IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 157
5516746

	BETWEEN	SONOKO GENTA Applicant
	AND	RANDALL DIGGS First Respondent
		ADVENTURE HOLIDAYS LIMITED Second Respondent
		ROAD RUNNER RENTALS LIMITED Third Respondent

Member of Authority:	Christine Hickey
Representatives:	Anna Oberndorfer, Advocate for the Applicant Randall Diggs in person and as Advocate for the Second and Third Respondents
Investigation meeting:	30 June 2015
Submissions:	For the Applicant at the hearing. Further evidence requested by the Authority and supplied by the parties on 9 and 10 July, 14 July, and 16 July 2015. Written submissions from the First Respondent on 9 July 2015. Submissions in reply from the Applicant on 21 July 2015.
Determination:	22 October 2015

DETERMINATION OF THE AUTHORITY

A. Randall Diggs was Sonoko Genta's employer.

B. Sonoko Genta was unjustifiably dismissed.

C. Within 28 days of this determination Randall Diggs must pay Sonoko Genta:

(i) compensation of $6,000.00 and

(ii) $647.93 gross in unpaid wages for the balance of her notice period.

D. Randall Diggs must pay a penalty of $500.00 to the Employment Relations Authority for transfer to the Crown account.

E. Costs are reserved and a timetable has been set.

Employment relationship problem

[1] Sonoko Genta says that Randall Diggs was her employer when she was the Reservations Manager at Fresh Rentals from 16 November 2013 until 22 April 2014. Ms Genta says that she was unjustifiably dismissed. She says she was unjustifiably disadvantaged by the failure of Mr Diggs to sign and return her parental leave documentation, the failure to maintain her tax payments and the failure to pay KiwiSaver contributions.

[2] Ms Genta also says that Mr Diggs failed to act in good faith, failed to provide her with a written employment agreement, and failed to provide time and wages records as requested.

[3] Ms Genta claims lost earnings, compensation for humiliation and loss of dignity, compensation for the loss of her paid parental leave and penalties for Mr Diggs' failure to supply her with a written employment agreement, failure to keep proper time and wages records and for breaching his duty of good faith. She also seeks costs.

[4] Mr Diggs says that he was never Ms Genta's employer but that Adventure Holidays Limited (AHL) was her employer. He is the sole director and shareholder of AHL. He is also the sole director of Road Runner Rentals Limited (RRR). Mr Diggs says that Ms Genta was dismissed solely because her position was made redundant due to financial inability to continue the Fresh Rentals business.

Procedural background

[5] Ms Genta's application named Mr Diggs as her employer. Mr Diggs objected and said that AHL was Ms Genta's employer. Ms Oberndorfer identified that RRR had also paid Ms Genta. On 11 March 2015 I joined the two companies under s 221 of the Employment Relations Act 200 (the Act).

[6] Mr Diggs' counsel applied to have the proceedings struck out against Mr Diggs on the papers. I decided that it would be more expeditious and cost effective to determine whether or not Mr Diggs employed Ms Genta as part of the substantive investigation meeting because Mr Diggs, as the director of AHL and RRR, was likely to attend the investigation meeting to represent the companies which were otherwise unrepresented.

[7] At the investigation meeting I heard sworn or affirmed evidence from and asked questions of Ms Genta; Keyton Gibson, her husband, and Mr Diggs on his own behalf and for AHL and RRR.

[8] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but findings of fact and law are stated and conclusions on the issues for determination are expressed.

Issues for determination

[9] The issues I need to determine are:

(i) Was Mr Diggs, or RRR, or AHL Ms Genta's employer?

(ii) Was Ms Genta unjustifiably dismissed?

(iii) Did Ms Genta's employer breach its duty of good faith to her?

(iv) Was Ms Genta unjustifiably disadvantaged in any way?

(v) What remedies, if any, is she entitled to?

(vi) Is Ms Genta owed any unpaid wages, holiday pay, or KiwiSaver contributions?

(vii) Should penalties be imposed for failing to supply a written employment agreement, failure to supply time and wages records and a breach of good faith?

Who or what was Ms Genta's employer?

[10] Section 6(2) and (3) of the Act, while not dealing directly with the identity of the employer, are of assistance in identifying the employer.[1] Section 6 provides:

> ...
>
> *(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.*
>
> *(3) For the purposes of subsection (2), the court or the Authority—*
>
> *(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and*
>
> *(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[11] The onus of proof is on Ms Genta to prove the identity of her employer on the balance of probabilities. The assessment of who the employer is must be looked at objectively by the Authority. In the Employment Court case of *Mehta v Elliot (Labour Inspector)*[2] Judge Colgan wrote:

> ***The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change.*** *...it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties.* ***Put another way, who would an independent but knowledgeable observer have said was*** **[Ms Genta's]** ***employer when*** **[she]** ***commenced employment?***

[12] It is also relevant to consider whether there were joint employers of Ms Genta. It is possible for an employee to have joint employers[3] but again the objective test is required to be applied. In the *Hutton v Provencocadmus* case Judge Inglis confirmed that the question remains who an independent but knowledgeable observer would have said was the plaintiff's employer.

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1 *Hutton v Provencocadmus Limited (in receivership)* [2012] ERNZ 566.
2 [2003] 1 ERNZ 451.
3 *Hutton*, ibid, at paragraph [79].

[13] Usually the starting point for consideration is the documentation evidencing any written agreement between the parties. However, in this case no employment agreement was executed.

[14] Ms Genta had been working for Fresh Rentals, which was owned by the Adventure Centre Limited (ACL), since May 2011 and was the sole employee. She already knew Mr Diggs because Fresh Rentals operated out of the same building as RRR, a car and campervan rental business, which Mr Diggs ran. In late 2013 John Phillips of ACL talked to her about selling the Fresh Rentals business. Mr Phillips asked Ms Genta if she would be comfortable staying on if the business was sold to Mr Diggs. He told her Mr Diggs could not buy the business without her remaining employed because she knew how the business worked.

[15] Ms Genta and Mr Diggs agree that before Fresh Rentals was sold he approached her and asked if she would work for him. Ms Genta agreed but only on the basis that her hourly rate and her minimum 35 hours a week remained the same, and if she could have a written agreement containing those two stipulations before she started work.

[16] On 15 November 2013 ACL sold the Fresh Rentals business to AHL. Mr Diggs had already paid a deposit for Fresh Rentals on 24 September 2013. Mr Diggs and AHL jointly agreed to *honour and take over all current forward bookings held by Fresh Rentals*.

[17] Mr Diggs says that AHL was incorporated on 24 October 2013 for the purpose of buying and running Fresh Rentals.

[18] Ms Genta's evidence is that she kept asking Mr Diggs for a written contract. However, neither AHL nor Mr Diggs provided Ms Genta with an employment agreement until 20 February 2014 when Mr Diggs gave her an unsigned one with the employer named as AHL.

[19] Ms Genta ran the Fresh Rentals business almost entirely on her own and generally worked from home. She filled in timesheets and prepared her own wages calculations and sent those to Mr Diggs every fortnight. She was paid by automatic bank transfer to her own bank account.

[20] From 17 November 2013 until 23 January 2014 Ms Genta had to process every Fresh Rentals sale through RRR by telephoning Mr Diggs or one of RRR's staff so that the client's electronic payment could be processed through the RRR EFTPOS terminal. The receipts read *Road Runner Rentals*. Ms Genta sent confirmation emails, the wording of which had been approved by RRR or Mr Diggs, to clients over that period that read:

> *Your deposit of $_ has been charged by Roadrunner Rentals (parent company of Fresh Rentals)…*

[21] Ms Genta says many clients were uncomfortable with that kind of transaction and that she continually asked Mr Diggs to obtain a phone line and EFTPOS terminal solely for Fresh Rentals. The Fresh Rentals EFTPOS terminal and phone line were installed in Ms Genta's house on 24 January 2014. From that date the client receipts read *Adventure Holidays L*.

[22] The factors Ms Genta relies on to support her claim that Mr Diggs was her employer are:

- Mr Diggs personally approached her and asked if she would stay on and work for him if he purchased the Fresh Rentals business. There was no mention of a corporate entity running Fresh Rentals or of AHL being her employer for some months.
- She dealt directly with Mr Diggs all the way through her employment.
- All emails to her and on behalf of Fresh Rentals sent by Mr Diggs are from info@freshrentals.co.nz and not from AHL.
- Client payments for the first two months were processed through RRR not AHL.
- Bank statements supplied for the investigation meeting show payments of salary were not always made by AHL but sometimes by RRR and Mr Diggs does not suggest RRR was ever her employer.

[23] The factors Mr Diggs relies upon to support his claim that AHL was Ms Genta's employer are:

- The sale and purchase agreement clearly shows Fresh Rentals was purchased by AHL and not Mr Diggs.

- The receipts from 24 January 2014 show Ms Genta was working for AHL.

- The payments for Ms Genta's PAYE and student loan and her KiwiSaver payments were made to the IRD by AHL.

- Statements from the Zoom Room for website hosting are made out to *AHL (freshrentals.co.nz)*.

- The draft individual employment agreement Mr Diggs gave Ms Genta identified AHL as the employer.

- Bank statements show Ms Genta's pay going out of AHL's account.

- Ms Genta's request for mediation identified her employer as either AHL or RRR.

- AHL's accountant has confirmed that AHL was Ms Genta's employer.

[24] I respond to Mr Diggs' factors in the order in which they are listed:

- Ms Genta was not a party to and was not aware of the content of the sale and purchase agreement.

- The receipts do not assist Mr Diggs in establishing that AHL was Ms Genta's employer as equally during November, December and most of January the receipts were from RRR, which entity, Mr Diggs submits, was never Ms Genta's employer.

- Although Ms Genta calculated her own PAYE and other payments to be made to the IRD she did not make such payments. Reg Hintz is RRR and AHL's accountant and he made such payments to the IRD. Ms Genta was not aware that her tax obligations were being met by AHL until well after she commenced employment, and possibly not until just before her dismissal, when she discovered that a student loan payment had been missed.

- Ms Genta was not responsible for engaging or paying the Zoom Room.

- The draft employment agreement in AHL's name was not presented to Ms Genta until February 2014 and the key time for assessing who the employer is is the start of the employment relationship which was in November 2013.

- Bank statements of RRR, AHL and Ms Genta show wages payments to her from AHL until March 2014 after which three of the four payments are made by RRR. I do not accept that payments recorded on Ms Genta's bank statements as variously *ADVENTURE HOLIDAYS L Adventure ho* or *ADVENTURE HOLIDAYS L adventure* or *ADVENTURE HOLIDAYS L Fresh rental* are sufficient to prove that from the beginning of her employment in November 2013 Ms Genta knew that her employer was a limited liability company known as Adventure Holidays Limited.

- Ms Genta's request for mediation dated 29 August 2014 identifies her employer as *Randall Diggs with business names The Adventure Holidays Ltd & Road* Runner *Rentals Ltd t/a Fresh Rentals*. That does not show Ms Genta was aware that Mr Diggs was not her employer.

- Mr Hintz, as AHL's accountant, did not let Ms Genta know at the beginning of her employment, the crucial time, that AHL was her employer.

[25] If Mr Diggs had intended AHL to be Ms Genta's employer from the beginning he would have ensured she was aware that it was to be her employer and not him personally. However, I find that Ms Genta was not aware of AHL's existence until after the purchase of Fresh Rentals and after she agreed with Mr Diggs to stay on and work for him running Fresh Rentals. The employer could only have changed if Ms Genta and Mr Diggs had both agreed during the employment relationship to make AHL Ms Genta's employer. Mr Diggs proposed that in his draft employment agreement. However, Ms Genta did not agree to that draft and provided him with a draft agreement of her own naming Mr Diggs as her employer.

[26] On 22 April 2014 in conveying Mr Diggs' decision to make Ms Genta's role redundant he wrote:

> ***Fresh Rentals (Trading as Adventure Holidays)*** *has incurred significant losses that the company can no longer sustain and as a result is now insolvent.*
>
> ***It is therefore with great regret from both myself and Adventure Holidays*** *that your employment will expire in five working days on 28th April.*
>
> *Please advise total wages and holiday pay due.* (emphasis added)

[27] It is not realistic of Mr Diggs to expect Ms Genta to know who her employer was when the above quote shows that he did not seem to be clear of the legal relationship between AHL and Fresh Rentals himself.

[28] I accept Mr Diggs' evidence that RRR was not Ms Genta's employer. Client payments to Fresh Rentals were only processed through RRR's EFTPOS machine because Fresh Rentals did not have one devoted to its business to begin with. Payments were made from RRR when AHL's bank account was in overdraft. Mr Diggs also made payments into AHL's bank account from his personal accounts.

[29] When I stand back and make an objective assessment of the beginning of the employment relationship I conclude that a knowledgeable observer would have considered Mr Diggs to be Ms Genta's employer.

Was Ms Genta unjustifiably dismissed?

Factual background

[30] When Mr Diggs presented Ms Genta with a draft IEA it proposed a fixed-term of six months backdated to November 2013. Ms Genta was not happy with that and did not agree to it.

[31] On 24 March Mr Diggs emailed Ms Genta stating her hours would reduce to 20 per week. Ms Genta let Mr Diggs know she did not agree to the reduction.

[32] On 15 April Mr Diggs emailed Ms Genta a letter stating that it was further to a discussion they had on 11 April in which he raised a proposed restructure of Fresh Rentals. He stated that trading was *significantly down … and your position may be*

disabled. He invited her to a meeting on 17 April 2014. The 17th of April was Holy Thursday; the day before Good Friday.

[33] Ms Genta engaged Ms Oberndorfer on 17 April itself and asked Mr Diggs for an extension of time to allow her to be able to attend with Ms Oberndorfer as her support person. Mr Diggs proposed Saturday, 19 April and Ms Genta reluctantly agreed to attend on that day, despite it being in the middle of a holiday weekend.

[34] Ms Oberndorfer, Ms Genta and Mr Diggs met and Mr Diggs proposed that Ms Genta's pay structure change to a reduced hourly rate as well as reduced hours, or be on a commission basis only, or on a reduced undisclosed salary. Ms Genta did not agree to any of the proposals at the meeting.

[35] Ms Oberndorfer and Ms Genta left the meeting with the understanding that Ms Genta had a reasonable period of time to respond to the proposal to make her role redundant and/or reduce her hours and her pay.

[36] Over the Easter weekend Ms Genta prepared a detailed four page document entitled *The Reasons Why I Believe* (sic) *Are Contributing Factors to the Sales Figures Being Down In Comparison to 2013 (From Reservations Manager's Point of View)*. Ms Genta attached to that document a further document entitled *Changes to the Wage* in which she made counter-proposals to Mr Diggs' wish to reduce her hours and/or income. In the second document Ms Genta also pointed out that her student loan repayments had not been made as required to the IRD although they had been taken from her wages and that her KiwiSaver had not been paid to her KiwiSaver provider since she began working for Mr Diggs. She required those errors to be corrected.

[37] At 10.21 a.m. on Tuesday, 22 April 2014 before Ms Genta had sent Mr Diggs her documents he emailed her announcing the redundancy and giving her notice of her employment ending on 28 April 2014.

[38] At 11.02 a.m. on the same day Ms Genta emailed her written feedback.

[39] Mr Diggs did not reconsider his decision in the light of Ms Genta's feedback.

The law on redundancy

[40] The decision whether to make redundancies is part of the management prerogative. It is not for the Authority to substitute its judgment for that of the employer. Although an employer may assert the decision was for genuine business reasons, the Authority may still review the decision to determine whether it, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.[4]

[41] Mr Diggs can only satisfy the objective test of what a fair and reasonable employer could have done if he met his statutory good faith obligations to Ms Genta in how he went about making the decision to disestablish her position. Mr Diggs' decision about her role would have or was likely to have an adverse effect on the continuation of her employment. Therefore, Mr Diggs had to be active and constructive in providing Ms Genta with all relevant information about what it proposed to do and give her an opportunity to comment on that information before any decision was made.[5]

[42] In addition, I need to take into account s.103A(3) of the Act as far as it is relevant to the issue of redundancy. That requires that Mr Diggs put his proposal to Ms Genta, give her a reasonable opportunity to provide her views on it and genuinely consider her views before deciding to make her position redundant.

Determination on unjustified dismissal claim

[43] Mr Diggs' evidence was that the Fresh Rentals business was unable to be sustained for two main reasons. First, a major supplier of campervans, Tourism Holdings Limited (THL), changed the financial basis of its supply of vans from allowing Fresh Rentals to take a 20% commission to only allowing a 10% commission. Therefore, Mr Diggs made the decision not to use THL as a supplier any longer. Ms Genta estimated that resulted in the loss of about 40 vehicles that Fresh Rentals would otherwise have been able to rent out and receive commissions on. Secondly, Mr Diggs and AHL appeared unable to manage the financial implications of the usual seasonal fluctuations in the flow of business.

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4 *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [53] – [54]

5 Section 4(1A)(b) and (c) and s.4(4)(d) and (e) of the Act.

[44] Ms Genta's view is that Mr Diggs failed to do a number of other things in a timely way and that if he had done so the business may not have been in such a bad state in April 2014. It is also her view that Fresh Rentals could have retained THL as a supplier but made other adjustments to compensate for the reduction in commission.

[45] In addition, Ms Genta is critical of the fact that, after she was made redundant, Mr Diggs left the Fresh Rentals website live although the business was apparently not functioning at all, that he continued to use a Fresh Rentals email address and did not immediately cut off the Fresh Rentals phone line. Ms Genta says that there were still some bookings coming through and she believed that between them they could have sorted something out to keep the business going, even if it was on a reduced basis.

[46] I have no power to criticise the business decisions that went into managing the Fresh Rentals business up until the point that a restructuring of Ms Genta's position was proposed. I accept that the financial position Fresh Rentals was in by mid-April 2014 could not be sustained while employing Ms Genta on a minimum of 35 hours a week. I accept that a decision on restructuring the business in some way was necessary.

[47] Mr Diggs did not present Ms Genta with all the information he was relying on to make the proposal that her position may have to be disestablished or at best that her hours needed to reduce substantially. However, Ms Genta was clearly aware of the THL change in commission and prior to meeting Mr Diggs on 19 April he had told her that trading was *significantly down and is suffering*.

[48] Mr Diggs says the meeting on 19 April 2014 was Ms Genta's opportunity to give her views on the proposals he had put forward but that she did not come up with any counter-proposal or agree to any of his proposed changes. However, Mr Diggs made some alternative proposals at the meeting, such as employing Ms Genta but on a commission only basis. Ms Genta could not reasonably have been expected to give a considered response at the meeting to new proposals.

[49] I find it more likely than not that Mr Diggs agreed at the meeting to wait a reasonable period before making a decision on the redundancy proposal to allow Ms Genta to put her feedback into writing. Both parties agree that Ms Genta knew more about the business than Mr Diggs. In addition at one point Mr Diggs had proposed meeting with Ms Genta and Ms Oberndorfer on 28 April. There was not a

specific time limit put on Ms Genta's feedback, although I accept there was some discussion about Mr Diggs needing to make a decision within 10 days. It is entirely implausible that Ms Genta would have put together such a comprehensive analysis of Fresh Rentals' business without being given the opportunity to give such written feedback to all Mr Diggs' proposals. However, he did not wait for that feedback before deciding to make Ms Genta's role redundant.

[50] I accept that Ms Genta felt it particularly unfair that Mr Diggs' departed for an extended holiday in Fiji after her dismissal. However, despite the fact that Mr Diggs was personally Ms Genta's employer he could not be expected to keep putting his own personal money into the business, as I accept he had done towards the end of the employment relationship, to keep it operational.

[51] Although some expenses were incurred apparently on behalf of Fresh Rentals' business after Ms Genta was made redundant, such as the relocation of a camper van to Auckland, it is clear that the business could not have continued to employ Ms Genta even in a reduced capacity at the 20 hours a week at $25 per hour, or $500 gross per week, she proposed. I consider the need to restructure, effectively closing the business, was a genuine one. Even if that came about because of bad management decisions on Mr Diggs' part leading up to that point, as alleged by Ms Genta, the fact is that by April 2014 Fresh Rentals was no longer a viable business that could keep Ms Genta employed.

[52] However, because Mr Diggs did not wait to receive Ms Genta's feedback I consider that he breached his good faith obligation, under s 4(1A)(c)(ii) of the Act, to give Ms Genta an opportunity to comment on the redundancy proposal and that same failure was also in breach of his obligations under s 103A(3) of the Act to give Ms Genta a reasonable opportunity to provide her views on the proposed redundancy and to consider her views before deciding to make her position redundant. These breaches were more than minor and caused Ms Genta to be treated unfairly. Therefore, Ms Genta was unjustifiably dismissed.

Did Mr Diggs' failure to complete the paid parental leave form unjustifiably disadvantage Ms Genta?

[53] At the meeting on 19 April Ms Genta got agreement from Mr Diggs to sign the employer portion of her application for paid parental leave. She had previously asked Mr Diggs to sign it and he had not done so. At that meeting he agreed that he would

sign it. However, he did not do so either before or after he made Ms Genta's role redundant.

[54] At the investigation meeting Mr Diggs agreed that he was likely to have said he would do so and within a few days. However, he said that he decided not to sign the form because Ms Genta did not agree with any of the proposals he put to her at the 19 April meeting.

[55] The Parental Leave and Employment Protection Act 1987 (the PLEP Act) provides for some female employees who give birth to a child or adopt a child to have paid parental leave. It is a government-funded entitlement and administered by the IRD. During the relevant period for Ms Genta the entitlement period was for a maximum of 14 weeks.

[56] Ms Genta would have been eligible for paid parental leave under s 7 of the PLEP Act only if the following applied to her circumstances:

> *Except as otherwise provided in this Act, every female employee—*
>
> *(a)* ***who becomes pregnant; and***
>
> ***(b) who, at the expected date of delivery, will have been in the employment of the same employer for at least an average of 10 hours a week over—***
>
> *(i) the immediately preceding 12 months; or*
>
> ***(ii) the immediately preceding 6 months,—***
>
> ***shall be entitled to maternity leave in accordance with this Act.***
> **(emphasis added)**

[57] Ms Genta had worked for Fresh Rentals for at least the preceding 6 months for over 10 hours a week before she was made redundant. She originally intended to take parental leave from late July 2014. She was five months pregnant when she was made redundant.

[58] Ms Genta first informed Mr Diggs of her wish to take parental leave from 28 July 2014 by a letter dated 17 April 2014. She was already aware then that Mr Diggs considered that Fresh Rentals needed to be restructured and that her position may *be disabled*.

[59] I need to assess whether it was more likely than not if Mr Diggs had carried out appropriate consultation with Ms Genta in good faith that she was likely to have

remained employed in the Fresh Rentals business for approximately another three months.

[60] I do not consider that even had Mr Diggs waited for Ms Genta's feedback document that he would have been able to continue to employ her in, in some way, in the Fresh Rentals business so that for the 6 months preceding her expected date of delivery she would have worked for at least an average of 10 hours a week. The redundancy was genuine although badly handled. The timing was very poor for Ms Genta and did mean that she would be ineligible for paid parental leave.

[61] Even if Mr Diggs had signed his portion of the application form at the meeting on 19 April 2014 Ms Genta would not have remained employed by Fresh Rentals for the 6 months immediately preceding her expected date of delivery and so would not have been eligible for paid parental leave.

[62] To make out a personal grievance of unjustified disadvantage an employee must first prove that they have suffered a disadvantage to one or some of their terms and conditions of employment from the employer's action or inaction. Only then does the enquiry focus on whether the employer's action or inaction was justifiable in all the circumstances.

[63] Mr Diggs' decision not to complete the form was for petty reasons but, in reality, did not disadvantage Ms Genta by negatively affecting any term or condition of her employment. It was superseded by her dismissal. This claim is dismissed.

Did Mr Diggs' failure to make a student loan repayment, and a KiwiSaver payment disadvantage Ms Genta?

[64] Clearly Ms Genta was disadvantaged near the end of her employment when she was notified by the IRD that she had a payment of $290.76 cents that was overdue and would attract penalties. That is because although the amount had been deducted from her pay Mr Hintz failed to pay it to the IRD. This matter has now been resolved and no penalties were charged to Ms Genta by the IRD.

[65] Ms Genta was also disadvantaged by the KiwiSaver deductions (employee and employer) not being correctly paid to the IRD in the early part of her employment. However, I understand that has now been remedied. If I am incorrect about that then Ms Genta may come back to the Authority for a determination on what exact amount or amounts are claimed from Mr Diggs for KiwiSaver.

[66] Mr Hintz wrote an email to Mr Diggs on 6 May 2014 in which he took responsibility for making mistakes in the tax amount and the student loan repayment and KiwiSaver deductions actually made and actually paid to the IRD. People, including employers, do make mistakes and while a mistake in payment is not justifiable in all circumstances it is the kind of mistake even a fair and reasonable employer in all these circumstances could have made. In making that decision I have taken into account the mistake was put right quickly once it was drawn to Mr Diggs' attention. Therefore, Ms Genta was not unjustifiably disadvantaged by those payment mistakes.

Remedies

Lost wages

[67] Despite considering the dismissal unjustified my conclusion that the business did not have enough money to keep Ms Genta employed means that I will not make an order for lost remuneration after Ms Genta was dismissed.

Compensation

[68] Ms Genta seeks compensation of $8,000 for humiliation, loss of dignity and injury to her feelings. Ms Genta says she was stunned by her dismissal and hurt by Mr Diggs failing to sign her paperwork for her paid parental leave. She was also deeply upset that she and her husband had to use their savings they had put aside for after the baby was born for the period immediately after the dismissal.

[69] Ms Genta says her stress levels went *through the roof* and that she worried that she was *slipping back in to depression as I have experienced it before and it felt as though I was down on a very similar path.*

[70] Mr Gibson also gave some evidence of Ms Genta's hurt and distress.

[71] I accept Ms Genta's and Mr Gibson's evidence. However, I must discount the amount of stress and hurt that was consequent on Ms Genta's mistaken belief that if only Mr Diggs had completed her paid parental leave application for she would have been eligible for paid parental leave. I consider that in all the circumstances compensation of $6,000 is appropriate.

Was Ms Genta's final pay incorrect?

[72] Mr Diggs instructed Ms Genta to calculate her final pay and send it to Mr Hintz. However, her final pay was $647.93 nett less than her calculations. That is because she had calculated that she should have been paid for a two week notice period. Mr Diggs disagreed and believed she was only entitled to one week's paid notice. He has not provided any calculations for how he worked out how much pay he would withhold, although Ms Oberndorfer requested those.

[73] Although Ms Genta and Mr Diggs had not concluded a written IEA containing an agreed notice period I note that in AHL's proffered IEA, prepared by Mr Diggs, two weeks was the notice period proposed and in Ms Genta's proffered IEA she also proposed a notice period of two weeks. Ms Genta was paid fortnightly. In all the circumstances, I consider it fair and reasonable that Ms Genta should have received two weeks' paid notice and the $647.93 should be paid to her.

Contribution

[74] Having determined Ms Genta has a personal grievance s 124 of the Act requires me to consider whether she contributed to the situation which gave rise to her dismissal and if so reduce remedies accordingly.

[75] Ms Genta did not engage in any blameworthy conduct, and did not contribute to the situation which gave rise to her redundancy so her remedy of compensation is not to be reduced on the grounds of contribution. Nor is the week's pay withheld by Mr Diggs to be reduced for contribution.

Should penalties be imposed on Mr Diggs?

[76] Ms Genta has asked for penalties to be imposed for Mr Diggs' failure to provide a written employment agreement and his failure to supply time and wages records that were asked for, as well as for his breach of good faith.

Failure to provide a written employment agreement

[77] There is no jurisdiction to impose a penalty for Mr Diggs' failure to provide a written employment agreement at the outset of Ms Genta's employment because only a Labour Inspector can bring an action for a penalty for failure to comply with s 65 of the Act. This claim is dismissed.

Failure to provide wages and time record

[78] I now consider whether a penalty should be imposed for Mr Diggs' failure to provide wages and time records. Ms Oberndorfer wrote to Mr Diggs on 28 May 2014 and asked for a copy of the time and wages record for Ms Genta within 14 days. These were never provided. Ms Genta was the only employee and prepared her own calculations for pay and for the amounts of PAYE, KiwiSaver and student loan deductions to be made. She sent those to Reg Hintz, Mr Diggs' accountant, who made the necessary payments to Ms Genta and to the IRD.

[79] Ms Genta had copies of her timesheets and some of her calculations on which Mr Hintz relied to pay her. She handed these up at the investigation meeting. However, s 130 of the Act requires every employer to keep a wages and time record for each employee and specifies what that record must contain. Section 130(2) of the Act means an employer must provide an employee with access to or a copy of their wages and time record upon that employee's request.

[80] Section 130(4) of the Act provides that an employer who fails to comply with any requirement of s.130 is liable to a penalty imposed by the Authority. Mr Diggs had a responsibility to ensure that a wages and time record was kept for Ms Genta and Mr Hintz would have been the logical person to keep such a record on Mr Diggs' behalf.

[81] Section 133(1)(b) of the Act gives the Authority exclusive jurisdiction to award penalties for any breach of the Act.

[82] There has never been an explanation offered of whether a wages and time record was kept or not and certainly no such record was produced despite the request made on Ms Genta's behalf. Therefore, Mr Diggs breached his obligation under s.130(2) and is liable to a penalty.

[83] In *Xu v Macintosh*[6] Chief Judge Colgan wrote:

> *A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*

6 [2004] 2 ERNZ 488

> *The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*

[84] The following non-exhaustive list of factors is also useful to consider in exercising the Authority's discretion about whether or not to impose a penalty, and if it is to be imposed what amount should be ordered paid:

- the seriousness of the breach;
- whether the breach is one-off or repeated;
- the impact, if any, on the employees;
- the vulnerability of the employees;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.[7]

[85] A penalty should only be awarded for the purpose of punishment and should not be used as an alternative way of increasing compensation[8] to parties who have been disadvantaged by the actions of the employer. For that reason penalties are often payable to the Crown and not to the party that suffered the wrongdoing.

[86] I have made a finding that Mr Diggs breached his duty of good faith under s 4(1A) of the Act. He did so as part of the poor process he used to unjustifiably dismiss Ms Genta's role redundant and she has been compensated for that. I do not consider it is required in this case to impose a separate penalty for Mr Diggs' breach of his duty of good faith.

[87] However, I do consider that a penalty should be imposed for Mr Diggs' failure to supply a copy of Ms Genta's wages and time record to her. Had the record been

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7 These were set out by Judge Inglis in *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32] and I have also considered comparable cases since that date.

8 *Xu v McIntosh* [2004] 2 ERNZ 448 (Employment Court).

supplied as requested Ms Genta's advocate would have been more able to easily work out how much money was still owed to Ms Genta.

[88] It is important to bring home to Mr Diggs and to other employers that they must not only keep a proper wages and time record but that an employee or ex-employee has a right to have a copy of that within the statutory time limit. Mr Diggs simply did not answer that request and certainly gave no explanation for why it has not been supplied. The breach was an on-going one. If such a record existed it could have been supplied to Ms Genta at any time after it had been requested. It was not a technical or inadvertent breach.

[89] The maximum penalty for an individual who breaches a provision of the Act is $10,000[9]. In all the circumstances, including a lack of remorse, I consider a penalty of $500.00 should be paid to the Crown.

Costs

[90] Costs are reserved. The unsuccessful party is usually expected to pay a reasonable contribution towards the other party's legal costs plus, if the applicant is the successful party as in this case, the filing fee of $71.56. The parties are invited to agree on the matter of costs.

[91] If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

[92] In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is $3,500 per day. The investigation meeting took one day. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff, such as *Calderbank* offers.

Christine Hickey
Member of the Employment Relations Authority

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9 Section 135(2)(b) of the Act.