IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 533
3129735

	BETWEEN	HOLLY BELL (née) MELVILLE Applicant
	AND	INKDROP LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Simon Davies-Colley, counsel for the applicant Anton Baker and Lisa Ryan for the Respondent
Investigation Meeting:	5-6 May 2022 in Tauranga and 3 August 2022 by audio-visual link
Last submissions and information received:	3 August 2022 from the Applicant 18 August, 13 September 2022 and 30 August 2023 from the Respondent
Determination:	18 September 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Holly Bell (née) Melville (Holly), a former intermediate graphic designer for Inkdrop Ltd (Inkdrop or the company) from February 2018 to February 2020, has asked the Authority to investigate the following claims:

(i) unjustified disadvantage in that she was required to work in excess of her standard hours of work in breach of s 67D of the Employment Relations Act 2000 (the Act) and without reasonable compensation for her availability;

(ii) breach of the express health and safety obligations of Holly's individual employment agreement with the company;

(iii) constructive and unjustified dismissal; and

(iv) a claim for penalties for various breaches of the Minimum Wage Act 1983 (MWA), the Holidays Act 2003 (HA) for unpaid holiday pay, the Wages Protection Act 1983, for an unlawful deduction, and a penalty under s 134 of the Act for a breach of the employment agreement in relation to portfolio rights.

[2] In its defence, Inkdrop says that Holly resigned of her own accord and that the company had a system in place whereby for every hour worked overtime, staff were paid time off in lieu (TOIL) on an as you go, one to one, or second-for-second basis. Inkdrop further says that it consistently worked hard to ensure that Holly's needs were met during her time at the company however her style of communication with management was ambiguous and rather than discussing matters directly and working towards a resolution, she "stewed on them".

How did the Authority investigate?

[3] Holly's case consisted of written witness statements from herself, her mother, Andrea Melville, and a former graphic designer at Inkdrop, Hope Dykstra. For Inkdrop, written statements were received from its sole company director, Lisa Ryan, creative lead, Lucy Lucking, and Ms Ryan's former employer and mentor, Kat Quinn. All witnesses answered questions under oath or affirmation from myself and the representatives.

[4] A two day in person investigation meeting took place in Tauranga on 5-6 May 2022 with the third day (3 August 2022) being completed by audio-visual link. Prior to the third day of meeting, I was provided with a copy of Inkdrop's meeting minutes in which Ms Ryan discussed with Holly and Ms Lucking what work the company had in progress for the week. At the end of the investigation meeting, closing written submissions were provided by the representatives.

[5] This determination has not been issued within the three-month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[6] 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.

What are the issues?

[7] The issues requiring investigation and determination are:

(a) Was Holly unjustifiably disadvantaged?

(b) Was she constructively dismissed?

(c) Is Holly owed unpaid wages?

(d) Did Holly's employment agreement with Inkdrop contain a valid availability clause under section 67D of the Act?

(e) Has Inkdrop breached the MWA, the HA, the WPA, and the Act and if so, what penalties should be imposed?

What are the relevant facts?

[8] In May 2015, Lisa Ryan, then aged 24, incorporated Inkdrop Limited, a graphic design studio operating in Tauranga. One of the first employees she ever employed was Holly, then aged 20, and a recent graduate with a Bachelor of Media Arts. In February 2017, Holly commenced working for Inkdrop as a part-time contractor. In February 2018, she was offered full-time employment as a graphic and website designer.

[9] During the contract negotiation phase of Holly's employment agreement, she emailed her father a draft response to Ms Ryan's offer of employment. In that email, Holly expressed her disappointment about the salary she had been initially offered and her concern that, without an additional payment for working overtime, her actual earnings would decrease. Holly's email further recorded that she had gone home late many times after work.

[10] However, there is no evidence that the email Holly sent to her father was ever forwarded to Ms Ryan or Inkdrop. The first time the email appears to have been seen by the respondent was after the present proceedings were lodged in the Authority.

[11] A subsequent and better offer of employment was made and accepted by Holly which required her to work 37.5 hours per week from 8.30 am to 5.00 pm Monday to

Friday. Holly had requested a 37.5-hour work week because she wished to leave work early on a Friday so that she could attend to personal matters before sunset which marked the commencement of the Sabbath, a religious day of rest. Holly's employment agreement contained the following terms and conditions:

> C. HOURS OF WORK
>
> You may be required to work such hours as are necessary for the effective discharge of your duties and in order to meet deadlines. Hours may include evenings and weekends. No additional overtime payments will be made but you will be able to take the time in lieu on a day mutually agreed by both parties.
>
> D. REMUNERATION
>
> Your salary will be $40,000 (gross) per annum.
> …
> There is no overtime rate, any hours worked in excess of your usual hours shall be paid at your usual hourly rate or taken as time in lieu on a date agreed upon by both parties. Any overtime shall be paid at the same time as Inkdrop's normal pay for the week during which the overtime was worked.

[12] During the course of Holly's employment, she regularly worked overtime in excess of her weekly work hours. Inkdrop kept a time off in lieu (TOIL) log of her overtime which records that from 2 April 2018 to 21 February 2020 (a period of 98.57 weeks) Holly worked an additional 254.21 hours over and above her usual hours of work. On average, this equates to an additional 2.57 hours of work per week or a 40.07-hour work week instead of the agreed 37.5 hours.

[13] Inkdrop is a small business of three-to-four employees. At some point in early 2018, Ms Ryan became pregnant with her first child. It is not clear when she commenced maternity leave but it is understood that her son was due in October 2018 and before she took leave, she wanted to ensure that the business had a senior designer to oversee her team in her absence.

Holly's first email raising concerns

[14] On 20 May 2018, Holly emailed Ms Ryan that on Friday 11 May 2018 she had stayed at work past sunset/Sabbath and that she was a "little upset" about it as a result. Ms Ryan responded by email (21 May 2018) and apologised for the oversight and stated that it did not cross her mind that day. Ms Ryan stated that she valued and respected how important it was for Holly not to work past sunset on a Friday and for her to "tell it to her straight" next time and to head home. Ms Ryan's email ended with a meme of an apologetic Steve Carell.

[15] In early June 2018, a former employee of Inkdrop was dismissed which reduced the Inkdrop team down to two staff members; Holly and Ms Ryan. In July 2018, Ms Ryan managed to recruit an additional staff member, Shevonne Willis, and not long after her, Ms Lucking joined the company as senior designer in late August 2018.

[16] It was necessary for Ms Ryan to employ someone who was proficient in publication because one of Inkdrop's major clients required a flier which ran for two weeks in any given month (the flier). The flier was on a standard template that required formatting but not a significant amount of creative energy. Holly had been doing the flier largely on her own since June 2018 and Ms Ryan hoped that by employing Ms Willis she would be able to assist with the flier because of her apparent background in publication. However, Ms Willis's capabilities did not match her resume and she was not able to assist Holly with the flier to the standard it required.

[17] From time to time, Inkdrop would pay for the services of an independent contractor for additional cover and to assist the company meet client deadlines. Invoices from the contractor show that she did work for Inkdrop in May–August 2018, October–November 2018, January–March, August, November 2019, and early 2020.

[18] During the 98-and-a-half weeks Holly was employed for Inkdrop, there were two occasions where her weekly wages fell below the applicable minimum wage. The first relates to the week beginning 21 May 2018 where she worked 49.18 hours for gross wages of $769.23 per week which equates to an effective hourly rate of $15.64 per hour. The minimum wage at that time was $16.50 per hour. The second occasion occurred during the week of 19 August 2019 in which Holly worked 52.65 hours for gross wages of $923.08 which equates to an actual hourly rate of $17.53. However, the relevant minimum hourly rate at the time was $17.70.

[19] As examples as how the TOIL system worked in practice, in August 2018, Holly went to Australia for one week to support her partner's sister who had cancer. Holly did not use annual leave for this time off from work which Inkdrop deducted from her TOIL balance. On 24 September 2018, Holly used some of her TOIL to attend a clinic appointment at a beauty salon during work hours.

[20] On 10 December 2018, Ms Willis resigned unexpectedly due to homesickness and returned to the United Kingdom.

Holly's second email raising concerns

[21] By email of 8 January 2019, Holly raised concerns with Ms Ryan about being declined (additional) annual leave by Ms Lucking for the period from 21 to 25 January 2019. Holly further stated that the previous year had been a hard one for her because of the sudden dismissal of the former co-worker (not Ms Willis) which came with it "tough times and extra hours". Further, with Ms Ryan now on maternity leave, Holly felt that she had "reached the end of [her] tether" which was further impacted by Ms Willis' resignation which resulted in extra work and aggravation from clients. Holly further stated that she had been running the flier for the better part of a year and that there was no one else in the office who was fully trained to do the flier which made her feel that there were very limited opportunities for her to take a holiday.

[22] On 10 January 2019, Ms Ryan invited Holly to her home situated not far from Inkdrop's design studio. The pair had a constructive conversation which resulted in Holly being granted two days leave, a promotion to intermediate graphic designer, and a salary increase to $48,000. Ms Ryan emailed Holly that she would speak to Ms Lucking to see if she had capacity to take some of the pressure off from Holly in doing the flier.

[23] The following day, Holly emailed Ms Ryan stating that it was good to see her and her son and that she was pleased that Ms Lucking could take some of the pressure off from doing the flier which Holly joked "can crush your heart and soul ha-ha." However, Ms Lucking's work commitments were such that she could not provide cover for the flier and consequently Ms Ryan returned to work early from maternity leave. When Holly returned from leave, she was primarily responsible for the flier until she resigned from Inkdrop a year later on 28 January 2020.

[24] Ms Ryan continued to take steps to recruit additional staff to assist Holly with the flier. In February 2019, she offered a prospective candidate employment at Inkdrop but the offer was not accepted and no appointment could be made. On 30 September 2019, Ms Dykstra was employed on a part-time basis. Her resume indicated she was proficient with a publication software programme but in reality she lacked the skills in

publication to be able to assist Holly with the flier. She was nevertheless employed and worked in illustration. In January 2020, Ms Dykstra joined the team full-time.

Incident at Inkdrop studio

[25] On 7 March 2019, there was an incident at Inkdrop in which Holly's partner's nephew threw an egg at the window and tried to force his way into the studio but was stopped at the door by Holly and Ms Lucking. Ms Lucking was of the mind to call the Police but at Holly's insistence refrained from doing so.

[26] Ms Ryan was at home with her son at the time of the incident which she learnt about from Holly by text. Holly wished to talk and was invited to Ms Ryan's home. Concerned for her welfare, Ms Ryan offered her husband (Mr Baker) to walk Holly back to her car. Although this was declined, Holly texted Ms Ryan to thank her for her support and that she would not let anything interfere with her work or the business that Ms Ryan had worked hard to build.

[27] Later that year in September 2019, Holly fell ill and was on sick leave for four days. During this time she texted Ms Ryan to have the work she was doing on the flier sent to her home. Ms Ryan declined to do so and texted Holly that she should rest instead.

[28] By email of 26 October 2019, Ms Ryan advised Holly, Ms Lucking, and Ms Dykstra that they were entering a busy period leading up to Christmas and that now more than ever they needed to support each other as a team. Ms Ryan suggested that each member create a daily deadline target list and "check-in" with each other if a deadline was going to be missed so as to avoid "a domino effect" from occurring. Holly responded to the suggestion by sending a meme with the words "Good Luck – You've Got This."

[29] On 5 December 2019, Ms Ryan met with Holly to discuss her accumulated TOIL. When Ms Ryan followed up with Holly about what she wanted to do with her TOIL, Holly advised by email (18 December 2019) that she wished to keep five days available for a holiday (in 2020) for her and partner and have the remaining TOIL paid out to her. Holly further stated that if Ms Ryan was worried about her TOIL "creeping up again" that they could talk about it at their monthly check-in meetings. At the end

of Holly's email, she attached a meme of Will Smith with the words "pls help" explaining to Ms Ryan that this is how she felt in the last week of the year.

[30] On 19 December 2019, Holly sent a draft email to her father that was intended to be sent to Ms Ryan and Ms Lucking. The message intended for Ms Ryan, which was forwarded to her, expressed Holly's concerns around time frames for a new project. The second half of the email that was intended for Ms Lucking does not appear to have been sent to her or to Inkdrop.

Resignation letter

[31] On 28 January 2020, Holly texted Ms Ryan if she could come to her house to see her about something. She handed over an envelope that contained her letter of resignation. In her letter, Holly stated that towards the end of 2019 she found herself re-evaluating her goals with a feeling of disappointment with her place in the company particularly not being "old enough" to lead projects with Inkdrop's larger clients and being taken off illustration projects despite having done large amounts of work on them. Moreover, Holly stated that she was still doing the flier despite several discussions and promises to have this removed from her which would give her greater ability to take time off since the flier took up two weeks of every month and was a large component to her accrued TOIL.

[32] Holly further stated that it was a huge effort on her part to manage and maintain the increased workload that was now coming through the office which left her feeling "burnt out" and without a "good work/life balance". She felt stressed about her job all the time and had dreams about having made a "massive mistake" and then remaining awake trying to figure what out what the mistake was.

[33] Holly disclosed that she had started writing her resignation letter "two months ago" and that she had no other role to go to or had any job interviews pending. She explained that her family was willing to take her into their retail and finance business but she was unsure about her future direction. Holly stated that while she considered Ms Ryan a friend, she felt too disillusioned to speak to her in person or was worried that there would not be enough time to meet and that any meeting would be pushed back as a result.

Resignation accepted

[34] Ms Ryan tried to dissuade Holly from resigning. In a text message later that same day, she said to Holly that she was sorry and that she felt that she had let her down. Ms Ryan stated that looking back, becoming a mother had taken its toll on her ability to keep a close eye on things at work. She asked if they could meet the next morning for breakfast to see if there was anything she could do to fix things. Ms Ryan stated that she would rather rework the business to make Holly feel valued and happy, and then see her go if that is what she wanted to do.

[35] The pair met for lunch the next day following which Holly texted Ms Ryan on 29 January 2019 to thank her but advised that she would stay with her original decision. Holly stated that she could see the position Ms Ryan was in but the flier was something that could not be changed for some time and she needed to do something about her work/life balance. Ms Ryan texted back the following day stating that she accepted and respected her decision. Holly had given four weeks' notice which made her last day of employment at Inkdrop 21 February 2020.

[36] Prior to Holly's departure, the company had three large projects with converging deadlines. Even with the contractor coming in one-to-two times a week and Ms Ryan working full-time over this period, the team found themselves working late on 5 February 2020 to complete a project for a large client who had an upcoming conference that was held once every two-to-three years.

[37] Ms Ryan attributes the late nighter, which happened only once during Holly's employment, to a mistake made by Ms Dykstra which required plenary screens to be re-worked to the client's specifications. Holly recalls matters differently and says that Ms Dykstra had been at the office since 7.30 am that morning and that she was heard sniffling/crying at her desk at around 8 pm. At approximately 9-9.30 pm, Ms Dykstra left work and returned home while Holly, Ms Lucking and Ms Ryan remained behind to complete the plenary screens. It is understood that Holly left work and returned home at approximately 10-10.30 pm.

[38] The following day (Waitangi Day), with the exception of Ms Ryan who continued to work to complete the conference-related work in time, Holly, Ms Dykstra and Ms Lucking, observed the public holiday and did not work that day.

[39] On 20 February 2020, Ms Ryan held an exit meeting with Holly and took notes which record that Holly was returning to work for Inkdrop as an independent contractor, that her final pay for the week of 17-21 January 2020 would be paid the following week (27 January), and that her TOIL pay-out would occur the following week because Inkdrop needed to stagger the larger payments. When Holly was asked what she liked to see change at the company, her response was "Inkdrop culture – teambuilding – social."

[40] On 21 February 2020, Ms Ryan and her team took the afternoon off to watch a film. The company covered all expenses and paid staff for their time. Holly asked for her picture to be taken outside Inkdrop's studio for her mother which was taken and which Holly posted on her personal Instagram page with the caption "'loved working with the dream team".

Post-employment

[41] Due to cashflow issues, Ms Ryan and Mr Baker injected a further $50,000 of their own funds into Inkdrop. Payment of these funds were made in two tranches of $25,000 each on 11 February and 3 March 2020. On 27 February 2020, Inkdrop paid the balance of Holly's unpaid annual leave. However, the payment was six days late.

[42] On 28 February 2020, and before Holly returned to work for Inkdrop as a contractor, she returned to the studio with a box of doughnuts for the team.

[43] On 11 March 2020, Holly signed her contractor's agreement with Inkdrop. She did two short jobs for the company that month. She later picked up some contract work from an organisation called Platform, Seed Media and for a local church.

[44] Over the weeks following Holly's resignation, Ms Ryan's infant son fell sick with a viral cold which developed into a chest infection. Ms Ryan would subsequently fall ill with a chest infection herself which delayed the payment of Holly's TOIL balance of $6,041.57. The payment was eventually made on 26 March 2020 but it was

due on 5 March and came 24 hours after Holly had raised her personal grievance against Inkdrop.

Personal grievance raised

[45] By email of 25 March 2020, Holly stated that she had put in long hours at Inkdrop but had not received the TOIL payment that was promised which left her being paid below the minimum wage. Holly further stated that she had been promised access to the portfolio of work she had done at Inkdrop but there was no indication when that would be provided which gave her no way of showing a prospective employer what she had done for the past three years. Holly referred Ms Ryan to her lawyer, Mr Davies-Colley, whose advice was for her to raise personal grievances for breaches of the MWA and health and safety obligations, failure to pay compensation for an unlawful "availability clause", constructive dismissal, and underpayment of holiday pay as all payments should have included compensation for her availability.

[46] There was correspondence exchanged between Holly's lawyer and Inkdrop's previous lawyer who advised Holly in a letter (16 June 2020) that she had been mistakenly overpaid for the week of 24-28 February 2020, resulting in an overpayment of $923.08.

[47] On 13 January 2021, Holly lodged her Statement of Problem in the Authority. Inkdrop's Statement in Reply was lodged on 10 February 2021. The parties have attempted mediation but that has not resolved the employment relationship problem.

Was Holly unjustifiably disadvantaged by having a non-compliant availability provision in her employment agreement?

[48] Holly has raised a personal grievance of unjustified disadvantage. Section 103(1)(b) of the Act is applicable to disadvantage grievances and relevantly states:

> 103 Personal grievance
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> (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—
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> …
>
> (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; or
>
> …
>
> (h) that the employee has been disadvantaged by the employee's employment agreement not being in accordance with sections 67C, 67D, 67G, or 67H; or
>
> …

[49] As an applicant, the responsibility is on Holly to not only establish that there was some unjustifiable action by Inkdrop which affected the terms and conditions of her employment, but that the action was also to her disadvantage.

[50] Section 103A(1) of the Act requires employment institutions to deal with personal grievances for unjustifiable disadvantage or unjustifiable dismissal on an objective basis by applying the test of justification at s 103A(2) which states:

> 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.

[51] It was submitted that the unjustified disadvantage here was that Holly's employment agreement was not compliant with s 67D of the Act and that she was required by her employer to work over and above her usual hours of work of 37.5 hours per week.

[52] Under s 67D(1) of the Act, an availability provision is defined as provisions under which:

> (a) the employee's performance of work is conditional on the employer making work available to the employee; and
>
> (b) the employee is required to be available to accept any work that the employer makes available.

[53] In *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*, the Employment Court was required to decide whether New Zealand Post Ltd could require its delivery agents to perform extra hours of work over and above their standard hours of employment without compensation for their availability. [1] The court found in favour of the delivery agents and held that s 67D was not limited to zero-hour contracts but that the intention was to ensure that reasonable compensation was paid to employees, who, by agreement, held themselves available for their employer's benefit.[2]

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[1] *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 47, [2019] ERNZ 78.
[2] n 1 at [24].

[54] Availability is a matter of contract and Holly's employment agreement did require her to work such hours for Inkdrop as were necessary for the effective discharge of her duties and the meeting of deadlines. I find that Holly's employment agreement with Inkdrop did require her to make herself available to accept any work the company made available.

[55] Availability provisions are permitted under s 67D(2) but only if the following requirements are met:

(a) the employment agreement specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

(b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

[56] While the meaning of 'guaranteed hours of work' in s 67D(2) has no statutory definition, the Employment Court in *Postal Workers* held there was nothing to suggest that guaranteed hours of work and "agreed hours" under s 67C could not be the same.[3] Holly's agreed hours of work were 37.5 hours per week which were to be worked between 8 am and 5 pm, Monday to Friday. I take these hours of work to be synonymous with "guaranteed hours of work" under s 67D(2)(a).

[57] However, Holly's employment agreement fails to specify the period for which she is required to be available for her employer that is in addition to her guaranteed hours of work. In other words, there is no provision in the employment agreement for s 67D(2)(b). It follows that Holly's employment agreement contained a non-compliant availability provision.

[58] This was not the only instance of non-compliance with s 67D. The employment agreement also contained no provision for the payment of reasonable compensation for an employee's availability. Under s 67D(3), an availability provision must not be included in an employment agreement unless:

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[3] n 1 at [36].

(a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and

(b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

[59] Inkdrop's lead representative Mr Baker submits that Holly was reasonably compensated for her overtime through her salary and the payment of TOIL which could be taken as paid leave at a mutually agreed date. However, Holly's employment agreement did not contain a provision which stated that her salary also covered compensation for her availability. Further, the cashing up of Holly's TOIL compensated her for her overtime work but it did not compensate her for making herself available to perform that overtime work.

[60] The fact that Holly was never required to work weekends, public holidays, be on-call, or required to return to work after having left for the day does not change matters as "availability" is distinct from the work itself. "Availability" is the opportunity cost that an employee sacrifices in order to make themselves available for their employer. This is acknowledged in the *Postal Workers* decision which reflects the statutory recognition given to an employee's time as a commodity which has a value.[4]

[61] Mr Baker submits that the *Postal Workers* decision came some 14 months after the commencement of Holly's employment with Inkdrop. However, ignorance of the law is no excuse and given the inherent power imbalance between employers and employees, the responsibility is on the employer to understand what is required of them by law. Whether she knew of her entitlement or not, Holly could not reasonably be expected to have come to Ms Ryan or Mr Baker about compensation for her availability.

[62] As a (then) busy graphic design studio, I accept that Inkdrop may have had genuine reasons under s 67D(3)(a) of the Act to include an availability provision in Holly's employment agreement. Even so, she was not awarded reasonable

[4] n 1 at [29].

compensation for making herself available to work the overtime. The company's TOIL log records that, at the time of her resignation, Holly had worked some 254 to 300 hours over and above her agreed hours of work.

Reasonable compensation

[63] Section 67D(6) of the Act sets out a range of factors relevant to the assessment of reasonable compensation for availability which include:

(a) the number of hours for which the employee is required to be available:
(b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work:
(c) the nature of any restrictions resulting from the availability provision:
(d) the rate of payment under the employment agreement for the work for which the employee is available:
(e) if the employee is remunerated by way of salary, the amount of the salary.

[64] There is no information before me as to the number of hours Holly was required to make herself available under s 67D(6)(a). For this reason the proportion calculus under s 67D(6)(b) cannot be performed. It was Holly's evidence that she was unable to plan with certainty outside activities with her partner, family, and friends (s 67D(6)(c)). The employment agreement was silent as to s 67(D)(6)(d). In relation to the last criterion at (e), Holly was paid a salary of $40,000 per year when she commenced employment at Inkdrop in February 2018. This was increased to $48,000 a year later. If she worked her agreed hours only, her effective hourly rate was $24.62.

[65] The factors at s 67(D)(6) are not closed and I take into consideration some of Holly's email communications with Ms Ryan which gave her employer the impression that she was always willing to help. Ms Ryan reasonably relied on those communications but had Holly been more transparent about the impact that working longer hours was having on her personal and social life, Ms Ryan could have been more vigilant and kept Holly to her agreed hours of work thus reducing Inkdrop's liability for reasonable compensation for her availability.

[66] For example, on 20 May 2018, Holly emailed Ms Ryan that she was a little upset about working past sunset on Friday contrary to her religious beliefs. However, in the same email, Holly stated that she was willing to stay late on Thursdays and that she was always available to help. At the investigation meeting, Holly conceded that she had broken her own rules about working past Sabbath and had stayed late that Friday.

[67] I find that there have been times during Holly's employment where she has chosen of own accord to stay behind at work longer than she was required to by her employer. It was Ms Ryan's understanding that Holly was accruing TOIL so that she could take a holiday to South Africa with her partner in 2019. For reasons that remain unknown, Holly chose not to take that holiday.

[68] While I was invited to adopt the standard measure of "time-and-a-half" as a basis for reasonable compensation for Holly, Inkdrop has already paid Holly $6,041.58 for her TOIL. A further 50 percent payment equates to $3,020.79 for Holly's availability. However, a significant reduction is required to take into account her own contribution to working overtime and the real chance that Inkdrop may have adopted other measures to reduce its liability had Holly been more candid in her email communications with Ms Ryan about being willing to work late when she was not.

[69] I find that $1,000 more accurately reflects the lost benefit to Holly in not having an availability provision that complied with the Act.

[70] An unjustified disadvantage includes having an employment agreement that is not in accordance with s 67D (see 103(1)(h)). However, there must also be a disadvantage. In *Lye v Iso Limited* the Authority observed that little more than a degree of negative impact may be required.[5] I agree. However, the impact for Holly is not nearly at the same level as Mr Lye in *Iso* whose commitments as a father to a seven-year-old son were significantly compromised.

[71] Holly was disadvantaged by having an employment agreement that was not in accordance with s 67D of the Act. The impact affected her personal relationship with her partner. The grievance is established and Holly is entitled to remedies.

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[5] *Lye v Iso Limited* [2022] NZERA 258 at [41].

[72] The Authority has the power under cl 11 of the Second Schedule to the Act to award interest if it thinks fit to do so. This is an appropriate case for the award of interest as Holly has been deprived of reasonable compensation for her availability since her employment ended on 21 February 2020. Inkdrop is ordered to pay interest on $1,000 from 21 February 2020 until the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.[6]

Remedies

[73] Holly seeks compensation under s 123(1)(c)(i) of the Act for her personal grievance in having an employment agreement that was not in accordance with s 67D. Although Holly has been awarded reasonable compensation for her availability, compensation under s 123(1)(c)(i) is for the effects the grievance has had on the employee. Awarding compensation for humiliation, loss of dignity and injury to feelings is not intended to be a penalty imposed on the employer to indicate the Authority's disapproval of their conduct.

[74] The evidence before me does not establish that compensation for humiliation is warranted. However, the lack of a compliant availability provision in Holly's employment agreement and reasonable compensation for her availability does give rise to compensation for loss of dignity and injury to feelings. A compliant availability provision would have provided Holly the opportunity to plan with greater certainty her outside work events with her partner, family and friends.

[75] Holly's evidence was that there were periods during her two years of employment at Inkdrop (from 25 February 2018 to 21 February 2020) where she worked a significant amount of overtime in excess of her standard 37.5 hours per week. In particular, May 2018 was a busy period where, for the week ending 14 May 2018, her effective hourly rate was 50 cents over the minimum wage. The following week, the week ending 21 May 2018, her wages fell below the minimum wage for the first time. A further "crazy period" was in August and September of 2019 where, for the week ending 25 August 2019, she worked 15 hours' overtime which pushed her wages under the minimum wage for the second (and final) time. Leading up to the Christmas in 2019, Holly sent Ms Ryan a meme to show her how stressed she had been.

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[6] www.justice.govt.nz/fines/civil-debt-interest-calculator.

[76] I accept that Inkdrop's work came in "waves" in that there were peaks and troughs. This is to be expected of the design industry which is deadline driven. However, having had the benefit of hearing from Ms Ryan, I am not persuaded that she operated on the basis that the 'client's work always came first' or that staff had to simply 'push through' as was contended by Holly and her support witnesses.

[77] There were strategies which Ms Ryan put in place to mitigate the impact of stress on staff which included compensating staff for overtime through the use of TOIL; work in progress meetings that were held weekly on a Monday morning to manage the workflow and to address any workplace concerns; Inkdrop using a contractor to provide cover during busy periods; Ms Ryan returning early from maternity leave to assist her staff; Ms Ryan's genuine efforts to recruit suitable staff; and the use of a software programme (Workflow max) to manage client projects and deadlines which included staff being able to renegotiate deadlines with clients and manage their expectations.

[78] There were busy periods of work for Inkdrop which required staff to work such hours as were necessary for deadlines to be met. Even so, Inkdrop's work records for Holly show that the busy waves of work such as the conference project described above was the exception and not the norm. Inkdrop's work records for Holly show that for the two years she worked for the company, she was never at work before 7 am and that she had started work before 7.40 am on 10 occasions out of 425 (two percent). In addition, Holly's average hours of work were 40.07 per week and 76 percent of the time she finished work for the day on or before 5.15 pm, or 80 percent of occasions by or before 5.30 pm.

[79] I have had regard to the Employment Court's five-step process in *Richora Group Ltd v Cheng* concerning the assessment of compensation for humiliation, loss of dignity, and injury to feelings.[7] Awarding compensation under s 123(1)(c)(i) of the Act is hardly an exact science and to some extent the award of $1,000 in availability compensation does make up for not having a valid availability provision. Even so, Holly has suffered in other ways which compensation for availability does not address such as the impact on her relationship with her partner, family and friends. However, the degree of impact is considerably of less intensity than in *Lye* and my compensation

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

award reflects this. On balance and comparing this loss and harm to other cases of unjustified disadvantage, I quantify Holly's loss and harm at $5,000.

Contribution

[80] Section 124 of the Act requires me to consider the extent to which Holly has contributed to her own grievance. I find that she has. Holly's emails could have been clearer and put Ms Ryan on notice that working in excess of her usual hours was impacting her personal and social life. Holly has the ability to speak plainly and to be heard which manifested during the incident with her partner's nephew. In addition, it was Ms Ryan's evidence at the investigation meeting that Holly would at times say "no" to work. Ms Ryan was able to pick up on this because Holly's communication left no room for ambiguity. If all of Holly's communications were this matter of fact, the employment relationship may not have ended.

[81] I find that the Inkdrop team were close knit and that Holly's willingness to help was consistent with her being a team player. She is a talent and Inkdrop struggled to find someone of her calibre and energy. However, her emails were not always clear. The Will Smith meme she emailed to Ms Ryan on 18 December 2019 with the words "pls help" was written at a time when Holly, by her own admission, had already commenced drafting her resignation letter but there was no hint in her 18 December 2019 email that she was thinking of resigning. Rather, the email implied that all was well and that she was coming back to work after the Christmas/New Year holidays.

[82] It is not necessary to repeat other emails from Holly which send mix messages to her employer. I find that Holly contributed to her own grievance and that a significant reduction of 35 percent is warranted. Inkdrop Limited is to pay Holly Bell $3,250 in compensation for loss of dignity and injury to feelings within 28 days from the date of this determination.

Did Inkdrop breach the express health and safety obligations in Holly's employment agreement?

[83] The health and safety obligations are set out in clause 21 of Holly's individual employment agreement and this required Inkdrop to take all practical steps to provide her with a safe and healthy work environment. I am satisfied that Inkdrop did not breach the health and safety obligations in the employment agreement.

[84] First, the company kept a TOIL log of Holly's overtime hours which was monitored. Holly was not left to work on her devices. Although she had accumulated some 254-300 hours of overtime, Ms Ryan was under the reasonable impression that she was accumulating overtime in order to have a holiday with her partner in South Africa in 2019. When Holly did not take that holiday, Ms Ryan met with her in December 2019 to discuss what she wanted to do with her accumulated TOIL. It was decided that she would keep five days of TOIL for a future holiday and the balance to be paid out to her by Inkdrop. However, before that plan could be implemented, she resigned.

[85] Second, as an employee, Holly had a part to play in maintaining a safe and healthy work environment as well. This countervailing obligation is reflected in cl 21 of her employment agreement which required her to, among other things, notify the company if she became aware of any unsafe practice or situation in the workplace which she did not expressly do.

[86] Third, for the clear majority of her employment at Inkdrop, Holly started work at 8.30 am and finished work by 5.30 pm each day. While I acknowledge that she did work long hours of overtime during busy 'waves' of work for Inkdrop, those periods were outliers and not reflective of her employment overall.

[87] Fourth, during the investigation meeting, I asked Holly that while Inkdrop's efforts to recruit someone like her had not been successful, could she say that her employer had been unreasonable. Holly's response was that the company never intentionally created an environment where she felt stressed.

[88] For the above reasons, I find that Inkdrop has not breached the express health and safety obligations stipulated in its employment agreement with Holly.

Was Holly unjustifiably disadvantaged by being required to work overtime?

[89] I find this to be a variation of the availability argument made on Holly's behalf. It would neither be just nor equitable to allow an employee to obtain "double recovery" by raising different claims in relation to the same fact scenario. Having granted Holly reasonable compensation for her availability and compensation for loss of dignity and

injury to feelings for the impact of not having a compliant availability provision, I need not consider this alternative cause of action which relies on the same facts.

Was Holly unjustifiably and constructively dismissed?

[90] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation? Second, if there was such as breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, was there a substantial risk of resignation?[8]

[91] In the seminal Court of Appeal decision of *Auckland Shop Employees Union v Woolworths (NZ) Limited*, constructive dismissal cases included situations where:[9]

(a) an employer gives an employee a choice of resigning or being dismissed;

(b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(c) a breach of duty by an employer leads an employee to resign.

[92] Holly relies on the third category relating to a breach of duty by Inkdrop which caused her to resign. I was referred to the Authority's decision in *Carpenter v Mondiale Freight Services* the facts of which are considerably more extreme than the present case.

[93] In *Mondiale*, Ms Carpenter worked as an Operations Manager and she raised a personal grievance against her employer of constructive dismissal, breach of express and implied terms in her employment agreement and unjustified disadvantage. Ms Carpenter's employment agreement required her to work a 40-hour week from 8.30 am to 5.30 pm Monday to Friday. However, she soon found herself working 55-65 hours per week and one weekend day without compensation for the additional hours. There was documented medical evidence of Ms Carpenter's depression and stress of which she had made her manager aware. The Authority found that through Ms Carpenter's communications, she had taken *unequivocal steps to make [her] concerns or stressors*

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[8] *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 at 172.
[9] *Auckland, etc, Shop Employee, etc, IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

or medical conditions known to her employer.[10] The Authority concluded that the risk of harm to Ms Carpenter from working long hours was reasonably foreseeable.

[94] While it is not in dispute that Holly worked overtime, her overtime hours pale in comparison to Ms Carpenter's. On average Holly worked 40.07 hours per week during her two years of employment at Inkdrop and she worked overtime on the understanding that she would be compensated through the company's TOIL system on a "one-to-one" basis. The threshold for constructive dismissal is high. As stated above, I have expressed my concerns with some of Holly's emails to Ms Ryan which contained mixed messages. For example, on Sunday 20 May 2018, she expressed a concern about working past Friday sunset/Sabbath. However, in the same email, Holly says that she was "happy to stay late on Thursdays" and that she is "always available to help".

[95] Where Holly was most explicit regarding the impact of her workload was her email of 8 January 2019 to Ms Ryan in which she expressed her disappointment that Ms Lucking had declined her request for leave and that without Ms Ryan in the office, Holly felt that she had reached the end of her tether and that the previous year had left her "absolutely tired to the bone with very high stress levels." Holly further stated that her biggest fear was making some kind of mistake and that she had been running the flier on her own for the better part of the year.

[96] Unlike the employer in the *Mondiale* case who effectively left Ms Carpenter to work whatever hours were required to meet the respondent's business demands, Ms Ryan did monitor Holly's accumulated TOIL. She also responded promptly to her concerns by granting Holly two of the five days of leave she requested and Ms Ryan agreed to return to work early from maternity leave so as to assist Ms Lucking in the office while Holly was away.

[97] I find that Inkdrop resolved Holly's concerns around her declined leave request fairly and reasonably. This is evident from the fact that there were no follow-up concerns raised by Holly after Ms Ryan's intervention. In fact there were no further emails from Holly advising concerns for the next 11 months. On 19 December 2019, she emailed Ms Ryan expressing concerns about timeframes on a new project which

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[10] *Carpenter v Mondiale Freight Services* [2012] NZERA Christchurch 20 at [56].

Ms Lucking resolved. The email does however show the equivocal nature of Holly's style of communication because she says "just checkin in – really don't like making mistakes lol." The use of "lol" leaves the reader in two minds as to the gravity of the concern (if any).

[98] Following Holly and Ms Ryan's discussion and agreement in mid-December 2019 about what was to be done about her accumulated TOIL, the next written communication Inkdrop received from Holly was her letter of resignation of 29 January 2020. While I accept that working long hours of overtime could be a sufficient reason for an employee to have no other choice but to resign, on average Holly worked 40.07 hours per week which is the equivalent of an additional 2.57 hours per week over and above her usual work hours. When spread over the course of a working week, Holly would have worked an additional half hour per day. I am mindful that averaging has the effect of flattening the busy periods where Holly worked several hours of overtime per week. Even so, without more, and there was really only one email advising concerns in 2019, cumulatively considered, Inkdrop could not have reasonably foreseen that requiring Holly to work the overtime hours she did, would result in her having no other choice but to resign.

[99] The claim of constructive unjustified dismissal is not made out.

Has the respondent breached the MWA, the HA, and the WPA, and if so, what penalties should be imposed?

[100] Of the three statutory breaches, it is the breach of the MWA which has traction. The breaches of the HA and WPA are related in that s 27 of the HA required Inkdrop to pay Holly eight percent holiday pay on her TOIL payment of $6,041.57 which amounted to $483.30. Inkdrop's position is that a payroll error resulted in Holly being inadvertently overpaid one week's wages worth $923.08.

[101] Based on the payslip information provided, I prefer Inkdrop's evidence and find that what is owed by way of holiday pay should be set off against what is owed to the company in overpaid wages. As I understand that Inkdrop is not pursuing Holly for the remaining balance of the overpayment ($439.78), I take the matter no further.

[102] As for the MWA breach, Inkdrop submits that there was no breach because of its TOIL payment to Holly. It was also submitted that Holly's remuneration was in the form of an annualised salary and according to cl 7 of her employment agreement was to be calculated on a monthly basis. However, the clause also stated that Holly was to be paid "on the Thursday of each week" and the reality was that she was paid once a week not once a month. Moreover, Inkdrop's argument that Holly's salary should be averaged across an agreed period is a submission that has previously been rejected by the Court of Appeal in *Idea Services v Dickson*.[11]

[103] Briefly stated s 6 of the MWA prescribes that every worker receive from their employer no less than the applicable minimum wage. As to the timing of that payment, that is a matter for agreement between the parties and in the present case Holly's wages were paid in advance of the week worked and on a weekly basis. In light of that arrangement, Inkdrop needed to ensure that Holly's weekly wages were above the minimum wage rate for the hours worked in any given week. However, there were two occasions where her wages fell below the minimum wage; the week ending 21 May 2018 and the week ending 19 August 2019. I find that there has been a breach of the MWA for which a penalty is warranted.

[104] The Authority derives its jurisdiction to award a penalty for a breach of this nature under s 10 of the MWA. Penalties are discretionary but s 133A sets out in a non-exhaustive way several mandatory factors that employment institutions must consider in determining the amount of penalty to impose. In considering whether a penalty is warranted and, if so, at what level, I have taken into consideration the mandatory factors set out in s 133A of the Act and the Employment Court's decisions in *Nicholson v Ford*[12], *A Labour Inspector v Daleson Investment Ltd*[13] and *Borsboom v Preet Pvt Ltd*.[14]

[105] In *Borsboom*, the full bench of the Employment Court stated that the objective behind the award of penalties were to:[15]

(a) punish those who breach statutory obligations;

(b) deter deliberate breaches;

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[11] *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.
[12] *Nicholson v Ford* [2018] NZEmpC 132.
[13] *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.
[14] *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.
[15] Above at [61] to [63].

(c) compensate the victim of the breach;

(d) eliminate unfair competition and business.

The court also applied a four-step process to the assessment of penalties which I have adopted and applied below.

Step one – nature and number of breaches

[106] The maximum penalty for a company or corporation is a penalty not exceeding $20,000.[16]While there is evidence of two separate breaches of the MWA, these are essentially the same and can be globalised into one. The maximum penalty Inkdrop faces is $20,000.

Step 2 – assessment of the severity of the breach in each case to establish provisional penalties starting point and consider both aggravating and mitigating factors

[107] The first breach occurred within the first three months of Holly's employment and during one of the busy periods for Inkdrop which saw her actual hourly rate fall 86 cents below the then minimum hourly wage of $16.50. The second breach occurred some 15 months later and on that occasion Holly's hourly rate fell 23 cents below the then minimum wage of $17.70 per hour. While it was advanced that the breaches continued over a significant period of time and cannot be regarded as an isolated aberration, the effluxion of time between the breaches suggest otherwise. In any case, the company needed to ensure that Holly received at least the minimum rate for every hour of every week she worked which it did not do on two separate occasions.

[108] The MWA exists to provide minimum essential terms and conditions of employment and to avoid the exploitation of employees with little or no bargaining power. Inkdrop's failure to pay Holly the minimum wage has adversely affected her overall enjoyment of her job and left her feeling that she was not valued.

[109] In mitigation, I take into account that Inkdrop has no prior history with the Authority and that the company's actions appear negligent rather than intentional. More importantly, it did eventually pay Holly for all of her overtime albeit three weeks

[16] The Act, s 135(2)(b).

late. I consider a reduction of 75 per cent to be appropriate. The adjusted total for the penalty so far amounts to $5,000.

Step three – means and ability to pay the provisional penalty

[110] On 30 August 2023, Mr Baker emailed the Authority and advised that due to the worsening economic environment, the company, similar to many design agencies and businesses across New Zealand, experienced a severe downturn this year. Mr Baker anticipates the situation to only deteriorate over the next 12 months.

[111] Inkdrop is a small business. At the time of Holly's employment it employed a team of only four people. The COVID-19 pandemic has had an impact on the business and it is noted that Ms Ryan and her husband invested a further $50,000 of their own personal funds into the business because of cashflow issues that delayed the payment of Holly's annual leave and TOIL. The business operates in Tauranga a city which will have its own localised cost of living challenges.

[112] I am prepared to make a modest discount of a further two percent in light of the respondent's ability to pay. The adjusted total for the penalty is decreased to $4,600.

Step four – proportionality of outcome

[113] The penalties imposed should be in proportion to the amounts of money unlawfully withheld.[17] The shortfall for the two wage payments in question amount to $51.06 gross which was included in Inkdrop's TOIL payment of $6,041.57 to Holly.

End point

[114] Standing back in assessing the proportionality of the outcome for Inkdrop, I conclude an appropriate figure for a penalty under the MWA to be $1,000 in all the circumstances.

[115] The penalty of $1,000 is to be paid by Inkdrop. Pursuant to s 136(1) of the Act, the penalty of $1,000 is to be paid by Inkdrop directly to Holly Bell within 28 days of the date of this determination.

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[17] n 14 at [190].

Did Inkdrop breach Holly's employment agreement in relation to portfolio display rights?

[116] As part of Holly's exit from the business, Ms Ryan agreed to provide her with a written reference and that she would also seek permission from Inkdrop's clients for Holly to be able to include in her portfolio of works some of the projects that she had been involved in. A written reference was provided but after Holly had raised her personal grievance, Ms Ryan changed her mind about providing her with access to any of Inkdrop's intellectual property. Ms Ryan also resiled from the written reference that she had provided.

[117] Holly has not asked Inkdrop to create a portfolio of works for her which she acknowledges is her responsibility. However, what she seeks is that which Ms Ryan initially promised to provide her, samples of the graphic design work that Holly had worked on during her time at Inkdrop.

[118] Clause 31 of Holly's employment agreement deals with confidentiality, copyright and intellectual property. Briefly stated, the clause states that any matter or thing conceived or developed by Holly during the period of her employment was the absolute property of the company and would always be its sole property. The provision applies even after the employment relationship is no more. Clause 32 deals with portfolio display rights and moral rights. It allowed Holly to display graphic design work completed while employed by Inkdrop in her own portfolio however the work needed the necessary attribution to Inkdrop.

[119] Inkdrop's actions must be considered through the prism of s 103A of the Act; the test of justification. The statutory test of s 103A of the Act is well understood and employment institutions cannot substitute their own view for that of an employer. Put differently, I am required to assess Inkdrop's actions on an objective basis and so long as what it did (and how it did it) falls within the range of outcomes of what a fair and reasonable employer could have done in all the circumstances, the outcome will be justified.

[120] Ms Ryan's explanation for not providing Holly with access to Inkdrop's intellectual property was that she had lost her faith and confidence in her after she had

raised her personal grievance which included the allegation that Holly had been constructively dismissed. I accept that this claim came out of the blue for Ms Ryan whose thoughts turned to protecting her business and the interests of her clients to whom she owed a duty to protect their privacy and confidentiality.

[121] Acting on the legal advice of her former lawyer, the decision was made to revoke Holly's rights to Inkdrop's intellectual property. Having sought legal advice, Ms Ryan's decision to walk back on her earlier promise was not arbitrary but informed. Looking at matters objectively, the decision not to provide Holly with samples of the graphic design work she had been involved in was a decision that falls within the range of what a fair and reasonable employer could have done in all the circumstances.

[122] However, the same cannot be said about Ms Ryan's decision to retract her character reference for Holly. Work references are a matter of discretion for an employer and Holly's employment agreement carved out no such entitlement for her. However, Ms Ryan elected to provide a reference which she did. The reference remains Inkdrop's property as it cannot be used incorrectly. Having provided Holly with her reference, Ms Ryan's decision to retract it, again a matter for her, is an action that must be exercised fairly and reasonably. Here, I find that a fair and reasonable employer could have provided Holly with a limited work reference rather than none at all particularly as Ms Ryan had created the firm expectation that one would be provided.

[123] Rather than impose a penalty under s 134 of the Act (because penalties are by their very nature punitive), I find that Holly was unjustifiably disadvantaged and that this has caused her loss of dignity and injury to her feelings.

[124] On the spectrum of harm suffered and compensation awarded, I consider an award of $3,750 for loss of dignity and injury to feelings to be warranted in the circumstances. I make no deduction for contribution. Inkdrop Limited is to pay $3,750 in compensation to Holly Bell within 28 days of the date of this determination.

Reasonable expenses

[125] Inkdrop Limited is to reimburse Holly Bell $71.56 being the filing fee she incurred to lodge her Statement of Problem with the Authority.

Summary of Orders

[126] The Authority makes the following orders. Inkdrop Limited is ordered to pay the following amounts to Holly Bell within 28 days of the date of this determination:

(i) $1,000 in availability compensation under s 67D(6) of the Act;
(ii) interest on $1,000 from 21 February 2020 to the date of payment using the civil debt interest calculator;
(iii) compensation under s 123(1)(c)(i) of the Act for loss of dignity and injury to feelings in the total amount of $7,000;
(iv) a penalty of $1,000 which is to be paid in its entirety to Ms Bell; and
(v) the filing fee of $71.56.

Costs

[127] Costs are reserved.

[128] If they are not able to do so and an Authority determination on costs is needed Ms Bell may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Inkdrop 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.

[129] 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. For more information as to how costs are awarded in the Authority the parties are referred to its revised and consolidated Practice Note, effective 25 August 2023.[18]

Peter Fuiava
Member of the Employment Relations Authority

[18] https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf