

(b) \$12,000 as compensation for humiliation, loss of dignity and injury to feelings.

C. TMC is ordered to pay Ms Downs the following sums within 14 days of the date of this determination:

(a) \$382.68 gross as sick pay;

(b) \$672.30 gross for statutory holiday entitlements;

(c) \$1905.00 gross as holiday pay; and

(d) \$298.49 as the employer contribution to Kiwisaver.

D. TMC breached s 130 of the Employment Relations Act 2000 by failing to keep a proper wages and time record. TMC shall, within 28 days of the date of this determination, to pay a penalty of \$2,000.00 to the Employment Relations Authority for payment into the Crown account.

E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Alicia Downs worked for TMC Bloodstock Limited (TMC or the company) in 2017 and 2018 as a stable hand at Winmark Racing Stable (the Stables). The Stables is a family operated business, run by the Cruz family.

[2] Ms Downs claims that she was constructively dismissed by TMC, as well as making other grievance, wage and statutory entitlement claims. TMC largely denies those claims.

[3] An investigation meeting was held in Hamilton on 25 October 2018. I heard evidence in person from Ms Downs and her mother, from a father and his daughter who said they were employed as stable hands by TMC in 2018, and from Angel Cruz (director of TMC, whom I refer to as Mrs Cruz). I also heard evidence by telephone from another former colleague of Ms Downs, who worked for TMC in 2017.

[4] The evidence was unable to be completed on 25 October 2018 and so an investigation meeting was resumed by telephone on 21 November 2018. I heard evidence from Mrs Cruz's adult children Natasha Cruz (whom I will refer to as Ms Cruz) and Martin da Cruz, both of whom work for TMC. Another son of Mrs Cruz, who did not give evidence, was in charge of the Stables until early December 2017.

[5] On 21 November 2018 I heard submissions over the phone from the parties, with TMC's representative also having filed written submissions. Short additional submissions were also filed thereafter by both parties.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[7] The issues for determination are:

- (a) When did Ms Downs start working for TMC and what was her work pattern?
- (b) Was Ms Downs subject to unjustified actions by TMC to her disadvantage regarding Kiwisaver, warnings given and being prevented from returning to work in April 2018?
- (c) Was Ms Downs constructively dismissed by TMC?
- (d) If Ms Downs establishes any grievance claims, what remedies, if any, should she receive, including a consideration of contribution?
- (e) Did TMC breach its duty of good faith to Ms Downs?
- (f) Does TMC owe Ms Downs sick pay?
- (g) Does TMC owe Ms Downs pay for time worked on public holidays and/or alternative days not taken prior to her employment finishing?
- (h) Does TMC owe Ms Downs holiday pay?
- (i) Did TMC fail to comply with s 4 of the Wages Protection Act 1983 and if so, should it be penalised?
- (j) Did TMC fail to keep wages and time records and if so, should it be penalised?

[8] There are significant areas of disagreement between the parties. Credibility issues affect most of the claims made. I will outline the evidence for the parties on the working days and hours issues for 2017 and 2018 and a payroll document filed by TMC, before drawing an overall conclusion on credibility.

The arrangement in 2017

[9] The parties gave conflicting evidence on the nature and extent of Ms Downs' work at the Stables in 2017.

Ms Downs and other witnesses' evidence

[10] Ms Downs says that she started working for TMC in September 2017, mainly doing three hours most mornings. The Stables were short staffed because one of the employees had gone overseas. She went in to see Mrs Cruz and they discussed her covering for the absent employee. Ms Downs could only work 4.30am to 7.30am as she needed to be home by 8am for family responsibilities. Mrs Cruz asked her how much she wanted and Ms Downs said \$20 an hour. She assumed tax would come out of that. Ms Downs says she was paid cash by TMC for all of her 2017 work.

[11] Ms Downs says that Mrs Cruz continued to need her after the other employee came back, so she kept on with the same hours. She asked for a part time contract but Mrs Cruz replied that she had enough staff, just to keep on coming in like she was.

[12] Ms Downs says that by the beginning of December 2017 she was able to work more hours so she spoke to Mrs Cruz and asked to work full time. Mrs Cruz replied that she would give her a contract but that did not happen until January 2018. However, Ms Downs began working longer hours from the beginning of December 2018; 4.30am to 9.30/10am and 1.30pm to 3.30/4pm. Some weekend days were also worked.

[13] Ms Downs' evidence was supported by that of some other witnesses. A colleague from TMC whose work included the period from September to December 2017 says that Ms Downs was there working most days, except the occasional Saturday. She thought Ms Downs started in September as Ms Downs was there before the show season started, which is early October.

[14] Although not present at the Stables in 2017 the father stable hand spoke of his own pattern of employment, which was similar to Ms Downs' evidence. He started work in early February 2018 but was not given a written employment agreement until March. The daughter stable hand also said that in the month she worked at the Stables she was only ever paid in cash. This was usually paid by Mrs Cruz, but if she was away, Ms Cruz handed out the money

[15] Ms Downs' mother says that from September 2017 she came to Ms Downs' house to stay overnight during the week, so she could get her grandchildren up and ready for school whilst Ms Downs was working at the Stables. She says that the arrangement started around 20 September, which she recalled as that was the date of her husband's birthday. Ms Downs' mother confirms that her daughter was paid in cash as she would come home from work on Friday mornings with a pile of cash, from which she would give her mother some petrol money. She says the arrangement finished in December 2017. She was adamant under cross examination that it was September to December 2017 when she looked after the grandchildren.

Mrs Cruz and other witnesses' evidence

[16] Mrs Cruz says that Ms Downs worked for two hours on each of seven days from 24 October to 7 December 2017. The seven dates were specified. When asked how she knew those were the dates, she said that she used her memory. However, at another point she said she wrote the dates down. She said that she did not need paper anymore when asked if she had thrown it away. However, she also said that she still had the paper, but it was never filed with the Authority.

[17] Mrs Cruz agrees that Ms Downs was paid cash for her work in 2017. She says that she told Ms Downs to sort out her own tax and ACC.

[18] Mrs Cruz's evidence was supported by her children. Ms Cruz described Ms Downs as being on a trial at the Stables in 2017 and completing about 14 hours of work. She was pretty sure that this was just on mornings. Ms Cruz says that she saw Ms Downs first on 24 October 2017 when Ms Downs started her trial. Ms Cruz did not give any reason for being able to recall it was that day other than that Ms Cruz was present at the Stables that day. I found it surprising that she could recall which day it was over a year before, when Ms Cruz herself worked at the Stables most days. She reported that her mother wrote down the hours which staff worked on a piece of paper for the accountant to make sure people got paid.

[19] Ms Cruz says that Ms Downs usual hours were 4.30am to about 7.30am. However, then Ms Cruz suggested that Ms Downs usually worked around two and a half hours.

[20] Mr da Cruz recalled seeing Ms Downs working at the Stables a few times in October, not in September. He also recalled seeing her once in December 2017. Mr

da Cruz mentioned having CCTV cameras at the Stables which could be checked from their family home which was near to the Stables. No CCTV footage was filed by TMC.

Other evidence from 2017

[21] There was little documentary evidence to support either party's version of events in 2017. There was no employment agreement at that stage. There was no system for staff to record their own hours.

[22] Both Mrs Cruz and Mr da Cruz referred in their evidence to there being rosters but neither had seen them. No rosters were filed in the Authority.

[23] Some text messages between Ms Downs and Mrs Cruz were filed. There is a message from 24 October where Ms Downs says:

...I really enjoy helping out at the stables. Would there be any chance of a job with you? Mornings and some afternoon work, ...I understand if you can't offer me anything however I'll need it keep an eye out for more work just thought I'd talk to you first.

[24] Mrs Cruz responds positively, suggesting dinner with Ms Downs and her husband, who was a horse rider. The next day Ms Downs texts:

...I've had a think on the hours I could do...The week I have the girls I could do mon, tues, wed, sat mornings. Might be able to do Thurs and fri mornings if Mum can...Mon, wed, fri afternoons. I don't know if this suits you or not.

[25] Then two days later Ms Downs texts questioning what hours Mrs Cruz wanted her to work when she does not have her girls. Mrs Cruz responds:

Our normal hours is 4.30am to 9.30am in the morning depends when we finish all the work. Afternoon is 1.45pm – 3.30-3.45pm

[26] These texts suggest that Ms Downs may have been working more regularly from late October 2017. On 15 November 2017 Mrs Cruz texts that she going overseas tomorrow and Natasha Cruz "knows our arrangements and will ready your pay on every Friday please let her know". Mrs Cruz said this was a group text.

[27] In early December Ms Downs asks by text what Mrs Cruz could offer her if she was to be "full time".

[28] Later in April 2018, when there is turmoil between the two, as discussed below, Ms Downs texted saying she has worked since September doing morning shifts until December when she became full time. She refers in the text to working three of the public holidays over the Christmas/New Year period.

The arrangement in 2018

[29] When Mrs Cruz gave Ms Downs a contract in January 2018 it only specified part time morning work, 4.30am to 7.30pm, Monday to Saturday.

Ms Downs' evidence

[30] Ms Downs says she asked Mrs Cruz about the hours and was told that an employee had been made redundant when Mrs Cruz's other son left and the employee was challenging that, so the contract had to reflect part time hours, although those hours were less than Ms Down was actually doing. Ms Downs says that she worked from 4.30am until at least 9.30am, and also in the afternoon.

[31] From January 2018 onwards Ms Downs says that she was paid part of her wages into her bank account (\$280), which reflected the contract hours and part in cash (\$370) that reflected the additional hours. She says the agreement was that she would get \$650 net in total per week, rather than a particular hourly rate. Mostly the cash was paid by Mrs Cruz but occasionally by Ms Cruz, if her mother was away. Ms Downs understood that other staff were on a similar part cash, part bank account arrangement.

[32] Ms Downs filed her bank statements which showed what appear to be sums of cash, usually in the \$100 to \$200 range, being deposited at the same branch into her account on Friday, usually as the entry immediately before the TMC wage payment entry.

Other witnesses supporting Ms Downs

[33] Ms Downs' evidence is supported by the father and daughter who say they worked as stable hands for TMC. As with Ms Downs, TMC disputes matters about their employment. It initially said that the father started on 16 March 2018, although Mrs Cruz later accepted that he did some trial time beforehand. Ms Downs produced photos from 1 and 3 March 2018 showing him working at the Stables. TMC says the

daughter never worked for the company and would just come in to visit her father. I found the daughter to be a very credible witness and accept her evidence that she worked at the Stables for most of March 2018.

[34] The father stable hand says that he worked with Ms Downs from February until April 2018 from 7.30am until at least 9.30am, sometimes until 10am. These are the same morning hours as Ms Downs claimed to have worked. He also says that he was initially paid solely in cash and then after his employment agreement was signed, he was paid partly in cash from Mrs Cruz and partially through bank transfer. He says that Mrs Cruz told him it was done this way because an accountant advised her to. The daughter stable hand also confirmed Ms Downs' evidence that she was working until after 9am, and then returning for a couple of hours in the afternoon.

Witnesses for TMC

[35] Mrs Cruz's witness statement refers to Ms Downs working mornings only in 2018. However, under cross examination she accepted that Ms Downs sometimes worked afternoons.

[36] Mrs Cruz's witness statement refers to her being a "hands on director fully involved in and aware of all of the operations of TMC". However, under cross examination she said that from December 2017 she employed a foreman (Ms Downs' husband) to deal with staff and rosters. She says that there were rosters run by the current manager or foreman but she says that she never saw the rosters.

[37] Mrs Cruz denied paying Ms Downs cash during 2018 after Ms Downs was on a contract. She says the \$650 rate was for qualified staff. She accepted that she had paid the father stable hand in cash during his trial, before he got a contract.

[38] Ms Cruz says that the person I have referred to as the daughter stable hand did not work at the Stables but just came in to visit her father occasionally. She denies having paid staff in cash. She did accept that when her mother was away, Ms Cruz would make a note of staff hours of work.

[39] Mr da Cruz says that Ms Downs worked two hours in the mornings only from January 2018.

Payroll form

[40] TMC produced a form headed Payroll Weekly-Monthly Control (the Payroll form) for Ms Downs' pay. Ms Downs had not seen it during her employment. The form has monthly summaries on the left with a day by day account for each month on the right, in columns.

[41] I found Mrs Cruz's evidence regarding the creation of this document somewhat unclear. At one point she said she created the Payroll form but her other evidence suggested that the accountant created it. No evidence readily identifiable as being from Mrs Cruz's accountant was filed.

[42] The daily entries start with a reference on 6 January 2018 to "employment contract signed", although the contract is actually dated as being signed on 10 January. There are entries for all seven days each week. Mostly these refer to a number of hours; either 2 or 3, beginning on 7 January. The last entry of hours is on 7 April, with the addition "left early" and then "NO SHOW" entries after that. However, approximately once a week there is an entry "Sick leave" which is often, but not always, on Wednesday or Thursday. There is no readily apparent pattern in the recording of two or three hours. There are four days noted as "vacation leave" in early March. Some entries have a reference to "late to work" but without specifying how much Ms Downs was supposedly late by and without it appearing to affect the number of hours recorded as being worked.

[43] The weekly payments recorded in the left column show a standard rate paid of \$321.97 gross and \$280.00 net.

[44] Ms Downs denied being late for work or taking sick leave, except in April 2018. She does not accept that the hours of work on the Payroll form are accurate. She questioned whether actual hours were recorded. She was never told they were or saw any evidence of it whilst in employment. Ms Downs says that Mrs Cruz and her daughter did not come to the Stables until around 5.30am, so would not have known when she started.

[45] There are a number of problematic aspects to the Payroll form.

[46] Initially Mrs Cruz said that the sick leave entries were when Ms Downs was reported by the foreman as being sick. However, on further questioning she accepted that it was used to indicate a day off. However, it did not seem to be used on the actual days Ms Downs had off, which were usually Sundays.

[47] It seems unlikely that Ms Downs would do either exactly two or exactly three hours every day. Why it would be two hours some days and three hours another is not apparent and was not explained by Mrs Cruz. Both parties agreed that the work continued until it was finished.

[48] The purpose of noting hours is also unclear. A differing number of hours in a pay period did not result in a different payment that week.

[49] Overall I am not satisfied that the Payroll form is a genuine reflection of Ms Downs' hours or days of work or leave.

Credibility conclusion

[50] I must assess whether the evidence of Ms Downs and the witnesses she called is more credible than that given for TMC.

[51] Ms Downs was confident, but not overly so, in her recall of the varying arrangements over time. I found the evidence of the witnesses she brought to be credible. Her witnesses provided consistent evidence of payments being made in cash for those on trial arrangements and for employees on more permanent arrangements being paid partly in cash and partly through bank transfers. There was also consistent evidence of the hours which Ms Downs worked.

[52] I found Mrs Cruz's evidence that she recalled the seven dates when Ms Downs worked in 2017 from memory, to be unlikely. The production of the Payroll form, along with Mrs Cruz's assertion that it showed the days Ms Downs was away, did not assist in establishing her credibility.

[53] Mrs Cruz initially said at the investigation meeting that she did not know either the father or daughter who gave evidence in support of Ms Downs. However, she later accepted that the father had worked at the Stables. Other aspects of her evidence were also internally inconsistent, such as whether she had written down dates of hours worked, and whether she still had that paperwork.

[54] I found Ms Cruz's high level of knowledge and recall of the particular dates and amount of hours which Ms Downs worked in 2017 to be surprising when Ms Cruz was not directly involved in setting up the arrangements with Ms Downs, or arranging rosters or payroll.

[55] Ms Cruz's evidence that Ms Downs came in during 2017 from 4.30 to 7.30 am (three hours a day) was inconsistent with Mrs Cruz's evidence that Ms Downs only worked two hours a day when she worked in 2017.

[56] Ms Cruz was confident that her mother noted down the hours which staff worked, but Ms Cruz had never seen that documentation and was not sure where it was kept. I found this surprising, particularly as Ms Cruz said that she occasionally had to write down the hours when her mother was away.

[57] When Ms Cruz was questioned about her confident assertion that Kiwisaver was available to TMC staff, she said that she did not deal with payroll or the accountant and she was not sure why she thought that Kiwisaver was available.

[58] Mrs and Ms Cruz gave inconsistent evidence regarding whether Ms Cruz dealt with TMC's accountant. Also, Mrs Cruz texted to staff in November 2017 saying that Ms Cruz would handle the account, she knows the arrangements and would ready staff pay every Friday. Ms Cruz denied that she had ever paid anyone.

[59] The text evidence between Ms Downs and Mrs Cruz is somewhat ambiguous, but overall is more in keeping with Ms Downs' evidence.

[60] Standing back and looking at the evidence overall I find Ms Downs, and the witnesses who gave evidence on her behalf, more credible than TMC's witnesses.

Conclusion on work issues

[61] Both parties agree that another staff member was away for a few weeks around the time Ms Downs started. It is difficult to put an exact start date on Ms Downs beginning at the Stables. The best conclusion I can draw from the text evidence and the evidence of witnesses is that prior to 24 October 2018 Ms Downs had done three weeks or so of work covering the absent staff member and in her text of that date was inquiring about a more permanent arrangement. That would take her start date to very early October or late September. Largely only morning work, from 4.30 am to 7.30am, continued until December, when Ms Downs was given longer morning hours and some afternoon hours.

[62] I accept Ms Downs' evidence that she asked Mrs Cruz for an employment contract before she finally received one in early January 2018. Mrs Cruz was

reluctant to set out all of Ms Downs' hours in the agreement due to the employment dispute with Ms Downs' colleague who had been declared redundant. In 2018 Ms Downs worked from 4.30am to 9.30 or 10am and from 1.30pm to 3.30 or 4pm.

Early departure from work

[63] I now move to look at events leading up to the completion of Ms Downs' employment.

[64] On Saturday 7 April 2018 Ms Downs was only due to work in the morning and was to have Sunday off as her daughters were staying with her. One of her daughters became unwell and so Ms Downs left early, she says around 6.30 or 7am. She messaged Ms Cruz to tell her she was going early. At this stage Ms Cruz was the back-up supervisor. Other staff were still working at the Stables and Ms Downs told one of them what was happening.

First warning

[65] On 8 April 2018 at 4.31am Mrs Cruz texted Ms Downs:

This is our warning notice to you for your unauthorized leave from work yesterday morning. Even if you got any family emergency to handle, proper notice to your employer so that we can rearrange stable duty is necessary to protect fragile horses. Any further similar absence from work without getting proper authorization from our company will not be tolerated.

[66] This warning was an unjustified action by TMC to Ms Downs' disadvantage. There was no evidence of what was communicated to staff about expectations if they had to leave during a duty. Ms Downs' departure from the workplace was explained by her daughter's illness. There was no evidence that there was anyone from the Cruz family present to inform in person as by that time most or all of them would usually be at the track with the horses. Ms Downs informed another employee of her departure and the reason for it, as well as sending a text to Ms Cruz to let her know what had happened. There was at least one other employee present at the time she left. Mrs Cruz emphasised in her evidence on another issue that family members were able to attend to all aspects of the running of the Stables, if necessary.

[67] There was no process before the warning was issued. No explanation for this absence was provided for TMC. Ms Downs was not told of her employer's concerns and given a chance to respond. These were not the actions of a fair and reasonable employer under s 103A of the Act.

[68] Ms Downs says she was shocked to receive the message. It was the first warning she had ever had. Given the situation that developed in the next couple of days I consider that remedies can be dealt with along with the dismissal claim.

Ms Downs' illness

[69] Ms Downs believes that she picked up the viral illness which her daughter had. During Sunday 8 April 2018 she started not to feel well, and then was awake most of the night, vomiting. She says that she must have dozed off as she missed the time when she was due to be at work on Monday morning. She always had her phone on silent for calls but with her alarm set. She says that she must have pressed the alarm off although she does not recall doing so. She says it was not intentional for her to sleep through.

[70] On waking Ms Downs saw that she missed a call from Mrs Cruz at 4.54am followed by a text asking her to let Mrs Cruz know what was going on. Ms Downs replied by text at 7.14am saying that her phone was on silent and she did not hear the call. She noted that she will not be in that day as she does not feel well.

[71] Mrs Cruz replied that morning saying that if Ms Downs were sick she needed to inform her employer "properly and promptly so that we can rearrange" the morning stable duty and:

This is our formal notice to you so that you will follow the requirements stated in your employment agreement.

[72] There is no reference to any particular provision of the employment agreement. There is no specific obligation in the sick leave clauses of the agreement regarding notification of sickness. Clause 8.3 sets out the entitlement to sick leave and what it may be taken for. Clause 8.4 is headed "Medical Certificate required for Sick Leave". It gives the employer the right to require proof of entitlement to sick leave, with the employer paying if the employer requests it within three days absence from work. The employee pays if the employer requests proof for at least three consecutive days off.

[73] I find Mrs Cruz's reference to "the requirements" of the employment agreement to be unclear.

Second warning

[74] At points during the week Mrs Downs' mother, who works as a health care assistant, came to check on her daughter. Her temperature was high.

[75] On Tuesday 10 April 2018 Ms Downs was still sick. She says that she assumed Mrs Cruz would think she was still sick. She says she was not aware of any particular requirements about notification. She did not notify Mrs Cruz. Mrs Cruz sent a text that morning:

... You didn't come to work ... This is the second warning to you. You need to inform your employer properly and promptly so that we can rearrange the morning stable duty. This is our formal notice to you so that you will follow the requirements stated in your employment agreement. ...

[76] Again there was no discussion before the warning was issued and thus no chance to comment.

[77] Ms Downs was surprised and upset to get this warning. She responded:

...sorry for not letting you know last night that I would be in this morning, I've been really unwell and slept all day and night. I will let you know tonight if I will be in tomorrow. I can provide a doctor's certificate if needed.

[78] Ms Downs says that she felt very unwell on Tuesday, with a high temperature and feeling unable to get off the bathroom floor. She texted her mother to come over to help her.

[79] She texted Ms Cruz that evening letting her know that she would not be in the next day. Despite having referred in texts over two days to feeling unwell, Mrs Cruz replies:

Your notice today saying you won't be in tomorrow needs to give me the reason for not reporting duty tomorrow. If your work attitude and performance continues in unacceptable manner, our company will terminate your employment according to your signed employment agreement.

[80] Although not identified as a warning by Mrs Cruz, the reference to termination of employment if performance does not change, is indicative of a warning. Again there was no attempt to speak to Ms Downs or give her the chance to explain before

warning her. Ms Downs felt it was extremely unfair when she had already texted that morning to say she was “really unwell”. She was not sure what the reference to performance was, as she was always early for work and believed that she did her work to the highest standard. She says that she was shocked and very upset to see that her employment might be terminated. Ms Downs replied:

Is it clear I am sick? I don't know what you are talking about in terms of my performance. Don't send threats like that please.

[81] And Ms Cruz responded:

Please ask your doctor to provide medical certificate for the duration of leaves you need, Then, please don't come into work until you ask your doctor to call me when he or she thinks that you can be fit to work at our stable again”.

[82] At this point Ms Downs had just had her second full day off work. Under clause 8.4 if the employer requires a medical certificate within three consecutive calendar days it is at the employer's cost. Ms Cruz does not mention anything in the text about who would pay. There is no specification in the employment agreement about a doctor contacting the employer.

[83] Ms Downs replied:

You want my doctor to call you don't be ridiculous. I will of course get medical certificate.

[84] It seems unfortunate that neither party attempted during this period to ring the other for a discussion, rather than rely solely on text messages.

[85] Mrs Cruz replied:

...This is to inform you that our company complies with and requires employees to follow the regulations on workplace safety and procedures. Because horses are fragile animals, our company must ensure that no infection or any harm will be done to any of them. Once you are sick, please do not come in to work until your doctor has talked to me to confirm that you are fit to work at our stable environment....

[86] Perhaps not surprisingly if not terribly diplomatically, Ms Downs responded:

You weren't concerned earlier in the week. Look if you don't want me to work there anymore just tell me.

[87] On the morning of Wednesday 11 April 2018 Ms Downs' texted asking if she will get paid sick leave. Mrs Cruz responds asking her to look at clauses 8.3 and 8.4 on sick leave matters, without further explanation.

[88] Ms Downs asks at 5.54pm whether the employer will be paying for her doctor's appointment and the consult when the doctor has to call Mrs Cruz. A couple of hours later she texts asking why Mrs Cruz had not replied.

[89] On the morning of Thursday 12 April 2018 Ms Downs texts that she has been working since September 2017 and so she has been there more than six months. She asks why Mrs Cruz is not responding. This time Mrs Cruz does respond:

...You didn't come to work and reply (*sic*) duty from 4.30am until now at 8.28am. This is the third warning to you. You need to inform your employer properly and promptly so that we can rearrange the morning stable duty. This is our formal notice to you so that you will follow the requirements stated in your employment agreement. Also This is to inform you that our company complies with and requires you employees to follow the regulations on work place safety and procedures. Because horses are fragile animals, our company must ensure that no infection or any harm will be done to any of them. Once you are sick, please do not come into work until your doctor has talked to me to confirm that you are fit to work at our stable environment. ...

[90] Ms Downs was confused by Mrs Cruz's message as she was getting warnings for not coming in to work but she was also being told that she was not to come in to work until her doctor spoke to Mrs Cruz. Ms Downs replied:

Thank you for your response but however you have not replied to the text message I sent you prior to you sending yours?

You told me I couldn't come in until my doctor called you. Please reply re sick leave. This is crazy. If you want me to leave tell me. This is stressing me out.

[91] Ms Cruz ignored that and then on Friday 13 April 2018 sent a message with the same content as the 12 April one, except the different date and time and the reference this now being the fourth warning.

[92] Ms Downs again texts asking Mrs Cruz why she is not responding to her messages. She asks how she can arrange to collect her cash, it being Friday. She had worked some hours on Saturday which would not yet have been paid for, aside from the issue of whether she was to receive paid sick leave. She messages again saying that she's been told not to come into work until the doctor phones and asks if Mrs Cruz will be paying for that. She says a reply to her texts would be appreciated. She then texts saying her mother will come to collect her pay.

[93] Ms Downs' mother went to the Stables but no one was there. Mrs Cruz later messages:

As you did not have any report of sickness due to workplace, you should attend to your own costs for any personal doctor consultation.

[94] It is not clear whether this is a reference to Mrs Down's condition not being work related, or whether the question of who pays for a medical certificate is seen as being related to a failure to report by Ms Downs.

[95] Ms Downs relies:

I am happy to pay for a medical certificate but you want my doctor to call you. This will cost extra. Will you pay for this. I can't afford to pay as I haven't been paid. My mother went to collect my cash but no one was there. I can't cope with this stress.

[96] Mrs Cruz texted Ms Downs saying that she is not entitled to any sick leave pay "according to your employment contract". Again no more specific reason is given. Ms Downs replied that her mother will be in today to collect her cash pay and:

I have worked for you since September. Why won't you do the right thing and pay me what I am owed. This too much.

[97] Mrs Downs' mother then visits she says that Mrs Cruz yelled at her. Her evidence was not challenged although in statements on behalf of TMC there was a denial of yelling. Ms Downs says that her mother was visibly upset and shaken when she returned. She was unable to get any money. Ms Downs texts Mrs Cruz:

Why were you so awful to my mother? She just came to collect the \$370 I am owed in wages. Do I not even get my wages I have earned now?

[98] Again Mrs Cruz ignores that question and texts on 14 April:

Your sickness needs to be reported on daily basis and 3-day continuous sick leave needs medical certificate to support your claim. You did not follow what is required in your employment agreement and this is our final warning to you. Your workload and job responsibilities will be taken up by other part time workers available to the company.

[99] This is the first time Mrs Cruz has referred to a requirement to report daily, although she may have considered that was implied in her requirement to report properly and promptly so that the morning so that they could rearrange the morning stable duty.

[100] Ms Downs says that she felt very threatened and extremely nervous about the final warning and all she wanted to do was work. She says that she was finding Mrs Cruz's lack of communication frustrating and very stressful.

[101] Ms Downs had made an appointment with her doctor for the afternoon of Friday the 14th. However, she says she did not attend as she could not afford to, having not been paid. Her doctor was in Te Awamutu and Ms Downs was now living in Cambridge. She accepts that she did not tell Mrs Cruz that she had an appointment.

[102] On Monday 16 April 2018 Ms Downs was feeling better and ready to return to work so she texted Mrs Cruz in the morning asking what time her doctor could call Mrs Cruz. Mrs Cruz texts:

Your sickness needs to be reported on daily basis and 3 –day continuous sick leave needs medical certificate to support your claim. You did not follow what is required in your employment agreement. Communication will be continued until your valid medical certificate have been provided and your doctor's qualification has been verified.

[103] Mrs Cruz seems to be questioning in advance the qualification of Ms Downs' medical certificate supplier. There is no mention of the phone call from the doctor.

[104] Ms Downs texts again asking what time her doctor can call Mrs Cruz. Mrs Cruz replies:

You have to provide all required medical certificates per your sick leaves claimed before the company considers in contact (*sic*) with your mentioned doctor.

[105] Ms Downs replies:

I am trying to arrange a time with the doctor. This is difficult I can provide certificates but I need to organise this time as per your request. You are now preventing me from returning.

[106] Having received no response after almost three hours, Ms Downs texts:

I am trying to talk to you but you don't respond. I'm entitled to wages you refuse to pay me. You tell me I cannot return until my doctor calls you but you don't tell me when he can call you. I have to pay for all this but I haven't been paid what's owed to me. You clearly don't want me there and you refuse to talk to me. What choice do I have but to look for another job.

[107] There is no response within the next hour and Ms Downs then texts at 5.07pm:

I can't take this anymore. I want to work and you are being awful. You clearly want me to go. If I do that what am I entitled to? Will I get my last week's pay at least?

[108] There is no reply from Mrs Cruz. There was no explanation from Mrs Cruz either at the time or at the investigation meeting as to why she did not respond, other than that she did not get what she wanted from Ms Downs.

[109] The following morning at 9am Ms Downs tests:

You have got what you want. Please tell me what my final pay is. I presume you don't want me to work notice?

[110] There was no reply from Mrs Cruz. Ms Downs did not return to the Stables.

[111] Ms Downs did not receive any final payment from TMC. The company says that its accountant worked out that Ms Downs had been overpaid and so nothing was owing. However, this was on the basis that the information in the Payroll form was accurate, whereas I have found that it was not.

Grievance claims

[112] The warnings issued to Ms Downs were at the least procedurally unfair and Ms Downs was thus subject to unjustified actions by TMC to her disadvantage. However, remedies for the warning grievances are caught up with the dismissal claim and will be dealt with together. The good faith issues, as well as the disadvantage claim that Ms Downs was prevented from returning to work, can best be dealt with as part of the unjustified dismissal claim.

Constructive dismissal

[113] A constructive dismissal is an apparent resignation or leaving by the employee, which is found to be a departure at the employer's initiative.¹ Does the employer's action cross the line between inconsiderate conduct causing some unhappiness or resentment to the employee and dismissive or repudiatory conduct which is sufficiently serious to justify the termination?²

¹ *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 AC

² *Ibid* at 104

[114] In the *Woolworths* case the Court of Appeal set out three categories of constructive dismissal, noting that the concept is not limited to these three:

- (a) The employer gives the employee a choice between resigning or being dismissed;
- (b) The employer embarks upon a course of conduct with the deliberate and dominant purpose of causing the employee to resign; and
- (c) A breach of duty by the employer leads the employee to resign.³

[115] The Court of Appeal commended an English Appeal Tribunal decision which said that “employers will not, without reasonable and proper cause, conduct themselves in a manner ... likely to destroy or seriously damage the relationship of trust and confidence”⁴ such that the employee was not expected to put up with it. Intention to bring the employment to an end is not required on the part of the employer.

[116] In breach of duty cases a two-step test was outlined by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)*:

- (a) Whether the resignation was caused by a breach of duty by the employer; and
- (b) whether the breach was sufficiently serious to make resignation reasonably foreseeable to the employer.⁵

[117] The onus of proof is on the employee to show that a dismissal, albeit constructive, has occurred. If that onus is met, the onus shifts to the employer to justify the dismissal.

Resignation caused by breach of duty

[118] Firstly, did TMC breach its duty? Secondly, if so, was Ms Downs’ resignation caused by that breach or those breaches.

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

⁴ *Woods v WM Car services (Peterborough) Ltd* [1981] ICR 666 at 670

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [21994] 2 NZLR 415 at 419

[119] TMC dealt with the matter in a mechanistic way. There was no effort by TMC to find out what was wrong with Ms Downs or to enquire as to why she was finding the situation stressful or thought TMC did not want her back. I find that TMC breached its obligation of trust and confidence, as well as its duty of good faith towards Ms Downs, including by:

- (a) issuing Ms Downs with at least four warnings by text message without any proper process before hand;
- (b) referring out of the blue in a text on 10 April 2018 to Ms Downs' work attitude and performance needing to improve, when there was no indication of what the concerns were in these regards;
- (c) failing to communicate clearly, referring for example, broadly to requirements under the employment agreement and nothing more;
- (d) requiring a medical certificate after two days' absence without saying that TMC would pay, when that is what the agreement provided at that stage;
- (e) not answering Ms Downs questions for extended periods, such as whether she would be paid for sick leave, despite sending texts giving her warnings or dealing with other matters in the meantime;
- (f) blocking Ms Downs' return to work by requiring her doctor to phone Mrs Cruz but then failing to identify, despite several requests, when her doctor could call Mrs Cruz;
- (g) failing to answer Ms Downs' questions and statements over several days, that it did not want her return to work, and ignoring her reporting of finding he situation stressful; and
- (h) towards the end, failing to respond to Ms Downs' messages at all.

[120] Was the resignation caused by the breach? Ms Downs' spoke of feeling threatened and extremely nervous about getting the final warning, when all she wanted to do was work. She enjoyed her work at the Stables and wanted to return to it. Ms Downs' mother confirmed that her daughter mentioned feeling harassed by the frequent warnings, and becoming stressed and anxious.

[121] Her text messages to TMC clearly identify that she believed that TMC did not want her back at work. She concludes with the message that TMC had got what it wanted and asking about her final pay. She notes her presumption that TMC would not want her to work out her notice. She presumed correctly as there was no response from TMC. In conclusion, Ms Downs resignation was caused by TMC's breaches.

Foreseeable resignation

[122] Were TMC's breaches sufficiently serious enough to make resignation reasonably foreseeable?

[123] I regard TMC's breaches as serious. Ms Downs was effectively prevented from returning to work and thus being paid.

[124] TMC was certainly on notice that Ms Downs was finding the situation difficult and was questioning whether the company wanted her to leave. From Wednesday the 11th Ms Downs is referring to telling her if Mrs Cruz wants her to leave. The following day a similar message is sent, along with a note that the situation is stressing Ms Downs out. On Friday she makes further references to not being able to cope with the stress and it being too much. By Monday the 16th she is stating that the company is preventing her from returning to work and that it clearly does not want her there. Having received no response she texts that Mrs Cruz had got what she wants.

[125] Ms Downs' resignation was readily foreseeable by TMC.

[126] TMC's breaches were sufficiently serious to justify Ms Downs' action. She was unable to get clarification from TMC about to get back to work. Especially given that she had finally been told that she would not be paid for her sick leave, getting back to work and pay was a serious matter for her.

[127] I find that Ms Downs was constructively dismissed by TMC.

Justifiability of the dismissal

[128] I now examine whether that dismissal was justified.

[129] Were there genuine and reasons for not wanting Ms Downs to return to work until her doctor had called and discussed the matter with Mrs Cruz? Several reasons were suggested for this requirement, not adding to its credibility as a reason against

Ms Downs' return to work. As Ms Downs pointed out at the time, it was not a requirement for the first couple of days of her illness. It is also an unusual requirement after what was, at the point it was requested, just two days absence due to sickness. None of the witnesses suggested that this was a usual practice at TMC.

[130] In her witness statement Ms Cruz raised a concern that if Ms Downs went into work sick, this would not have been good for the horses. There are several references in her texts to horses being fragile animals

[131] Ms Downs says that people usually went into work when they were sick. There were people at various times sucking throat lozenges at work, indicating that they were unwell. Accepting that she was not a vet she did not think that anything could be passed on to the horses. The father stable hand had worked with horses for over 40 years and had not heard of people being quarantined from working with horses if the people were ill.

[132] Mr da Cruz provided evidence that gave some support Mrs Cruz's evidence in the sense of horses' care needing to be taken with people who are unwell. He referred to medical certificates but did not mention a need to talk to the staff member's doctor.

[133] The apparent need to talk to the doctor also faced difficulty with evidence from TMC's witnesses was that Ms Downs had nothing to do with the horses, as she only cleared out the stalls and the like. They said that others lead the horses to the track and that they did not see Ms Downs as qualified to have contact with the horses. This casts further doubt on Mrs Cruz's position about the necessity to keep infections away from the fragile horses.

[134] The employment agreement does not indicate anything specific to this work place in terms of sickness. Ms Downs had the minimum sick leave entitlement under the Holidays Act 2003. TMC did not produce any policies setting out requirements when staff are sick.

[135] At the investigation meeting Mrs Cruz denied that the requirement to talk to Ms Downs' doctor was to do with infections, saying instead that it was about being sure that the employee was fit to work.

[136] Mrs Cruz said that she was afraid Ms Downs had an allergy to stable work, although even on Mrs Cruz's evidence Ms Downs had been there for a few months. There is nothing in the texts which refers to an allergy.

[137] Another possible ground raised for the call was a need to ensure that Ms Downs was fit enough to do the work. That type of concern is usually dealt with without a need to talk to the doctor.

[138] The final matter is that when Ms Downs asked repeatedly what time her doctor could phone she got no reply. I am not satisfied that TMC was keeping Ms Downs away from work for genuine reasons.

Procedural inadequacies

[139] TMC also failed to put its concerns to Ms Downs. From her evidence at the investigation meeting, Mrs Cruz doubted Ms Downs' honesty and the genuineness of her illness. Mrs Cruz believed that Ms Downs' absence may have related to difficulties her TMC and her husband were having regarding his employment. Those issues were not raised with her. Other than an oblique reference to checking her doctor's qualification, Mrs Cruz's seemingly baseless concern that Ms Downs may attempt to set up a friend to provide her with a medical certificate or call Ms Cruz and pretend to be a doctor, was also not put to Ms Downs before the termination of her employment.

[140] I find that Ms Downs' dismissal by TMC was unjustified.

Applicable pay rate

[141] Before I move on to consider remedies and the claims to other entitlements, I need to work out what Ms Downs' gross pay rate was. This was challenging as she was paid according to her employment agreement a net weekly rate for a maximum of 20 hours per week in the mornings. However, I have found that she actually worked in the afternoons as well. I accept her evidence that she received a total of \$650 net per week, through a payment of \$280 net into her account and the remainder in cash.

[142] Using the IRD website calculator for income tax applicable at the time of Ms Down's termination of employment, I have calculated her annual gross salary,

rounded to the nearest hundred to be \$39,800 gross per annum. This gives a weekly salary of \$765.38, or a daily rate, over six days as \$127.56.

Reimbursement of lost wages

[143] Ms Downs claims lost wages for her constructive dismissal. Under s 128(2) I must order the company to pay the lesser of the lost remuneration or three months' salary. I am not satisfied that Ms Downs should be awarded lost wages for a longer period.

[144] Ms Downs attempted to mitigate her loss. She enquired at some other stables but nothing was forthcoming. She was able to obtain some other work in June 2018 at the same rate but it required substantial daily driving so was not financially viable. She held that position for about four weeks. She also enquired about other types of positions but was not successful.

[145] On the basis of 13 weeks' lost earnings, less the four weeks in the other employment, Ms Downs is entitled to nine weeks lost wages at the rate of \$765.38 per week, totalling \$6888.42 gross, before a consideration of contribution.

Compensation

[146] Ms Downs sought \$20,000 under s 123(1)(c)(i) of the Act. Ms Downs' text messages in the last days of her employment show the pressure she felt she was under. She was concerned that word had got around and she may not be able to work in the horse industry again. Ms Downs was under financial pressure which put stress on her relationship with her husband. She also felt anxious about her inability to support her children and she went into arrears with her child support payments.

[147] Ms Downs' mother gave compelling evidence that her daughter was not the same person she had been a year ago, having lost weight, become anxious and being stressed out about her children and her marital relationship. Ms Downs lost confidence as a result of being out of work and not being able to find another job. She had to swallow her pride and ask her mother if she could borrow some money off her.

[148] I consider that given the warnings and constructive dismissal grievances a compensation figure of \$16,000 is appropriate before considering contribution.

Contribution

[149] Under s 124 of the Act I am required to consider whether Ms Down's contributed to the situation which gave rise to the warnings and her dismissal. In order to make a finding of contribution I must be satisfied that her behaviour was both causative of the outcome and blameworthy⁶.

[150] There are aspects of Ms Downs' behaviour over the week that she was sick which also demonstrated a lack of communication on her part. Having become sick on Sunday 8 April, it would have been preferable if Ms Downs notified TMC that day that she may well not have come in on Monday. However, this is tempered by TMC appearing not to have made it clear when notification was expected for a job that started so early in the morning. For the record I note Mrs Cruz's evidence was that all of her family members could help out and cover work in the Stables if necessary.

[151] Ms Downs also assumed that Ms Cruz would assume that Ms Downs was still sick on Tuesday, and did not notify her either on Monday evening or Tuesday morning that she was still sick. Ms Downs' Monday text refers to her not feeling well, so would not necessarily convey a sense of a sickness that was likely to continue for several days.

[152] Although there was the complication of the requirement for the doctor to ring Mrs Cruz, I still consider that Ms Downs should have attempted to get a medical certificate earlier. In the event that factors like the distance it took to get to her doctor was significant, these could have been raised with her employer. It would also have been preferable if Ms Downs tried to contact Mrs Cruz by phone rather than relying on text messages, although the same can be said of Mrs Cruz.

[153] I find that Ms Downs' actions did contribute to the situation and were blameworthy. A deduction of 25% of remedies should be made for Ms Downs' contribution. Therefore I order TMC to pay the following sums within 28 days of the date of this determination:

- (a) \$5166.32 gross as lost wages; and

⁶ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

(b) \$12,000 as compensation.

Kiwisaver

[154] Ms Downs claims that she said she wanted to have Kiwisaver contributions made for her work with TMC. She was a Kiwisaver member. She says that Mrs Cruz told her that she did not do Kiwisaver and so Ms Downs had to sign the opt out form. TMC says that Ms Downs did not want Kiwisaver deductions as she needed all the income from her wages.

[155] Ms Downs said that this was not something she could negotiate; she had to accept it or she was out of a job. Ms Downs' mother, who is a firm believer in saving for retirement, says that Ms Downs told her that TMC would not pay Kiwisaver.

[156] The TMC colleague, who worked with Ms Downs from September to December 2017, also said that TMC "did not do Kiwisaver". She was handed an opt-out form by the manager in place when she started. This may not have been the appropriate form as she was already a Kiwisaver member. However, no contributions were made on TMC on her behalf.

[157] Supporting Ms Downs' evidence is the father stable hand who says that Mrs Cruz told him several times that the company did not do Kiwisaver. He was also a member but stopped asking about being on it because Mrs Cruz was so adamant that they would not do it.

[158] I am satisfied that Ms Downs was entitled to contributions from TMC to Kiwisaver from the time that the Kiwisaver discussion occurred in January 2018 when the employment agreement was signed. TMC's unjustified action in not allowing her to participate was a disadvantage to Ms Downs.

[159] The appropriate remedy is to make TMC pay Ms Downs the employer's contributions to Kiwisaver which should have been made on her behalf. On the basis of the weekly gross wage of \$765.38, I calculate the amount which should have been paid on the basis of the 13 pay weeks in 2018 to be \$9949.94 gross. At the minimum Kiwisaver contribution rate of 3%, I order TMC to pay Ms Downs the sum of \$298.49.

Sick pay

[160] Ms Downs claims that she was not paid sick pay when she had five days off work in April 2018 (\$650 net). TMC says that Ms Downs was not entitled to sick pay as she had not been working for six months, or alternatively that she had used up all her sick pay.

[161] I have found that Ms Downs was working at TMC from late September or early October 2018. On that basis she gained an entitlement to five days sick leave in late March/early April 2018.

[162] TMC suggested that any sick leave entitlement had been used up. As stated above, I do not find the Payroll form to be a credible record. The reference to almost weekly sick days suggests that Ms Downs would have been working seven days a week, had she not had what was noted as sick days. Both parties agree that Ms Downs was not regularly working seven days a week, but there is no reflection for days off on the form.

[163] Ms Downs appears not to have been paid sick pay prior to April 2018. The stable hand who worked with her from February until April 2018 confirmed that she took no sick days that he could recall, until the block leading up to the end of her employment. The daughter stable hand could not recall Ms Downs taking any sick leave during March when she worked at the Stables.

[164] I find that Ms Downs reached six months' service by early April 2018 and was thus had an entitlement to five days' paid sick leave. However, by the end of Tuesday 10 April 2018 TMC had identified that it wanted a medical certificate. Ms Downs did not arrange for that, albeit saying she had an appointment on Friday 13 April 2018 which she cancelled due to lack of funds having not been paid. Although I am satisfied that Ms Downs was sick she did not provide the medical certificate as requested, and I consider that she should only be entitled to three days' sick leave. I order TMC to pay Ms Downs the sum of \$382.68 gross within 14 days of the date of this determination.

Statutory holidays

[165] Ms Downs claims that she is owed for time worked on some public holidays which was paid at the ordinary rate, rather than time and a half. She also says that she

was not given alternative days off and so is owed for those. TMC accepts that a payment is due for the extra half time for public holidays for Waitangi Day but otherwise does not accept that payment is due.

[166] Ms Downs claims she was owed alternate days for seven days worked. I accept that but also find that she was given four days off in early March and so deduct those. This leaves three days outstanding, which at the daily rate of \$127.56 gross amounts to \$382.68.

[167] In addition Ms Downs was not always paid the extra half time that work on a public holiday attracts. This applies to Labour Day 2017 when she was only working mornings. Using TMC's gross figures, \$23 gross per hour was the applicable hourly rate. So for three hours, Ms Downs was entitled to \$69 per day, making the extra half time worth \$34.50.

[168] The latter days when Ms Downs was not paid the extra half time were when she was undertaking morning and afternoon work⁷ and thus I use the daily rate of \$127.56, which the half time component is \$255.12.

[169] Adding \$382.68, \$34.50 and \$255.12, I order TMC to pay Ms Downs the sum of \$672.30 gross for statutory holiday entitlements, within 14 days of the date of this determination.

Holiday pay

[170] Ms Downs claims \$1905.00 gross as holiday pay based on an 8% calculation. She says that she did not take any paid holidays when she worked at the Stables. The leave she had in early March 2018 has been taken into account as alternative holidays.

[171] TMC says that any entitlements were paid on the way through her employment as she took more paid holidays than she had gained entitlement to. However, in submissions it accepted that it took into account days marked as "sick days" and lesser hours worked marked "late to work".

[172] I do not accept that Ms Downs took paid annual leave during her time at the Stables. The days in early March 2018 have been taken into account as alternative days.

⁷ 2 January, Anniversary Day, Waitangi Day and Good Friday, all 2018.

[173] I order TMC to pay Ms Downs the sum of \$1905.00 gross as holiday pay, within 14 days of the date of this determination.

Penalties

[174] Ms Downs seeks that penalties be ordered against TMC for breaches of s 4 of the Wages Protection Act 1983 and s 130 of the Employment Relations Act for not keeping full and accurate time and wage records.

[175] I am not satisfied that TMC should be subject to a penalty regarding the Wages Protection Act. There is no claim for wages not paid when they were due whilst Ms Downs was working at the Stables, except as regards the payment of the extra half time on a few public holidays.

[176] As regards the time and wage records I consider that a penalty should be considered. I have not accepted that the Payroll form is a genuine record of the hours and days worked. The evidence before the Authority shows no record of the cash payments made. TMC failed to keep a wages and time record which complied with s 130 of the Act.

[177] In considering the appropriate penalty I have regard to s 133A of the Act as well as the Employment Court's approach in recent cases *Nicholson v Ford*⁸ and *A Labour Inspector v Daleson Investment Ltd*⁹.

[178] The maximum penalty is \$20,000 against a company. There was only one breach.

[179] Records matters are sometimes regarded as at the lower end of the scale. However, the keeping of accurate records is important so that it can be ensured that minimum entitlement and contractual obligations are complied with.

[180] The absence of proper records has made the determining of Ms Downs' entitlements rather more challenging than it should have been.

[181] There is no evidence of any inability to pay by TMC.

⁸ *Nicholson v Ford* [2018] NZEmpC 132.

⁹ *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

[182] I consider that there is a need for specific deterrence against TMC. Having regard to the evidence overall a penalty of \$2,000 is appropriate. I order TMC, within 28 days of the date of this determination, to pay a penalty of \$2,000 to the Employment Relations Authority for transfer into the Crown account.

Costs

[183] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Downs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. TMC shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[184] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Nicola Craig

Member of the Employment Relations Authority