Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 73
5395755

	BETWEEN	NATHAN GUNNING Applicant
	A N D	BANKRUPT VEHICLE SALES & FINANCE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Peter Moore, Counsel for Applicant Graeme Gowland, Counsel for Respondent
Investigation meeting:	14 February 2013 at Christchurch
Submissions Received:	1 March 2013 and 12 March 2013 from Applicant 5 March 2013 from Respondent
Date of Determination:	3 May 2013

DETERMINATION OF THE AUTHORITY

A. **The Applicant was not an independent contractor but was employed by the respondent on an as-and-when-required, casual basis. His personal grievance for unjustified dismissal fails.**

B. **The Applicant is owed $100 by the respondent in respect of commission on the sale of two cars, together with $40 holiday pay. The Applicant was not paid less than the prescribed minimum rate of pay under the Minimum Wage Act 1983.**

C. **A penalty of $500 is imposed upon the respondent, the whole of which sum is payable to the Applicant.**

D. **Costs are reserved**

Prohibition from publication

[1] During the investigation meeting, evidence was given in relation to a confidential business agreement between the respondent and a car hire company. By consent, the details of the agreement and the identity of that car hire company are to be kept confidential.

[2] In addition, evidence was given in relation to a former associate of Ms Chapman (the owner of the respondent company). The activities of this associate in relation to Ms Chapman and to the respondent company are being investigated by the Police. The name of this associate and other information that may lead to him being identified are to be kept confidential, by consent, and he shall be referred to as *Mr X* in this determination.

Employment relationship problem

[3] Mr Gunning raises a personal grievance in respect of an alleged dismissal from his employment on 3 September 2012. He also claims that he is owed holiday pay, commission of $200 on the sale of four cars and that he was paid below the national minimum wage during his short period of employment. He also seeks penalties for breaches of contract and for breaches of ss.4 and 63A of the Employment Relations Act 2000 (the Act).

[4] The respondent denies that Mr Gunning was ever an employee of the company. It says that Mr Gunning was an independent labour-only contractor and that, accordingly, the Employment Relations Authority has no jurisdiction to consider his personal grievance and other claims.

Brief account of the events leading to the alleged dismissal

[5] The business of the respondent is as a third or fourth tier lender, lending to people with adverse credit histories. It is also a registered motor trader and the company holds all the necessary accreditations to lend and trade as such.

[6] Between around April and October 2012, the respondent operated a part of its business in Christchurch, being located at a yard which it shared with the hire car company and another small business. The respondent on-sold some of the hire

company's surplus vehicles, selling them by one of two methods; through a loan book or for cash.

[7] The parties knew each other because Mr Gunning had previously taken out a finance agreement with the respondent in order to purchase a car and, indeed, had worked for the respondent company previously doing what Mr Gunning called *leg work*, which largely appeared to be assisting the respondent with talking to customers who were behind in their loan payments.

[8] The evidence of Ms Chapman is that her company had also lent around $1,000 to Mr Gunning as a personal loan, on which he was not making any repayments. Ms Chapman said that she noticed that some of the cars in the yard needed washing, and she thought of offering car grooming work to Mr Gunning, it being her hope that Mr Gunning would be *moved ethically* to start repaying the loan in recognition of her offer to him of work. The previous arrangement she had had with Mr Gunning was that he would work for nothing, his payments going to reduce the car loan (although this arrangement subsequently changed on Mr Gunning's request). On this occasion, Ms Chapman said, she did not wish to enter into such an arrangement because she did not wish to disadvantage Mr Gunning and so all she could offer him was a small amount of money, namely $50 a day, together with $50 for every car that he sold.

[9] Generously, Ms Chapman also offered to make a one off payment to Mr Gunning of $50 petrol money so that he could visit the yard and speak to Mr X to find out what the job entailed. If he was happy, Ms Chapman said, Mr Gunning would then work as and when Mr X told him. (Mr X was based in Christchurch, with his own car yard and wrecking business whilst Ms Chapman was largely based in the North Island.)

[10] There is a conflict of evidence between Ms Chapman and Mr Gunning in respect of the work that Mr Gunning did. It is Ms Chapman's evidence that Mr Gunning would do car grooming and general yard duties only and would not get involved in the financial transaction and loan side of the business, as it was complex and he would have needed to have learned how to do that. Mr Gunning's evidence is that, in reality, he was effectively in sole charge of the yard on some occasions when Mr X was absent and did deal with customers. However, upon questioning him, Mr Gunning effectively accepted that he did not fill out any of the loan agreements or other vehicle sale documentation. I believe that Mr Gunning did look after the yard

on occasions while Mr X was absent, although I believe that this would not have been a particularly onerous obligation, as there was little passing trade, the yard being little more than a paddock upon which the car hire company's cars were parked. The respondent had no permanent office in Christchurch, although there was a campervan at the site.

[11] A further conflict of evidence with respect to the commission on sales is that Mr Gunning understood that he would get $50 commission for every sale he brought about, including referrals. Ms Chapman's evidence is that it was industry practice that commission is not earned on referrals but only on sales. As it turns out, Mr Gunning was paid commission only once, and this had been paid at the discretion of Ms Chapman because Mr Gunning had assisted her by printing out some documentation to give to Mr X and by taking a photo of the customer's driving licence.

[12] On Ms Chapman's evidence, Mr Gunning actually would not have been able to earn any commission because, according to her evidence, a sale only takes place when the salesman completes all the paperwork to execute the sale and Mr Gunning was not in a position to execute the documentation because he had not been shown how to. Ms Chapman accepted that, if Mr Gunning had been able to earn any further commission in accordance with the criteria which she says had been agreed with him, it could only have been by way of her exercising a discretion to let him do so. She said that it was her expectation that, eventually, he would have learned to fill out the documentation but her evidence was also that, once he learned how to do so, the commission would rise to $100 per sale.

[13] Mr Gunning says that he should receive commission on four further sales because two of them were to relatives of his (his brother and his uncle), and because he had had interactions with the other two individuals. Ms Chapman says that she filled out the paperwork with respect to the two relatives and therefore that did not constitute a sale by Mr Gunning in accordance with her criteria. The third individual, according to Ms Chapman, did not actually take any finance from the company as Mr Gunning had given him details of another loan company. Finally, according to Ms Chapman, no records can be found for the fourth sale in respect of which Mr Gunning claims commission.

[14] Another conflict of evidence exists with respect to how Mr Gunning was summoned to work on each day that he did so. It was his evidence that, often, Mr X would tell him the day before when to come in and that, sometimes, that would change or Mr X would later text to give him a precise time. It was the evidence of Ms Chapman that Mr X would not know when to summons Mr Gunning to work until the afternoon of the previous day because it was only then that it would be apparent whether or not Mr Gunning's services would be required. (Such as, for example, taking cars to VINZ or to a workshop a little way down the road.)

[15] Mr Gunning also stated that Ms Chapman had told him in her initial conversation about the possibility of working for the company that he was to work every Saturday. Ms Chapman denies this, saying that the yard did not need to be open on Saturdays.

[16] As it turns out, Mr Gunning worked only seven days for the respondent in 2012, on Wednesday 22 August; Saturday 25 August; Monday 27 August; Tuesday 28 August; Wednesday 29 August; Saturday 1 September; and Sunday, 2 September 2012.

[17] It was Mr Gunning's evidence that, on 1 September, he asked Ms Chapman why he had not been paid commission on the sales that he believed he had made. He said that she told him that he would only get commission for cars sold for cash. If the cars were financed through the company, he would not get any commission. Mr Gunning's evidence was that this had been news to him and it caused him concern because most of the sales were financed through the company. Because of this, Mr Gunning began to consider that he should be given a contract of employment and, on Monday 3 September, having got some advice from the Department of Labour (as he called it – properly, the Ministry of Business, Innovation and Employment), he sent the following text to Ms Chapman:

> *Sue can I get a employment contract off you for working at the yard.*

[18] The reply from Ms Chapman and the ensuing exchanges were as follows:

> *No sori it casual an if u nef* [need] *that best we talk bout it when I am there thurs tku.*
>
> Mr Gunning: *Every employee must have one by law so one will need to be provided ASAP.*

[19] Mr Gunning's evidence is that, after he sent that final text, Ms Chapman rang him up angrily and said:

> *What the bloody hell are you texting me like that for?*

[20] Mr Gunning said that Ms Chapman was upset because he had written ASAP in capital letters. He says that he explained that that happened automatically because of the predictive text setting on his phone. Mr Gunning said that Ms Chapman then just got more upset and said:

> *If your gonna act like that, Ill call it quits. If you have that attitude, never expect to get a job someplace else.*

[21] Mr Gunning's evidence was that the exchange continued as follows:

> Mr Gunning: *What attitude? I am just doing what the Department of Labour said.*
>
> Ms Chapman: *I know what the law is.*
>
> *Your wages have been all paid up today.*
>
> *Nice having you working with us. It was good for you and good for us. Some experience for you.*

[22] Mr Gunning said that the call then ended. Mr Gunning's evidence was that he regarded this as Ms Chapman dismissing him.

[23] Conversations then ensued between Mr Gunning, Mr X, and Ms Chapman which it is not necessary to detail here. Email exchanges also took place between Mr Gunning and Ms Chapman. Mr Gunning eventually wrote an email to Ms Chapman on 3 September in the following terms:

> *Subject: Personal grievance*
>
> *I hereby raise a personal grievance with BVSF in relation to unfair dismissal and non supply of contract.*
>
> *My unfair dismissal as you "called it quits" without a reasonable excuse when I requested a contract as per my job at your yard located at* [details omitted].
>
> *In relation to my grievance to non supply of contract I requested a contract after being unaware how the pay worked and what the performance bonuses were so we both had an understanding of how it worked and that we were both protected under the contract.*
>
> *I wish to invite you to undertake mediation in relation to the above grievance with the department of labour if you accept to do that*

> *please let me know by 17th of September 2012 failing to respond leaves me no option but to apply to the ERA.*

[24] Ms Chapman replied the same day in the following terms:

> *Nathan thank you for your email. it has been referred to our accountant for reference who holds terms agreed with all indepent* [sic] *contractors. The only person that called it quits … As you know you are an independent contractor and you are entitled to work for whom you wish subject of course to your WINZ obligations.*

[25] The Authority was shown a letter which Ms Chapman gave evidence was sent to her bookkeeper towards the end of August 2012. (It was dated *August 2012* only.) The text of the letter was as follows:

> *Re Nathan Gunning: Proposed Independent Contractor*
>
> *BVSF loan 1514 – balance $1,026.37 August 2012.*
>
> *Dear Sarah,*
>
> *I have had cause to recently speak to Nathan Gunning regarding some work experience/work with BVSF Ltd … but only as an independent contractor. I would guess that he is not registered for GST but at this point cannot confirm. As you will be aware we have no employees in the company and I seek to raise this so that we can apply the proper independent contractor deductions – should we have a need for his services on a regular basis.*
>
> *I am also aware that Nathan is still on WINZ and we would need to ensure that he is not breaching any of his conditions regarding receiving his WINZ benefit.*
>
> *One of my aims in doing this is that he might work/pay off the outstanding balance that he has with BVSF Limited.*
>
> *There have been no payments on this loan since February 2012, and the balance exceeds $1,000.*
>
> *Can I please re iterate that there is no wish to hire this person as an employee and can you please advise what we need to do regarding withholding tax payments.*
>
> *Thanks for help.*
>
> *Sue Chapman*
> *Director*

Issues

[26] The Authority needs to determine the following issues:

(a) Whether Mr Gunning was an independent contractor or an employee;

(b) If Mr Gunning was an employee, whether he was employed under a casual employment arrangement or whether he was a permanent employee;

(c) Whether Mr Gunning was unjustifiably dismissed from his employment;

(d) Whether Mr Gunning is owed $200 in respect of commission on the sale of cars.

(e) Whether Mr Gunning is owed arrears of wages in respect of the Minimum Wages Act 1983 and holiday pay pursuant to the Holidays Act 2003;

Was Mr Gunning an independent contractor or an employee?

[27] Section 6(2) of the Act states as follows:

> *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.*

[28] Section 6(3) of the Act states as follows:

> *For the purpose of subsection (2) the court or the Authority –*
>
> *(a) Must consider all relevant matters, including any matters that indicate the intentions of the parties; and*
>
> *(b) Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[29] The leading case in determining whether an individual is an employee or an independent contractor is the Supreme Court case of *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372, which held that the starting point is to examine the terms and conditions of the contract and the way it operated in practice and to apply the three tests (the control test, the integration test and the fundamental or economic reality test).

[30] No written contract of any kind was given to Mr Gunning by the respondent and the only document put before the Authority was the letter dated August 2012 from Ms Chapman to her bookkeeper, Ms Barry. It was suggested by counsel for

Mr Gunning that this letter was created after the dispute had arisen but pre-dated *August 2012* to make it look as if the letter had been written at the time when Ms Chapman and Mr Gunning had reached their agreement that he would work for the respondent. On balance, I accept this proposition. I do this because there appeared to be little reason for Ms Chapman to write to Ms Barry in the way that she did and because it is suspicious how the letter emphasises so strongly that Mr Gunning is to be an independent contractor. A letter had been produced from Ms Barry to Ms Chapman dated 12 February 2013 to say that she received this letter approximately between 3 and 5 September 2012. This would support the proposition that the letter had only been created once the dispute had arisen with Mr Gunning on 3 September.

[31] Whilst it is disappointing that Ms Chapman felt that she had to fabricate a letter to bolster what I accept was her belief in any event, even if the letter had been genuine it would not be determinative of the issue of whether the relationship between Mr Gunning and the respondent was genuinely one of an independent contractor. Turning to the oral agreement between the parties, they were at odds in their evidence with respect to what was agreed, and so that is of little assistance. Therefore, I must examine the day to day relationship between the parties in terms of the three tests referred to in *Bryson*.

[32] Applying first the control test (which examines the extent to which the activities of Mr Gunning were controlled by the respondent), all the evidence suggests that Mr Gunning had to do what he was told. He took his day-to-day instructions from Mr X and, occasionally, from Ms Chapman. Although it is assumed that Mr Gunning was not given close instructions precisely how to wash the cars, it is clear that, from day-to-day, he had little discretion as to what he did and how and when he carried it out. Although Mr Gunning says that he was often left in sole charge of the yard, this appears to have been no more than an occasional caretaker role and I accept the evidence of Ms Chapman that Mr Gunning would not have been able to have completed any sales because he would not have been properly *au fait* with the relevant paperwork. Therefore, given that Mr Gunning had little control over his day-to-day activities, the control test points to an employment relationship.

[33] Turning to the integration test, which examines the extent to which Mr Gunning was integrated into the respondent's business, it is difficult to reach any

clear conclusions on this given that Mr Gunning only worked when he was asked to. That fact would suggest that Mr Gunning maintained some independence resonant of an independent contractor's position. It was Mr Gunning's evidence that he felt that he was obliged to come in whenever he was asked to (save on a Friday when he was not able to do so). I accept that evidence.

[34] However, although it was not possible to question Mr X for reasons outside the control of the Authority, my impression from the evidence of Ms Chapman is that the respondent felt no obligation to offer work to Mr Gunning on any particular occasion. Indeed, I believe that Mr Gunning accepted that, as his text communications with Mr X show that he often checked whether he was to come in the following day or not. Although this was attributed to Mr Gunning needing reassurance, because of a condition which his counsel said Mr Gunning suffers, I believe that a regular arrangement would not have necessitated such checking. Overall, the integration test favours an interpretation of the relationship as one of an independent contractor.

[35] Applying the fundamental or economic reality test, which examines the extent to which Mr Gunning took on financial risk himself in providing his services, this test favours an interpretation of the relationship as being one of an employee. For example, as Ms Chapman stated, Mr Gunning provided no equipment of his own. (Ms Chapman appeared to believe that this fact favoured an interpretation that Mr Gunning was an independent contractor, but this is incorrect.) Mr Gunning simply turned up when he was asked to and provided his labour and nothing else. Indeed, Ms Chapman even paid Mr Gunning to travel the relatively short distance to the yard on 21 August 2012 so that Mr Gunning and Mr X could discuss Mr Gunning working for the respondent.

[36] The respondent pointed out that Mr Gunning had once been the director of a company called AWA Electrical & Entertainment Limited. Mr Gunning explained that this had been set up with his brother but had never traded and had been struck-off the companies' register for failing to file a constitution.

[37] Ms Chapman stated that she was expecting an invoice to be provided by Mr Gunning. Mr Gunning's evidence was that he had only ever been asked for an invoice after he had asked for an employment contract. I accept this evidence,

especially given that the respondent had no problem paying Mr Gunning without an invoice prior to Mr Gunning asking for an employment contract.

[38] Discussing with Mr Gunning his previous employment history, it is clear that he has never operated as a businessman and his evidence was that he knew nothing about running his own business.

[39] Whilst I accept that Ms Chapman may have intended that the relationship between the respondent and Mr Gunning was not to be an employment relationship, I am also satisfied that she did not make this in any way clear to Mr Gunning and I am also satisfied that Mr Gunning assumed that his relationship with the respondent would be one of employment. Whilst Mr X may well have been an independent contractor, he was a businessman in his own right with his own business interests. Mr Gunning, on the other hand, was not a businessman, had no intention of being one and it never occurred to him that that was the nature of his relationship with the respondent. When I step back and look at the overall picture of the relationship between Mr Gunning and the respondent, as I am obliged to do, it is my conclusion that, on balance, the relationship was not one of an independent contractor but one of employment.

[40] That leads me to examine whether Mr Gunning was a casual employee, as is argued by the respondent in the alternative.

Was Mr Gunning a casual or permanent employee?

[41] The Act does not define the concept of a casual employee but it is accepted from case law that a relationship which bears the following characteristics is likely to be a casual employment relationship:

(a) Engagement for short periods of time for specific purposes;

(b) A lack of regular work pattern or expectation of ongoing employment;

(c) Employment is dependent on availability of work demands;

(d) There is no guarantee of work from one week to the next;

(e) Employment takes place as and when needed;

(f) There is a lack of an obligation on the employer to offer employment or on the employee to accept any other engagement; and

(g) Employees are only engaged for the specific term of each period of employment.

Thompson Brookers on-line Employment Law resource, ER66.07, referring to *Lee v. Minor Developments Ltd t/a Before Six Childcare Centre* (unreported) Employment Court Auckland AC52/08, 23 December 2008.

[42] *Lee* also emphasised that the question of whether a person has been employed as a casual employee depends on the mutuality of the intention at the outset of the employment and the nature of the work, including its regularity, its hours and the obligations imposed on the employee.

[43] In *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225, the Employment Court stated the following:

> *[40] The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.*
>
> *[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice.*

[44] Counsel for Mr Gunning also refers me to *Rush Security Services Ltd t/a Darien Rush Security v Samoa* [2011] NZEmpC 76, in which Colgan CJ referred with approval to the principles of two Canadian cases which had been referred to in *Jinkinson*.

[45] There is some difficulty in analysing the exact nature of the relationship between the parties because it lasted for such a short time (Mr Gunning having worked on seven occasions only over a period of two weeks). Furthermore, the Authority was unable to question Mr X on how he decided when Mr Gunning was required to turn up for work. However, it does appear that Mr Gunning was engaged

for short periods of time for specific purposes (that is, to clean the cars when they got dirty and to cover partially for Mr X when his business obligations took him elsewhere).

[46] There was also, as a result of the nature of the relationship, a lack of regular work pattern. This is demonstrated by the frequent texts between Mr Gunning and Mr X, in which Mr Gunning often asked whether he was to work the following day and what time he was to turn up. On at least one occasion Mr X told Mr Gunning by text that he was not needed the following day and on another occasion, that he was not needed that morning.

[47] It is also clear that Mr Gunning was only asked to work when there was actually work for him to do. It follows from that, that no work needed to be offered by the respondent when there was none. For example, Ms Chapman said that, if it were raining, the yard would usually be closed. If Mr X was available to be at the yard, Mr Gunning would not be required normally and, also, it appears that during the two week period when Mr Gunning worked, another individual had been engaged for a short period to carry out some grooming work.

[48] Applying the principles referred to in *Rush Security Services*, I believe that Mr Gunning was *spasmodically called upon once in a while to do a bit of work for an indeterminate time* rather than being *hired to work specified hours for a definite period or on a particular project until it* [was] *completed*. I do not believe that the stage was ever reached where it was foreseeable when Mr Gunning should turn up for work.

[49] Whilst I am satisfied that Mr Gunning felt under an obligation to work when he was asked to, I am also satisfied that there was no obligation on the respondent to offer Mr Gunning work. Therefore, there was no mutuality of obligation between the parties in my view.

[50] I accept Mr Gunning's evidence that he was told by Ms Chapman that he would be working each Saturday. However, in my opinion, given the overall nature of the arrangement, if Mr X had told Mr Gunning that he was not required on a specific Saturday, Mr Gunning would have accepted this. When I step back and look at the overall nature of the relationship between Mr Gunning and the respondent, it seems clear that he would work and be paid only when Mr X or Ms Chapman asked

him to, and that they did so only when the need arose (and that need did not arise on a regular or predictable basis). Mr X and Ms Chapman were not only able to decide on what days Mr Gunning worked but also between what times.

[51] Whilst counsel for Mr Gunning suggests that there was an intention to train Mr Gunning to fill in the sales and loan documentation, and that demonstrates an intention to employ him on a permanent basis, that was not supported by the pattern of work that was evident during his short period in employment. It is possible that a more regular work pattern may have emerged with time, but this had not emerged by the time Ms Chapman terminated the arrangement.

[52] I am not satisfied, overall, that there was an *irreducible minimum of mutual obligation necessary to create a contract of service* (*Jinkinson* at [34]). Therefore, Mr Gunning was employed by the respondent on an as-and-when-required, casual basis.

Was Mr Gunning unjustifiably dismissed?

[53] In view of my conclusion that Mr Gunning was employed on a casual basis, it follows that, as there was no obligation to provide work between times when the respondent had nothing to give him, Ms Chapman's words to Mr Gunning on 3 September (and I accept Mr Gunning's evidence in this respect that she told him that she wished to *call it quits*), cannot amount to a dismissal as Mr Gunning was not in employment at that time and the respondent was not obliged to offer further work to Mr Gunning in any event. What she was doing, effectively, was saying that she no longer wished to offer him work when the need next arose.

[54] Whilst I am also satisfied that the only reason that Ms Chapman decided to end the relationship was because Mr Gunning asked for an employment contract, a request that he made in good faith, and whilst that would have undoubtedly resulted in a finding of unjustified dismissal had Mr Gunning been employed at the time Ms Chapman *called it quits*, the Authority cannot make such a determination in circumstances where the respondent had no ongoing obligations towards Mr Gunning from one episode of work to another.

Was Mr Gunning entitled to commission on the sale of four cars?

[55] I am satisfied that Mr Gunning was not told in clear terms at the beginning of the engagement that the commission he would earn would only be triggered when he made a sale (as opposed to referring a customer) and, further, that to make a sale, he had to complete all the documentation, which he had not been shown how to do. Mr Gunning appears to be an intelligent young man who took the engagement seriously and it is my view that he would have checked if he had believed that the commission arrangement had been one which he would not have been able to have benefited from in reality.

[56] Although Ms Chapman said that it is industry standard not to give commission for referrals, which I accept, Mr Gunning was engaged on a casual basis and has never been employed as a salesman in the motor industry before. Therefore, I believe it is an act of bad faith by Ms Chapman to purport to rely on industry practice without spelling it out, when she should have known that Mr Gunning is unlikely to have been aware of the details of such practice. Furthermore, by her own evidence, her offer of commission to Mr Gunning was a meaningless one in effect because it would have been impossible for him to have fulfilled the criteria to receive any commission.

[57] I therefore believe that the agreement between Mr Gunning and Ms Chapman was that he would be entitled to receive commission for sales made, and for referrals. From the evidence, it is clear that two of the sales Mr Gunning cites were referrals, as they were to relatives of Mr Gunning. I reach this conclusion even though at least one of those individuals had already been a customer of the respondent because, I understand from the evidence, Mr Gunning did refer this relative to Ms Chapman in respect of his desire for a loan.

[58] However, with respect to the third individual that Mr Gunning relies upon, I accept the evidence of Ms Chapman that all that Mr Gunning did was to give to the individual a compliment slip with the details of a finance company written on it. I do not believe that the actions of Mr Gunning resulted in what one would traditionally call a *sale* and therefore I do not accept that he should be paid commission in respect of that individual.

[59] The final individual was someone whose name Mr Gunning could not remember and I accept Ms Chapman's evidence that she had no idea who this

individual was. Given that Mr Gunning did not properly record the details of this sale, it would not be just for him to be paid commission in respect of it.

[60] In conclusion, I believe that Mr Gunning should be paid $100 in respect of the two referrals that he made.

Was Mr Gunning paid below the prescribed rate contrary to the Minimum Wage Act 1983?

[61] Section 6 of the Minimum Wage Act states that, notwithstanding anything to the contrary in any enactment, award, collective agreement, determination or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under the Minimum Wage Act shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[62] The minimum rate that Mr Gunning was entitled to during the period 22 August 2012 to 2 September 2012 was $13.50 per hour. The exceptions at sections 7 to 9 of the Minimum Wage Act do not apply.

[63] Unfortunately, neither Mr Gunning nor the respondent kept accurate wage and time records and so it is not possible to ascertain exactly how many hours Mr Gunning worked over the period in question. Mr Gunning estimates that, on average, he worked between 4 hours and 4 hours 45 minutes each day. He says that on Sunday 2 September he worked for 6 hours.

[64] I believe that a fair assessment would be to assume that Mr Gunning worked 4 hours for 6 days and 6 hours on Sunday, 2 September. That amounts to a total of 30 hours work. (If he carried out any work on 21 August, when he was chatting to Mr X about the possibility of working, the $50 petrol money should cover that. I do not accept that he worked on Monday, 3 September, as he mooted was a possibility.)

[65] Taking into account the prescribed rate, Mr Gunning should have been paid a total of $405 gross. Taking into account the $100 commission that I will order to be paid to him, but excluding the $50 petrol money he was tendered for meeting with Mr X on 20 August, Mr Gunning would have been paid a total of $500. Therefore, I do not believe he has been paid under the prescribed rate.

Should the respondent have to pay a penalty?

[66] Mr Gunning seeks the following penalties:

(a) $5,000 for each breach of contract in accordance with s.135 of the Act;

(b) $5,000 for each breach of s.4 of the Act pursuant to s. 4A; and

(c) $10,000 for each breach of s.63A of the Act.

Section 135 of the Act

[67] With respect to Mr Gunning's application for a penalty to be imposed upon the respondent pursuant to s.135 of the Act, in relation to a breach of employment agreement arising from the failure to pay Mr Gunning for sales he had made, I believe that a bargain had been struck between Mr Gunning and Ms Chapman that he would be paid $50 for each sale he made, and for referrals. This was not recorded in writing but was agreed orally, and so became part of the terms of agreement on each day that Mr Gunning was engaged as a casual employee.

[68] Mr Gunning was adversely affected by the respondent's breach and, as I have found above, I believe that Ms Chapman was acting in bad faith by later purporting to rely on *industry practice* in order to deprive Mr Gunning of what had been agreed. Under such circumstances, I believe that the imposition of a penalty is appropriate, albeit at the lower end of the scale. Accordingly, I impose a penalty of $500, the totality of which is to be paid to Mr Gunning.

Section 4A of the Act

[69] With respect to the application for a penalty to be imposed upon the respondent pursuant to s. 4 A of the Act, s. 4A provides as follows:

> *A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—*
> *(a) the failure was deliberate, serious, and sustained; or*
> *(b) the failure was intended to undermine—*
> *(i) bargaining for an individual employment agreement or a collective agreement; or*
> *(ii) an individual employment agreement or a collective agreement; or*
> *(iii) an employment relationship*.

[70] Section 4(1) provides:

> *The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other*

[71] Section 4A(a) sets a high threshold that must be met before a penalty is imposed; the breach must be deliberate, serious and sustained. The full Employment Court in *Waikato District Health Board v New Zealand Public Service Assoc Inc* [2008] ERNZ 80 (EmpC) held that "egregious bad faith" was required for a penalty to be awarded under s 4A.

[72] Counsel for Mr Gunning points to a number of actions by the respondent that took place after Mr Gunning first asked for an employment agreement. These include:

(a) Ms Chapman shouting at Mr Gunning when he used the word *ASAP* in his text;

(b) Ms Chapman *calling it quits* when Mr Gunning pursued his request for an employment agreement;

(c) Ignoring texts sent by Mr Gunning;

(d) Threatening to lay a police complaint;

(e) Refusing to enter into further correspondence with him and threatening a restraining order and accusing him of harassment.

[73] Whilst Ms Chapman was entitled to disagree with Mr Gunning, her choosing to threaten police action was, in my view, an act of bad faith as there was nothing in Mr Gunning's communications which were objectively of a criminal nature. However, whilst I accept that the respondent's threat was deliberate, in order to discourage Mr Gunning from asking for an employment agreement, and that it was serious as it was intended, in my view, to frighten Mr Gunning into backing down, I cannot find that it was sustained. The word *sustained* carries the meaning of continuing for a lengthy period of time (see *the New Zealand Oxford Dictionary,* 2005

for related definitions). Nothing about the actions of Ms Chapman can be properly characterised as sustained in my view.

[74] Furthermore, turning to the second, alternative limb of s. 4A of the Act, I do not believe that the failure to act in good faith was intended to undermine the employment relationship. Firstly, Ms Chapman did not believe there was an employment relationship (so there can have been no intention to undermine it), and secondly, the actions of Ms Chapman were not intended to undermine the relationship, but were intended to discourage further communication from Mr Gunning. Although not the actions of someone acting in good faith, I do not believe that the definition in s. 4A has been satisfied.

[75] Accordingly, I decline to impose a penalty upon the respondent under this heading.

Section 63A of the Act

[76] With respect to the application for a penalty of $10,000 for a breach of s. 63A of the Act, s. 63A imposes on an employer an obligation to provide to an employee a copy of an intended employment agreement under discussion, together with other obligations. Therefore, in theory, the respondent is liable to Mr Gunning for failing to provide him with a copy of the intended employment agreement.

[77] I accept that Ms Chapman did not believe that Mr Gunning was an employee. As such, she had a reason for not having provided him with an employment agreement. Although much of the difficulty that arose between the parties arose because of a failure to make clear the terms and conditions of the engagements, I do not believe that it would be just to impose a penalty upon the respondent for having failed to provide an employment agreement in circumstances where it believed that the relationship was not an employment one.

Is Mr Gunning owed sums under the Holidays Act 2003?

[78] Section 23 of the Holidays Act provides that, if the employment of an employee comes to an end and the employee is not entitled to annual holidays because he has worked for less than 12 months, then the employer must pay the employee 8% of the employee's gross earnings since commencement of employment, less any amount paid to the employee for annual holidays taken in advance or paid in

accordance with s.28 (when annual holiday pay may be paid with the employee's pay).

[79] The meaning of gross earnings is set out in s.14 of the Holidays Act and makes clear that it means all payments that the employer is required to pay to the employee under the employee's employment agreement, including salary or wages and productivity or incentive-based payments including commission.

[80] Therefore, as Mr Gunning was paid a total of $400, and is owed a further $100 which the respondent is ordered to pay pursuant to this determination, Mr Gunning is entitled to be paid holiday pay of $40.

Conclusion

[81] I find that Mr Gunning was a casual employee of the respondent and, as such, was not unjustifiably dismissed when Ms Chapman decided to *call it quits*.

[82] I find that Mr Gunning was not underpaid by reference to the Minimum Wage Act although he is owed a further $100 gross in respect of commission on the sale of two cars. He is also owed $40 holiday pay.

[83] I find that a penalty of $500 should be imposed upon the respondent, the entirety of which is to be paid to Mr Gunning.

Orders

[84] I order the respondent to pay to Mr Gunning the following sums:

(a) The gross sum of $100 in respect of commission on the sale of two cars; and

(b) The gross sum of $40 in respect of unpaid holiday pay.

(c) The sum of $500 in respect of a penalty payment.

Costs

[85] The parties should seek to agree between themselves how the question of costs should be dealt with. In the absence of such agreement within 28 days of the date of this determination, any party seeking costs should serve and lodge a memorandum of

counsel and any memorandum in opposition should be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority