above, I find the recruitment costs fall into the category anticipated by the Employment Court as falling within a definition of a premium under s 12A. I find H breached s 12A of the WPA.

Payment of fees to the Pharmaceutical Association of New Zealand

[28] Mr Mohamed says that membership of this association is voluntary, and he was not a member during the time he was employed by H. Based on this uncontested evidence I find this fee was not likely owed by Mr Mohamed to H.

Pharmacy Defence Association

[29] Mr Mohamed says that membership of this association is voluntary, and he was not a member during the time he was employed by H. He provided evidence to show he has since joined the association after he left his employment with H. Based on this uncontested evidence, I find this fee was not likely owed by Mr Mohamed to H.

Summary

[30] In summary, I find that Mr Mohamed did not likely owe the deductions made, and that H breached s 5(1A) and 12A of the WPA. Under s 13 of the WPA Mr Mohamed is entitled to recover the money deducted from his final payments being a total of $5,675.31 (net). To this amount he is entitled to interest which I will deal with below. I will now consider penalties.

Are penalties to be awarded for breaches of the WPA and if so, should any or all of this be paid to Mr Mohamed?

[31] An employer is liable to a penalty for any breach of the WPA.[8] I have found H has breached two sections of the WPA, ss 12A and 5(1A). I am satisfied that H is liable to a penalty for each breach. The amount that can be ordered against a company employer as a penalty for each breach is an amount not exceeding $20,000.00.[9]

[32] Section 133A of the Act sets out that in determining the amount of a penalty there are 'relevant factors' to consider including:

> (a) the object of the Act
> (b) the nature and extent of the breach
> (c) whether the breach was intentional, inadvertent, or negligent
> (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
> (e) whether the person in breach has taken steps to mitigate the potential adverse effects of the breach
> (f) the circumstances in which the breach occurred including the vulnerability of the employee
> (g) whether the person involved in the breach has previously been found by the

[8] Wages Protection Act, s 13.
[9] As above and Employment Relations Act 2000, s 135.

Authority or the court to have been engaged in similar conduct.

[33] The Employment Court has set out guidance when considering whether a penalty is to be awarded in the context of statutory breaches. This includes the number and nature of the breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are 'just in all the circumstances.' [10] There is also the need to consider deterrence and to award penalties consistent with similar cases [11].

Should a penalty be awarded against H?

Nature and extent of the breach

[34] There are two breaches of the WPA. While both relate to the same action by H the breach of duty to consult about the deductions extends to more than a situation where 'but for' that duty the money would have been owed anyway. However, the breaches do not relate to multiple employees or multiple employment standards where the employees are in vulnerable positions relating to (say) immigration visas tied to employers. Those types of cases often attract significantly high multiple penalties. I do not find the extent and nature of this matter is in that category.

[35] The breaches here reflect a single incident with one employee but with behaviour that needs to be deterred.

Was the breach intentional, inadvertent, or negligent?

[36] I might consider some sort of mistake has been made by H about the legality of the deductions which might weigh against consideration of a monetary penalty. However, if that were the situation, H has, through its director, had time to understand its obligations likely pointed out to Mr Handforth as early as June 2022[12] and make good on this if the action was truly inadvertent.

[37] I find some likelihood of wilful blindness about the way H has opted to make the deductions from Mr Mohamed's final pay.

Severity

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[10] *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].
[11] *Lumsden v Skycity Management Limited* [2017] NZEmpC 30.
[12] Letter from the Labour Standards Early Resolution Service to Mr Mohamed dated 16 June 2022 explaining that it had provided education to Mr Mohamed's employer and 'requested him to pay your final pay to avoid breaching the Wages Protection Act 1983 [sic].'

[38] The effect of the deductions by any reasonable reading must be considered more than minor. The deductions were unexpected, and not explained until the employee had to ask where the pay (as recorded on his payslips) was. This was in the context of a resignation and an employee supporting five dependants. From this perspective there is a level of severity exacerbated by what was a brutal sting in the tail when the employer claimed money back the other way with the spectre of a debt collector within 7 days.

Ability of the person in breach to pay

[39] I have no reliable evidence from H to say there is a financial reason not to award a penalties against H. I see that H remains registered on the New Zealand Companies Office Register and according to the same source, it has filed a return this year. This is all an outward statement to the world of solvency. This factor is therefore neutral in my consideration of the amount to award.

Steps taken to mitigate the potential adverse effects of the breach

[40] I find no mitigating steps taken by H to lessen the adverse effect of the breaches even when as noted above at [36] it has had the opportunity to be educated about its obligations and could have sought reliable advice on the face of the challenge about them.

The circumstances in which the breach occurred including the vulnerability of the employee

[41] I accept that the sudden non-payment of a sizeable final pay would have likely to have had a significant adverse effect on Mr Mohamed. I also accept Mr Mohamed's evidence of communications with Mr Handforth and their abrupt tenor at this time. I find this likely put Mr Mohamed in a vulnerable position. H controlled the decisions about pay and payments for work completed. The non-communication about deductions until after they occurred and after Mr Mohamed was no longer employed resulted in Mr Mohamed being taken advantage of at least in his last pay cycle.

Whether the person involved in the breach has previously been found by the Authority or the court to have been engaged in similar conduct.

[42] I have nothing before me to show that H has previously breached obligations similar to this matter.

Deterrence and whether the penalty is 'just in all the circumstances.'

[43] I find deterrence is necessary here. This is because this was not likely an inadvertent breach, the effect on Mr Mohamed was serious and in circumstances during his notice period that were unfair to him. The breaches also fall foul of a fundamental right of an employee to be paid for their work. I find a need to deter employers from the same type of behaviour.

Proportionality

[44] I have considered other comparable situations where the Authority has imposed penalties for breaches the Wages Protection Act 1983 both as to deductions and premiums. There is little that is exactly the same to compare and most are combination penalties with such things as lack of employment agreements and records. However, I have considered matters where there is a single employer with no evidence of previous breaches but where the employer could have taken advice and did not, did not take any mitigation steps or participate in resolving the matter. Based on this, I find that a single penalty for both breaches is appropriate and award this at $4,000.00.

How much should be awarded and should any of this be paid to Mr Mohamed?

[45] A penalty is paid into the Authority which in turn then pays this into the Crown Bank Account.[13] The Authority may however award that the whole or any part of a penalty recovered must be paid to any person.[14] I find it appropriate to award to Mr Mohamed 50% of the penalty I have awarded, being $2,000.00.

Did H breach the Holidays Act 2003 by not paying him for his final day of employment and if so, what is the remedy?

[13] Employment Relations Act 2000, s 136(1).
[14] As above, s 136(2).

[46] Clause 10, Schedule 1 of the IEA required Mr Mohamed to give eight weeks' notice for termination and I am satisfied from his evidence he resigned on 21 February 2022. I find that Friday 15 April 2022 (Good Friday) was included in this eight week notice period and Mr Mohamed was entitled to be paid for this non worked public holiday day at his ordinary pay. This is because I accept that a Friday was an otherwise working day for him.[15] The 'holiday pay' payslip refers to the pay period ending on the 14 April 2022 contrasting with the contemporaneous 'wages payslip' showing the period ending two days after (the likely pay cycle). This appears to support at best some misunderstanding on the part of H about the obligation to pay to the last day of notice by changing the holiday pay payslips to exclude Good Friday.

[47] Accordingly, H is to pay Mr Mohamed $363.40 (gross) plus 8% for holiday pay component ($29.04 gross)[16] being a total of $392.44 gross.

Was Mr Mohamed disadvantaged in his employment and if so what if any compensation is to be awarded to him?

[48] Section 103(1)(b) of the Act allows an employee to bring a personal grievance if the employee's employment, or one or more conditions of the employee's employment, is or are affected to the employee's disadvantage by some unjustifiable action by the employer. This includes any condition that survives termination of employment.

[49] The question of whether an action by an employer is justifiable is determined on an objective basis by applying the test at s 103A of the Act. That test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the action occurred. In determining this test, I am required to consider procedural factors[17] and may take into account any other factors. However, I must not determine an action to be unjustified solely because of minor defects in the process[18]. H could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

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[15] Holidays Act 2003, ss 46 and 49.
[16] As above, s 23.
[17] Employment Relations Act 2000, s 103A (3).
[18] Employment Relations Act 2000, s 103A (4) and (5).

[50] Before considering Mr Mohamed's claim that he was disadvantaged in his employment I will first deal with an issue that became apparent at the investigation meeting. This relates to whether the unjustified actions that are claimed, in relation to the grievance, were raised within time.

Raising of the grievance

[51] Section 114 (1) of the Act includes that an employee must raise a personal grievance 'within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.'

[52] It became apparent during my investigation that I did not have the documents showing that Mr Mohamed had raised a grievance within the statutory timeframe. When supplied, the documents showed that a previous representative for Mr Mohamed had raised a grievance in a letter dated 17 June 2022 (the 17 June letter) to H addressed to the attention of Mr Handforth. This means that I need to consider whether some of the actions alleged, or conditions affected, may sit outside of this time frame.

[53] The things that were raised as part of the disadvantage claim in the 17 June 2022 letter were:

1. A failure to consult on the deductions
2. A failure to supplement Mr Mohamed's wages when he had to isolate at home due to Covid-19
3. A failure to address repeated requests to address sick leave entitlements
4. Sending emails to all staff but not communicating with Mr Mohamed directly
5. Messaging Mr Mohamed that he was taking unauthorized breaks but not providing any information or an opportunity to discuss this
6. A lack of staffing and a lack of addressing the same when raised after Mr Mohamed's fellow pharmacist went on parental leave with a result of an unsafe workplace and workload stress on Mr Mohamed.

[54] It has been submitted for Mr Mohamed that I should accept that all of the above formed an overarching breach of good faith that culminated at the end of employment. I accept that the end of the employment appears to have been 15 April 2022. I do not agree with this submission because there are actions claimed that do not neatly form a course of events. I will therefore address under each heading where applicable if the alleged unjustified action was raised within 90 days. That is not to say I will not consider the duty of good faith in relation to what is claimed.

Failure to consult in relation to the deductions to the final pay

[55] I find that H's action of deducting from Mr Mohamed's final pay was unjustified for reasons already covered above under the issues relating to breaches of the WPA. Mr Mohamed was left without a sizeable payment after having worked out his eight weeks contractual notice. I accept his evidence that this was sudden and unexpected and affected his ability to support his family of five dependants. I find Mr Mohamed was disadvantaged.

A failure to supplement Mr Mohamed's wages when he had to isolate at home due to Covid-19

[56] Mr Mohamed says that when he was isolating at home in March 2022 due to being a household contact to Covid-19 he was disadvantaged because H did not at the time apply for the then available Government subsidy. This which would have been $600.00.

[57] Messages show that Mr Mohamed provided Mr Handforth with a link to a government website providing information. I accept (having followed the link myself) that this would have shown Mr Handforth that Mr Mohamed was in the category of employee that a subsidy could have been applied for. The response from Mr Handforth was, "Your pay has been processed correctly mohamed [sic] as per the govt rules. Thanks John". Mr Mohamed challenged this saying that the government did have such a scheme and referred again to the form he had previously sent to Mr Handforth. Finishing with, "you are denying me a big chunk of my pay and I am not sure why". Mr Handforth responded, 'You have been paid correctly' and provided a screen shot from what appears to be another website. The screen shot refers to the situation where if an employee's sick leave was exhausted the employer and employee could agree to special leave. Mr Mohamed then pointed out that the support scheme is to 'patch up

the gap when you don't have sick leave'. Mr Handforth's response was curt, and I accept Mr Mohamed's evidence that it 'cut him off': 'as far as I'm concerned this matter is settled.'

[58] Standing back from the above I find the communications in the messages and the link sent are consistent with Mr Mohamed's evidence that it was unreasonable of Mr Handforth not to consider the link material sent to him and then to simply disagree. I find a breach of good faith[19] in not constructively communicating on this matter. I find the action was unjustified.

[59] I find that Mr Mohamed was disadvantaged financially as a result of this action in that he could have been paid an extra $600.00 in his pay when he was isolating. This matter appeared to resolve but not until some months later, when just after Mr Mohamed raised a personal grievance in the 17 June 2022 letter, $600.00 was paid to him by H without explanation. Until then Mr Mohamed had the immediate stress of the above exchanges and a delayed payment to him of money that could have supported his pay but for the lack of constructive communication.

A failure to address repeated requests to address sick leave entitlements

[60] A follow on from the above is that Mr Mohamed says that he then became concerned about whether in fact H was correct in recording he had exhausted all but 2.25 days of sick leave availability at the time he isolated. This appears to have been prompted because there was an amendment to s 63 of the Holidays Act 2003[20] (the statutory amendment) that had increased sick leave entitlement to ten days per year from five after the first six months of continuous employment and for each year thereafter.

[61] On 18 March 2022, Mr Mohamed messaged Mr Handforth for clarity about his sick leave entitlements. Mr Handforth replied he would provide this. I accept that such clarity was again asked for and was never provided.

[62] At this point I need to consider the reason for Mr Mohamed making these requests. Mr Mohamed's IEA was entered into before the statutory amendment. The IEA allowed for 5 days per year after the first six months, a reflection of the then statutory entitlement. The statutory amendment came into force on 24 July 2021 with

[19] Employment Relations Act, s4(1A)(b).
[20] Holidays (Increasing Sick Leave) Amendment Act 2021

the effect on existing employees[21] that the new 10 days would not apply until the next date that they would become entitled to more days of paid sick leave[22]. For Mr Mohamed this would have been one year after the date from when he worked for six months[23]. He commenced employment on 27 April 2021, six months on from this was 27 October 2021 and 12 months on from that date would have been 27 October 2022. By the latter date he had ended his employment. In short, he had not become entitled to 10 days sick leave.

[63] Mr Mohamed gave oral evidence to me that he believed he would have taken about 3 to 4 days of sick leave by the time he isolated at home in early 2022. H recorded on the payslip for pay for the week when Mr Mohamed isolated that he had only 2.25 days of paid sick leave left. While I accept that Mr Handforth for H did not follow up on requests to provide further information about sick leave, it appears H was likely correct in how much sick leave Mr Mohamed had left at the time he was isolating. As a result, this part of Mr Mohamed's claim for disadvantage fails. It seems to be based on a misunderstanding. Any further information from the employer may not likely have altered what had been recorded about the sick leave available at the time.

Sending emails to all staff but not communicating with Mr Mohamed directly

[64] Mr Mohamed describes in his brief of evidence a working environment where he says he was not communicated with directly by Mr Handforth and this caused him stress. This was given as examples of when he would find out through others that pharmacy hours had changed, or services had changed. He gave oral evidence that this was humiliating because he was the senior pharmacist. The problem I have in considering this evidence is that it lacks specifics as to when these things occurred. Those occurring before 17 March 2022 would be out of time to raise and be heard.

[65] In his oral evidence Mr Mohamed helped me to understand that it was difficult for him now to recall event details, but they continued throughout his employment. He also explained to me that he was not included in group emails after he resigned during the period of his notice, and he found this humiliating as the senior pharmacist and that it affected him being able to do his job.

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[21] Employees that were existing when the above amendment came into force which was 24 July 2021, 2 months after the Royal Assent on 24 May 2021.
[22] Holidays (Increasing Sick Leave) Amendment Act 2021, s 5(2).
[23] Holidays Act 2003, s63(2)(i).

[66] Standing back from this I find that Mr Mohamed was a plausible straightforward witness. For this reason, I accept his uncontested evidence that he was likely shut out of communications in the latter part of his notice during a time after 17 March 2022 and that this likely as he says had a stressful and humiliating effect on him causing him disadvantage in his responsible senior role.

Messaging Mr Mohamed that he was taking unauthorized breaks but not providing any information or an opportunity to discuss this.

[67] On the 18 March 2022 when Mr Mohamed asked for information to clarify his sick leave entitlements, the following exchange then occurred that day:

> Mr Handforth: Will do Mohamed [in response to supplying sick leave entitlement clarification]. Can you also clarify something for me please? I have been made aware that you take regular breaks during each day in addition to meal breaks. Can you confirm you have been deducting this time when writing in your hours on your time sheet?'
>
> Mr Mohamed: This is absurd [sic]. I demand to know who told you that because it is an absolute …lie. [and later] 'Sorry John I need to know who has been lying about me. This is extremely important.'
>
> Mr Handforth: A concern has been raised with me Mohamed in confidence. I will send through the details of the concern in an email and would ask that you respond. Thanks John.

[68] On 21 March 2022 Mr Mohamed sent the following message to Mr Handforth:

> Hi. I am still waiting for that email you said you will send detailing the allegation you have made against me. I am also waiting to find out about my sick leave summary. Thanks.

[69] Mr Mohamed's affirmed evidence is that the 'allegation' was never clarified until perhaps (and he is assuming) after these proceedings commenced when Mr Handforth emailed the Authority with a claim that Mr Mohamed had taken unauthorised prayer breaks during his employment. Mr Mohamed's evidence is that he was very upset about the allegation when first raised and then when sent in as part of these proceedings Mr Mohammed suggested that discrimination against his religion

was to play. I make no finding about this but can understand Mr Mohamed trying to fill in the gaps when H provided no details of the allegation during his employment. This lack of follow up prompted Mr Mohamed before he left his employment, to ask staff if they had an issue about his breaks. He says he got on with them all and they did not confirm they had any issues about his breaks.

[70] I accept Mr Mohamed's affirmed evidence that H did nothing further to clarify what can reasonably be seen as an allegation that infers Mr Mohamed was not being honest about recording his breaks. Mr Mohamed says that he was not aware he needed to record breaks but, in any event, explained to me that he performed prayers for about five minutes at a time for five times a day (if that is what the allegations were about). He said two of these prayer times fell during a working day and he carried them out in a break, or at the lunch time break. I accept Mr Mohamed's explanation and feel concerned he has had to justify his religious practice in these proceedings especially in the light of H making these claims long after he left his employment and then did not largely participate in these proceedings.

[71] Standing back from this I am satisfied that H's apparent 'allegation' about 'unauthorised' breaks and the way it was handled by Mr Handforth for H was unjustified and not what a fair and reasonable employer could have done. There are well known processes for raising disciplinary matters. Based on the uncontested evidence before me H followed none of these even if it had a genuine reason to do so which I doubt. I accept then that this action disadvantaged Mr Mohamed. He was already being kept out of emails as noted above and had a less than reasonable response when he raised issues about the wage subsidy. I accept that Mr Mohamed was feeling at best uncomfortable in a small workplace that someone had complained about him and at worst affronted and hurt at having his integrity questioned in a brief undetailed allegation without more said.

A lack of staffing and a lack of addressing the same when raised after Mr Mohamed's fellow pharmacist went on parental leave with a result of an unsafe workplace and workload stress on Mr Mohamed.

[72] I do not find this matter has been raised within time. The reason for this is because it appears to relate to situations that occurred before the 17 March 2022. The lack of specificity in the evidence has not assisted me here. The way I understand the evidence is that it was in February 2022 that Mr Mohamed's colleague was not

replaced, and technicians were instead employed who needed supervision. February 2022 came before the date for which the 90 days started running to bring a grievance about these actions.

Duty of good faith

[73] When considering the actions that I have found were unjustified causing disadvantage that have been raised within time, I consider them all to be part of a breach of good faith by H. That duty includes that it,

> 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 …[24]

[74] I accept that each action involves a lack of constructive communication that would likely have contributed to a productive final part of the employment relationship for Mr Mohamed and avoided the dispute that has then ensued. To the extent that the above actions occurred within the time for raising of the grievance I find that H has breached its duty of good faith to Mr Mohamed during his final part of his employment.

Summary

[75] In summary I find that Mr Mohamed has mostly made out grievances for disadvantage and will now consider his claim for compensation.

Compensation

[76] Mr Mohamed has described being stressed and humiliated in relation to the unjustified actions. I accept this is likely the issue about his whole final pay being deducted with the aggravating claim for money to be paid back in return. I also find it likely Mr Mohamed felt humiliated when he began to be shut out from communications and when allegations about his integrity were made without any follow up. I find that an appropriate level of compensation to be $7,000.00 considering some double up of the way in which Mr Mohamed's claim for disadvantage has been brought forward for him.

Should any remedies be reduced because of employee contribution?

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[24] Employment Relations Act 2000, s 4 (1A)(b).

[77] Under s 124 of the Act I must consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance and consider whether to reduce the remedies awarded accordingly. I do not find before me any evidence that Mr Mohamed has contributed to the personal grievance he has mostly made out.

Should the Authority award interest for any money found owing?

[78] The Authority has the power to award interest. I find this matter is appropriate to award interest on the money deducted from Mr Mohamed's final pay. H is to pay interest on the outstanding sum of $5,675.31 from 15 April 2022 until the date of payment. The order is made pursuant to Schedule 2, clause 11 of the Act. The interest may be calculated using the www.justice.govt.nz/fines/civil-debt-interest-calculator .

Costs

[79] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Mr Mohamed has been largely successful in his claims. He should not have been put to the cost of bringing this matter before the Authority to resolve it and is to have an award to contribute towards his costs in doing so.

[80] The investigation meeting took a half day on 13 April 2023. The current tariff of costs generally applied for a one-day Authority investigation meeting is $4,500.00.

[81] Accordingly, H is to pay half of the daily tariff usually applied being $2,250.00 as a contribution to Mr Mohamed's costs, together with the Authority filing fee of $71.56.

Summary of orders

[82] Hardy St Pharmacy Limited is ordered to pay Mohamed Ibrahim Hassan Mohamed the following amounts:

a. $5,675.31(net) as recovery of wages under s 13 of the Wages Protection Act 1983

b. Interest on $5,675.31 to be calculated from 15 April 2022 to the date of payment under s Schedule 2, clause 11 of the Act

c. Payment of $392.44 gross under ss 28, 46 and 47 of the Holidays Act 2003

d. A penalty of $4,000.00 is to be paid for breaches of ss 5(1A) and 12A of the Wages Protection Act 1983, $2,000.00 of which is to be paid into the Crown account and $2,000.00 of which is to be paid to Mohamed Ibrahim Hassan Mohamed

e. $7,000.00 compensation under s 123(1)(c) of the Act

f. $2,250.00 in costs

g. $71.56 for the Authority filing fee.

Antoinette Baker
Member of the Employment Relations Authority