

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 27
3129714

BETWEEN DANIEL ANDREW
Applicant
AND 20 FINANCE LIMITED
Respondent

Member of Authority: Claire English
Representatives: Anna Oberndorfer, advocate for the Applicant
Danielle Bridge, for the Respondent
Investigation Meeting: 27 October 2021 at Christchurch
Submissions received: 11 November and 1 December 2021 from Applicant
26 November 2021 from Respondent
Determination: 4 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed by the respondent as its Business Manager. The applicant's employment came to an end when the Director of the respondent invited the applicant to a meeting at the respondent's business premises. The Director's step-father was present at this meeting, and physically assaulted the applicant. The Director then told the applicant to leave the premises, while retaining his car keys and attempting to remove his mobile phone.

[2] The applicant raises a claim for constructive dismissal, and remedies resulting, as well as a claim for breach of good faith, and a penalty for failure to provide the applicant with a compliant written employment agreement.

[3] The respondent denies the claim, and says that the applicant's employment came to an end when he resigned, by way of a letter raising a personal grievance claim 2 days after the assault.

The Authority's investigation

[4] For the Authority's investigation, written witness statements were lodged from the applicant, and two witnesses who had worked with the applicant, and from the Director of the respondent, and her step-father. All witnesses answered questions under oath or affirmation from me and the parties' representatives. Both parties also provided written submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (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

[6] The issues requiring investigation and determination were:

- (a) Was the applicant dismissed?
- (b) If the respondent's actions were not justified (in respect of any dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss) and holiday pay; and
 - Compensation under s123(1)(c)(i) of the Act.
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to his grievance?
- (d) Should penalties be awarded for a breach of good faith, and/or for a failure by the respondent to provide a compliant written employment agreement to the applicant?

- (e) Should either party contribute to the costs of representation of the other party.

Facts

[7] The applicant, Mr Daniel Andrew, commenced working for the respondent (20 Finance) which was then named “Bridge Finance Limited”, as a vehicle lending specialist.

[8] He was employed by the sole director, and at that time, sole shareholder, of 20 Finance, Ms Danielle Bridge.

[9] Mr Andrew was employed according to the terms of a one-page letter headed “Offer of Employment” dated 27 October 2017, which he dated and signed that same day. The terms set out in that document include the following:

As discussed, your position/title is Business Manager.

Your position is full time. Your base salary is \$100,000.00 plus a company vehicle or car allowance (whichever is preferable) and tools of the trade.

Commission/bonuses structure to be confirmed however we have verbally agreed a 50% profit share structure.

[10] In early 2020, Mr Andrew discussed with Ms Bridge that he was considering leaving his employment, and wanted to consider buying the company or reaching an agreement to resign.

[11] Ms Bridge says that she was not surprised by this, as she believed that their working relationship had changed over time, and in any case, she was focusing on developing the company’s business in Motueka in the residential mortgage market, rather than in Christchurch.

[12] Ms Bridge said that she was open to selling Mr Andrew the company, as long as she got to keep its name. Mr Andrew understood that Ms Bridge wanted to keep the company name, and remained interested in purchasing the business.

[13] On 13 February 2020, Mr Andrew set up a limited liability company, and investigated lending to allow him to buy the business. He gave evidence that the company he had created took no steps to trade, but that he had done so as he was serious

about buying the business from Ms Bridge, and understood that he would need his own company to achieve this as Ms Bridge wanted to keep the existing company name.

[14] Ms Bridge agreed that retaining the company name was important to her, but said that she had not yet mentioned this to Mr Andrew. When questioned, she could not recall when she first mentioned this to him, but acknowledged it was important to her at the time.

[15] Mr Andrew states that he mentioned setting up his own company to Ms Bridge as part of their discussions. Ms Bridge denies that he ever mentioned this to her.

[16] On 12 March 2020, Mr Andrew emailed Ms Bridge asking if she could provide him with profit and loss statements for the company.

[17] Ms Bridge emailed him back later that day, agreeing to provide him with the profit and loss information, on the condition that it was kept confidential, to which Mr Andrew agreed. Ms Bridge also said:

if we don't agree a buy out by you (makes sense to make that work) that as per our discussion you resign finishing up end of month.

[18] Mr Andrew replied by email on 14 March 2020, saying:

While I consider my options around an exit plan or buy out & date, I'd like you to also have a think about my payout figure if I was to leave. Based on our profit share arrangement & my work towards the business setup and establishment from the outset. Its only seems right we have something in place prior to a decision especially if I was to leave at the months end.

I'll look over the numbers/profit & loss to get an idea and would appreciate if you would do the same (taking into account any tax owing at the end of the financial year). Come back to me once you have a figure in mind.

[19] On 18 March 2020, Ms Bridge emailed Mr Andrew at 7.56 am saying:

Hi Daniel

We can chat about this today.

[20] Mr Andrew replied saying:

Sure, I have a few things to do this morning so will be around from 11.

[21] Both parties recall that they came to work at more or less their usual time, and that Ms Bridge went to the private downstairs meeting room to do some preparatory work. Then, sometime mid-morning, Ms Bridge asked Mr Andrew to come downstairs and join her in the meeting room. Consistent with this, Ms Bridge sent a further email to Mr Andrew, at 11.00 am on 18 March 2020, saying:

Free when you are.

[22] This email was a continuation of the same email string quoted above.

[23] Unbeknownst to Mr Andrew or the two other employees, Ms Bridge had arranged for her step-father Mr Boote, to attend the meeting with her.

[24] She was unable to say exactly why she had asked him to attend, or what his role in the meeting was to be, apart from that he was there to generally provide her with support.

[25] When Mr Andrew came to the meeting room, he found Mr Boote sitting at one end of the table, Ms Bridge sitting on one side of the table, and a place left for him facing Mr Boote, with his back to the doorway, which did not have door.

[26] Mr Andrews explained that he did not want to buy the business. He then said that he had expected the conversation to move on and for the parties to discuss how he would exit the business. This was consistent with Ms Bridge's emails to him where she had mentioned his resignation twice, as well as the idea that if they were not able to agree to a buy-out, Mr Andrew would "finish up" at the end of the month.

[27] Instead, he recalls that Mr Boote accused him of "setting up in competition with us", and indicated to him that he would not get anything.

[28] Ms Bridge had a piece of paper in front of her on the table, and asked Mr Andrew to sign it, and then he could go. Mr Andrew believed he was being asked to sign a letter of resignation, but was not able to see what was on the paper, which was not produced in evidence.

[29] He declined to sign, and said that they still needed to work out what his leaving would look like.

[30] He then states that Mr Boote stood up and moved around the table, saying words like “how could you do this”, and Ms Bridge moved towards him and the door which was directly behind him, and exited the room.

[31] Mr Boote then grabbed Mr Andrew by the collar, pulling him upright, and pushed him up against the wall of the meeting room squeezing his hands around Mr Andrew’s neck and tearing his shirt.

[32] Mr Andrew was deeply shocked by this, and when Mr Boote had let go of him, he exited the meeting room into the entrance and stairwell area. He called upstairs to the other staff members, asking for his car keys.

[33] About this time, Ms Bridge ordered Mr Andrew to leave the premises, and went upstairs.

[34] Ms Bridge was not able to given any clear answer as to why she exited the room when she did, why she did not try to prevent her step-father from assaulting Mr Andrew, or why her first reaction to the assault was to tell Mr Andrew to leave.

[35] When Ms Bridge got upstairs, she saw the other staff member with Mr Andrew’s car keys, and asked her to hand them over. When the staff member refused, Ms Bridge repeated her request very firmly, telling the staff member that the car was company property. In the end, the staff member placed the car keys down on a piece of office furniture.

[36] Ms Bridge then returned downstairs holding the car keys. She retained these, and stated that she “confiscated” them.

[37] By this time, Mr Andrew had exited the building, followed by Mr Boote.

[38] Ms Bridge says that it was important that Mr Andrew was prevented from re-entering the building, although she could not explain why.

[39] The other staff upstairs could see from the window that Mr Andrew’s shirt was torn.

[40] After following Mr Andrew out of the building, Mr Boote then grabbed Mr Andrew again, and pushed him up against the wall of the building. This was also viewed by the other staff.

[41] Ms Bridge came outside and again told Mr Andrew to leave the premises. It is unclear how she expected Mr Andrews to leave when she had taken possession of his car keys, and she could not explain this.

[42] Mr Andrew began to call his parents on his mobile phone to come pick him up, as he had no other way of leaving.

[43] Ms Bridge attempted to take the cell phone from his hands, saying it was a company cell phone. Mr Andrew backed away from Ms Bridge.

[44] Mr Andrew then started walking down the street. Neither Ms Bridge or Mr Boote followed him. He recalls he was in a state of shock. When he was out of sight of the building, he waited on the side of the road for his father to come to pick him up.

[45] While he was waiting, Mr Boote drove up to him in the company vehicle. He gave Mr Bridge his wallet, and a child's car seat, which had been in the car, and then drove away.

[46] Ms Bridge phoned Mr Andrew, and had a brief conversation with him. Neither Mr Andrew nor Ms Bridge could clearly recollect what they said to each other. Ms Bridge said at the investigation meeting that she had some general expectation that Mr Andrew would return to work, but could not explain why she thought that might occur following the assault, as she did not ask him to return.

[47] Ms Bridge did however put a block on Mr Andrew's phone number that same afternoon, so that he could no longer use his phone. He had to get a new phone number on an urgent basis, even though the phone number held by Ms Bridge was one that he had had for a number of years prior and had brought with him. Ms Bridge explained that when Mr Andrew became an employee, the number had been "assigned" to the company plan, which Ms Bridge suggested gave her the right to the number.

[48] The following day, Mr Andrew went to the local police and filed a report. He also sought medical assistance, for both the bruising to his neck and throat, and because he was unable to sleep.

[49] He sought legal advice, and Ms Bridge accepted that the employment relationship was over when Mr Andrew's lawyer raised a personal grievance claim on his behalf later that week.

[50] Shortly thereafter, the country entered Level 4 Lockdown. Mr Andrew's police complaint was not able to be addressed.

[51] When lockdown ended, Mr Andrew set up his own business, and continues to be self-employed in it.

Findings

[52] Ms Bridge accepts that Mr Boote assaulted Mr Andrew both in the meeting, and afterwards when he had exited the building and was in the car park.

[53] Mr Boote also gave evidence that he assaulted Mr Andrew twice. He was clear about this in his oral evidence, and unapologetic, to the extent of repeatedly calling Mr Andrew childish names rather than responding directly to questions from myself as to what had happened.

[54] In her written evidence, Ms Bridge suggested that Mr Andrew "rushed towards [me] aggressively in the doorway and pushed me". When questioned about this in oral evidence, she did not confirm this, but recollected that Mr Andrew came towards her while she was moving towards him to exit via the doorway behind him. Mr Boote also suggested in his written statement Mr Andrew "attacked" Ms Bridge, but when questioned about this, repeatedly said that he could not recall what had happened, and when questioned about his written statement, could not recall any of the contents of that statement.

[55] Given the way the room was set up, it was necessary for Ms Bridge to move towards and past Mr Andrew in the process of exiting the room, as he was sitting with his back to the open door, between her and the doorway.

[56] It also seems likely that Ms Bridge exited the room as she no longer wished to be physically between Mr Boote and Mr Andrew at that point.

[57] Ms Bridge stated in her oral evidence that Mr Andrew never touched her, but that her claim of being attacked by him was based on a feeling that, as she was walking towards the door, Mr Andrew “moved towards” her.

[58] Under these circumstances, I do not accept that Mr Andrew attacked or assaulted Ms Bridge.

[59] In her written submissions on behalf of 20 Finance filed after the investigation meeting, Ms Bridge again stated that Mr Andrew attacked her, and also added that he “tried” to attack her. These statements are inconsistent with each other and with her oral evidence. It was also submitted that Mr Boote was forced to restrain Mr Andrews “in self defence of Ms Bridge”. These statements are inconsistent with the oral evidence of both Ms Bridge and Mr Boote, and cannot be relied on.

[60] Following the assaults, Mr Andrew did not return to work, and was not asked to do so. He claims to have been unjustifiably constructively dismissed. Ms Bridge claims that he resigned by raising a personal grievance. I note that the letter raising a personal grievance sent to Ms Bridge by Mr Andrew’s advocate does not mention resignation, but instead states that he had been assaulted and unjustifiably dismissed.

[61] Mr Andrew did not resign. Instead, I find that he was unjustifiably dismissed from his employment.

[62] It is well established that an employer may dismiss an employee by sending them away from the workplace, or by committing a serious breach of duty. These are types of constructive dismissal.

[63] It is established law that constructive dismissal can arise where there has been a breach of the terms of employment by the employer sufficiently serious to warrant the employee leaving, for example, in circumstances where:

- a. an employer gives an employee a choice between resigning or being dismissed; or

- b. an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
- c. a breach of duty by the employer causes an employee to resign¹.

[64] For avoidance of doubt, in the present case, the example in (a) above does not apply.

[65] Relevantly, constructive dismissal includes a variety of circumstances where the employment comes to an end as a result of acts or omissions of the employer². It is where the intent of the employer is to terminate the employment relationship, even if this is by conduct that compels the employee to leave, rather than an actual dismissal³. A wide range of conduct by employers has been found to amount to constructive dismissal, often with an emphasis on actions by the employer that amount to sending the employee away from the workplace, or creating a working environment where it is reasonably foreseeable that an employee would not continue work.

[66] The Court has commented that:

I draw attention to the emphasis of both the common law and the statute on whether a reasonable person would conclude from the behaviour that the other party did not intend to perform the obligations undertaken⁴.

[67] A constructive dismissal may also occur when the employer sends the employee away from the workplace, instead of allowing the employee to continue working. In such a case, the “sending away” amounts to a dismissal⁵. In these types of cases, again the initiative for the so-called resignation comes from the employer⁶.

[68] I will first consider whether Ms Bridge’s actions towards Mr Andrew were such that they amounted to a breach of duty by the employer that was sufficiently serious that it amounted to an ending of the employment relationship.

¹ See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

² *Richards v Fresh Flower Wholesaler Ltd* [2016] NZERA Auckland 66.

³ *Taranaki Health Care v Lloyd*, [2001] ERNZ546, quoted at [44] and [45].

⁴ *Ibid*, at [47].

⁵ In *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZLR 154, (1989) ERNZ Sel Cas 247 (CA), it was held that a dismissal includes a “sending away”.

⁶ *NID Distribution Workers etc IUOW v Foodtown Supermarkets Ltd* [1988] NZILR 588 (LC), where a constructive dismissal is described as a situation where the initiative for the dismissal comes from the employer.

[69] Mr Andrew and Ms Bridge were engaged in actively discussing the future of their employment relationship. Mr Andrew had made it clear that he was seriously considering taking over the business by buying Ms Bridge out of that business, which prospect she was happy to discuss. He was also willing to leave her with the company name at her request, and to discuss his prompt resignation if they were unable to reach agreement, again, it appears from the email correspondence, at her request.

[70] Mr Andrew actively sought a meeting with Ms Bridge to progress these discussions, including the potential for his own resignation, and what the newly disclosed profit and loss information might mean in terms of the profit share agreement set out in the letter of offer that was his employment agreement. This was unexceptional, and was consistent with mutual obligations of good faith, requiring both parties to be active, constructive, and communicative about the employment relationship⁷. The language of the email exchange leading up to this meeting is amicable in tone, and suggests that Mr Andrew and Ms Bridge were going to meet together to discuss employment matters in a frank but informal way.

[71] Instead, without telling Mr Andrew that she was doing so, Ms Bridge brought a third person into the workplace. The company records show that Mr Boote and Ms Bridge were, at that time, joint shareholders of 99% of the shares in 20 Finance, however, Ms Bridge has always been the sole director of the company and owner operator, and there is no suggestion that Mr Boote had ever exercised any managerial position in the company.

[72] Then Ms Bridge stood by while the person she had brought into the workplace without notice physically assaulted Mr Andrew, her employee⁸. Mr Andrew was assaulted twice, and Ms Bridge made no attempt to stop it or to remonstrate with Mr Boote either time, or even to separate Mr Boote from Mr Andrew so as to prevent the second assault.

[73] It is difficult to imagine a clearer breach of duty by an employer, than by bringing a person into the workplace and allowing that person to assault an employee on multiple occasions.

⁷ The duty of good faith is a statutory duty and is defined at section 4 of the Employment Relations Act 2000.

⁸ See *Corbett v UDP Shopfitters Ltd* [2012] NZERA Christchurch 151 for an example of constructive dismissal by way of physical assault.

[74] This conduct is fundamentally inconsistent with the maintenance of an on-going employment relationship, including the duties of an employer to provide a healthy and safe workplace, and to act in a way that expresses and maintains a relationship of mutual trust and confidence.

[75] However, Ms Bridge went further, and instead of trying to repair the situation, ordered Mr Andrew to leave the workplace, while taking away his car keys, and then tried to physically remove his phone from his hand as he was calling for assistance to leave the premises in accordance with her instructions, which assistance he needed because she had removed his access to the vehicle.

[76] This conduct amounts to a literal “sending away” from the workplace in the strongest terms, and is in and of itself sufficient to amount to a constructive dismissal⁹.

[77] Mr Andrew was constructively dismissed. The dismissal was unjustified.

[78] In her written statements, Ms Bridge touched on a variety of other matters. Perhaps most importantly, she suggested that by setting up his own company, Mr Andrew had acted improperly, and that this meant she could not trust him. However, she never raised any concerns with him prior to the meeting.

[79] An employee is not prevented from preparing for a new business, as long as there is no fraudulent attempt to undermine their current employer, breach the relevant employment agreement, or disclose confidential information¹⁰. An employee does not have a general duty to advise their employer of future plans¹¹, and may undertake preparatory work for setting up a new business, including establishing a new company¹².

[80] There is no evidence to suggest that Mr Andrew had taken any actions that would be inconsistent with his employment obligations. In fact, Mr Andrew had

⁹ In *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZLR 154, (1989) ERNZ Sel Cas 247 (CA), it was held that a dismissal includes a “sending away”. See also *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA). The Court of Appeal held that breach of an employer’s duty to provide a safe workplace constitutes constructive dismissal.

¹⁰ See *Walker v Aiken* [1993] 2 ERNZ 240 (EmpC) at 248–249 (dicta); *Laughton v Bapp Industrial Supplies Ltd* [1986] ICR 634 (EAT).

¹¹ *Marsden Providors (1988) Ltd v Cotterill* (1989) 2 NZELC 97,094 (HC).

¹² *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 (EmpC) noted at [157].

conveyed to Ms Bridge by email his willingness to receive and keep company information on a confidential basis. He also states that he told Ms Bridge about creating his own company, and explains that he did this specifically so that he would be in a position to buy the business from Ms Bridge, while leaving her with the existing company and name, which was important to her.

[81] Ms Bridge accepts that she never raised any concerns about Mr Andrew setting up his own business with Mr Andrew prior to sending him away, and that the meeting with him was at that time seen by her as nothing more than an informal one to discuss whether he wished to buy the business. Ms Bridge specifically advises that the meeting was not disciplinary in nature, and states in written submissions that she “did not believe a formal process was required” and “the parties had not gotten to that point”¹³.

[82] By Ms Bridge’s own account, the concerns about Mr Andrew’s conduct that she later attempted to rely on at or after the investigation meeting were not raised with Mr Andrew at the time in any formal or informal way. There was no attempt by Ms Bridge to commence a formal process to fairly and fully raise any concerns with Mr Andrew before sending him away, or to give him the opportunity to consider and respond, or to discuss with him in advance what an appropriate outcome might be. These are the types of steps that would be required of a fair and reasonable employer in all the circumstances, and are set out as part of the test of justification at section 103A of the Act.

[83] In addition, Ms Bridge believed at the time (both by her own account, and as shown by the contemporaneous email correspondence) that any concerns she might have had were not of sufficient import that she needed to take any particular steps to progress them, or to change her informal approach. Having made this decision at that time, Ms Bridge cannot now attempt to retrospectively justify her actions on the basis of matters she did not then raise.

[84] What she was concerned about at the time (albeit unexpressed to Mr Andrew) was his creating his own company, which was a preparatory step he was entitled to take while still employed, and was in fact consistent with the terms Ms Bridge had requested for the potential “buy-out”. Accordingly, nothing flows from this.

¹³ Submissions for the Respondent, received 26 November 2021.

[85] For completeness, I will also mention new information put forward by Ms Bridge in her written submissions following the investigation meeting.

[86] Ms Bridge submitted that “Mr Andrew has acted maliciously and appears to have purposely planned to destroy her business and reputation while he was covertly setting up his own business in direct competition.” No evidence to support this statement has been produced. It also contradicts Ms Bridge’s responses to questions at the investigation meeting, where she said that what she was concerned about at the time of the meeting was that Mr Andrew had set up his own company. Accordingly, I cannot give any weight to these late claims.

[87] It is also necessary to note that, as part of her written submissions, Ms Bridge attempted to introduce new evidence about a witness. These statements were unsupported, and irrelevant to the matters before the Authority. They appeared to be nothing more than a type of personal attack against one of the applicant’s witnesses. Even leaving aside the irrelevant nature of this information, none of it was put to the witness at the investigation meeting for response. Accordingly, no weight can be given to these statements.

[88] Mr Andrew was unjustifiably dismissed, as a result of a fundamental breach of duty by his employer incompatible with the continuation of the employment relationship. The later concerns raised by Ms Bridge around Mr Andrew setting up his own company fall far short of justifying the fundamental breach of duty committed, even if these matters had been raised properly at the time, which they were not.

Remedies

[89] Having been unjustifiably dismissed, Mr Andrew is entitled to remedies.

[90] Mr Andrew claims the following remedies:

- a. Nine week’s lost wages;
- b. Holiday pay in respect of this sum;
- c. Kiwisaver contribution in respect of this sum;
- d. The reimbursement of an unlawful deduction of \$200, made in breach of the Wages Protection Act 1983;
- e. The 50% profit share referred to in his employment agreement;

- f. Interest;
- g. Compensation for hurt and humiliation relating to the way his employment came to an end.

[91] Mr Andrew is entitled to the reimbursement of a sum equal to the whole or any part of the wages or other monies lost, in accordance with section 123(1)(b) of the Employment Relations Act 2000.

[92] Mr Andrew has lost nine weeks wages, which is quantified as being \$10,278.09 gross once part payments made by the employer have been taken into account.

[93] The applicant is also entitled to holiday pay on this sum calculated at the rate of 8%, being \$822.25, and an allowance for Kiwisaver calculated at the rate of 3%, being \$308.34, as these are wages or other monies lost as a result of the applicant's grievance. This amounts to a total sum \$11,408.68 gross.

[94] The respondent made deductions from Mr Andrew's final pay of \$200, which was described as a payment for the mobile phone that had been provided to the applicant, and \$72, which was described as a deduction relating to a meal expense.

[95] Section 5 of the Wages Protection Act 1983 provides that:

An employer may, for a lawful purpose, make deductions from wages payable to a worker –

- (a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement)...

[96] The two deductions were made without Mr Andrew's knowledge or consent. Nothing was recorded in writing, and the employment agreement contained no general deduction clause on which 20 Finance might rely.

[97] Ms Bridge argues that the deduction of \$200 in relation to the cost of a phone was "reasonable", but accepts the provisions of the Wages Protection Act requiring written consent were not complied with.

[98] Mr Andrew accepts that the deduction of \$72 for a meal expense was a proper deduction, that he consented to being made, albeit after the fact. He does not claim reimbursement for this amount.

[99] Accordingly, 20 Finance is ordered to repay the sum of \$200, which was deducted from Mr Andrew's pay in breach of the Wages Protection Act.

[100] In addition, the applicant is entitled to the 50% profit share that was part of his employment agreement. Based on financial information provided to the Authority and the applicant by Ms Bridges at the request of the Authority, the applicant calculates that his profit share amounted to:

- a. 50% of \$5,087.00 (being \$2,543.50) for 2019 and
- b. 50% of \$6308.00 (being \$3,154.00) for 2020.

[101] Although the applicant was also employed in 2018, no figures relating to the 2018 year were provided to the Authority or to Mr Andrew, and Mr Andrew makes no claim in respect of this year.

[102] The respondent does not dispute these figures. Rather, Ms Bridge states that no profits were paid out to Mr Andrew, but the entirety of the profits was re-invested back into the company. In other words, despite the promise in the employment agreement to pay a 50% profit share to Mr Andrew, this simply did not occur.

[103] There is no dispute as to what the figures are, or that this remains outstanding and was never paid. It appears Ms Bridge simply decided not to pay.

[104] Accordingly, Mr Andrew is owed the 50% profit share, and is to be paid a total of \$5,697.50 gross, being \$2,543.50 for 2019, plus \$3,154.00 for 2020.

[105] The applicant has also claimed for interest on unpaid monies.

[106] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[107] The amount of interest owing is to be calculated in accordance with that Act¹⁴, and an interest site calculator is provided for the purposes of calculation¹⁵, known as the Civil Debt Interest Calculator.

¹⁴ See section 12 of the Interest on Money Claims Act 2016.

¹⁵ See section 13 of the Interest on Money Claims Act 2016.

[108] Mr Andrew should have been paid his wages and holiday pay (including Kiwisaver and profit share payments on or immediately after his dismissal on 18 March 2020. These outstanding amounts attract interest until paid, and total \$17,306.18.

[109] At the very latest, Ms Bridge accepts that Mr Andrew's last day of work was Friday 20 March 2020, which was the date that Mr Andrew's representative wrote to her raising a personal grievance claim and asking for the payment of all entitlements including outstanding wages. Giving the respondent the benefit of the doubt for the purposes of being able to practically make such a payment after Ms Bridge had been put on notice monies were owing, it is appropriate to calculate interest owing starting from Monday 23 March 2020.

[110] The amount of interest owing up to the date of this determination is \$509.68. This sum is also to be paid to Mr Andrew, in recognition of his loss of the use of the monies that should have been paid to him.

[111] In addition, Mr Andrew claims \$25,000 for hurt and humiliation resulting from his dismissal. The way he was dismissed was shocking, involving repeated physical violence in the workplace, which the respondent, acting through its sole director, allowed to happen while she stood by. Ms Bridge then exacerbated this breach of duty, by ordering Mr Andrew to leave, but denying him the ability to do so, by "confiscating" his car keys, and attempting to remove his phone when he was calling for someone to pick him up.

[112] Mr Andrew suffered both physical harm and mental harm, which was significant and on-going. He gave thoughtful evidence at the investigation meeting about the on-going affect the assault had had on him, including how it had impacted his confidence and his ability to work with others, which was a significant change from his previous experience.

[113] Taking all the circumstances into consideration, Mr Andrews is entitled to \$25,000 in compensation for hurt and humiliation.

Penalties

[114] Mr Andrew submits that penalties be awarded for two breaches of statute by the respondent:

- a. First, a breach of the employer's obligation to provide a compliant employment agreement, containing the minimum terms required by section 65 of the Act.
- b. Second, a breach of good faith by the respondent, for acting contrary to its obligations to be active and constructive in establishing and maintaining a productive employment relationship, as required by section 4 of the Act.

[115] Taking all the circumstances into account, Mr Andrew seeks penalties of \$7,000 in total, and suggests that it would be appropriate for 75% this to be awarded to him, with the remainder payable to the Crown.

[116] For each of the two breaches of statute referred to, the respondent is liable to a maximum penalty of \$20,000.

[117] I find that 20 Finance failed to provide an individual employment agreement in accordance with the minimum requirements of section 65 of the Act. Specifically, the employment agreement provided to Mr Andrew was one page. It did not contain a description of the work to be performed, an indication of where the work to be performed, agreed hours of work (although it did state that the position was full time without stating what that meant), or a plain language explanation of services available to resolve employment relationship problems including a reference to the 90 day period for raising personal grievances.

[118] I also find that 20 Finance breached its obligation to act in good faith, as already mentioned above. Specifically, 20 Finance did not act in a way that was constructive to maintaining a productive employment relationship, and it was not responsive and communicative in its dealings with Mr Andrew when it came to discussing the proposed buy-out, and ultimately, ending the employment relationship altogether.

[119] These are two separate breaches of different sections of the Act, each with a different impact on the applicant.

[120] The law in respect to settling penalty amounts is well established given the content of s 133A of the Employment Relations Act 2000 and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,¹⁶ *A Labour Inspector v Prabh*¹⁷ and *A Labour Inspector v Daleson Investment*.¹⁸

[121] Section 133A of the Act requires that when making a penalty determination, I have regard to the object of the relevant statutes that have been breached, the nature and extent of the breach(es), whether they were intentional or not, the nature and extent of any loss or damage, any mitigating actions, the circumstances of the breach and any vulnerability, and any previous conduct.

[122] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances involving a distinct power imbalance.¹⁹

[123] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question²⁰, or failures to take reasonable steps to fulfil their legal obligations.²¹ Here the evidence leads to a conclusion the failures of the respondent in respect of its obligation to provide a compliant employment agreement can be reasonably characterised as a failure to take steps to fulfil its legal obligations, and was to some extent mitigated as there was no suggestion from either party that information missing from the employment agreement gave rise or contributed to the later employment relationship problem between the parties.

[124] The failure to act in good faith is a more severe breach, and has made a direct contribution towards the end of the employment relationship.

¹⁶ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

¹⁷ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

¹⁸ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

¹⁹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

²⁰ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich, Auckland* TT 4088383.

²¹ *El-Agez v Comprede Limited*, TT 4121553, at para 18.

[125] With respect to the severity of the breaches, the starting point for failures to pay proper entitlements is around 80%.²² In this case, neither breach has created a monetary loss, suggesting a reduction should be applied.

[126] There is no evidence of similar previous conduct by the respondent. The circumstances of the respondent are also relevant, and the respondent is a small business, in that it is owned and operated by its sole director. The respondent's limited financial resources are apparent from its profit and loss information. Finally, it is important to consider both consistency and proportionality. In the present case, all these factors serve to reduce the amount that might be properly awarded as a penalty.

[127] It is submitted for Mr Andrew that the failure to provide a compliant employment agreement is one where the employee has no particular recourse other than a penalty action, and a penalty should be imposed as a matter of general deterrence. In relation to the breach of good faith, it is submitted that this conduct shows a disregard for the spirit and purpose of the Act, and a penalty is both necessary and warranted.

[128] I agree. It is not sufficient for employers to disregard the need to provide compliant employment agreements. This is a fundamental obligation of being an employer. However, the impact from this action in the present case is limited. A penalty of \$1,000 is appropriate, payable to the Crown.

[129] The breach of good faith is significant however, and has directly contributed to the unjustified ending of Mr Andrew's employment. A penalty of \$5,000 is awarded against 20 Finance, taking into account the resources available to it. \$4,000 of this is to be awarded to Mr Andrew in all the circumstances, with the remainder to be paid to the Crown.

Costs

[130] The applicant seeks costs on a tariff basis, with an uplift of \$1,000 sought in recognition of delays by the respondent in filing documents.

[131] The investigation meeting took one day, and the daily tariff is \$4,500. The parties can expect the Authority to determine costs, (if asked to do so), on this usual

²² See *Preet*, at paragraph [167] which suggests a starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²³

[132] While noting that delays did occur, these were not so severe as to require a change in the usual daily rate.

[133] Accordingly, costs of \$4,500 are awarded in favour of the applicant.

Orders

[134] The respondent is ordered to pay to the applicant within 28 days:

- a. The sum of \$11,408.68 gross, being compensation for nine week's lost wages at \$10,278.09 gross, plus holiday pay on this sum calculated at the rate of 8%, being \$822.25, plus Kiwisaver calculated at the rate of 3%, being \$308.34.
- b. The sum of \$200 gross, being the reimbursement of an unlawful deduction from wages.
- c. The sum of \$5,697.50 gross, being unpaid profit share, calculated as \$2,543.50 for 2019, plus \$3,154.00 for 2020.
- d. The sum of \$509.68, being interest calculated under the Interest on Money Claims Act 2016, up to the date of this determination, and continuing until paid;
- e. The sum of \$25,000 without deduction, being a compensatory payment for hurt and humiliation in accordance with section 123(1)(c)(i) of the Act.
- f. The sum of \$4,000 without deduction, being a portion of the penalties awarded against the respondent, with a further \$2,000 in penalties being payable to the Crown account.

²³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

g. The sum of \$4,500 without deduction, being costs.

Claire English
Member of the Employment Relations Authority