

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 378
3023975

BETWEEN JASON BYE AND KYM BYE
 Applicants

AND KELEE DEVELOPMENTS
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Simon Mitchell, Counsel for the Applicant
 Chris Eggleston, Counsel for the Respondent

Investigation Meeting: 31 August 2018

Determination: 29 November 2018

DETERMINATION OF THE AUTHORITY

- A. Kelee Developments Limited (KDL) unjustifiably dismissed Jason Bye and Kym Bye.**
- B. In settlement of Mr Bye’s personal grievance, and within 28 days of the date of this determination, KDL must pay him the following remedies, which have been reduced by one quarter due to actions of Mr Bye that contributed to the situation giving rise to his grievance:**
- (i) \$3,000 in lost wages; and**
 - (ii) \$6,000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C In settlement of Mrs Bye’s personal grievance, and within 28 days of the date of this determination, KDL must pay her the following remedies, which have been reduced by one third due to actions of Mrs Bye that contributed to the situation giving rise to her grievance:**

- (i) \$5,200 in lost wages; and**
- (ii) \$6,000 as compensation for humiliation, loss of dignity and injury to her feelings.**

D. KDL breached s 4 of the Wages Protection Act 1983 by making an unauthorised deduction from the final pay due to Mr Bye.

E. Within 28 days of the date of this determination KDL must pay to the Authority, for transfer to the Crown account, a penalty of \$2,000 for its breach of the Wages Protection Act 1983.

F. Costs are reserved with a timetable set for memoranda if an Authority determination of costs is necessary.

Employment Relationship Problem

[1] Jason and Kym Bye, a married couple, began work in June 2014 for Kelee Developments Limited. They were employed as caretakers and property managers of a 40-hectare rural property the company owned near the Bay of Islands. Their duties included maintenance of the property, building and equipment along with providing housekeeping services for buildings, caravans and a private camp ground on the site. Under their terms of employment Mr and Mrs Bye were provided accommodation, a house for which they paid a modest rent deducted from their wages.

[2] Kevin Pugh is KDL's director and, through two trust companies, its sole shareholder. Mr Pugh has a residence in Auckland and frequently travels abroad. The Northland property includes a holiday home used by him and his family.

[3] On 30 December 2017 Mr Pugh dismissed Mr and Mrs Bye after an argument over leave Mrs Bye intended taking to attend the wedding of her daughter. Both dismissals were made on the grounds Mr Bye and Mrs Bye had each verbally abused Mr Pugh. Mr Pugh also said Mr Bye had physically manhandled him when he delivered a letter of dismissal to him. In making those dismissals Mr Pugh gave the couple notice to quit their accommodation, initially within 14 days and then shortened to seven days.

[4] Mr and Mrs Bye applied to the Authority seeking findings that their dismissals were unjustified and orders for remedies. They also sought an order for holiday pay not paid to them at the end of the employment. Mr Pugh had not paid that money because he said Mrs Bye owed more than that amount for her share of the rent on their accommodation. After a work accident in January 2017 Mrs Bye had received earnings related compensation paid directly to her by ACC for about 40 weeks. No deductions for rent were made from those ACC payments. The fact Mrs Bye owed rent for this period was not disputed but KDL had recovered that amount by withholding the holiday pay of Mr Bye as well as that of Mrs Bye. Mr Bye owed no money to the company because deductions for his share of the rent had continued to be made from his wages while Mrs Bye was on ACC. They asked for orders imposing a penalty on KDL for withholding money due to Mr Bye.

[5] KDL's statement in reply described their claims as without foundation. However in submissions given at the Authority's investigation meeting KDL accepted Mr Pugh had not satisfied the statutory criteria in how he dealt with his concerns about the conduct of Mr Bye and Mrs Bye. Despite this KDL said the dismissals were still justified because Mr and Mrs Bye were the "authors of their own misfortune" and no remedies should be awarded to them.

The Authority's investigation

[6] Mr Bye, Mrs Bye, Mr Pugh and his partner Jennifer Kent each provided a written witness statement and attended the Authority's investigation meeting. Under oath, they each answered questions from me and the parties' representatives. The representatives also provided oral closing submissions, speaking to written synopses, on the issues for determination.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- (i) Was the dismissal of Jason Bye and Kym Bye on 30 December 2017 what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) If not, what remedies should be awarded, considering:
 - (a) Lost wages (subject to the evidence of Mr Bye and Mrs Bye of having made reasonable endeavours to mitigate their losses); and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Bye and/or Mrs Bye that contributed to the situation giving rise to their respective personal grievances?
- (iv) Was the employer entitled to deduct amounts said to be due for rent from the holiday pay entitlements of Ms Bye and Mr Bye at the end of their employment?
- (v) If unauthorised deductions were made from holiday pay due to Mrs Bye and Mr Bye, should KDL be ordered to:
 - (a) pay those arrears, with interest and/or
 - (b) pay a penalty under s 13 of the Wages Protections Act 1983?
- (vi) Should either party contribute to the costs of representation of the other party?

The dismissals

[9] The dismissals of 30 December 2017 occurred against a background of some long-term and immediate tensions between Mr Pugh and the Byes about their work and how they carried it out. Mrs Bye, for example, was unhappy Mr Pugh had said her 10-year-old granddaughter could not stay with her at the property during the school holidays. This was, he said, due to safety concerns as Mrs Bye would have to take the child with her as she worked around the property, including on a quad bike.

[10] More immediately Mr Pugh had sent a four page email to Mr and Mrs Bye on 28 December 2017 criticising the quality of their work. He said improved work practices and work rate was needed for vermin control, weed control, fencing, mowing, line trimming, house cleaning and maintenance and for the maintenance and cleaning of equipment and vehicles on the property. He reminded them that the

property had been put on the market and he wanted his “property, equipment and facilities to be pristine”.

[11] At the time of sending the email Mr Pugh was visiting and staying at the property after a period of several months overseas. Although the house Mr and Mrs Bye lived in on the property was only a few minutes travel from the holiday house Mr Pugh was staying at, he set out his concerns about their work in a lengthy email rather than organise a meeting with them. He ended his email with this instruction:

Talk to me on any issues. I don't want to get into email exchanges. Just let me know any reasons why you cannot carry out my requests in a timely manner.

[12] A further aspect of that background was Mrs Bye's plan to take several days leave in early January 2018 to attend her daughter's wedding in Auckland. Mrs Bye said she had told Mr Pugh in July and November 2017 about those plans. Mr Pugh denied being told about the wedding then. Instead he said he only knew about her plans when he overheard Mrs Bye talking about her daughter's wedding in mid-December, probably on 14 December. He asked her to confirm those arrangements with him. On 15 December she sent him the following email (set out as written) under the subject heading “Weddings”:

Hi
I will be going on the 3rd Jan after i have cleaned camp. Jason probable the day of wedding 6th (Saturday), we will be back the Sunday.
March 9th till the 12th for Jasons brother wedding in Whakatane.
Thats is all ...
Cheers

[13] Mr Pugh did not respond to the email. Although they saw one another most days around the property after that, nothing more was said about Mrs Bye's leave plans until Saturday, 30 December.

The events of 30 December

[14] Around the middle of that day Mrs Bye came down the driveway of Mr Pugh's house on a quadbike and spoke to him and Ms Kent. Mr Pugh said Mrs Bye told him she had realised Monday (1 January) and Tuesday (2 January) were public holidays so he would have to pay her time and a half and give her a day in lieu if he wanted her to clean the camp before she went to Auckland on 3 January.

[15] Mr Pugh said he was “staggered” by what she said and he did not respond immediately. He returned to his house and checked Mrs Bye’s 15 December email which said she would leave on 3 January after cleaning the camp. On that day Mr Pugh’s daughter and her family, who were holidaying at the property, were due to leave and some locals who had booked the camping site were due to arrive in the afternoon.

[16] Mrs Bye’s account of what she said in the driveway to Mr Pugh was different. She said she called by Mr Pugh’s house to see if he wanted it cleaned before she left on Wednesday. She said she suggested doing that on Sunday (31 December) so he did not need to pay her time and a half for working on the Tuesday public holiday (2 January). She said she had also said she could do the camp cleaning work on the Sunday (31 December) or the Wednesday (3 January). In answer to a question at the investigation meeting Mrs Bye agreed there would be little point doing the expected cleaning, of a caravan and the camping area, on the Sunday three days before the families using them left on 3 January. However she maintained she had made it clear to Mr Pugh in their driveway discussion on 30 December that she was still happy to clean up the camp ground on Wednesday (3 January) if that was what he preferred.

[17] Mr Pugh, however, formed a quite different impression. He understood Mrs Bye would not do the work on Wednesday before she left the property to travel south to Auckland and instead wanted extra pay to do it before the camping ground guests had left. After checking the wording of Mrs Bye’s 15 December email he decided to go to her house to talk to her.

[18] On arrival there he talked with Mrs Bye and Mr Bye on the deck of the house. A heated argument ensued. All involved gave differing accounts of what was said.

[19] Mr Pugh’s written statement said he:

stated that unless we could sort something out which meant that the required change over cleaning would be completed on 3 January as previously advised, then Kym’s leave request could no longer be approved.

[20] He said Mrs Bye had replied that she was going to Auckland on Wednesday morning and he would have to pay her extra if he wanted the camp cleaned before then. He said she became “increasingly agitated and accused me of making her choose between her job and her daughter’s wedding”. He said Mrs Bye suggested

that Mr Bye could do the cleaning instead but Mr Pugh replied that was not acceptable because Mr Bye did not have the skills to do it to the required standard.

[21] Mr Pugh said Mr Bye then told him: “We resign, we give you a month’s notice, we have a life outside this fucking job”.

[22] Mrs Bye denied saying she would have to be paid extra to clean the camp. And she understood Mr Pugh’s comments to mean he had cancelled her entire leave period from 3 to 6 January, so she would not be able to attend her daughter’s wedding at all.

[23] Mr Bye confirmed he had told Mr Pugh that he and Mrs Bye would resign as a result. His oral evidence was that he said “we will have to give you a month’s notice cos we are going to the wedding”.

[24] Mr Bye also confirmed that he spoke angrily to Mr Pugh as he then left the premises. He called Mr Pugh an “arsehole”. He denied Mr Pugh’s account that Mr Bye had gone further by telling him: “You are fucking stupid” and “you’re just a fucking asshole”.

Dismissal of Mr Bye and Mrs Bye, with 14 days’ notice to leave accommodation

[25] Mr Pugh returned to his house and checked the employment agreements of Mr Bye and Mrs Bye. He decided Mr Bye’s abusive comments were serious misconduct and wrote a letter advising Mr Bye he was “dismissed forthwith”. The letter also said this meant that, under the terms of Mr Bye’s employment agreement, the employment of Mrs Bye could no longer continue. Their individual employment agreements referred to them being “engaged in conjunction” with one another. The letter said any payments due to her would be made, less money owed for the period when she was “on ACC” and had not paid her share for the accommodation.

[26] Mr Pugh also drafted a separate letter addressed to Mrs Bye. It gave her two weeks’ notice of the termination of her employment due to the dismissal of her husband.

[27] Both letters advised they had to vacate their accommodation within 14 days.

[28] Mr Pugh said he had Ms Kent type up the letters and print them out. He said the process of checking the agreements and preparing the dismissal letters had taken up to an hour. He then returned to the house occupied by Mr and Mrs Bye.

[29] Mr Bye was at the front door when Mr Pugh arrived. Mr Pugh handed him the letter saying it was a letter of dismissal. Mr Pugh said Mr Bye ripped up the letter and threw it on the floor. Mr Bye denied he ripped up the letter and said he still had it at home now.

[30] Mr Pugh then asked to see Mrs Bye but he said Mr Bye grabbed him and pushed him off the porch. He said Mr Bye shouted at him: "You are not coming in here, we rent this place. We will call the Police". Mr Bye denied touching Mr Pugh. Instead he said Mr Pugh had tried to "barge his way in". Mr Bye said he closed the door in Mr Pugh's face.

[31] Mr Pugh said he had then walked down the side of the house to its back deck because he still needed to give Mrs Bye her letter of dismissal. He saw Mrs Bye was in the lounge but she did not take the letter. He left it on the floor, just inside a ranch slider. Mr Pugh said Mrs Bye then subjected him to "a further tirade of abuse". He said she told him "you have no friends because you are an asshole", "you treat your family like shit" and "your kids don't like you". Mrs Bye denied those were the words she used but accepted she had shouted at Mr Pugh after he asked for keys to the property. She said she told him: "you don't even trust your own kids and you treat people like shit" and "you have no respect for anybody".

[32] On his return to his own house shortly afterwards Mr Pugh said Ms Kent noticed his shirt was torn. He had not noticed this before but said this resulted from Mr Bye grabbing him by the shirt in their encounter at the front door of the Byes' accommodation.

Mrs Bye dismissed a second time, with reduced time to leave accommodation

[33] Mr Pugh then drafted an email to Ms Bye which included the following relevant passages:

Further to my letter of today's date ... and subsequent to the abuse, accusations and personal attack you have made verbally to me today, you are dismissed from your position with [KDL] immediately. Your outburst is totally unacceptable to the company and myself as Director. ...

Please vacate your accommodation within 7 days.

I ask again for the return of the keys to my trusts property ...

For the record I note today you have refused to hand over the keys to my trusts property.

Any further assaults by your husband on me will be reported to the Police. I will put today down to having the wrong advice. I suggest you take this very seriously.

[34] Mr Pugh sent the email at 3.56pm that day to the joint email address Mr and Mrs Bye used. He copied the email to his business lawyer (who was not his counsel in the Authority investigation). He had not talked to his lawyer before delivering the dismissal letters or sending the email but did so later that day or soon after.

Unjustified actions

[35] Mr Pugh conceded that how he went about dismissing Mr Bye and Mrs Bye did not follow the steps required by s 103A of the Act. He had not advised them that their actions towards him gave rise to concerns that could result in their dismissal, not given them the opportunity to comment on his concerns and not taken some time to genuinely consider any explanation given. On those grounds alone, his actions on behalf of KDL on 30 December were unjustified.

[36] However KDL submitted the dismissals were nevertheless justified because Mr Pugh could have reached the same conclusion if he had followed the statutory steps, allowing Mr and Mrs Bye to get representation and taking time to reflect on what they might have said in response to his concerns. In short, KDL submitted that counter-factual possibility would have made no practical difference to the outcome.¹

[37] I have not accepted that submission. The defects in the process followed by Mr Pugh were more than minor and they did result in Mr Bye and Mrs Bye being treated unfairly. This was because both the actions of Mr Pugh and Mr Bye and Mrs Bye all occurred in the heat of the moment. All the events of that day, from the discussion in the driveway to Mr Pugh's second dismissal of Mrs Bye at 3.56pm, occurred within a period of probably less than four hours.

¹ See *Xtreme Dining Limited v Dewar* [2016] NZEmpC at [158].

[38] Employment law has long favoured employers allowing a ‘cooling off’ period before acting on the heated words of workers or the employer’s own reaction to heated exchanges with its workers.² This approach is consistent with the duty of good faith binding both employers and workers under s 4 of the Act. Each employer and each worker must be responsive and communicative as part of their mutual obligations to be active and constructive in establishing and maintaining a productive employment relationship. This duty must, sensibly, apply in circumstances where there is doubt about the viability of the relationship or where it may be brought to an end by the action or inaction by one or other party. A fair and reasonable employer will take the time to consider if enough has been done to maintain a productive relationship. The worker must also participate in a similarly measured way in communication about the situation. This is the clear intention of s 4(1)(b) and (c)(i) and s 103(3)-(5) of the Act.

[39] In this case there were ample indications in all the witnesses’ evidence, however contradictory, that taking time to coolly check what was being communicated would very likely have made a real difference to the outcome. There was plenty of time to do so between 30 December and 3 January. All the key people were present, living on the property and within a few minutes reach.

[40] Firstly, the issue of whether Mrs Bye would have abided by her emailed undertaking to clean the campsite on the morning of Wednesday, 3 January would likely have been clarified.

[41] Secondly, the notion that Mr Pugh had cancelled her leave entirely would similarly have been made clear, one way or the other. Mrs Bye and Mr Bye had reacted dramatically to the notion that Mrs Bye would not be able to go to the wedding at all. However more likely than not Mr Pugh’s intention was that she would be free to leave on Wednesday, as she had originally intended, once the morning cleaning tasks were completed. Mrs Bye’s evidence was that those tasks would have taken her about two hours. If Mr Pugh had paused and taken time to talk to Mrs Bye the next day, whatever miscommunication there may have been would likely have been resolved.

² See, for example, *Walker v Firth Industries* [2014] NZEmpC 60 at [23] and [74].

[42] Thirdly, on the objective standard of what a fair and reasonable employer could have done, Mr Pugh may well have reflected on whether his own reaction on 30 December, to what he considered was an unacceptable change of plan by Mrs Bye, contributed to their own volatile reaction.

[43] Fourthly, as Mr Pugh accepted during the Authority investigation meeting, there was “possibly” no need for him to dismiss Mr and Mrs Bye at all if he really wanted the employment relationships to end. This was because Mr Bye had given him their notice of resignation in the first argument at their house that day. A calm discussion, perhaps the following day, may have confirmed that was their intention and then allowed discussion of an orderly exit.

[44] And, contrary to KDL’s closing submission, a proper consideration of the evidence leads to the view that some of the conduct of Mrs Bye and Mr Bye asserted as justifying their dismissals had occurred after the fact of the decisions being communicated to them. Those post facto actions (if they were as Mr Pugh described them) could not then be given as the reason for something already decided and imposed.

[45] The first example concerns whether Mr Bye ‘manhandled’ Mr Pugh off the front porch at their house. The evidence of both men sought to minimise their own actions and maximise the alleged actions of the other. With no independent witnesses to corroborate that event and the highly-coloured account of each, the truth likely lies somewhere between. Mr Pugh’s written evidence refers to him thinking Mr Bye appeared to be inviting him into the house on his second visit on 30 December, bearing letters of dismissal, so he probably did go to step inside. However his evidence also indicated he told Mr Bye that he was dismissed as he handed him the letter. He said he then asked to see Mrs Bye so he could hand over her letter of dismissal. Mr Bye then, more likely than not, did push him out. However when Mr Bye did so he was no longer an employee, given Mr Pugh had seconds before instantly dismissed him.

[46] The second example concerns the angry reaction of Mrs Bye after Mr Pugh walked along the side of her house and delivered her first letter of dismissal, by leaving it on the floor inside an open ranch slider off the deck of the house. At that point she was under 14 days’ notice of the termination of her employment. Her angry

comments were made when he then demanded she hand over keys for buildings on the property. Mr Pugh's subsequent decision, to replace that notice with a letter of immediate dismissal (and seven fewer days to vacate the property) because of those comments, did not make his earlier termination of her employment justified.

[47] On that analysis the actions of Mr Pugh in so swiftly dismissing Mr Bye and then, twice, Mrs Bye on 30 December 2017 were not what a fair and reasonable employer could have done in all the circumstances at the time. Both were accordingly entitled to an assessment of remedies for their personal grievance of unjustified dismissal. The extent to which each might have contributed to the situation giving rise to their grievance, is considered as part of that assessment.

Remedies: Jason Bye

Lost wages

[48] KDL paid Mr Bye up to 29 December 2017. He started a new job at a comparable rate on 7 February 2018. He sought an award of lost wages for the intervening five weeks. At his hourly rate of \$20 for a 40 hour week, the sum sought was \$4000. The relatively short period between the end of one job and beginning another indicated Mr Bye had made diligent efforts to mitigate his loss. There were no other contingencies of life within those weeks that might have warranted shortening the permitted period of lost wages, apart from the prospect that the Byes might have made good on the one month's notice given in the heat of the moment on 30 December. As likely, if the dismissals had not been made and some cool-headed discussion ensued instead, they would not have gone through with ending the employment in that way, so soon and without other jobs and accommodation arranged to move to. Accordingly \$4000 was the appropriate sum to award Mr Bye under s 123(1)(b) and s 128(2) of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[49] Mr Bye was upset at having to abruptly leave the house, and its pleasant sea views, that he and Mrs Bye had enjoyed the use of while employed on the KDL property. He was also upset that the end of his job with KDL delayed their plans to build a house of their own on a section they had purchased. It also reduced his enjoyment of the wedding of Mrs Bye's daughter on 6 January. Mr Bye said he also experienced sleeping difficulties, which eased once he had a new job, and he had

needed anti-depressant medication to cope with the effects of losing his job with KDL. Mr Bye said he felt humiliated when Mr Pugh advised some businesses in the Kerikeri area that Mr Bye no longer had authority to make purchases on KDL accounts with those businesses. Although Mr Pugh was entitled to update that information with those businesses, as a result of the end of Mr Bye's employment, Mr Bye felt this was a means of publicising his dismissal.

[50] His evidence, of immediate rather enduring effects on him, warranted an award of \$8000 compensation under s 123(1)(c)(i) of Act, an amount at the lower end of the range in similar cases.

Reduction for contribution

[51] Having awarded remedies, the Authority must consider whether the actions of Mr Bye contributed to the situation giving rise to his personal grievance and had done so to an extent that required a reduction of those remedies.

[52] For reasons already noted the disputed question of whatever scuffle or shoving may have occurred at the front door between Mr Bye and Mr Pugh was not relevant to that assessment. Mr Bye's grievance was about his dismissal and that had already occurred by that point. Whatever happened after then had not contributed to the situation giving rise to his grievance.

[53] However Mr Bye's heated comments during the first encounter with Mr Pugh on 30 December had contributed to the relevant situation. His own admitted conduct of calling Mr Pugh an "arsehole", and possibly similar phrases, made the conflict worse. The extent to which it was blameworthy conduct had to be tempered by weighing Mr Pugh's own contribution to ramping up those exchanges. Mr Bye had reacted to what he believed was Mr Pugh's unwarranted criticism of Mrs Bye and her upset at the prospect of not being able to attend a very important family occasion for her. In a broad assessment, Mr Bye could be apportioned a quarter of the blame for abusive comments made to his employer which then, unfortunately, fuelled Mr Pugh's own intemperate preparation and delivery of dismissal letters. The resulting adjustment of remedies reduces the lost wages award to \$3000 and the distress compensation to \$6000.

Remedies: Kim Bye

Lost wages

[54] KDL paid Mrs Bye up to 29 December 2017. She started a new job in Kerikeri in late July 2018. She sought an award of wages for the intervening period of around 29 weeks. On her hourly rate of \$20 an hour for 30 hours a week, the award would total \$17,400 if the full period of the alleged loss was granted.

[55] Mrs Bye's evidence of efforts to mitigate her loss during that time fell well short of what was required for an award of lost wages for the whole time she was without work. In her oral evidence she said she sought work through the Seek and Trade Me websites, checking the local papers and using the local Facebook 'grapevine'. Nothing was provided to corroborate such efforts although she was on notice from at least the time of the Authority case management conference in May 2018 of the need for such evidence.

[56] Applying the requirements of s 128(2) of the Act, regarding an order for the lesser sum between the total period of loss and three months' ordinary time remuneration, the award of lost wages to Mrs Bye is limited to three months. Applying a monthly calculation to her weekly earnings, the appropriate sum to award Mrs Bye under s 123(1)(b) and s 128(2) of the Act was \$7,800 for that minimum three month period.

[57] For the same reasons considered in respect of the award of lost wages to Mr Bye, no adjustment to that figure for Mrs Bye's award was needed to allow for other contingencies of life that might have further reduced the period of loss and the resulting award of lost remuneration.

Compensation for humiliation, loss of dignity and injury to feelings

[58] Mrs Bye gave evidence of being greatly upset by her abrupt dismissal and being required to leave what had become her home. This affected her ability to enjoy what would otherwise have been the happy occasion of her daughter's wedding. In the following months she was often sleepless and cried as she reflected on the events of her dismissal.

[59] Mrs Bye's oral evidence of the upset caused by her dismissal was more effusive than that of her husband. However not all the distress she experienced could be fixed to the fact of her dismissal and how it happened. In part her upset can be seen as her recognition of her own role in the chain of events, addressed below in respect of contribution. For the upset that could be attributed directly to Mr Pugh's actions on KDL's behalf, what he did and how he did it, an award of \$9,000 was a modest and sufficient amount of compensation under s 123(1)(c)(i) of Act.

Reduction for contribution

[60] One particular aspect of Mrs Bye's conduct contributed to the situation giving rise to her grievance and was sufficiently blameworthy to require reduction of remedies awarded to her. Mrs Bye had, in response to a direct request from her employer, made clear that she would clean the camp before leaving the property on Wednesday, 3 January. Giving Mrs Bye the benefit of the doubt about whether she had asked for extra pay to do that work on another day, she nevertheless sought to change the arrangement by suggesting she do the work instead on Sunday. She admitted doing so. She also accepted it was a pointless suggestion given that the guests would be there for a further two days after Sunday. It understandably confused Mr Pugh. He overreacted to the situation but so did Mrs Bye. She was not being asked to forgo attendance at her daughter's wedding on the Saturday by doing work she had already agreed to do on the Wednesday morning. Even if this delayed her travel to Auckland until later on Wednesday, she still would have had all of Thursday and Friday to join in preparations for the important Saturday event.

[61] Mr Pugh has to accept, and pay for, his part in the events of 30 December but so does Mrs Bye. In a broad assessment Mrs Bye could be apportioned one third of the blame for how her actions contributed to the situation as it then unfolded. The resulting adjustment of remedies reduces the lost wages award to \$5,200 and the distress compensation to \$6,000.

Deduction for accommodation cost

[62] The company pay roll records show Mr Bye was due holiday pay of \$4,314.95 at the end of his employment. Mrs Bye's record showed she was due \$1,334.70 as final holiday pay.

[63] Including the last weeks' wages due to each of them, Mr Bye's net final pay was \$3,776.85 while Mrs Bye's was \$1,452.73. During their employment their pay was transferred by direct credit to a joint bank account. In this case, for the final pay, the total net amount of that transfer should have been \$5,229.58.

[64] The evidence of the parties about how much of that net total was actually transferred was somewhat sketchy but they all agreed that KDL had withheld \$4,680. This was the amount Mrs Bye owed for her share of the rent not paid in 2017. She did not dispute the debt but Mr Bye disputed, quite rightly, any part of that debt being deducted from money owed to him.

[65] Orders could be made for payment of the amount of holiday pay to be made to him now and then for the accrued rent debt of Mrs Bye to be deducted from remedies now due to be paid to her. A simpler, less technical approach is more sensible. The rent debt has already been satisfied, albeit by an unauthorised deduction from money due to Mr Bye as well as Mrs Bye. The remedies due to Mr Bye and Mrs Bye should be paid in full. How Mr and Mrs Bye then resolve the balance of funds between them can be left for them to sort out.

[66] A similar non-technical approach should be taken to the question of interest here. Mr Bye, technically, could be awarded interest on holiday pay wrongly deducted from amounts due to him. However, considering all the equities of the situation, the money involved was to satisfy a rent debt of Mrs Bye to KDL. She had the benefit of not paying that money back sooner and KDL, arguably, could say interest should be awarded on it for the loss of the use of that money in the meantime. Determining that issue according to the substantial merits, the matter of interest was best left to lie where it lay. No order for interest is made.

Penalty

[67] There was however the issue of KDL's wrongdoing by making such an unauthorised deduction from pay due to Mr Bye in the first place. Wider issues of public interest apply because KDL's action was a breach of employment standards, which include the provisions of the Wages Protection Act 1983 (WPA).

[68] The terms of the employment agreements of Mr Bye and Mrs Bye did include a clause allowing deductions of money owed to KDL from final pay but Mr Bye owed nothing.

[69] Section 4 of the WPA required KDL to pay Mr Bye the entire amount of his final pay without deduction. Its failure to comply with that provision made KDL liable to a penalty under s 13 of the WPA. Although not raised in the Byes' statement of problem, KDL's action in regard to Mr Bye's final pay also appeared to be in breach of the requirements of s 27 of the Holidays Act 2003 for which a penalty was also available under s 75 of that Act.

[70] Relevant matters set out in s 133A of the Employment Relations Act and judicial guidance on setting penalties have been considered in determining an appropriate penalty for KDL's breach of s 4 of the WPA.³ The factors and steps considered are set out in summary form.

[71] For the single breach KDL was liable to a penalty of up to \$20,000. KDL wrongly believed it could satisfy the wife's debts from pay due to the husband. Its actions in doing so were deliberate and caused loss to Mr Bye. It did nothing to mitigate that breach.

[72] A penalty was appropriate considering the object of the Act to address inherent inequality of power in employment relationships and to promote effective enforcement of employment standards. KDL imposed the deduction in circumstances where Mr Bye had little power to resist this breach of the employment standards intended to protect his rights to pay due to him at the end of his employment. Deterring KDL or other employers who might be tempted to breach employment standards in this way favoured imposition of a penalty. Consistency with other cases imposing penalties for breaches of the WPA put this case in a range of appropriate penalties from \$1000 to \$3000.⁴ There was no evidence of similar prior conduct by KDL, that might have warranted a higher penalty, or anything to suggest a penalty should be lowered because it lacked resources to pay a penalty within that range. Having regard to all the relevant factors considered and whether such an amount was proportionate and just in all the circumstances, a penalty of \$2000 was warranted.

³ See *Nicholson v Ford* [2018] NZEmpC 132 at [14]-[19].

⁴ See, for example, *Talipope v Truck Systems Logistics Ltd* [2017] NZERA Auckland 247 at [92].

This is the amount KDL must pay as a penalty for its breach of s 4 of the WPA within 28 days of the date of this determination.

[73] The penalty is to be paid to the Authority for transfer to the Crown Account. I was not persuaded any portion of the penalty should be paid to Mr Bye. Loss or harm to him was addressed by the remedies awarded for his personal grievance.⁵

Costs

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

[75] If they are not able to do so and an Authority determination on costs is needed Mr and Mrs Bye 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 Kelee Developments Limited 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.

[76] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate of \$4500 unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Robin Arthur
Member of the Employment Relations Authority

⁵ Employment Relations Act 2000, s 136.

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].