

Note: An order prohibiting publication of some evidence is made at paragraph [3] of this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 235
3031155

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|---------|--|
| BETWEEN | NEIL ARMSTRONG Applicant |
| AND | SURPLUS BROKERS LIMITED Respondent |

Member of Authority: Robin Arthur

Representatives: Lawrence Anderson, advocate for the Applicant
Sarah-Jane Neville, counsel for the Respondent

Investigation Meeting: 22 January 2019

Determination: 18 April 2019

DETERMINATION OF THE AUTHORITY

- A. Surplus Brokers Limited (SBL) unjustifiably dismissed Neil Armstrong during a period of employment on a casual basis.**
- B. In remedy of his personal grievance for unjustified dismissal, and within 28 days of the date of this determination, SBL must pay Mr Armstrong the sum of \$9,000 as compensation for humiliation, loss of dignity and injury to his feelings. Due to conduct of Mr Armstrong that contributed to the situation giving rise to his personal grievance, a reduction of ten per cent has been applied to the amount of compensation awarded to him.**

C. SBL must pay a penalty of \$1,000 to the Authority, for transfer to the Crown Account, for not providing Mr Armstrong with an intended employment agreement.

D. Costs are reserved, with a timetable set for memoranda if any issue of costs is not resolved by the parties.

Employment Relationship Problem

[1] Neil Armstrong worked as a sales assistant for Surplus Brokers Limited (SBL) between November 2017 and April 2018. He worked at displays in shopping malls and at specialty events such as field days or car shows promoting caravan and trailer products SBL sold under the Road Chief brand.

[2] SBL's Road Chief product and sales manager Lex Caspersen ended Mr Armstrong's employment in April after an incident between Mr Armstrong and another employee during the night of 7 April or early hours of 8 April.

[3] The other employee is referred as Mr R in this determination. Publication of Mr R's actual name is prohibited under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). This order is made because, for health reasons, Mr R could not give evidence in person at the Authority investigation meeting to respond to adverse comments about his behaviour made in Mr Armstrong's evidence.

[4] The incident between Mr R and Mr Armstrong occurred in Hamilton. They had travelled there to work on a show for SBL over a four day period. They were provided with one motel room to share as overnight accommodation.

[5] Mr Armstrong initially told Mr Caspersen that Mr R had threatened to kill him for snoring. Some weeks after SBL ended his employment Mr Armstrong sent Mr Caspersen a further and different account of what happened. He said he had since remembered that Mr R also assaulted him earlier that night by pushing him into a wall in the bathroom of their motel room. Mr Armstrong said he was pushed with such force that a mirror on the bathroom wall broke.

[6] As a result of whatever had happened Mr Armstrong left the room around 2am on 8 April. He spent the remainder of the night sitting in a work vehicle in the

carpark of a nearby supermarket. He called the Police from there. Two constables came and spoke to him and then went to the motel but were not able to rouse Mr R.

[7] At 6.39am Mr Armstrong sent Mr Caspersen a text telling him that Mr R had threatened to kill him and he had slept in the car all night. Mr Armstrong's text said he could not work that day. After speaking with Mr Armstrong Mr Caspersen arranged for him to remain resting in a work vehicle parked at the show venue. A few hours later Mr Armstrong left the vehicle and travelled back to Auckland by bus.

[8] Mr Armstrong let Mr Caspersen know that he was leaving Hamilton and soon after got a text from him. Mr Caspersen said he had received a complaint from the motel about Mr Armstrong and Mr R arguing outside their room and SBL was to be charged for a mirror broken in the room. Mr Caspersen's text said he was upset by what occurred, Mr Armstrong had let him down badly and told Mr Armstrong to leave his work shirts at SBL's depot in Auckland. On the next day, Monday 9 April, Mr Armstrong sent a text message to Mr Caspersen asking if he was needed for work that day. Mr Caspersen responded with a text telling Mr Armstrong to pick his car up from the company depot in Auckland and "drop off shirts".

[9] At Mr Caspersen's request Mr Armstrong sent him an email on 9 April setting out his account of what happened, again saying Mr R had threatened to kill him for snoring. Mr Caspersen responded by email on 10 April referring to the noise complaint, the broken mirror and Mr Armstrong letting the company down by not working on 8 April. Mr Caspersen said he would "not be continuing our job role offers with you".

[10] Mr Armstrong claimed SBL's actions amounted to an unjustified dismissal. He sought orders for the payment of lost wages and compensation. He also sought orders for holiday pay he said was not paid to him and for penalties against SBL for not providing him with a written employment agreement, not providing wage records when requested, not paying holiday pay and, because of how he was dismissed, for a breach of good faith.

[11] SBL's reply said Mr Armstrong was a casual employee and Mr Caspersen's decision not to offer Mr Armstrong any more work was made outside a period of casual employment. It denied a dismissal had occurred, far less an unjustified one. It also denied any liability for holiday pay, saying Mr Armstrong was paid that money

on a pay-as-you-go basis due to the casual nature of his employment. SBL also said it was not liable to any of the penalties claimed.

The issues

[12] The issues for determination were:

- (i) Was the real nature of the relationship between Mr Armstrong and SBL one of permanent or casual employment?
- (ii) Was Mr Armstrong unjustifiably dismissed (whether from permanent employment or during a period of casual employment) by SBL?
- (iii) If SBL is found to have acted unjustifiably, what remedies should be awarded to Mr Armstrong, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iv) If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Armstrong that contributed to the situation giving rise to his grievance?
- (v) Was Mr Armstrong owed holiday pay?
- (vi) Was SBL liable for any penalties in relation to payment of holiday pay, not providing a written employment agreement or for committing a breach of good faith?
- (vii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[13] Mr Armstrong, Mr Caspersen, Mr R and an SBL accounts clerk each lodged written witness statements for the Authority investigation.

[14] A Hamilton police constable also provided a written statement. It was not necessary to interview the constable. Her account said she and a fellow officer had responded to a call about 2.30am on 8 April and met Mr Armstrong, sitting in a vehicle in the supermarket carpark near the supermarket. She said Mr Armstrong reported Mr R was intoxicated, aggressive and threatened him "that if he snored again, he would kill him". The constable then visited the motel and attempted, unsuccessfully, to wake Mr R by knocking loudly on the door. She returned to Mr

Armstrong who told her he would stay in his car and decide what to do later in the morning. She told him to call the Police again if he felt unsafe to enter the motel room to uplift his belongings.

[15] As already noted Mr R could not attend the investigation meeting for health reasons. It was only necessary to note two points from his unconfirmed and untested written witness statement. Firstly, Mr R wrote that he had complained to Mr Armstrong in the early hours of 8 April about his snoring and “in a joking way said that if he didn’t shut up, I would kill him”. Secondly, Mr R denied assaulting Mr Armstrong or knowing about a broken mirror in their motel room.

[16] It was not necessary to hear from the accounts clerk in person. Her written statement confirmed Mr Armstrong had not received payslips by email, due either to him giving an incorrect email address or because the address was incorrectly entered.

[17] Mr Armstrong and Mr Caspersen both attended the investigation meeting and, under oath, answered questions from me and the party’s representatives. The representatives also provided closing submissions on the issues for determination.

[18] 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 nature of the employment

[19] Determining the nature of the employment relationship in a case of this type is important because it may affect what obligations the parties have to one another about future work and how the relationship may lawfully come to an end.

[20] The Employment Court has explained the difference between the terms “casual” and “ongoing” or “permanent” in this way:¹

Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual

¹ *Jinkinson v Oceania Gold (NZ) Limited* [2009] ERNZ 225 at [40]-[41].

obligations which continue between periods of work, there will be an ongoing employment relationship.

[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[21] The evidence of Mr Armstrong and Mr Caspersen established that, on the facts in this case, Mr Armstrong was a casual employee of SBL.

[22] Among company records was an unsigned written employment agreement dated 1 November 2017 and addressed to Mr Armstrong. It described his employment as casual but was never sent to him. The only documentation of the intended nature of the employment relationship comprised an email Mr Caspersen sent Mr Armstrong on 14 November 2017 with the subject heading: "Lex: forms for casual employment". The text of that email asked Mr Armstrong to print out and fill in the attached forms. Those forms were an employee information form for payroll, a tax code declaration and a KiwiSaver deduction form. He filled in and returned the employee information form after he worked for SBL at an event in late November.

[23] Mr Armstrong worked at seven shows or mall displays between November 2017 and April 2018. On each occasion he worked for between two and four days. The reality of that employment relationship was clear from what his email correspondence with Mr Caspersen showed about whether Mr Armstrong had an obligation to accept and carry out work offered to him. By email on 31 January Mr Armstrong asked Mr Caspersen to tell him the dates of upcoming events and wrote: "[I]f I can't do one I just tell you not that one". He told Mr Caspersen that he would work if it suited other personal commitments.

[24] A further indicator of the real nature of the relationship was found in an email from Mr Caspersen on 21 March about the arrangements for the event to be held in Hamilton in early April. His email did not tell Mr Armstrong that he was to work those days but asked him to "confirm you are ok for Hamilton ... show".

[25] At the Authority investigation meeting Mr Armstrong conceded he was able to pick and choose whether he accepted work offered. Although he generally intended to carry out whatever work he was offered, he was not obliged to do so. Similarly Mr

Caspersen was not obliged to ensure Mr Armstrong was offered available work. He could choose to offer it to others. On both accounts what happened in those arrangements met the Court's description of casual employment.

[26] This was not changed by Mr Armstrong's expectation that he would be offered more work, possibly as much as 70 hours a week, based on conversations he had with Mr Caspersen about upcoming events. Neither was the nature of that relationship changed by Mr Armstrong's suggestion that Mr Caspersen had given him some promotional material about products to study between events. There was no obligation established that he must study that material between periods of work.

[27] While Mr Armstrong's employment relationship with SBL was therefore of a casual nature, dismissal may occur during a period of such employment. This was confirmed by the Employment Court in *Rush Security Services Limited v Samoa* where a security officer was offered and accepted work for a four day period starting on a Monday.² On that Monday he was told there was no more work for him. The employer's action, at that time, was not merely a failure or refusal to enter further periods of casual engagement that would not have amounted to a dismissal. Rather, the Court held that ending the assignment, during its course, was a dismissal and the same questions of justification for that action arose whether the employment at the time was casual or ongoing.³

[28] Mr Armstrong was offered the Hamilton assignment by email on 21 March. The email said he would be involved in set up work from Thursday, 5 April and work at the show on the Friday, Saturday and Sunday and then be involved in the pack up and bringing back equipment on the night of Sunday, 8 April. He was also told he would get a meal allowance and have a motel room to "share with another".

[29] He accepted the assignment verbally but the expected period of work was changed in discussion with Mr Caspersen. As Mr Caspersen's oral evidence confirmed, Mr Armstrong was also expected and had agreed to be available to work on Monday, 9 April. The possible Monday work involved driving a vehicle to bring SBL equipment or gear back from Hamilton to its depot in Otahuhu in Auckland.

² *Rush Security Services Limited v Samoa* [2011] NZEmpC 76.

³ *Samoa*, above n 2, at [32]-[33].

[30] The period of the assignment, during which there was mutual obligations to offer and carry out work, therefore included Sunday, 8 April and Monday, 9 April. This was not changed by what Mr Caspersen said was the fact that, as it happened, other SBL employees were able to bring back the equipment on 9 April and Mr Armstrong would not have been needed as a driver that day. The relevant point for this determination was that the actions of both Mr Armstrong and Mr Caspersen on both 8 and 9 April occurred during a period when the mutual obligations of employment existed between the parties.

[31] As a result of that conclusion, Mr Caspersen's actions on SBL's behalf at that time had to meet the statutory test of justification: was what he did and how he did it, what a fair and reasonable employer could have done in all the circumstances at the time of those actions?⁴

Did SBL unjustifiably dismiss Mr Armstrong?

[32] Mr Caspersen became aware of the overnight incident through Mr Armstrong's text at 6.39am. When Mr Armstrong arrived at the show venue later than morning, Mr Caspersen arranged for him to stay resting in the work vehicle while Mr Caspersen and Mr R went into the venue to work at SBL's display.

[33] In the late morning Mr Armstrong let Mr Caspersen know he was returning to Auckland. At 12.59pm Mr Caspersen sent Mr Armstrong the following text:

Neil I have received a complaint from the motel that at 11.30pm last night you two were arguing outside, they tell me they had to approach you both and ask you to move inside. Also a mirror is broken [a]nd they have deducted this from our company card. Do you know about broken mirror? I am really upset at what has occurred and you have let me down badly. Please leave your company shirts at Otahuhu hq. I will decide tomorrow what [I] am going to do from this point.

[34] Mr Armstrong responded with his view of events, set out in three texts sent between 1.34pm and 2.13pm:

Hi Lex I know nothing about a broken mirror. I really don't. As for the arguing I don't argue with anyone else ever and it was [Mr R] changing his mind every 5 minutes that provoked it even as early as 6pm. I am very sorry to let you down you have been good to me and I am annoyed about it all myself. I had to leave today I couldn't stand another minute cramped in the car. Things have been good except for when [Mr R] pokes fun all the time it wears thin. I will put shirts in outside shed.

⁴ Employment Relations Act 2000, s 103A.

A broken mirror suggests violence and I got out of the motel to avoid violence that was the last thing I needed. So I ran away.

The front gate was locked. It was [Mr R] who threatened to punch my head in at 6pm and him again that threatened to kill me if I snored again. That's violence. How do you stop snoring? That's why I said we really need separate rooms ...

[35] In the late morning and early afternoon of 9 April the following exchange of texts occurred:

Armstrong: Hi Lex do you need me if so what's the plan?

Caspersen: No plan, pick your car up drop off shirts.

Armstrong: OK I thought you still wanted me to go to Hamilton in afternoon. No worries. I've put shirts on front wheel of your ute didn't want to bump into him.

Caspersen: I just got back from show, what ute did you put shirts? And where was it.

[36] Mr Armstrong then sent further texts setting out his view about the broken mirror. Mr Caspersen responded with a request that Mr Armstrong write him an email about the events and said he intended "to follow this issue up inside this week". Mr Armstrong set out his account in an email sent at 4.33pm on 9 April. Mr Caspersen's reply, sent at 7.40am on 10 April, ended with his statement that he would "not be continuing ... job role offers" with Mr Armstrong.

[37] In response to further messages from Mr Armstrong about that email Mr Caspersen sent him another email at 10am. That email included the following statements:

I am not judging any one as I was not present, I am saying very clearly from a company point of view what occurred is not acceptable by our company, and as a result of what happened you let us down on Sunday.

I am not interested in who did what as I have two different versions, my responsibility is representing my company and our integrity.

... Again I am not taking sides or believing one or other, I have made the decision to discontinue the part time opportunity as a direct result of the problem that occurred, it is very much unacceptable for me and my company.

[38] SBL submitted there was no dismissal of Mr Armstrong. Rather it said the Mr Caspersen decision not to offer Mr Armstrong further work, as communicated by his 10 April email, was made outside a period of casual employment. It also submitted

that the direction Mr Caspersen gave to Mr Armstrong to return his work shirts did not amount to notification of dismissal.

[39] Those submissions are not accepted. A dismissal occurs when there is a “sending away” of a worker so the termination of the employment occurs at the initiative of the employer.⁵ The context and content of the communication between the worker and the employer are considered on an objective standard to discern what was more likely than not to have occurred in the facts of any particular case.

[40] In this case Mr Caspersen’s direction to return the work shirts was, objectively assessed, a clear statement that Mr Armstrong’s employment was being terminated at the initiative of the employer. The message was simple. Mr Armstrong had to give back the work shirts because Mr Caspersen had decided Mr Armstrong was not working for the company anymore and did not need the shirts. Mr Armstrong was being sent away. This direction was given twice – once on 8 April and once on 9 April. As already found in this determination, those days were within the period of the assignment. This meant Mr Armstrong was dismissed while employed by SBL.

[41] Mr Caspersen’s subsequent inquiries, and his emails of 10 April, provided and confirmed his rationale for the decision he had already reached and communicated by his directions about the shirts on the previous two days. Having occurred during a period of employment that decision was required to have been reached on the standard of what a fair and reasonable employer could have done. Mr Caspersen’s actions failed to meet that standard because he had not sufficiently investigated his concerns or given Mr Armstrong a reasonable opportunity to respond to them before making the decision. He had not given Mr Armstrong the opportunity to comment on whatever Mr R had told him. And, because he declined to reach any view on what had happened at the motel, Mr Caspersen could not have fairly have reached the conclusion that Mr Armstrong’s decision to return to Auckland on the Sunday was really misconduct. Neither was Mr Armstrong given the opportunity to comment on the prospect that he was to be dismissed for his conduct.

[42] Those failures of fairness were defects in the process Mr Caspersen followed. Those defects were more than minor. They resulted in Mr Armstrong being treated

⁵ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* ERNZ Sel Cas 95, at 102-103.

unfairly.⁶ As a result Mr Caspersen's actions, on SBL's behalf, amounted to an unjustified dismissal.

[43] One further point about that conclusion needed to be noted. The assessment of justification is made on what could have been done in all the circumstances at the time of the employer's actions. In this case those circumstances were that Mr Armstrong had told Mr Caspersen that Mr R had threatened to kill him. All of Mr Armstrong's texts and emails up to 9 April described Mr R's actions as shouting at him and threatening him. It was not until his 27 April email to Mr Caspersen that Mr Armstrong mentioned being pushed by Mr R. That later email, and the accusation of assault, were not part of the circumstances known to Mr Caspersen at the time of his decision or that could have been known if he had made further inquiries of Mr Armstrong at the time.

[44] And there were, anyway, several reasons to doubt the reliability of Mr Armstrong's much later and different account of events. He said he had not remembered until 25 April that Mr R "slammed" him into the bathroom wall after they went into the motel room on the night of 7 April. He said he had remembered that event during a dream he had while he was in bed on 25 April and suffering from a virus.

[45] Mr Armstrong suggested that he had not remembered this part of the incident earlier because he had been concussed at the time. There was no medical evidence to support that proposition. The records of Mr Armstrong's own texts, sent on 8 and 9 April, made no reference to being assaulted. The Police constable's report of what Mr Armstrong told her in the early hours of 8 April show he referred only to being threatened, not assaulted.

[46] A further reason to doubt Mr Armstrong's 27 April account was his reference to the bathroom mirror being broken. As photos provided by the motel owner to Mr Caspersen showed, the mirror reported to be broken was in the bedroom, not the bathroom.

⁶ Employment Relations Act 2000, s 103A(5).

Remedies

Lost wages

[47] Having established a personal grievance for unjustified dismissal, Mr Armstrong was entitled to an assessment of remedies.

[48] He claimed lost wages but his evidence did not support an award being made for that remedy.

[49] He had suffered an injury in a fall soon after his dismissal, was referred for assessment of a degenerative spine condition and had other health issues that were likely to have impaired his ability to seek and do other work. Those conditions would also likely have prevented him accepting further casual assignments if he had still been working for SBL in that period, so it could not be said he had lost those earnings as a result of his grievance.

[50] He also said his ability to seek other work to mitigate those losses was affected by severe headaches which he attributed to concussion he said he had suffered as a result of Mr R assaulting him in the motel bathroom. While his medical records record him raising that proposition with his doctors in October 2018, the contents of their assessments did not compellingly support his conclusions about it.

[51] Following his dismissal Mr Armstrong had focussed his efforts on plans to start a new business rather than seeking other work and income to mitigate his loss. Those activities were not sufficient mitigation endeavours, so no award of lost wages was warranted.

Compensation for humiliation, injury to feelings and loss of dignity

[52] Mr Armstrong submitted he should be awarded \$25,000 as compensation for the humiliation he experienced as the result of how SBL treated him over the events of 7 and 8 April.

[53] His evidence established Mr Armstrong was upset by Mr R's conduct towards him on the night of 7 and 8 April. This was, at least in part, caused by SBL's arrangement that the two men share a room and Mr R being angry at his sleep being disturbed by Mr Armstrong snoring. Mr Armstrong considered his safety was sufficiently at risk that he needed to vacate the room and spend the remainder of the

night in a vehicle in a carpark. Mr Caspersen was not unsympathetic to the effect on Mr Armstrong. Mr Armstrong's own written evidence recorded that, on arriving at the show venue on 8 April, Mr Caspersen had asked if he wanted to have a sleep. He wrote that Mr Caspersen said: "Have a sleep and if you feel okay come and join us, and lock the car up". When Mr Armstrong later told Mr Caspersen that he felt he needed to return to Auckland, Mr Caspersen did not chastise him but only asked that he lock the vehicle before doing so.

[54] It was not until a slightly later telephone call from the motel owner, informing Mr Caspersen of complaints about a loud argument outside the room and a broken mirror, that Mr Caspersen's approach changed. His text at 12.59pm, ending with the direction for Mr Armstrong to leave his work shirts at the depot, was a sharp and upsetting blow for Mr Armstrong. Although Mr Armstrong's texts the next morning took a mild tone in inquiring about work and accepting the direction to return the shirts, he understood he had been abruptly dismissed.

[55] His evidence about his resulting sense of humiliation and injured feelings warranted a modest award of \$10,000 compensation under s 123(1)(c)(i) of the Act.

Contribution

[56] Under s 124 of the Act the Authority must consider whether any remedies granted should be reduced because of blameworthy actions by Mr Armstrong that contributed to the situation giving rise to his grievance.

[57] Mr Armstrong was not responsible for Mr Caspersen's cursory approach to investigating his concerns and deciding to dismiss him. Neither was he responsible for SBL's decision to have the two men share a room where Mr R became upset over Mr Armstrong's snoring.

[58] However Mr Armstrong had, outside work hours, socialised with and then fallen out with Mr R. After work on Saturday 7 April they spent some time drinking in the motel room before going to a local RSA club. At the club they had further drinks and played snooker for two hours. Around 9pm they left and parted ways. Mr R went on to another bar. Mr Armstrong found a restaurant and had a meal, returning to the motel room soon after 10pm. Mr R had the only key and Mr Armstrong had to wait outside until Mr R returned around 11.30pm.

[59] Mr Armstrong said Mr R was very intoxicated and swore at him. Mr Armstrong accepted he was also angry and had shouted at Mr R over being left outside the motel room. Those exchanges resulted in someone complaining about the noise and telling them to go inside their room. This was part of the background which resulted in, at the least, Mr R's later angry comments to Mr Armstrong about snoring. A moderate reduction of ten per cent of the compensation remedy was appropriate to mark the manner in which Mr Armstrong's participation in those interactions had contributed to the situation giving rise to his grievance.

Holiday pay

[60] SBL opposed Mr Armstrong's claim for an order for holiday pay on his earnings. It said holiday pay was included in his wages on a pay-as-you-go basis consistent with the casual nature of his employment.

[61] Section 28 of the Holidays Act 2003 allows holiday pay to be paid with an employee's regular pay where providing annual holidays is impracticable because the work is too intermittent or irregular. That provision is subject to two conditions: the employee must have agreed in her or his employment agreement to such an arrangement and the holiday pay must be clearly identified as a separate component in the employee's pay.

[62] Neither condition was met. Mr Armstrong did not have a written employment agreement so there was no record of any agreement by him to pay-as-you-go holiday pay. He also did not receive pay slips so nothing identified to him, during his employment, that he was receiving holiday pay along his ordinary wages.

[63] If Mr Armstrong's employment had continued for 12 months or more, s 128(4) of the Holidays Act provides that he would have become entitled to annual leave despite the pay-as-you-go holiday pay having been included in his wages.⁷ However this provision does not appear to apply to shorter periods of casual employment, such as that of Mr Armstrong. SBL's wage records showed holiday pay was included in wages paid to him for each of the seven times he worked. Its wage accounting system also included payslips for him, clearly identifying the separate holiday pay, although by error he did not get those slips. As a result, he had been paid whatever holiday pay was due to him and no order for payment of it was needed.

⁷ *Cross v D Bell Distributors Limited* [2017] NZERA Auckland 295 at [30]-[38].

Penalties

[64] SBL denied liability to penalties for failing to provide a written employment agreement, failing to provide wage records when requested, not paying holiday pay and for a breach of good faith.

[65] This determination has already concluded there was no failure in payment of holiday pay so no penalty was warranted on that ground.

[66] The compensation remedy already awarded has addressed the failings in how SBL came to dismiss Mr Armstrong. Those failures were not sufficient to warrant the award of a penalty for breach of good faith.

[67] Requests by Mr Armstrong's representative for wage records and payslips were satisfactorily responded to by SBL or its representative. There were no grounds for a penalty of that account.

[68] SBL did however fail to comply with the requirements of s 63A of the Act to provide Mr Armstrong with a copy of an intended employment agreement. SBL had, according to its own records, prepared an agreement for him but never gave it to him.

[69] SBL submitted no penalty was warranted for that failure because no loss or damage resulted for Mr Armstrong and, with his previous work experience in management and recruiting staff, he should have told SBL that he had not got an agreement from it. Both submissions entirely missed the point of the protective nature of s 63A and its clear placing of the obligation on the employer, not the worker.

[70] Mr Armstrong did suffer a loss as a result of not getting an employment agreement. This was apparent from the dispute about the nature of his employment with SBL. If the agreement had been provided to him and signed, the argument over that point would not have been necessary. The same point applied to the holiday pay question.

[71] Considering the matters identified in s 133A of the Act for determining the amount of a penalty, SBL's failure to provide Mr Armstrong with a written agreement was contrary to the object of the Act in building productive employment relationships. Supposed inadvertence or oversight in sending him other forms but not an intended

agreement was not a sufficient excuse for not complying with a fundamental and universal statutory provision designed to assist all parties to the employment relationship. The other matters listed in s 133A of the Act have already been addressed or did not apply to the circumstances of this case.

[72] An appropriate penalty for SBL's failure, to deter it and other employers from such breaches, was \$1,000. Within 28 days of the date of this determination, SBL must pay this amount to the Authority for transfer to the Crown Account.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If they are not able to do so and an Authority determination on costs is needed Mr Armstrong may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum SBL 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.

[75] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Robin Arthur
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].