



New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2016](#) >> [2016] NZERA 727

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Brady v Jones (Christchurch) [2016] NZERA 727 (22 February 2016)

Last Updated: 17 December 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH		
		[2016] NZERA Christchurch 15 5580588
	BETWEEN	ALEXANDRA BLISS BRADY Applicant
	A N D	SHARON JONES Respondent
Member of Authority:	Helen Doyle	
Representatives:	Suzanne Evans, Advocate for Applicant Fiona McMillan, Counsel for Respondent	
Investigation Meeting:	28 January 2016 at Christchurch	
Submissions Received:	1 and 5 February 2016 for Applicant 3 February 2016 for Respondent	
Date of Determination:	22 February 2016	
DETERMINATION OF THE AUTHORITY		

A Alexandra Brady was unjustifiably dismissed.

B. Sharon Jones is ordered to pay to Alexandra Brady:

(a) Compensation in the sum of \$2125 without deduction under [s 123 \(1\)\(c\)\(i\) of the Employment Relations Act 2000](#).

(b) Holiday pay in the sum of \$134.64 gross and interest from 3 September 2015 on the outstanding amounts of holiday pay until payment at the rate 5% per annum.

C. The claims for abuse and harassment and tea/rest breaks are dismissed.

D. Costs are reserved and failing agreement a timetable is set for an exchange of submissions.

Employment relationship problem

[1] Alexandra Brady was employed by Sharon Jones from in or about November 2014 until 18 August 2015 as a shop assistant in a store selling equestrian products. Ms Brady's hours and days of work gradually increased until in or about January 2015 she was undertaking full-time work for forty hours per week Monday to Friday. An employment agreement dated 7 January 2015 was provided to Ms Brady and it was signed by both parties.

[2] Ms Jones is the sole director of Canterbury Equestrian Limited which operates the store. Ms Jones entered into the written employment agreement with Ms Brady in her personal capacity and the proceedings have therefore been brought against her by Ms Brady. If there are awards made against Ms Jones she can no doubt look to the company for payment of them.

[3] The employment agreement entered into between Ms Brady and Ms Jones is headed *Casual Individual Employment Agreement*. It is acknowledged in submissions from Ms McMillan that Ms Brady became a permanent employee from in or about January 2015 when her employment had become full time and regular.

[4] Ms Brady says that she was unjustifiably dismissed from her employment after she gave 3 and a half weeks' notice of her resignation but was then required to leave her employment immediately and was not permitted to work out her notice.

[5] Ms McMillan who was instructed shortly before the Authority investigation meeting indicated at the outset of the investigation meeting that payment for a sick day on 17 August 2015 would be made by Ms Jones.

[6] Ms Brady subsequently provided a medical certificate dated 18 August 2015 to Ms Jones but Ms Jones did not accept that Ms Brady was sick on 17 August and accordingly no payment was made. Ms McMillan advised that payment for that day would be made by Ms Jones together with interest on the sum until payment although there is still some concern about the validity of the sick day.

[7] There was an issue as to whether the full amount of holiday pay has been paid to Ms Brady. At the conclusion of the investigation meeting Ms Evans and Ms McMillan agreed to discuss that matter further. It is clear from submissions the holiday pay issue remains unresolved and will need to be determined by the Authority.

[8] Ms Brady says that she was unable to take two 10 minute tea breaks each day and that she was provided with and/or was party to a casual employment agreement when a permanent employee. There is a further claim in relation to the manner in which holiday pay was paid to her under that employment agreement and the way Ms Brady says she was treated during the few months before she resigned. Ms Evans confirmed that there was no claim that Ms Brady was unjustifiably constructively dismissed.

[9] Ms Brady seeks compensation for the unjustified dismissal and for working through tea breaks. She also seeks 60 hours wages in lieu of notice and reimbursement of holiday pay.

[10] Ms Jones in her statement in reply did not accept that Ms Brady was unjustifiably dismissed and further that the parties entered into an agreement that any issues between them would be resolved by payment of holiday pay and two weeks' notice.

The issues

[11] The issues for the Authority to determine in this matter are as follows:

- (a) Was Ms Brady dismissed from her employment on 18 August 2015?
- (b) If Ms Brady was dismissed then was the dismissal unjustified?
- (c) If the dismissal was unjustified then what remedies is Ms Evans entitled to and is there an issue of contribution?
- (d) Are the allegations of abuse and harassment made out?
- (e) Is there an outstanding amount owing for holiday pay?
- (f) Should interest be awarded on any outstanding holiday pay amounts?

(g) Were there breaches of Ms Brady's employment agreement and/or the [Employment Relations Act 2000](#) (the Act) about the rest breaks and the nature of the employment agreement?

(e) Should compensation or a penalty be awarded if there were breaches?

Background against which these issues are to be considered

[12] Ms Brady said that she enjoyed working at the Canterbury Equestrian store until about June 2015 when she

said that she started being talked to differently, that there was an increase in stress and Ms Jones would approach her about *a lot of little things*. Ms Brady put the change down to Ms Jones being stressed about a work related trip to Europe in August. Ms Jones denied that was the reason and said that she annually undertook the trips. Further she denied any abuse of Ms Brady and said in her written statement attached to the statement in reply that it was an *utter lie*. She said that there had been some issues but considered that they had been deal with fairly.

[13] Ms Brady said that she did not receive a tea break morning or afternoon for the full time that she worked. She said that she would joke with the another employee at the store, Emma, who was Ms Jones' daughter, when asked by Ms Jones why they were taking time out that they were taking a tea break.

[14] On 17 August 2015 Ms Brady said she had a migraine and advised Ms Jones she would not be at work that day. During the day Ms Brady snapchatted a picture of her horse and sent this to people, including Ms Jones' daughter. Ms Jones' daughter Emma showed Ms Jones the snapchat and Ms Jones sent a text to Ms Brady that day at 1.30pm asking how her migraine was. Ms Brady responded by saying it was getting better, she thought she had let herself get too dehydrated over the weekend and Ms Jones responded with *thought you must be as snapchatting on line*.

[15] The following day Ms Brady returned to work. She had car issues and was late arriving at work. Ms Brady said in her evidence that she had anticipated, in light of previous difficulties, having a difficult conversation with Ms Jones about the sick day and had written a letter of resignation the previous day which she went to get out of her bag. She said that Ms Jones spoke to her about the previous day in a tone that made her cry and she went to get the resignation letter from her handbag. The letter of resignation provided as follows:

To whom it may concern.

Please accept my formal resignation on the 18.08.2015 as a Sales Assistant from Canterbury Equestrian Christchurch branch. My last day will be the 12th of September 2015. Thank you so much for the opportunities you have given me to travel and learn about all equestrian related products. I am still more than happy to work in the store while you are away in Europe and take care of everything. I will also return all work related clothing clean.

Kind regards Lexi Brady

[16] Ms Brady said that when she handed the letter of resignation to Ms Jones, Ms Jones said *thanks for nothing*, and that she could leave now and would be paid out. Ms Brady said that she went to get her bag in the office and Ms Jones followed her and expressed her displeasure about the situation and asked what Ms Brady was going to do. Ms Brady said that Ms Jones said that she was worried about Ms Brady before she hired her and referred to her as a *failure who gives up on everything she does*.

[17] Ms Brady said that she advised Ms Jones that she was more than happy to work out the time in the shop while Ms Jones was in Europe, but that Ms Jones said she could not trust her and that she had let her down badly. Ms Brady said there was a comment made that she was *unemployable* and that she was unreliable.

[18] Ms Jones said that she went to talk to Ms Brady about the previous day's leave taken as a sick day. She said that Ms Brady became quite defensive, yelled and she then went to the office to get the resignation letter.

[19] Ms Jones said she asked Ms Brady if the resignation was anything to do with Ms Brady's mother and then advised that she would get someone else to fill in so Ms Brady could leave then. Ms Jones said she did not feel comfortable or confident about Ms Brady's attitude and had lost confidence she would do a good job when Ms Jones was in Europe.

[20] Ms Brady as I understand it was to be effectively in charge of the shop when Ms Jones left although there would be another person to work with her. Ms Brady said in her evidence that she felt somewhat apprehensive about that responsibility. Ms Jones did not accept that she called Ms Brady *a failure who gives up on everything*. She agreed that Ms Brady did say she was happy to work until Ms Jones

got back from Europe. Ms Jones said that she had made up her mind she could no longer trust Ms Brady to run the shop. Ms Jones said she did not recall Ms Brady crying. She agreed that she did ask Ms Brady what she was going to do, but could not recall what Ms Brady responded to that question.

[21] After 18 August 2015 some communication took place between Ms Evans' firm, Loxley Cole Advocacy Services and Ms Jones which very nearly resolved the issues the parties had which is always preferable with employment

relationship issues.

[22] The first letter sent by Ms Evans to Ms Jones was dated 26 August 2015 and was sent by email. It advised that Ms Brady would be lodging a claim with the Authority if she did not receive \$3,659.79 net in full by 5pm 31 August 2015. The amount claimed was made up of the notice period specified by Ms Brady in her resignation letter which was 3.5 weeks at \$16.50 per hour for 40 hours per week, payment for the sick leave taken on 17 August 2015 and holiday pay.

[23] Ms Jones responded to that letter on 26 August 2015 by email advising that she was in Europe at that time. She questioned the validity of the sick day and explained that she had organised for other staff to come in that day at extra expense to spend time with Ms Brady before her departure on 19 August for Europe and this had placed her in a distressing and stressful position. She pointed out provisions of the employment agreement that stated the notice requirement was 2 days and said that she would be paying two weeks' paid notice together with holiday pay once she was back in New Zealand.

[24] A medical certificate had been obtained on 18 August 2015 and was provided to Ms Jones as part of the exchange at this time.

[25] On 29 August 2015 Ms Evans provided Ms Jones with confirmation that Ms Brady had returned 12 items to the Canterbury Equestrian shop which was a requirement of Ms Jones. Provided with this letter was an agreement that, according to the letter from Ms Evans to which it was attached, was requested by Ms Jones.

[26] The agreement provided that Ms Brady agreed to a payment of 2 weeks wages less \$80 for a saddle blanket, 1 days sick leave and a payment of \$1000 holiday pay being a part payment owed on the condition that the payments were made before 5pm on 31 August 2015. The balance of the holiday pay was to be paid when Ms Jones

returned from Europe by 5pm 18 September 2015. Ms Brady signed the agreement although it was never signed by Ms Jones because she was overseas.

[27] On 2 September 2015 Ms Evans wrote to Ms Jones and advised that as Ms Brady had not received payment of two weeks wages, one day's sick pay and outstanding holiday pay, the matter would proceed further. There was a further claim for \$20,000 for unjustified dismissal and breach of contract.

[28] On 3 September Ms Jones sent an email to Ms Evans advising that her internet access had been limited but she had just arrived in Italy. Payments were made for

\$1000 part holiday pay on 3 September 2015 and for two weeks wages less the saddle cloth on 4 September.

[29] A statement of problem was then lodged with the Authority on 10 September 2015 with additional claims regarding unjustified dismissal and tea breaks.

[30] The matter therefore remained unresolved with the claims increased to include a personal grievance alleging unjustified dismissal from the events of 18 August 2015, allegations of abuse and harassment and the issue about the tea breaks in addition to the issue to payment of the one day's sick leave and holiday pay.

Was Ms Brady dismissed from her employment on 18 August 2015?

[31] Ms McMillan submits that there was no dismissal and that Ms Brady's employment simply came to an end by way of resignation.

[32] The employment agreement provides for a notice period in clause 6.

6. Termination and suspension: The minimum period of notice for termination by either party shall be 2 working days notice. The Employer may give pay in lieu of all or part of the notice period. If the agreed period of work is 2 working days or less, the agreement may not be terminated early except by the Employer where there are grounds for immediate termination, such as serious misconduct....

[33] On 18 August Ms Brady provided Ms Jones with a letter of resignation providing that she would be resigning as sales assistant and her last day would be 12 September 2015. The content of the letter read as a whole supports that the period of notice of 3.5 weeks was to coincide with what Ms Brady believed was the date Ms Jones was returning from Europe. Although the notice period was three days short of Ms Jones' return from Europe Ms Brady said that she was willing to work for

that period and it was simply that she was unsure of Ms Jones' exact return date when she wrote her resignation letter. I accept that evidence as more likely than not when the resignation letter and evidence of discussions at the time the letter was provided are considered.

[34] There is a dispute as to what was said on 18 August but it is clear Ms Jones had reached a view that Ms Brady could not be trusted to work for the period of her notice and should leave the store more or less immediately.

[35] Ms Brady was entitled to give more than 2 working days' notice in accordance with her employment agreement. In *Auckland etc Shop Employees etc IUOW v Bos Upholstery Ltd*¹ the employee had given more notice than the *not less than seven days* in the award. The Court was of the view in that case that what occurred was a dismissal as the worker was entitled to resign on the chosen date and to give notice longer than seven days but the employer had unilaterally imposed an earlier finish date.

[36] Ms Jones concluded, she said in her oral evidence, that she could no longer trust Ms Brady to be at the store without her being present because of issues about the previous day's sick leave. She asked Ms Brady to go that day and said that she would be paid out.

[37] Ms McMillan placed some reliance on Ms Brady being offered by Ms Jones and accepting two weeks' payment in lieu of notice which Ms Jones paid on 4 September 2015. Ms Brady did agree after she had been sent away from her employment to a payment of two weeks in lieu of notice on 27 August conditional on payments being made by a certain time.

[38] It is clear from a text message though sent in the evening of 18 August that Ms Brady wanted Ms Jones to pay her to the date of her resignation. Ms Jones responded and said that she would be paid for the *two weeks required*.

[39] I agree with Ms McMillan that a fair and reasonable employer could have reached agreement to vary the notice period before termination. I do not find in this case there was a mutual agreement to end the relationship on 18 August by varying

1 [\[1985\] ACJ 477](#)

the notice period. It was not known what payment was intended to be made by Ms Jones in lieu of notice until after the relationship ended.

[40] In *Wellington Clerical Union v Greenwich*² Judge Williamson stated as to the meaning of dismissal. "*Dismissal*" is a word with a wide meaning. It should not be construed narrowly. The word "dismiss" is derived from two words meaning "send" and "apart". A dismissal is a "sending apart" or "sending away" or "sending forth".

[41] I do not find that Ms Brady's employment ended by way of resignation. I find that there was a sending away of Ms Brady from her employment on 18 August 2015 in the nature of an actual dismissal.

If Ms Brady was dismissed then was the dismissal unjustified?

[42] The Authority needs to consider justification of the dismissal in accordance with the test under [s 103A](#) of the Act and objectively determine whether the actions of Ms Jones and how she acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must consider the procedural fairness factors in [s 103A](#) (3)(a) to (d) of the Act but must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms Brady being treated unfairly. A fair and reasonable employer could be expected to comply with the statutory obligations of good faith in [s 4](#) of the Act.

[43] The primary justification advanced for not allowing Ms Brady to work out her notice was a lack of trust because Ms Jones believed that Ms Brady had not been unwell on 17 August 2015 as she had claimed.

[44] Abuse of paid sick leave can amount to serious misconduct and in turn justify dismissal because it involves obtaining payment by a false pretence.³ It does though depend on the circumstances in each case.

[45] Ms Jones had organised for another employee to come in and spend time with Ms Brady on 17 August 2015 before she left for Europe so it is not surprising that she

2 [\[1983\] ACJ 965](#) at 973

3 *Griffith v Sunbeam Corp Ltd* EmpC Wellington WC 13/06

was annoyed when she saw the snapchat. Ms Jones was also departing for Europe for four weeks on 19 August 2015.

[46] Ms Brady in anticipation of some unpleasantness in light of the text message and against a background of concerns that the work environment was not as pleasant as it had been decided to prepare the resignation letter and took it with her in her handbag the following day.

[47] Ms Brady was then late to work on 18 August 2015 because of car trouble and on arriving at the store was told by Emma words to the effect she was in so much trouble.

[48] Ms Jones said that she went to talk to Ms Brady about the previous day but Ms Brady started yelling and was defensive. Ms Brady did not accept that she yelled but agreed that she was defensive and started to cry. Ms Jones did not accept that Ms Brady was crying.

[49] There was no reasonable opportunity though for Ms Brady to respond to Ms Jones' concerns about the sick day when she was in a less emotional state before she was dismissed. That opportunity was required under [s 103A](#) (3) (c) of the Act. An explanation could not be genuinely considered under [s 103A](#) (3) (d) of the Act. Both of those are fundamental elements of procedural fairness and the requirements of the justification test in [s 103A](#) of the Act were not met. These were not minor defects in the process. It would have been fairer for Ms Jones to have suggested a meeting to discuss the matter when Ms Brady had had time to settle into the day.

[50] Ms Brady said at the Authority investigation meeting that she still had to feed the horses even when sick. She said that she took a photo of her horse that *looked cute with his ear tucked into his cover* and snapchatted (sent it) to a selected group of recipients which included Ms Jones' daughter.

[51] The employment agreement provided that the employer could require a medical certificate as proof of sickness for a period of less than three days and may withhold payment for any sick leave until satisfactory proof of sickness or injury is provided.⁴ A fair and reasonable employer could have been expected in the circumstances of this matter where it was not so obvious Ms Brady was engaging in

4 Clause 13 (b) and (d)

an activity completely inconsistent with sick leave, for satisfactory proof of sickness before concluding that there was no such proof. Ms Brady did obtain a medical certificate.

[52] The process to investigate the concerns about abuse of a sick day was fundamentally unfair and not simply in a minor way. I accept that there were concerns for Ms Jones about the snapchat on a sick day but a medical certificate was subsequently obtained. I do not find in all the circumstances of this case that a fair and reasonable employer could have concluded the snapchat was serious misconduct that justified dismissal.

[53] The dismissal was unjustified procedurally and substantively.

[54] Ms Brady has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost Wages

[55] Ms Evans claimed the balance of the notice period under this head. Where the Authority determines that an

employee has a personal grievance it may provide under [s 123\(1\)\(b\)](#) of the Act for reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.

[56] Ms Brady was successful in obtaining another position on 24 August 2015. The pay cycle with her new employment meant she was not paid for a further month but at that time would have received payment from 24 August. For completeness the Authority received written confirmation from her new employer that she did not interview for the position on 17 August which was her sick day.

[57] Ms Brady was paid two weeks in lieu of notice and has not suffered any loss of wages therefore as a result of the grievance. Her hourly rate with her new employer was higher than she received with Ms Jones and the hours were also full time.

[58] I make no award for lost wages.

Compensation

[59] I find it likely having heard the evidence that Ms Jones made statements to Ms Brady on 18 August 2015 that she found hurtful. Ms Brady said that she was called a failure who gives up on everything she does and was told she was unemployable. Ms Jones did not accept that she said those things in her oral evidence but in her statement in reply said that she stated that she had said that *it wasn't good to keep walking out on things* and asked *whether this was to do with her mum*. Ms Jones wrote that was a valid point considering earlier conversations she had had with Ms Brady. Ms Jones I accept was under stress at the time.

[60] Ms Brady said that she was very worried about going out and coming across Ms Jones because of the aggressive behaviour she had been subjected to and that she had sleepless nights about the matter.

[61] Ms Brady is a young employee and was somewhat vulnerable on 18 August 2015. I accept there was humiliation and injury to her feelings about the unsatisfactory end to the relationship on 18 August 2015 and in particular what was said to her. She was though able to obtain another job very quickly that she is enjoying and she is paid a higher hourly rate. Ms Brady is clearly very employable and there is nothing to suggest any failings in that regard whatsoever.

[62] Subject to any findings about contribution I am of the view that a suitable award taking into account that the relationship was going to end in any event by way of resignation is the sum of \$2,500.

Contribution

[63] The Authority when it determines that an employee has a personal grievance must, in deciding the nature and extent of the remedies consider whether the actions of the employee contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded.⁵

[64] I do not find on the balance of probabilities that Ms Brady was abusing her paid sick leave on 17 August 2015. There is a medical certificate to support a day's absence and sending a snapchat of a horse on the property Ms Brady was living at, whilst unwise, was not completely inconsistent with sickness.

5 Section 124 of the Act

[65] It was not unreasonable though for Ms Jones to want to talk to Ms Brady about her day off in light of the snapchat and Ms Brady expected this to occur. I do not find that she engaged as constructively as she could have and instead went almost immediately to get her letter of resignation which she had written earlier to provide to Ms Jones.

[66] I accept that Ms Brady was concerned and therefore defensive about what may be said because of an earlier deterioration in the relationship but there was I find an element of predetermination on the part of Ms Brady about producing her letter of resignation if challenged about her sick day. I find that did contribute in part to the procedural deficiencies and in part to the immediate response from Ms Jones to *finish now and be paid out*.

[67] There was a level of contribution to the situation that gave rise to the personal grievance but not 100% contribution that Ms McMillan submits should be assessed. Although Ms Jones almost immediately suggested that Ms Brady should leave and be paid out upon receipt of the resignation letter there was an opportunity for her to

revisit that before Ms Brady left the store. A modest contribution award is called for and I assess contribution at 15%.

Order

[68] Taking contribution into account I order Sharon Jones to pay to Alexandra Brady the sum of \$2125.00 without deduction being compensation under s 123 (1) (c)

(1) of the [Employment Relations Act 2000](#).

Abuse and Harassment

[69] It was unclear to the Authority whether and how the background evidence about the relationship formed a series of separate claims. There was some limited evidence about how Ms Brady felt Ms Jones was not treating her properly and I accept that Ms Brady may have noticed deterioration in the relationship. From Ms Jones' perspective she had to raise issues with Ms Brady which she may have seen as criticism. Ms Jones adamantly denied any harassment or abuse and there did not appear to have been complaints made.

[70] These were very serious allegations and I am not satisfied there is evidence to support claims of abuse and harassment of the standard required. These claims are not made out.

Holiday pay

[71] The parties could not resolve the issue of whether there was outstanding holiday pay. Ms Evans says that there is a balance owing for holiday pay of \$151.83 and Ms McMillan says that all holiday pay has been paid.

[72] It was clarified that Ms Brady had not taken any annual leave.

[73] The reason for the difference in views about the holiday pay seems to be quite clear. Ms Jones calculated holiday pay on gross wages of \$23,496 but did not include statutory holiday payments made to Ms Brady for November/December 2014 in the sum of \$363.00 or a further gross payment made to Ms Brady of the two weeks wages in September.

[74] The answer to whether the statutory holiday payments should have been included is found in s 14 of the Holiday Act 2003 which provides the meaning of gross earnings. Gross earnings amongst other earnings include payments for annual holidays, public holidays and alternative holiday. In short the sum of \$363 should have been included in the calculation of gross earnings. The calculation of annual holiday pay if the employment ends within 12 months as it did with Ms Brady is provided in s 23 of the [Holidays Act 2003](#). An employer must pay to the employee 8 % of gross earnings less any annual holidays taken in advance and/or any amount paid to the employee as she earns. It appears that Ms Jones in calculating holiday pay also did not include the payment of two weeks wages made on 4 September 2015 of

\$1320 gross to Ms Brady. I have in the absence of any information to the contrary taken that two week gross amount to be less the \$80 agreed deduction for the saddle blanket. If I have concluded incorrectly about that then it is simply a matter of the parties making an adjustment but in the event of difficulties I will reserve leave for either party to return to the Authority on that matter.

[75] I have calculated under s 23 of the [Holidays Act 2003](#) 8% of gross earnings of

\$25,179 with public holiday payments and the further two week gross payment to Ms Brady in September included. I have multiplied that sum by 8% to arrive at a figure of \$2014.32 gross for holiday pay. Ms Jones has paid holiday pay on gross earnings of \$23,496 in the sum of \$1879.68 by way of two separate net payments so I then take from \$2014.32 the sum of \$1879.68 leaving the sum of \$134.64 gross due and owing for holiday pay.

[76] I order Sharon Jones to pay to Alexandra Brady the sum of \$134.64 gross being holiday pay.

[77] Ms Evans has claimed interest on holiday pay from the date the relationship ended. I do take into account Ms McMillan's submission that Ms Jones was overseas in considering whether or not to order interest payable.

[78] I find it appropriate to order interest be payable at the rate prescribed under the s 87 (3) of the [Judicature Act 1908](#) 6 of 5% from 3 September 2015 until 2 November 2015 on the amounts of \$503 net and the net of the gross amount of \$134.64. Interest is then to be paid on the net of \$134.64 only from 2 November until the date of payment. I so order.

[79] There was some suggestion that Ms Brady may have been disadvantaged because she was not paid holiday pay *as she went* under her employment agreement. To have paid holiday pay in that manner would have been incorrect under [s 28](#) of the [Holidays Act 2003](#) as Ms Brady was not working for Ms Jones on an intermittent or irregular basis so that it was impracticable for her to have annual leave. She has therefore suffered no disadvantage.

Tea Breaks (Rest and Meal Breaks)

[80] The claim in the statement of problem was that Ms Brady was not given set tea breaks and would have to serve customers on her breaks. Ms Brady said that she never got a tea break at all in her oral evidence. Her written statement of evidence dated 2 September was that *if I was on my tea breaks and a customer entered the shop I was expected to go and serve them*. Ms Brady accepted that she received an uninterrupted lunch break each day.

[81] Ms Jones did not accept that Ms Brady did not have the ability to take a ten minute break morning and afternoon which were paid breaks under the employment agreement.

6 [Judicature \(Prescribed Rate of Interest\) Order 2011](#)

[82] Ms Jones says that she acted in accordance with Part 6D of the Act, s 69ZD and s 69ZE which took effect from 6 March 2015 with respect to rest breaks and in accordance with the former provisions for rest breaks. Ms Jones accepted that sometimes tea breaks would be interrupted by customers but that such interruptions were not unreasonable.

[83] Ms Evans provided to the Authority two statements of previous employees to support that they also did not receive tea breaks. I did not hear from those employees.

[84] There was no evidence to satisfy me that Ms Brady raised any issues about the rest breaks with Ms Jones so that any concerns could be resolved at the time they arose. The provisions in Part 6D support in my view discussion and dialogue between the parties to the employment agreement about rest and meal breaks to see if agreement can be reached. Good faith obligations also require parties to an employment agreement to be responsive and communicative in these types of situations. If there has been a breach of ss 69ZD and 69ZE or the employment agreement then a penalty is available however one was not claimed in the statement of problem.

[85] I am not satisfied to the required standard that there has been a breach of the obligations on the part of Ms Jones to provide a rest break and/or that the interruptions were unreasonable. Further there was no action commenced for the recovery of a penalty.

[86] This claim is dismissed.

Costs

[87] I reserve the issue of costs. Failing agreement being reached as to costs Ms Evans has until 4 March to lodge and serve submissions and Ms McMillan has until 16 March to lodge and serve submissions in reply.

Helen Doyle

Member of the Employment Relations Authority