IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 535
3108558

	BETWEEN	UNITE UNION First Applicant
	AND	AILINI ATI Second Applicant
	AND	THE APPLICANTS NAMED IN SCHEDULE 1 Third to Thirteenth Applicants
	AND	HOSPITALITY SERVICES LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	John Crocker, advocate for Applicants Andrew Scott-Howman, counsel for Respondent
Joint Memorandum received:	18 August 2022
Determination:	17 October 2022

DETERMINATION OF THE AUTHORITY

A. The 12 applicant former employees of the respondent Hospitality Services Ltd are to each receive $20,000.00 compensation to remedy their unjustified dismissal personal grievances.

B. The 12 applicant former employees of the respondent are to each receive $1,000.00 of the total penalty of $12,000.00 imposed on

Hospitality Services Ltd, for breaches of s 4(1A) of the Employment Relations Act 2000 and clause 7.5 of the collective employment agreement applying to the employment relationships.

C. Costs are reserved.

Employment relationship problem

[1] In a determination dated 22 July 2022[1] the Authority, for the reasons given, found that 12 employees of Hospitality Services Ltd (HSL) each had a personal grievance of unjustified dismissal.

[2] The Authority also found that HSL had breached s 4(1A) of the Employment Relations Act (the ER Act) by failing to adequately or sufficiently consult the 12 employees before deciding to terminate their employment for redundancy.

[3] Further, the Authority found that HSL had breached clause 7.5 of the Millenium Hotels and Resorts Collective Agreement (the CEA) under which the first applicant Unite union and its members, including the applicant employees, were required to be consulted before HSL announced any redundancy of its employees covered by the CEA.

Compensation and penalties

[4] In its 22 July determination the Authority reserved the remedies to be provided under s 123 of the ER Act to the 12 employees found to have a personal grievance.

[5] The Authority also reserved the penalties to be ordered for the breaches of the ER Act and the CEA which HSL was found to be responsible for.

[6] The Authority took this step to allow the parties time to confer with a view to reaching agreement about the amounts of compensation the applicants should receive individually. The Authority indicated that agreement successfully reached about

[1] [2022]NZERA 342

compensation would be a factor to be weighed in HSL's favour when determining penalties.

Joint memorandum

[7] After reserving compensation and penalties, the Authority received a memorandum signed by Mr Crocker for Unite and all 12 employee applicants, and by Mr Scott-Howman for the respondent.

[8] It recorded the agreement of the parties that

> a. the respondent will pay each of the 12 individual applicants the sum of $20,000.00 under s 123(1)(c)(i) of the ER Act for the harm personally suffered by having their employment terminated without justification
>
> and
>
> b. it would be appropriate for the Authority to impose a single penalty against the respondent in the sum of $12,000.00, to be divided equally amongst the 12 individual applicants.

[9] In their joint memorandum of 18 August 2022, advocate and counsel acknowledged that the agreement reached by the parties was not binding on the Authority but that a consent determination giving effect to the agreement would, in their assessment, be appropriate to the factual and legal circumstances of the case.

Quantifying compensation and penalties

[10] This exercise has to be carried out in context. The grievances and breaches arose from an unprecedented situation placing great pressure on HSL to act swiftly in protecting its business interests, and at the same time act fairly and reasonably to protect its employees' statutory and contractual rights.

[11] HSL did not set out to reap for itself some benefit or advantage by ignoring statutory and contractual obligations. Although HSL acted with deliberateness, it also acted honestly in the belief that the extraordinary circumstances the company was faced

with justified the degree of consultation it undertook with the union and employee applicants.

[12] HSL responded to a fast-developing national emergency that overwhelmed many other employers. It viewed the crisis as an 'existential' one, and certainly the survival of its hotel and conference centre business was threatened. HSL had to plan on its feet and think on the move in responding to a rare and unpredictable form of catastrophe. For all HSL could tell at the time, its business might be wiped out by what was happening to the travel industry and depending on the great unknown of how long covid restrictions would last.

[13] The circumstances cannot be viewed as being among the usual regular occurrences of unacceptable and unlawful employment practice, sometimes deliberately engaged in by parties to employment relationships.

Compensation

[14] It is likely that one or more, and perhaps even all, of the 12 employees would still have lost their jobs if HSL had fully consulted with them and Unite before deciding to terminate their employment. Nevertheless the Authority has found that the consultation to the extent it occurred was not adequate or sufficient in fact and in law, and the employees suffered harm as a result. They are entitled to be compensated for the distress resulting from the lack of justification for the employer's actions, but the amount must be set with due regard to the circumstances.

[15] The Authority approves the sum agreed by the parties, $20,000.00 per employee, and now determines that sum to be the amount the employees are each to receive under s 123(1)(c)(i) of the ER Act.

Penalties

[16] Penalties have a different purpose from compensation, and relevant considerations may extend beyond individual employees affected by a breach.

[17] The principles to be applied when determining penalties have recently been restated by the Employment Court in *Shah Enterprise NZ Ltd and another v A Labour Inspector*[2]. The Authority follows them here.

[18] The nature of the breaches in this case, failure to consult, went to the heart of the employment relationships with the 12 applicants and their union Unite which was also in an employment relationship with HSL. The good faith requirements of s 4 of the ER Act were not observed, and the employees were disadvantaged by the lesser power in the employment relationship that employees are recognised in law as having.

[19] The harm caused by the breaches was primarily harm to the employees and their agent, Unite. For that reason it is appropriate to direct that the employees receive payment from the penalties.

[20] The unforeseen and rapidly deteriorating situation that confronted HSL is acknowledged by the Authority. It is not one where a deterrent might be effective, because it cannot be predicted if and when anything like it will occur again.

[21] The payment of the compensation agreed between the parties is an important factor in considering penalties, although it must be noted that the agreed compensation was not (to the Authority's knowledge) offered before the employees attended the investigation meeting and had to give their evidence in support of the eventual determination made in their favour, all while resisted by HSL. Few things in life are certain, but the 12 applicants can have some confidence from the agreement that they will receive their compensation and have the use of it, unlike many successful parties in proceedings who are held to be entitled to be paid a sum but who will not see it for a long time or may never see it.

[22] The agreement is a late step taken by HSL but ought to be acknowledged by the Authority as some mitigation of the stress the employees have endured losing their jobs and in having to challenge HSL's actions. The 12 employees have a better interest in receiving the penalty than the Crown in this case.

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[2] [2022] NZEmpC 177

[23] It is also to be acknowledged that the employees were vulnerable as lower paid workers, some of whom had faithfully served HSL for many years and others who were just embarking on a career in hospitality.

[24] There is nothing the Authority has seen that shows the existence of relevant previous bad conduct on the part of HSL, which is a large employer and reputable commercial entity.

[25] Not every breach of s 4(1A) of the ER Act may result in a penalty. The breach must be deliberate, serious and sustained, or intended to be undermining in certain ways specified in s 4A. The Authority does not consider HSL intended its actions to undermine the employment agreement or employment relationship. Circumstances HSL had no part in creating were largely responsible for undermining the employment before HSL did anything.

[26] Also, as the Authority has found, there was not a complete absence of consultation. The deficiency was confined to a specific procedural area of consultation, although a vital one. For that reason the breaches of the Act and the employment agreement can be viewed as a distinct transgression although affecting a number of employees.

[27] In the circumstances, a single penalty will address the harm and other considerations which need to be looked at when punishment is to be imposed.

[28] The Authority considers that the penalty proposed of $12,000 – 60% of the maximum – is appropriate in all the circumstances. All of it is to be paid to the 12 employees - $1,000.00 each - through their union Unite.

[29] The penalty is ordered under s 135 of the ER Act, and disbursement of it to the employees under s 136.

Costs

[30] There is no issue as to costs

Alastair Dumbleton
Member of the Employment Relations Authority

SCHEDULE 1

Second to Thirteenth Applicants

2 Ailini Ati

3 Caroline Matterson

4 Devi Aryal

5 Faata Tukia

6 Sangeeta Narayan

7 Varinder Kaur

8 Bethany Johnson

9 Alex Teiwimate – Tonihi

10 John Wilkinson

11 Igor Fracellio

12 Rosemaree Rathbun

13 Shirley Flavell