

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 109
3140821

BETWEEN RASHEEL NAIDU
 Applicant

AND AZAK CARS LIMITED
 Respondent

Member of Authority: Peter Fuiava

Representatives: David Cain, advocate for the Applicant
 No appearance by the Respondent

Investigation Meeting: 11 March 2022

Submissions received: 18 March 2022 from Applicant

Determination: 25 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From 4 February 2020 to 25 February 2021, Rasheel Naidu was employed as a car groomer for Azak Cars Limited (ACL). Mr Naidu has applied to the Authority to investigate personal grievances of unjustified dismissal, unpaid annual leave, and the imposition of penalties against ACL for breaches of the Employment Relations Act 2000 (the Act) and the Holidays Act 2003 (HA).

[2] There has been no engagement by ACL with the Authority's investigation which means that Mr Naidu's evidence has gone largely unchallenged.

The Authority's investigation

[3] On 26 May 2021, Mr Naidu commenced proceedings in the Authority by lodging a Statement of Problem in which ACL was the named respondent. The

document was served on ACL at its registered office on 30 May 2021 and was signed for by Kevin Vgd. No Statement in Reply from ACL was filed with the Authority.

[4] The Authority convened a case management conference to progress matters to an investigation meeting and sought the assistance of Mr Naidu's representative for an alternative email address for ACL. Two email addresses were subsequently provided which the Authority used to notify ACL of the upcoming case management conference.

[5] On 19 November 2021, the case management conference was held. Mr Naidu's representative attended the teleconference but there was no attendance by a representative from ACL. Timetabling directions for the filing of witness statements were subsequently made in ACL's absence and an investigation meeting was set down for Friday 11 March 2022. A minute from the Authority recording the above was subsequently emailed to both parties.¹

[6] The Authority's minute recorded also its preference for the investigation meeting to be in person. However, if there was no engagement with the process by ACL, or if the COVID-19 Delta variant prohibited an in person investigation meeting from taking place, recourse would then be had for the meeting to occur by audio-visual link (AVL).

[7] On 28 February 2022, during which time cases of the Coronavirus Omicron variant in the community were beginning to rise, the Authority emailed the parties to ascertain whether they were amenable to having the investigation meeting conducted by AVL via Zoom. Mr Cain, Mr Naidu's representative, consented. ACL did not respond.

[8] On 8 March 2022, the Authority emailed both parties that it would be holding the investigation meeting via AVL. On 11 March 2022 at 10 am, Mr Naidu and Mr Cain attended the meeting by Zoom. There was no appearance by ACL. Out of an abundance of caution, the Authority took a short adjournment for 15 minutes to allow ACL more time to make an appearance. It did not appear.

¹ Minute of the Authority dated 19 November 2021.

[9] In ACL's absence, the Authority proceeded with the investigation meeting pursuant to clause 12 schedule 2 of the Act which enables it to act fully in the matter before it as if the company had duly attended or been represented.

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

The issues

[11] The issues requiring investigation and determination are:

- (a) Was Mr Naidu unjustifiably dismissed by ACL?
- (b) Is Mr Naidu owed annual leave by ACL?
- (c) If Mr Naidu was unjustifiably dismissed what remedies should be awarded considering lost wages and compensation for hurt and humiliation?
- (d) If remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Naidu that contributed to the situation giving rise to his grievance?
- (e) Should a penalty be imposed against ACL for various breaches of the Act and the HA?

Background

[12] Mr Naidu commenced employment as a full-time permanent car groomer with ACL on 4 February 2020. Three days later on 7 February 2020, he signed an individual employment agreement the terms of which required him to work 45 hours per week Monday to Saturday from 9 am to 5 pm. Mr Naidu was initially paid \$18 per hour but this was gradually increased with rises with the minimum wage. Before working for ACL, Mr Naidu had worked for four years as a repair technician for Out of Box Experience (OOBE) fixing iPhones and other Apple products.

[13] As a car groomer for ACL, it was Mr Naidu's job to move and organise the cars around the yard and in the showroom. While he was also responsible for picking up and delivering vehicles across Auckland as requested by his employer, car grooming remained a key part of his job taking up half of his working week.

[14] Mr Naidu stated that he was continuously requested to attend to tasks that were not aligned to his job description. This included stripping the interior of vans to their bare shell and cleaning them, lifting or moving heavy and specialised equipment, and painting vehicles without the required training or personal protective equipment. There was an expectation from his employer that while doing these tasks, he would be able to keep up with the actual tasks for which he was responsible. Mr Naidu found this hugely frustrating and he stated that he was unhappy about not regularly being able to take his breaks on time.

[15] One of Mr Naidu's co-workers, who was known also as Ricky, had worked for ACL as a car groomer three years before the commencement of Mr Naidu's employment. He had left the business for a time to work for Audi and BMW but had come back to work for ACL. While he had not worked for ACL for as long as Mr Naidu, the owners of the business, Ali Zakeri and his wife, Monica Zakeri, had known Ricky for longer because he had previously worked for the business before.

[16] On the morning of 25 February 2021, Mr Naidu and Ricky had a verbal disagreement regarding the grooming of a van. Upon attending work that morning, Mr Naidu checked the schedule and saw that the van needed to be groomed straight away. While doing so, he was approached by Ricky who told him not to groom the van as he (Ricky) and another staff member had planned to do this the day before.

[17] Mr Naidu questioned the other staff member who stated that he had no knowledge about cleaning the van that morning with Ricky. Mr Naidu approached Ricky to take exception to his telling him what to do when he was neither his supervisor nor manager. Although frustrated with him, Mr Naidu eventually worked on something else. At some point, Ricky approached Ms Zakeri to complain about Mr Naidu.

[18] Mr Naidu stated that, later that morning, he was approached by Ms Zakeri who asked why he was causing problems with Ricky. Hearing this upset Mr Naidu because it was apparent that Ms Zakeri had taken Ricky's side of the disagreement. Not wanting to discuss the issue any further, he returned to his work while Ms Zakeri kept standing in front of him "rehashing the issue". The conversation deteriorated from there with Ms Zakeri telling Mr Naidu to "get off the yard" and that "he was dismissed for the day". She started to swear at him saying "fuck you, fuck yourself, get the fuck off the yard now."

[19] Mr Naidu stated that Ms Zakeri was also pointing her “little finger” at him which he found “really infuriating”. He became so upset that he called her a “biased bitch” which Mr Naidu is not proud of having said.

[20] Mr Naidu walked off the yard but as his car was still being repaired at a mechanic shop nearby, he returned to the yard and went back to work. He stated that he told Ms Zakeri that his car was not ready to be collected. It was Mr Naidu’s thinking that, if he continued to work, Ms Zakeri would eventually calm down which would allow him to discuss what had transpired between them in a calmer manner.

[21] One hour later, Mr Naidu approached Ms Zakeri to talk to her but she asked for his email address and bank account details so that he could be given his final pay. Unsure as to what was meant by this, Mr Naidu asked if he would be required to work the next day. The response was that he was being “paid out”.

[22] Mr Naidu asked Ms Zakeri why he was being dismissed. She responded that she did not work well with him and that she knew Ricky longer and trusted him more. Mr Naidu was shocked to hear this and became upset. He left the yard for a second time and collected his vehicle. While sitting inside he texted Ms Zakeri his email address. It was then that he realised that he had left his lunch behind so he returned to work to retrieve it. He had been gone for only a few minutes. As Mr Naidu was getting his lunch, he saw Ms Zakeri and advised her that he had texted her his email address. However, upon seeing him, Mr Naidu stated that Ms Zakeri started yelling and swearing at him in front of customers until he left the yard saying to him, “[G]et the fuck off the yard now!”

[23] On 25 February 2021, Mr Naidu received his final pay from ACL in the amount of \$2,814.79 which was direct credited into his bank account.

[24] At some point following his dismissal, Mr Naidu began to feel bad about the way he had spoken to Ms Zakeri earlier which was out of character for him. He stated that he had texted Ms Zakeri an apology which she accepted. He texted also to say that he was shocked to have been “fired on the spot last week” which he had not seen coming. He had worked for ACL for over a year and enjoyed his job. Mr Naidu asked Ms Zakeri for his final pay slip and a termination letter. Although she texted “sure” and that she would follow up with her accountant, the requested documents were never provided.

[25] By letter of 15 March 2021, Mr Naidu's representative raised a personal grievance of unjustified dismissal with ACL. The letter set out the employment relationship problem as summarised above, requested a copy of Mr Naidu's wages and time records pursuant to s 130 of the Act, specified the remedies that were being sought, and inquired whether ACL would be willing to attend mediation.

[26] It is understood that ACL did not respond to Mr Naidu's personal grievance letter. No wages and time records were provided and it did not attend mediation. Consequently, Mr Naidu filed the present proceedings with the Authority on 26 May 2021.

Discussion

[27] The Authority was provided with a copy of Mr Naidu's individual employment agreement with ACL. The agreement makes clear that he was an employee of the company. Mr Naidu's role was that of a "Groomer" and his individual employment agreement required him to work 45 hours per week at the (then) rate of \$18 per hour.

[28] Mr Naidu was dismissed from his employment on 25 February 2021. On 15 March 2021, he raised a personal grievance against ACL of unjustified dismissal.² In his personal grievance letter to ACL and in his statement of evidence to the Authority, Mr Naidu refers to being continually asked by his employer to attend to tasks that were not aligned to his job description.

Unjustified disadvantage?

[29] Mr Naidu's individual employment agreement does not include a job description for him. When questioned by Mr Cain about the existence of a job or position description, Mr Naidu stated that he was not provided with one. If ACL required Mr Naidu to perform other duties that did not fit squarely within his role as a car groomer, it is arguable that he has been unjustly disadvantaged as well. However, such a personal grievance was never specifically raised with the employer and is now out of time. Further, an unjustified disadvantage cause of action was never pleaded in the Statement of Problem. Apart from making the observation, the Authority takes the matter no further.

² Employment Relations Act 2000, s 103((1)(a).

Whether Mr Naidu was unjustifiably dismissed

[30] Section 103A of the Act requires the Authority to assess on an objective basis whether an employer's dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.³

[31] In applying the fair and reasonable employer test, s 103A requires the Authority to consider the following mandatory procedural factors:

103A Test of justification

...

- (3) In the test in subsection (2), the Authority or the court must consider—
- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[32] It should be noted that the four procedural factors above do not constitute an exhaustive list. The Authority may consider any other factors it thinks appropriate.⁴ Further, the Authority must not determine a dismissal to be unjustifiable because of a defect in the employer's process that was minor and did not result in the employee being treated unfairly.⁵

Application

[33] There was a purely verbal dispute between Mr Naidu and one of the owners of ACL, Ms Zakeri, on the morning of 25 February 2021 concerning an earlier incident between Mr Naidu and his co-worker Ricky. Mr Naidu and Ricky had come to a

³ Employment Relations Act 2000, s 103A(2).

⁴ Section 103(4).

⁵ Section 103(A)(5).

disagreement as to whose job it was to groom a van that morning. Mr Naidu had started cleaning the van but was later told by Ricky to cease as he (Ricky) and another work colleague had planned to groom the van the day before. It does not appear that Mr Naidu was aware of the purported plan until he was advised of it by Ricky on the morning in question.

[34] Ricky has later informed Ms Zakeri about his falling out with Mr Naidu and she has approached him to discuss matters further. It is understood that Mr Naidu was advised to listen to Ricky because Ms Zakeri trusted him and knew him longer. However, Ricky was not Mr Naidu's supervisor or manager and it appeared to Mr Naidu that Ms Zakeri was biased against him, taking Ricky's side over his.

[35] It was Mr Naidu's evidence that Ms Zakeri had sworn at him first. Although he admits to calling Ms Zakeri a "biased bitch", his rebuke came after she had dismissed him from his employment and instructed him to leave the yard.

[36] While it is not clear why Ms Zakeri lost her composure in the way that she did that morning, it appears that her initial intention was to have an informal discussion with Mr Naidu to get to the bottom of things. There was no suggestion that Mr Naidu's job was at risk or that a disciplinary action had commenced as a result of Ricky's complaint.

[37] The onus is on ACL to show that, at the time of the dismissal, its actions were what a fair and reasonable employer could have done in all the circumstances. ACL has not participated with the Authority's investigation and, consequently, there is no information or evidence to show how it complied with the procedural factors of s 103A(3) of the Act. Those factors required ACL, as the employer, to sufficiently investigate the allegation against Mr Naidu, raise any concerns with him before dismissing him, afford Mr Naidu a reasonable opportunity to respond to those concerns, and genuinely consider any explanation (if any) from him.

[38] Even if, taken at its highest, the conversation between Ms Zakeri and Mr Naidu amounted to an investigation and response to a complaint made against Mr Naidu, there is nothing to indicate that Mr Naidu has a previous history of disciplinary or performance matters against him with ACL. A fair and reasonable employer could have

stood back and assessed all potential outcomes before dismissing him. Those options included a verbal or written warning.

Conclusion on unjustified dismissal

[39] The Authority has, on an objective basis, considered ACL's decision to dismiss Mr Naidu. Based on the information and evidence before the Authority, it finds that ACL's decision to dismiss Mr Naidu was unilateral and did not comply with the procedural factors in s 103A(3). It has not been established that the decision to dismiss satisfied the statutory test of justification. It follows that Mr Naidu's personal grievance of unjustified dismissal has been made out.

Remedies

[40] Where the Authority determines that an employee has a personal grievance, it may, in settling the grievance provide a number of remedies. Reinstatement was not sought by Mr Naidu. In his Statement of Problem, he sought compensation for hurt and humiliation of \$25,000 pursuant to s 123(1)(c)(i) of the Act, lost and unpaid wages, and costs.

Compensation

[41] The Authority observes that, in his submissions of 18 March 2022, Mr Cain has revised down Mr Naidu's claim for compensation for hurt and humiliation from \$25,000 to \$15,000-\$20,000. The concession is well made as the evidence does not support a compensation award of \$25,000. However, for the reasons that follow, the evidence does not support a compensatory award in the newly-revised range either.

[42] Assessing compensation has always presented challenges. While the focus of the inquiry is clear enough (the impact the personal grievance has had on the grievant) quantifying how much a grievant is to be compensated is not an exact science. Be that as it may, the inquiry should be undertaken on a principled basis and to that end, I have had regard to the Employment Court's decision in *Richora Group Ltd v Cheng* where it took a five-step approach to the assessment of compensation for humiliation, loss of dignity, and injury to feelings as set out below:⁶

⁶ *Richora Group Ltd v Cheng* [2018] ERNZ 337.

- What was the harm experienced by the employee?
- What was the extent of the employee's loss?
- Where on the spectrum of cases does the present case sit in terms of harm suffered?
- Where on the spectrum of cases does the present case sit in terms of quantum?
- What is a fair and just award in the present case?

[43] Compensation is for the effects on the employee of the grievance. It is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of the employer's conduct.

[44] It was Mr Naidu's evidence that his sudden termination caused him significant hurt, humiliation and loss of dignity. He stated that he had been told by a former work colleague, who still works for ACL, that there were rumours going around that he (Mr Naidu) was involved in a burglary at ACL sometime after his dismissal. Upon hearing this, Mr Naidu felt incredibly hurt and embarrassed that people with whom he had worked were talking about him in this way.

[45] Mr Naidu stated that for Ms Zakeri and her husband to act in this way towards him was a betrayal that negatively affected his confidence and his ability to pick himself up post-dismissal. He was jobless for three months and when Work and Income (WI) contacted ACL, Mr Naidu stated that his case worker had been told that he had willingly quit his job, which was completely untrue. ACL was being vindictive at a time when he was seeking financial assistance to pay his bills and borrowing money from his parents and his friends in order to get by.

[46] The Authority cannot give any weight to Mr Naidu's assertion that a former colleague had informed him that there were rumours about Mr Naidu being involved in a burglary at ACL after he had left. The former colleague was not called as a witness to give that evidence before the Authority and be cross-examined on the same. A serious allegation of post-termination conduct on the part of an employer requires there to be some corroborating evidence which has not been provided.

[47] Mr Naidu stated that ACL made it difficult for him to secure financial support from WI. Similarly, this assertion was not substantiated with evidence independent of

Mr Naidu himself, which could, at a minimum, come in the form of a letter from his WI case officer or relevant electronic notes from WI verifying the advice ACL had given about the cessation of his employment.

[48] The Authority further notes that the first time Mr Naidu has mentioned WI being contacted by ACL was in his statement of evidence which was filed with the Authority on 28 January 2022. There is no prior mention of this in Mr Naidu's Statement of Problem which was filed with the Authority on 26 May 2021, some three months after his dismissal and eight months before the filing of Mr Naidu's statement of evidence.

[49] This part of Mr Naidu's evidence is new. There being no other corroborative evidence provided, his assertion cannot be accepted at face value.

[50] The Authority accepts that Mr Naidu was shocked and disappointed by his sudden termination and that he was "really rocked" by the way he was treated. There is no doubt that the suddenness of Mr Naidu's dismissal had a negative impact on his self-esteem, peace of mind, and his ability to trust others. However, in making a compensation award for the effects the grievance has had on him, an uplift in the award for alleged post-termination by ACL has not been established.

[51] Mr Naidu's dismissal was nevertheless unfair and procedurally and substantively flawed. He had worked for ACL for 13 months and he appears to have had no previous disciplinary or performance-related issues with his employer. He says that he never took annual leave at any stage during his employment with ACL. The manner of Mr Naidu's dismissal was such that he felt humiliated and suffered loss of dignity and hurt feelings. Subject to any contribution, Mr Naidu is entitled to payment of compensation in the sum of \$7,000 under s 123(1)(c)(i) of the Act.

Contribution

[52] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[53] The Authority finds that Mr Naidu has contributed to his own grievance. He was approached by Ms Zakeri who wanted to hear what he had to say about the

disagreement he had with Ricky earlier that morning. When I questioned Mr Naidu that, by returning to his work when Ms Zakeri was speaking to him, he may have ignored her, he accepted that “in a way” he had ignored her. I find that this was not behaviour that was conducive to the requirement of s 4(1A)(b) of the Act that requires 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.

[54] It matters not who swore first. Mr Naidu’s rebuke to Ms Zakeri, while uncharacteristic of him, was gratuitous and inappropriate. It would have removed any prospect of Ms Zakeri resiling from her earlier decision made in haste and in the heat of the moment. When Mr Naidu returned to the yard a second time after he had twice been instructed to leave, this only hardened Ms Zakeri’s heart towards a dismissal.

[55] I find Mr Naidu’s reason for returning to the yard the second time, to collect his lunch, implausible and hardly compelling. It was an inopportune time to do so especially when Ms Zakeri was clearly still upset with him.

[56] Not every element of blameworthy conduct should be reflected in reduced remedies but after taking a robust and realistic attitude to what occurs in workplaces, I am satisfied that Mr Naidu’s actions and contribution “so require” a reduction in remedies.⁷ The factual matrix of this case is such that a 10 percent reduction in compensation (\$700) is sufficient.

[57] The Authority initially granted Mr Naidu a compensatory award of \$7,000 for hurt and humiliation. When a 10 percent deduction is applied, the Authority reaches an end point for an award under s 123(1)(c)(i) of the Act of \$6,300.

Lost wages

[58] Where the Authority determines that an employee has a personal grievance which has resulted in lost remuneration for the employee, the Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.⁸ Usually an employer

⁷ Employment Relations Act 2000, s 124(b).

⁸ Section 123(1)(b).

can be ordered to pay the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.⁹

[59] Although the Authority has a discretion under s 128(3) of the Act to order for more than three months' ordinary time remuneration, Mr Naidu seeks lost wages of three months or 13 weeks only. His last day of employment for ACL was 25 February 2021. He stated that he was proactive in looking for employment but it was not until June 2021 that he returned to full-time employment with his former employer, OOB (see [12] above).

[60] Mr Naidu stated that he holds a Level 3 certificate in automotive engineering and that he applied for a wide range of roles in the automotive industry. Those positions included the role of motorsport wiring technician, trainee automotive glazier, automotive accessory installer, tyre technician/mechanic, service technician, car groomer, and parts associate for a car dealership.

[61] When questioned by the Authority about his efforts to find alternative employment, Mr Naidu stated that he had some experience with changing tyres in order to apply for the tyre technician role. For the glazier and parts position roles, he had some experience but nothing directly relevant.

[62] While Mr Naidu may not have had a realistic chance in securing some of the roles for which he had applied due to his clear lack of relevant work experience or qualification, the Authority accepts that he was actively looking for work shortly after his dismissal. It was submitted that at the time he was dismissed, Mr Naidu was paid \$23 per hour; his pay having increased to that rate sometime in late 2020. This is consistent with Mr Naidu's Inland Revenue (IR) income details for the period of 7 February 2020 to 25 February 2021 which shows a modest increase in wages for him from September 2020 onwards.

[63] Mr Naidu's individual employment agreement required him to work 45 hours per week. At \$23 per hour, Mr Naidu's gross weekly wage was \$1,035. He seeks lost wages of 13 weeks which amounts to \$13,455 gross.

⁹ Employment Relations Act 2000, s 128(2).

[64] Following its investigation meeting by AVL on 11 March 2022, the Authority requested additional information from Mr Naidu which included his bank statements and his mechanic's invoice showing that his car was being repaired on 25 February 2021. The requested information was provided.

[65] Mr Naidu's bank statements show that he has received the following payments from OOBE, his current (and previous) employer:

- (i) 30 March 2021, \$1,500
- (ii) 28 April 2021, \$514.62
- (iii) 12 May 2021, \$702.80
- (iv) 26 May 2021, \$756.02

[66] The total amount Mr Naidu received from OOBE from 30 March to 26 May 2021 was \$3,473.44. Mr Cain's submissions are silent about these payments which *prima facie* indicate that Mr Naidu had resumed working for OOBE much earlier than was claimed (June 2021). However, it is possible that he may have been working on a casual basis during that period and secured permanent full-time employment later.

[67] In any case, the income Mr Naidu has earned from working for OOBE must be accounted for, as well as, the ten percent deduction being Mr Naidu's contribution towards his own grievance. The amount initially claimed by way of lost wages was \$13,455. From that amount, Mr Naidu's earnings of \$3,473.44 from OOBE and the ten percent deduction under s 124 of the Act of \$1,345.50 are to be deducted. The Authority's end point for lost wages for Mr Naidu is therefore \$8,636.06.

Annual leave

[68] Mr Naidu claimed that he was employed by ACL for a period of almost thirteen months and that he took no annual leave at all during that period. He further stated that he was not provided with any payslips from his employer but that he was told by Ms Zakeri that her accountant would sort something out for him by way of a final payslip or a termination letter. However, in the end, Mr Naidu was provided with neither.

[69] Mr Naidu's final pay from ACL was a payment into his bank account of \$2,814.79 on 25 February 2021. It is not clear how this payment was calculated or whether it includes a component of Mr Naidu's annual leave entitlement.

[70] Mr Cain invites me to have regard to Mr Naidu's IR income details for two periods the first of which, 29 February 2020 to 31 January 2021, Mr Naidu received gross wages of \$45,122 from ACL. The second period of time was from 25 February 2021 to 31 March 2021 during which time, Mr Naidu's recorded gross income was \$8,262.

[71] Although Mr Naidu's IR records show that he earned \$4,302 from ACL in March 2021 (he was dismissed on 25 February 2021) that recorded income may relate to Mr Naidu's final payment from ACL in late February 2021, the details of which may have been filed with IR in March 2021.

[72] The evidence establishes that Mr Naidu earned a total gross income of \$53,384 (\$45,122 + \$8,262) from ACL for the period 29 February 2020 to 31 March 2021. On the sum of \$53,384, it was submitted that Mr Naidu is owed eight percent holiday pay which amounts to \$4,270.72.¹⁰

[73] Because of the absence of wage and time and holiday and leave records for Mr Naidu, it is unclear whether his final payment of \$2,814.79 on 25 February 2021, included an annual leave component. Regrettably the final calculus cannot be made more precise based on the information available at the time of this determination. To avoid a situation of a windfall gain being obtained, in the interests of bringing finality to the proceedings, and being a jurisdiction founded in equity and good conscience, the Authority fixes Mr Naidu's claim for unpaid annual leave to \$4,000.

Interest

[74] Mr Naidu is entitled to an award of interest on the wage arrears and entitlements awarded. The Authority has the power to award interest under clause 11 of schedule 2 of the Act. Interest is to reimburse someone for the loss of monies to which there is an established entitlement. It is appropriate to award Mr Naidu interest as a person who has been deprived of the use of monies owed to him.

¹⁰ Holidays Act 2003, s 23(2).

[75] ACL is ordered to pay interest on the sum of \$4,000 no later than Thursday 14 April 2022. Interest is to be calculated using the civil debt interest calculator.¹¹ Interest on the forementioned sum is to be calculated from 25 February 2021 until the date payment is made in full.

Penalties?

[76] Various penalties were sought against ACL for failing to pay annual leave contrary to s 27 of the HA, failing to provide Mr Naidu with meal and rest breaks in breach of s 69ZD of the Act, and a breach of ACL's good faith obligations as Mr Naidu's employer under s 4.

[77] With respect to the penalty sought against ACL for the non-payment of annual leave, more evidence is required. I have given Mr Naidu the benefit of the doubt regarding his claim for unpaid annual leave but I do not afford him the same latitude when it comes to the penalty-setting exercise under s 133A of the Act. At its core, penalties are imposed to punish and deter a wrongdoer, and to signal disapproval of unacceptable conduct. Given the high stakes involved for ACL, as a matter of fairness, Mr Naidu needed to request a copy of his holiday and leave record under s 81 of the HA which to date he has not done.

[78] For similar reasons, it would be unwise for the Authority to impose a penalty for an alleged breach of s 69ZD of the Act. Serious allegations cannot be accepted at face value and there is a paucity of evidence here. In the 13 months Mr Naidu worked for ACL, the Authority notes that he has not once raised a formal personal grievance with his employer about not being given the opportunity to have a rest or meal break. The Authority further notes that Mr Naidu's purported reason for returning to the yard the second time was to collect his lunch. I find Mr Naidu's claim about getting his lunch incongruous with his assertion that he was never given a rest or meal break.

[79] As for the remaining penalty for breach of the section 4 requirements of good faith, to impose a penalty against ACL when Mr Naidu has contributed to his own personal grievance would be unjust and unduly harsh.

¹¹ www.justice.govt.nz/fines/civil-debt-interest-calculator.

Filing fee

[80] Mr Naidu is to be reimbursed the filing fee of \$71.56 by ACL.

Summary of orders

[81] The Authority orders the following. ACL is ordered to pay the following sums to Mr Naidu no later than 4 pm Thursday 14 April 2022:

- (i) compensation under s 123(1)(c)(i) of the Act of \$6,300 for unjustified dismissal;
- (ii) lost wages of \$8,636.06 (gross);
- (iii) \$4,000 in unpaid annual leave;
- (iv) ACL is to calculate and pay interest on annual leave arrears of \$4,000; and
- (v) the filing fee of \$71.56.

Costs

[82] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Naidu may lodge, and then should serve, a memorandum of costs within 14 working days of the date of issue of this determination. From the date of service of that memorandum, ACL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[83] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Peter Fuiava
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].