IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 28
3008331

	BETWEEN	LUCY KATHRYN NICOL Applicant
	A N D	VICTORIA LUND and IN THE PINK LIMITED Respondents
Member of Authority:	David Appleton	
Representatives:	Applicant in person Victoria Lund in person and on behalf of the Respondent	
Investigation Meeting:	20 February 2018 by telephone.	
Submissions Received:	20 February 2018 from Applicant 20 February 2018 from Respondent, with further information on 21 and 22 February 2018	
Date of Determination:	27 February 2018	

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. Ms Nicol's employer was In The Pink Limited.

B. Ms Nicol did not suffer an unjustified disadvantage in having her request for leave declined, nor for the manner in which the respondent dealt with her request for leave.

C. Ms Nicol did suffer an unjustified disadvantage by having her final pay and holiday pay withheld. She is awarded compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000, subject to a reduction for contribution, in the final sum of $3,500.

D. A penalty in the sum of $2,000 is imposed on In The Pink Limited for having failed to provide Ms Nicol an employment agreement.

Half of this sum is to be paid to Ms Nicol directly.

E. In The Pink Limited is to reimburse to Ms Nicol the lodgement fee of $71.56

Employment relationship problem

[1] Ms Nicol claims that she has a personal grievance for unjustified disadvantage in relation to the way she was allegedly treated when she applied for leave and after she resigned. She also seeks the imposition of a penalty against the respondent on the basis that she was not given an employment agreement during her employment. Also in issue is the identity of the correct respondent. Although Ms Nicol had resigned due to the leave issue, she does not pursue a claim for constructive dismissal.

[2] Ms Lund says that the correct respondent is In The Pink Limited. Ms Lund admits that an employment agreement was not issued to Ms Nicol. Ms Lund denies that Ms Nicol was subjected to an unjustified disadvantage in her employment or after she resigned.

[3] The investigation meeting was held by telephone because of travel disruptions being anticipated due to Cyclone Gita.

Background

[4] Ms Lund is the director and shareholder of In The Pink Limited which owns the In The Pink florist and design/gift shop in Queenstown. Ms Nicol commenced employment at the shop as a retail assistant on 8 December 2015.

[5] Ms Nicol states that she asked for an employment agreement when she started her work and on many occasions over the following months but that she was "fobbed off with excuses" such as that she would get one "after the Christmas rush" and that "it was coming". Ms Nicol says that she never sighted or received even a draft copy.

[6] Ms Lund says that Ms Nicol was not given an employment agreement initially because her hours were continually changing and she was continually asking for time off her rostered shifts. Ms Lund says that a draft employment agreement was prepared before the final change of rostered hours. Ms Lund says that Ms Nicol's shifts changed on at least four occasions while working at In The Pink. Ms Nicol says

that her hours changed only once, two weeks before she resigned and only because a new staff member had been hired.

[7] Ms Lund also says that, although Ms Nicol had not received a written agreement, she was "only too aware of her rights under the employment contracts act" as Ms Nicol had written out the house rules herself and had been told of the notice period required as a staff member had resigned while she worked at In The Pink.

[8] In the statement in reply served and lodged by Ms Lund on 10 May 2017 a draft individual employment agreement was attached. This document named Ms Nicol as the employee (although misspelt her surname) and was signed by Ms Lund on 1 February 2017. Ms Lund says that she did not give it to Ms Nicol, although she had intended to.

[9] On Tuesday 4 April 2017 Ms Nicol requested four hours' leave from her regular Saturday shift on Saturday 15 April 2017. This was the Saturday between Good Friday and Easter Monday of 2017. This request for four hours' leave was denied by Ms Lund.

[10] Ms Nicol says that this refusal to grant leave was discussed between her, Ms Lund and another managing staff member over text and in person the following day (5 April) but, because Ms Lund refused to change her mind, Ms Nicol resigned by giving one week's notice on Friday 7 April 2017.

[11] Ms Nicol says that she felt the refusal was unreasonable for the following reasons:

a. She and Ms Lund had agreed that Ms Nicol could have Easter off as she had worked for two Christmas periods in a row;

b. A new staff member could have looked after the shop on her own on the Saturday in question;

c. Although Ms Lund said that Ms Nicol was needed to deliver flowers, her car was off the road, so she would not have been able to have done so;

d. At the time of asking, no orders for flowers had been received in any event;

e. She was only asking for four hours' leave.

[12] Ms Nicol also says that the conversation she had with Ms Lund and the manager was unprofessional, taking place in the shop with both of them talking over her and with customers present.

[13] Ms Nicol says that she came to the conclusion that neither Ms Lund nor the manager wanted to change their mind because neither of them wanted to work that Saturday themselves. Ms Nicol says that she had had to stay behind and cover peoples' holidays in the past and so concluded that this was "just another occasion where she was being taken advantage of and put upon" as she was the youngest staff member. Ms Nicol says that she made Ms Lund aware of how important those four hours off were to her and that, if Ms Lund would not compromise, then Ms Nicol would have to resign. Ms Nicol says that Ms Lund told her not to threaten her.

[14] Ms Lund's response to these allegations is as follows:

a. There had not been an express agreement that Ms Nicol could specifically have Easter 2017 off, only that she could have some extended leave.

b. The shop needed to have two people present on the Easter Saturday, as it was going to be very busy, as one person was needed to deliver flowers and another person was needed to mind the shop.

c. She (Ms Lund) and the manager were both going to be away from Queenstown that weekend.

d. The new staff member could have delivered the flowers. There was, however, a dispute between Ms Nicol and Ms Lund over whether the new staff member had access to a car. After Ms Nicol had resigned, Ms Lund asked a friend to assist with delivering the flowers.

e. Orders for flowers come in at short notice.

f. There were no customers in the shop during their conversation, which was professional.

[15] Ms Lund says that Ms Nicol's time off request had always been granted with other staff and herself covering for Ms Nicol on a number of occasions. Ms Lund says that Ms Nicol had had several extended periods of leave off over the time she worked at In The Pink and, in the month prior to Easter, she had had two consecutive weekends off. She had also had extended holiday with her family in September the previous year in respect of which other staff covered her shifts.

[16] Ms Lund says that, after Ms Nicol resigned, she did not wish her to work her notice because she was obviously disgruntled and had sulked and would not talk to anybody for the rest of her shift.

[17] Ms Nicol says that, although Ms Lund accepted her resignation, she complained that Ms Nicol had not given enough notice. The draft employment agreement annexed to the statement in reply provides that four weeks' notice in writing should be given to terminate the employment. The draft agreement also states that, where an employee does not give the agreed amount of notice, the employer may deduct the equivalent remuneration from any payment due to the employee or otherwise recover the amount from the employee to compensate for costs incurred in relation to the failure to give notice.

[18] According to Ms Nicol, she gave what she believed was reasonable notice in the absence of an employment agreement given that she was paid on a weekly basis. Ms Nicol was not required to work this week's notice by Ms Lund.

[19] After Ms Nicol resigned, there was then a dispute between her and Ms Lund about the payment of Ms Nicol's final pay and holiday pay due to Ms Nicol refusing to return the shop key. This developed into a stalemate, and Ms Nicol's statement of problem had also sought an order for payment of her final pay and holiday pay. However, by the time the Authority's case management conference call took place, Ms Nicol had returned the shop key and Ms Lund had paid the final pay and holiday pay owing to Ms Nicol.

[20] Although the Authority does not need to consider the issue of final pay and holiday pay owing to Ms Nicol, she asks that the Authority consider whether Ms Lund's actions in withholding pay were reasonable.

The issues to be determined

[21] The following are the issues that the Authority must determine:

(i) Who was Ms Nicol's employer?

(ii) Was Ms Nicol subjected to an unjustified disadvantage in her employment when her request for leave was declined?

(iii) Was Ms Nicol subjected to an unjustified disadvantage in her employment in relation to the withholding of her final pay and holiday pay?

(iv) Should a penalty be imposed upon Ms Nicol's employer for a failure to give her a written employment agreement?

Ms Nicol does not bring a claim for unjustified constructive dismissal.

Who was Ms Nicol's employer?

[22] The principles which apply to determining the identity of the employer were discussed in an Employment Court judgment in *Vince Roberts Electrical Limited v Scott Phillip Carroll & Vincent Forsman Roberts (t/a Vince Roberts Electrical)*[1]. In this case His Honour Judge Perkins considered the authorities which set out the main principles for determining the identity of an employer. These principles can be summarised as follows:

(i) Section 6 of the Employment Relations Act 2000 ("the Act") provides some assistance with the question as it covers the meaning of an employee, and the Authority has the jurisdiction under s.6 to determine the identity of the employer. Of particular relevance are subsections (2) and (3) which provide as follows:

> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
> (3) For the purposes of subsection (2), the court or the Authority—
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

[1] [2015] NZEmpC 112, [17] et seq.

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(ii) The onus is on the employee to prove the identity of the employer. This assessment is generally to be made by reference to the outset of the employment relationship. It is for the Authority to make an objective assessment of the evidence and determine the identity of the employer.

(iii) The standard of proof is on the balance of probabilities.

(iv) In making an objective assessment each case must be determined on its own individual circumstances.

[23] Ms Nicol says that she was interviewed by Ms Lund and was offered employment by her. She says that no reference was made to In The Pink Limited when she was offered employment, or during her employment. Ms Nicol says that she was not aware of who employed the other two staff.

[24] Ms Lund says that there is plenty of evidence to show that In The Pink Limited was the employer of Ms Nicol. She refers to the house rules, time sheets and rosters which all referred to 'In The Pink' and to payslips which referred to In The Pink Limited. She says that the bank transaction would have also referred to wages from In The Pink. Ms Lund says that she had operated the shop through In The Pink Limited for 17 years, and that all staff had always been employed by In The Pink Limited. She says she never operated under the name Victoria Lund. I note that the financial statement of In The Pink Limited appears to show that it relates solely to the operation of the shop.

[25] Ms Nicol says that she had not known of the existence of In The Pink Limited, and had not noticed reference to the company name on the payslips.

[26] I accept that the 'In The Pink' name was used regularly on various documents. However, it is also the trading name of the company and the name of the brand and the actual shop itself. Ms Nicol seeing the name 'In The Pink' regularly would not have necessarily alerted her to the existence of the company therefore. Of course, if Ms Nicol had been given a copy of her employment agreement, she would have known that the intention was for her to be employed by In The Pink Limited.

[27] It is clear that Ms Nicol and Ms Lund did not have the same understanding or intention as to who the employer was. The parties' stated intentions do not assist therefore. When I stand back, and look at the overall picture objectively, I am satisfied that the company, In The Pink Limited, was the employer of Ms Nicol. Whilst Ms Lund gave day to day instructions and directions to Ms Nicol, that is not surprising as she is the sole shareholder and director of the company. Ms Lund uses In The Pink Limited to operate her shop, and it makes sense that she would use the company to employ her staff.

Did Ms Nicol suffer an unjustified disadvantage in her employment?

[28] Section 103(1)(b) of the Act provides as follows:

> **103 Personal grievance**
> (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
> …
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[29] Section 103(a) of the Act provides the test for deciding whether there has been an unjustified disadvantage (or dismissal). It states as follows:

> **103A Test of justification**
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
> (2) The 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 the dismissal or action occurred.
> (3) In applying 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.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[30] There is also to be considered the duty of good faith referred to in s. 4 of the Act. This provides that parties to an employment relationship must deal with each other in good faith and must not do anything directly or indirectly to mislead or deceive one another. The duty also 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.

[31] It is also relevant in this case to take into account s.18 of the Holidays Act 2003 which provides as follows:

18 Taking of annual holidays

(1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.

(2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.

(3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.

(4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.

[32] I understand why Ms Nicol became upset when her request for leave was declined. She believed that she had been promised the time off earlier. However, it appears that there was a genuine misunderstanding between Ms Lund and Ms Nicol as to when Ms Nicol wanted to take the extended leave. By the time that Ms Nicol asked for the leave, Ms Lund and the manager had already arranged to be out of Queenstown that weekend and there were only two staff left to call upon; Ms Nicol and the new staff member.

[33] Did Ms Lund unreasonably withhold consent to Ms Nicol's request to take annual holidays on the Easter Saturday? On balance, I do not believe so. It was not unreasonable for Ms Lund to want to keep her shop open on the Easter Saturday, and it was not unreasonable for her to anticipate needing two staff members to be working; one to staff the shop, and one to deliver flowers. I accept Ms Lund's evidence that the shop was expected to be busy on that particular day. It was also not Ms Lund's fault that Ms Nicol's request for leave came in after Ms Lund and her manager had already made arrangements to be away that weekend.

[34] To analyse the issue in terms of Ms Nicol's personal grievance for disadvantage, whilst she was disadvantaged at not being granted the request for annual leave, I do not believe that the disadvantage was unjustified in the terms of ss 103 and 103A of the Act. The declining of the request was not an unjustifiable action by Ms Lund on behalf of In The Pink Limited. Put another way, the declining of leave was an action that a fair and reasonable employer could have taken in all the circumstances.

[35] Did the discussion the following day amount to an unjustified disadvantage in Ms Nicol's employment? There is a conflict of evidence between Ms Nicol and Ms Lund as to how the conversation was conducted. Ms Nicol felt bullied, and talked over. This is denied by Ms Lund.

[36] I accept Ms Lund's evidence that she had little choice but to conduct the conversation about Ms Nicol's leave request in the shop. On balance, I think it is not likely that Ms Lund would have chosen to conduct the conversation in front of customers, as that could damage the reputation of the shop. It is possible that the three talked over one another, but that could well have been because Ms Nicol was upset and voices became raised.

[37] On the limited evidence I have available, I cannot find that there was an unjustified disadvantage in Ms Nicol's employment from the way that she was spoken to by Ms Lund and the manager when they were discussing the refusal to grant her leave.

Was Ms Nicol subjected to an unjustified disadvantage in her employment in relation to the withholding of her final pay and holiday pay?

[38] Ms Nicol raised her personal grievance regarding not being paid the remuneration legally owed to her upon resigning in her statement of problem, which was lodged on 21 April 2017. The Authority therefore has the jurisdiction to consider such a grievance.

[39] There is a direct conflict of evidence between Ms Nicol and Ms Lund as to whether the final pay and holiday pay were withheld because Ms Nicol was retaining the shop key, or whether Ms Nicol was retaining the key because final pay and holiday pay were being withheld.

[40] There have been disclosed to the Authority some copy texts and emails passing between Ms Nicol and Ms Lund after the resignation. The complete chain has not been disclosed, and it is not completely clear which version of events is correct. However, there is an email from Ms Nicol to Ms Lund dated 11 April 2017 which stated the following:

> I have already assured you that I will return the shop key on time as long as you pay me on time. This is only because I know you have a past history of not paying your outgoing employees their due and making their exit from your employ difficult and stressful. You have also insinuated by text to me today that you were going to do the same in my instance.

[41] The text that Ms Nicol refers to in her email was either not disclosed to the Authority, or the 'insinuation' she refers to is not clear, as I can see nothing in the text of 11 April from Ms Lund that suggests she would withhold pay. However, the response to Ms Nicol's email of 11 April from Ms Lund, sent on 13 April 2017 does state the following:

> After not hearing anything from you in regards to this I contacted you on Tuesday to say that I would not require you to work the notice that you gave which was unfair and unreasonable, as I had to urgently train another staff member to be able to do the full weekend on her own without any support from myself or the manager. I also believed that due to your attitude when resigning that having a disgruntled person in the store would effect [sic] my business and possibly effect [sic] the other staff. Hence pay was forfeited for any hours not worked. [Emphasis added].

[42] This does suggest that Ms Lund decided to withhold final pay because Ms Nicol did not give longer notice. As noted above, the draft employment agreement

provided by Ms Lund to the Authority states that, where an employee does not give the agreed amount of notice, the employer may deduct the equivalent remuneration from any payment due to the employee or otherwise recover the amount from the employee to compensate for costs incurred in relation to the failure to give notice.

[43] I infer that this was what Ms Lund originally intended to do, and that Ms Nicol's version of events is correct. Although Ms Lund did not want to pay the final pay until Ms Nicol had returned the shop key, Ms Lund was the first to indicate that final pay would be withheld because insufficient notice, in her opinion, had been given.

[44] By not being paid her final pay and holiday pay at the proper time, after she had resigned, Ms Nicol suffered a disadvantage in her employment. Was that disadvantage unjustified?

[45] Ms Lund did not, of course, have the right to withhold that final pay as Ms Nicol had not agreed to any such deduction, never having signed an employment agreement. In addition, in the absence of a written employment agreement, Ms Nicol was entitled to give no more than reasonable notice. Given the position, and the fact that she was paid weekly, I do not disagree that one week's notice was reasonable.

[46] Therefore, I find that Ms Lund was not justified in deciding to withhold final pay and holiday pay. That was an action which no fair and reasonable employer could have taken in all the circumstances.

Remedies

[47] Ms Nicol was eventually paid the outstanding amounts, so the only remedy for which Ms Nicol is eligible falls under s 123(1)(c)(i) of the Act, for humiliation, loss of dignity and injury to her feelings.

[48] Ms Nicol says that she felt 'bullied, scared, harassed and taken advantage of". I must be careful not to conflate the effects Ms Nicol suffered due to the refusal to grant the leave and the discussion about that refusal, which was not an unjustified disadvantage, on the one hand, with the initial decision by Ms Lund (on behalf of the company) not to pay final pay and holiday pay on the other.

[49] It is not possible to precisely separate out the different effects, but I do accept that not being paid one's final pay and holiday pay will have caused injury to Ms Nicol's feelings at the least. I estimate that those feelings would have been relatively mild, although they did lead to Ms Nicol lodging her claim before the Authority. I believe that the sum of $7,000 is an appropriate sum of compensation.

[50] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[51] Ms Nicol chose to withhold the shop key as security for her final pay and holiday pay. Whilst I understand her logic in doing so, she did not have a legal right to do so. Indeed, such an action is not to be recommended as it lays an employee open to potentially serious allegations if a security breach were to occur, and could result in claims against the employee for the cost of changing locks and alarm codes. The correct action is to return all property to the employer, and to bring a claim before the Authority, as Ms Nicol eventually did, if payment is then not forthcoming.

[52] It appears from the email exchanges between Ms Nicol and Ms Lund that Ms Nicol keeping the key prolonged the period for which Ms Lund withheld the final pay. I must find, therefore, that that action contributed to the situation that gave rise to the personal grievance. I believe that a reduction in the award of compensation is therefore merited, and reduce it by 50%. The award of compensation to Ms Nicol is therefore $3,500.

Should a penalty be imposed upon the employer?

[53] Section 63A of the Act imposes a duty on an employer to provide a copy of the employment agreement under discussion. The relevant parts of s 63A provide precisely as follows:

> **63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement**
> (1) This section applies when bargaining for terms and conditions of employment in the following situations:
> …

(e) in relation to terms and conditions of an individual employment agreement, including any variations to that agreement:

…
(2) The employer must do at least the following things:
(a) provide to the employee a copy of the intended agreement under discussion; and
(b) advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
(c) give the employee a reasonable opportunity to seek that advice; and
(d) consider any issues that the employee raises and respond to them.
(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.
(4) Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.
(5) The requirements imposed by this section are in addition to any requirements that may be imposed under any provision in this Act.
…
(7) In this section, **employee** includes a prospective employee.

[54] Ms Lund says that she did not provide a copy of the employment agreement to Ms Nicol because Ms Nicol's hours kept on changing. Although this is disputed by Ms Nicol, even if Ms Lund is correct, that was not a valid justification for failing to provide the employment agreement. Section 65 of the Act, which sets out the form and content of the individual employment agreement, specifies in s.65(2)(a)(iv) that the individual employment agreement must include:

> Any agreed hours of work specified in accordance with s.67C or, <u>if no hours of work are agreed</u>, an indication of the arrangements relating to the times the employee is to work. [Emphasis added]

[55] The relevant parts of s.67C provide:

> **67C Agreed hours of work**
> (1) Hours of work agreed by an employer and employee must be specified as follows:
> …
> (b) in the case of an employee covered by an individual employment agreement, in the employee's individual employment agreement.
> (2) In subsection (1), **hours of work** includes any or all of the following:
> (a) the number of guaranteed hours of work:
> (b) the days of the week on which work is to be performed:
> (c) the start and finish times of work:
> (d) any flexibility in the matters referred to in paragraph (b) or (c).

[56] In other words, even if the hours of work for Ms Nicol had not been completely fixed, it would have been relatively easy for Ms Lund to have drafted some wording indicating the arrangements relating to the times that Ms Nicol was to work. If she had found that wording difficult to draft, she could have easily obtained some brief legal advice on the matter.

[57] Ms Lund also says that Ms Nicol would have known what her terms and conditions are from other staff and from writing the house rules. However, Ms Nicol could not possibly have known all of the terms of her employment agreement in this way given that the draft employment agreement that was annexed to the statement in reply consisted of twelve pages covering numerous clauses and sub-clauses.

[58] In conclusion, I find that there has been a clear breach of s.63A(2) of the Act and that it is appropriate to consider the imposition of a penalty.

[59] Section 135 of the Act provides that every person who is liable to a penalty under the Act is liable, in the case of an individual, to a penalty not exceeding $10,000 and in the case of a company or other corporation to a penalty not exceeding $20,000.

[60] In *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*[2] the Employment Court has set out a multi-step procedure that the Authority should follow when assessing a penalty.

[61] As In The Pink Limited is Ms Nicol's employer, the maximum penalty that may be imposed for the breach of s.63A of the Act is therefore $20,000 (step 1). Where there has been only one breach of an employment standard, the procedure involves assessing the severity of the breach (step 2a); assessing whether there are any mitigating circumstances (step 2b); assessing the financial position of the paying party (step 3) and assessing whether the resulting penalty is proportionate (step 4).

[62] The Employment Court case of *Tan v Yang*[3] also set out other factors that the Authority must take into account when considering the quantum of penalty for a breach of the Act. These factors are as follows:

(i) The seriousness of the breach;

(ii) Whether the breach is one-off or repeated;

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2 [2016] NZEmpC 143.
3 [2014] NZEmpC 65

(iii) The impact, if any, on the employee/prospective employee;

(iv) The vulnerability of the employee/prospective employee.

(v) The need for deterrence;

(vi) Remorse shown by the party in breach; and

(vii) A range of penalties imposed in other comparable cases.

[63] Adopting the 4 step approach of *Preet*, I find as follows.

Step 1

[64] There was one breach, of s 63A of the Act. The maximum possible penalty is therefore $20,000.

Step 2(a)

[65] The failing was not the most severe as there was no intention to deliberately deprive Ms Nicol of the employment agreement. However, the failing did deprive Ms Nicol of fundamental information about her terms and conditions of employment. This is graphically illustrated by her not knowing what notice to give.

[66] I believe that the starting point is therefore 50% of the maximum. That gives a penalty of $10,000.

Step 2(b)

[67] Ms Lund accepts that she failed to give Ms Nicol an employment agreement, and that she should have done so. I accept that it was not a deliberate act, in order to exploit Ms Nicol. I also accept that Ms Lund had prepared a draft agreement, and so had intended to give it to Ms Nicol. Her business was also impacted by the failing, ironically, as Ms Nicol gave the company only a week's notice instead of 4 weeks' notice as was contemplated in the draft agreement.

[68] I believe that it is appropriate to reduce the penalty by 50%. That reduces it to $5,000.

Step 3

[69] This requires the Authority to consider the financial situation of the company. Ms Lund provided financial statements of the company as at 31 March 2016, and 31 March 2017. Without disclosing the details of the statements, they show that the company made a modest profit in 2015/2016 but suffered a modest loss in 2016/2017. Ms Lund did not state what the position of the company has been since 1 April 2017. She did say that she intended to close the business at the end of March 2018.

[70] Without disclosing details of the company's financial position, I believe that the financial situation of the company justifies reducing the penalty at step 3 to $2,000.

Step 4

[71] Step 4 requires the Authority to step back and assess what would be a just penalty overall. One approach is to compare other decisions of the Authority which are comparable. In *Cox v Campbells Carrying Company 2014 Limited*[4], there was one breach of s.63A of the Act by a company. The breach was not continuing, it was inadvertent and the employee was not impacted. In that case a penalty of $1,500 was imposed. It appears that, in this case, Ms Nicol was impacted in the sense that she did not know how much notice to give and she was then criticised for only giving one week's notice. In such a case there is an argument for imposing a penalty of $2,000.

Conclusion

[72] I conclude that a penalty of $2,000 should be imposed on In The Pink Limited for the breach of s.63A of the Act.

[73] Section 136 of the Act provides that the Authority may order that the whole or any part of any penalty recovered must be paid to any person. The reason for doing so would be where the breach in question has impacted the employee and she or he has not be compensated for that breach in some other way, such as through compensation for a related unjustified disadvantage personal grievance. I have already found that that In The Pink Limited must pay to Ms Nicol $3,500 as compensation for it withholding her final pay and holiday pay. That withholding

[4] [2016] NZERA Auckland 391

occurred because Ms Nicol did not give 4 weeks' notice. She did not do so because she had not been given an employment agreement.

[74] However, Ms Nicol was adversely affected in more than not knowing her notice period. She did not know what most of her terms of employment were. I do therefore believe that it is appropriate for part of the penalty to be paid to Ms Nicol. I believe that 50% should be paid to her.

Orders

[75] I order In The Pink Limited to make the following payments directly to Ms Nicol, within 14 days of the date of this determination:

a. $3,500 compensation, pursuant to s.123(1)(i)(c) of the Act; and

b. $1,000 penalty, pursuant to s.136 of the Act.

[76] I further order In The Pink Limited to pay $1,000 directly to the Authority, pursuant to s 136 of the Act, within 14 days of the date of this determination. The Authority will then pay that sum into a Crown bank account.

Costs

[77] Ms Nicol represented herself before the Authority and so has not incurred any professional legal fees. However, she did incur the Authority's lodgement fee of $71.56. I therefore order In The Pink Limited to pay directly to Ms Nicol within 14 days of the date of this determination the sum of $71.56.

David Appleton
Member of the Employment Relations Authority