

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 95
5430690

BETWEEN NATHAN GAVIN GUNNING
 Applicant

AND BLIGHS ROAD SERVICE
 STATION (1989) LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mark Henderson, Counsel for Applicant
 David Caddick, representative of Respondent

Investigation Meeting: 25 March 2014

Submissions Received: 25 March and 29 April 2014 from Applicant
 24 April 2014 from Respondent

Determination: 4 July 2014

DETERMINATION OF THE AUTHORITY

- A. Nathan Gunning was unjustifiably disadvantaged in his employment.**
- B. Nathan Gunning was unjustifiably dismissed.**
- C. Blighs Road Service Station (1989) Limited must pay Nathan Gunning the following amounts:**
- a) Unpaid wages for 21 and 22 August of \$144 gross;**
 - b) Unpaid holiday pay of \$109.20 gross;**
 - c) Unpaid employer Kiwisaver contribution of 3% on the unpaid wages above;**
 - d) Lost remuneration for 3 months after dismissal of \$5,460 gross;**

- e) **Holiday pay of 8% on the lost remuneration being \$436.80;**
 - f) **Employer KiwiSaver contribution of 3% on lost remuneration being \$163.80;**
 - g) **Unpaid wages for 23 to 29 August 2013 inclusive less two hours wages plus holiday pay of 8% and employer KiwiSaver contribution of 3% of that amount;**
 - h) **Interest at 5% on unpaid wages and unpaid holiday pay and KiwiSaver contributions owed to 29 August 2013 from 30 August 2013 to the date it is paid;**
 - i) **Leave is reserved to return to the Authority to set the specific amounts payable if not quantified above if they cannot be agreed upon between the parties;**
- D. Blighs Road Service Station (1989) Limited must pay Nathan Gunning \$6,000 in compensation for humiliation, loss of dignity and injury to his feelings.**
- E. Blighs Road Service Station (1989) Limited must pay a penalty of \$1,000 for breach of the Wages Protection Act 1983 payable to the Authority for payment into the Crown account.**

Employment relationship problem

[1] Mr Gunning was employed at Blighs Road Service Station (1989) Limited (BRSS) from 1 August 2013 until he was given notice by Mr David Caddick, the owner of the business, on 23 August 2013.

[2] Mr Gunning claims:

- (a) He was unjustifiably disadvantaged on four different occasions during his employment;
- (b) He was unjustifiably dismissed;
- (c) He is owed wages for 21, 22 and 23 August 2013 as well as holiday pay for the entire period he worked;

- (d) Lost wages from the date of dismissal up to 25 March 2014, the date of the Authority's investigation meeting;
- (e) Unpaid KiwiSaver employer contributions;
- (f) Holiday pay; and
- (g) Interest on lost wages.

[3] Mr Gunning seeks compensation of \$6,000 for humiliation, loss of dignity and injury to his feelings for unjustified disadvantage and unjustified dismissal.

[4] Mr Gunning also asks the Authority to consider whether penalties should be ordered against BRSS for breaching s 64(3) of the Employment Relations Act 2000 (the Act) by failing to supply him with a copy of his employment agreement, for breaching s 5 of the Wages Protection Act 1983 and for a breach of good faith.

[5] BRSS denies all claims. Mr David Caddick¹ says that Mr Gunning is unable to bring a claim for unjustified dismissal because there was a 90-day trial period provision in Mr Gunning's individual employment agreement which Mr Gunning was given before he started work and signed.

[6] Mr Caddick denies that Mr Gunning was ever unjustifiably disadvantaged in his employment.

[7] Mr Caddick agrees that Mr Gunning worked 11 hours on 21 and 22 August 2013 and has not been paid for that period but says that clause 29.4 of Mr Gunning's employment agreement allows BRSS to withhold Mr Gunning's pay and holiday pay because Mr Gunning did not work out his notice period. Mr Caddick says that Mr Gunning *decided of his own accord to abandon his employment immediately* once he was dismissed and not to work out his notice period.

Issues

[8] The Authority must determine the following issues:

¹ Mr Caddick is a director and shareholder and effectively the owner/manager of the BRSS business.

- (a) Was Mr Gunning unjustifiably disadvantaged in his employment? These claims can be considered whether or not there was a 90-day trial provision in the employment agreement.
- (b) Was there a valid 90-day trial provision in the employment agreement?
- (c) If the 90-day trial provision was not valid was Mr Gunning unjustifiably dismissed?
- (d) Was BRSS entitled to withhold Mr Gunning's pay for shifts worked and holiday pay under clause 29.4 of Mr Gunning's employment agreement? If not, how much is owed?
- (e) If Mr Gunning was unjustifiably dismissed and/or unjustifiably disadvantaged, what remedies are due taking into account contribution?
- (f) Should Mr Gunning be paid any interest on amount/s owed?

Procedural history

[9] Both parties were present at the investigation meeting. I heard sworn evidence from Mr Gunning, Mr Caddick and Colin Brown, the service station manager. I then received written legal submissions from Mr Henderson which he orally presented. I decided that because Mr Caddick had not taken any legal advice to that point I would provide an adjournment to allow him to obtain legal advice. Mr Henderson agreed on Mr Gunning's behalf with this course of action.

[10] I set a timetable for receiving further submissions. Mr Caddick had until 30 April 2014 to provide written submissions if he chose to do so with any submissions in reply by 7 May 2014.

[11] Mr Caddick lodged a document which he entitled his *testimony* on 24 April 2014. This repeated a number of assertions Mr Caddick made at the investigation meeting and added others including new evidence and Mr Caddick's personal opinions of Mr Gunning. It did not include legal submissions.

[12] Mr Henderson replied on 30 April and submitted that I should not take Mr Caddick's testimony into account because it included new evidence and also

evidence which conflicted with evidence given at the investigation meeting. Mr Henderson also repeated his main submission on the validity of the 90-day trial period.

[13] Insofar as Mr Caddick's testimony provided on 24 April 2014 conflicts with his or Mr Brown's evidence given under oath and tested by questioning at the investigation meeting I have not taken it into account. A number of Mr Caddick's assertions about Mr Gunning's history and character have likewise been ignored as these were not put to Mr Gunning at the investigation meeting to allow him to respond and in any event have marginal, if any, relevance to the issues I need to determine.

[14] As permitted under s 174 of the Act this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. Those findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

Was the 90-day trial period provision a valid one that can be relied on to disallow Mr Gunning's unjustified dismissal claim?

[15] On 30 July 2013 Mr Gunning was interviewed by Mr Caddick and Mr Brown for the advertised position of shift manager. At the interview Mr Gunning was asked what he had been paid when he was a shift supervisor at a BP service station. He said he had been paid \$14.00 per hour and was told that seemed to be the going rate. The parties disagree about whether or not Mr Caddick or Mr Brown also said that would be the starting rate if Mr Gunning was given the job.

[16] Mr Caddick and Mr Brown say that Mr Gunning was told that if he was offered the job it would be as a service station attendant in training as a shift manager. Mr Gunning disagrees that he was told that.

[17] There were some other discussions including about what impact Mr Gunning's slight cerebral palsy condition might have on his work. Mr Caddick told Mr Gunning that he seemed like the kind of person he was looking for. Mr Gunning says that Mr Caddick gave him a copy of a blank draft individual employment agreement to take home and consider. It was not an employment agreement that was specific to him and did not have the hourly rate or position title written in it.

[18] Mr Caddick says that he telephoned Mr Gunning the following day, 31 July 2013, and asked him if he would accept the job starting the following morning at 8am. He asked Mr Gunning to come into the service station and pick up a copy of the employment agreement. He agrees that the agreement did not have a number of details filled in, such as the hourly rate or the position title. He agrees that usually the gaps would have been filled in prior to giving a prospective employee a copy of their intended employment agreement but that the office staff had already gone for the day.

[19] Mr Caddick says he told Mr Gunning he had to bring the signed agreement with him on the morning of 1 August. He says *if he hadn't signed the agreement I wouldn't have employed him*. Either at the interview or when the agreement was supplied to Mr Gunning Mr Caddick told him his employment would be subject to a 90-day trial.

[20] Mr Gunning agrees he accepted the job over the phone and came to BRSS by 8am on 1 August 2013 having signed but not dated the agreement. He gave the signed agreement to Mr Brown. Mr Gunning asked Mr Brown that morning, and/or Mr Caddick the previous day, what would happen about the blank spaces in the agreement. Either Mr Brown or Mr Caddick or both told Mr Gunning not to worry about that and that they would fill those in. Mr Gunning did not fill in any blank spaces apart from on the page that he signed when he wrote his name in the following sentence:

I, Nathan Gunning, understand the conditions of employment set out above and accept those terms and conditions.

[21] Having given Mr Brown the agreement and his IRD and banking details Mr Gunning was instructed to go and get changed into a uniform, which he did. While he was changing Mr Brown hand wrote:

- On page 1 – *1 August 2013 and Nathan Gunning*;
- In Schedule 2 beside hourly wage *14*;
- In Schedule 3 – *Nathan Gunning, Service Station Attendant/training as Shift Manager* , Reports to *Colin Brown, Service Station Manager*; and
- Beside Mr Gunning's signature on the final page of the agreement - *31-7-13*.

[22] At some point after Mr Gunning had signed the agreement, and probably within at the most 20 minutes, Mr Caddick arrived at work and signed the agreement under Mr Gunning's signature. The date beside Mr Caddick's signature is also 31-7-13, although he was aware that it was 1 August 2013.

[23] At a later time page 1, Schedule 2 and Schedule 3 on which Mr Brown had handwritten were given to office staff who typed in the words Mr Brown had handwritten and replaced the 3 pages with the typed versions².

[24] Mr Gunning was not given a copy of his signed employment agreement but Mr Caddick says he told Mr Gunning when giving him the agreement that he could have a copy at any stage and that the completed agreement would be kept in the office.

[25] The employment agreement contained at clause 1.1:

A probation period will apply for three months of employment to assess and confirm suitability for the position. The employer will provide guidance, feedback and any necessary support to the employee. Both parties will promptly discuss any difficulties that arise, and the employer will appropriately warn the employee if he or she is contemplating terminations (sic). Any termination must comply with the termination clause in this agreement. The probation period does not limit the legal rights and obligations of the employer or the employee, and both parties must deal with each other in good faith.

[26] Immediately below clause 1.2 states:

TRIAL PERIOD

A trial period will apply for a period of 90 CALANDAR (sic) DAYS employment to assess and confirm suitability for the position. Parties may only agree to a trial period if the employee has not previously been employed by the employer.

During the trial period the employer may terminate the employment relationship, and the employee may not pursue a personal grievance on the grounds of unjustified dismissal. ...

Any notice, as specified in the employment agreement, must be given within the trial period, even if the actual dismissal does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the employer and employee (including access to mediation

² For BRSS' reference for the future any amendments or additions to an intended employment agreement should be included, either in handwriting or in typed form, before a contract is concluded by an employee signing it.

service), except as specified in section 67a(5) (sic) of the Employment Relations Act 2000.

[27] I note that clause 1.1 and clause 1.2 are at odds and could not both apply. One or the other would need to be deleted before an offer of employment was made by offering an intended employment agreement to a prospective employee.

[28] Section 67A of the Act provides:

- (1) An employment agreement containing a trial provision, as defined in subsection (2), may be entered into by an employee, as defined in subsection (3), and an employer.*
- (2) **Trial provision** means a written provision in an employment agreement that states, or is to the effect, that—*
 - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and*
 - (b) during that period the employer may dismiss the employee; and*
 - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.*
- (3) **Employee** means an employee who has not been previously employed by the employer.*

...

[29] Section 67B(1) and (2) provide that if an employer terminates an employment agreement containing a trial period provision under s 67A by giving the employee notice of the termination before the end of the trial period, whether the termination of the employment takes place before or after the end of the trial period, the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[30] However, s 67B(3) says that neither s 67B nor the existence of a trial provision prevents an employee from bringing a personal grievance under any of the grounds specified in s 103(1)(b) to (g).

[31] Therefore, employees dismissed under a valid s 67A trial period provision are denied the ability to bring a personal grievance for unjustified dismissal only. Other personal grievance claims are still open to them.

[32] The issue in this case is whether the 90-day trial period is valid and binding.

[33] Mr Gunning submits that the 90-day trial period provision cannot stand alone and must be a part of a new employment agreement. He relies on the Employment Court case of *Smith v Stokes Valley Pharmacy (2009) Limited*³ for that proposition

³ [2010] NZEmpC 111, at paragraph 50

and for his submission that s 67A must be interpreted strictly, because it takes away an existing employee protection.

[34] The Employment Court has found in *Blackmore v Honick Properties Limited*⁴:

It is not too onerous an expectation that employers will get the correct paperwork and do things in a correct sequence. ...

What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B must ensure that trial periods are mutually agreed in writing before a prospective employee becomes an employee. This will mean in practice that trial periods in individual employment agreements must be provided to prospective employees at the same time as, and as part of, making an offer of employment to that prospective employee. The legislation then requires that the prospective employee be given a reasonable opportunity to seek advice about the terms of the offer of employment (including the trial period provision) pursuant to 63A(2)(c). It will only be when that opportunity has been taken or has otherwise passed, any variations to the proposed employment agreement have been settled, and the agreement has been accepted by the prospective employee (usually by signing) that there will be a lawful trial period effective from the specified date of commencement of the agreement, usually in practice the date of commencement of work.⁵

[35] Mr Gunning submits that the employment agreement was not properly executed before he started his employment and therefore there was not a valid 90-day trial period.

[36] Mr Caddick says that Mr Gunning was well aware of the 90-day trial period provision as he had been told that he would be subject to one and that was also included at clause 1.2 of the employment agreement which Mr Gunning had at least the day before he started work. Mr Caddick is adamant that the 90-day trial period provision absolutely precludes Mr Gunning's unjustified dismissal claim.

[37] Mr Caddick understood that by Mr Gunning signing the intended agreement before he came into work on 1 August 2013 the 90-day trial period would be valid. However, I find that the 90-day trial period provision was not valid for the following reasons.

[38] Mr Gunning was already an employee before Mr Caddick signed the employment agreement. He had commenced work for BRSS. This conclusion follows the reasoning of the Employment Court in the leading cases of *Smith v Stokes*

⁴ [2011] ERNZ 455

⁵ *Ibid*, paragraphs [66] and [70].

Valley Pharmacy and Blackmore v Honick Properties Limited. Therefore, when the written employment agreement was entered into a s 67A trial period could not apply to Mr Gunning as he was not an employee who had not been previously employed by BRSS.

[39] In addition, Mr Gunning was offered a job in the late afternoon of the day before he was expected to begin work. Mr Caddick was required under s 63A(2) of the Act to advise Mr Gunning that he was entitled to seek independent advice about the intended agreement and given him a reasonable opportunity to do so. He did not do that. Even if Mr Gunning had a copy of the intended agreement from 30 July it is unlikely that any reasonable opportunity to gain independent advice could run from then. An employee cannot be expected to seek independent advice until he or she has been made an offer of employment, since no offer was made until the afternoon of 31 July Mr Gunning did not have a reasonable opportunity to seek independent advice before being required to sign the intended agreement.

[40] My finding that the 90-day trial period did not apply to Mr Gunning's employment leads to a consideration of whether he was unjustifiably dismissed.

Was Mr Gunning unjustifiably dismissed?

[41] Under the test of justification in s 103A of the Act the Authority needs to consider both the decision made by BRSS, and how that decision was arrived at. Often the process used to arrive at a decision and the reasons for the decision itself overlap. In this case there was effectively no process at all. Mr Gunning was handed a letter with no idea that his employment was imminently in jeopardy.

[42] He was not advised of the reasons for his dismissal apart from a reliance on a 90 day trial period. He was therefore not asked to and indeed could not give any explanation to the concerns which BRSS had. As the concerns were not put to him for his explanation it follows that no consideration at all could therefore be given to his explanations. There was no compliance with the minimum standard required for a fair process under the s 103A(3) test which also requires sufficient investigation of any allegations. I do not find that the procedural steps in s 103A(3) (a)-(d) were followed in a way that satisfied the requirements of the Act.

[43] The Authority must not determine a dismissal to be unjustifiable under s 103A solely because of defects in the process if they were minor and did not result in Mr Gunning being treated unfairly. I do not find in this case the procedural defects were minor. They were significant and went to the heart of a fair process.

[44] The unavoidable conclusion is that Mr Gunning was unjustifiably dismissed. The decision made to dismiss Mr Gunning was not a decision a fair and reasonable employer could have made in all the circumstances at the time.

[45] The finding that Mr Gunning was unjustifiably dismissed leads to a consideration of remedies, which are considered below.

Was Mr Gunning unjustifiably disadvantaged in his employment?

[46] Section 103A of the Act provides that when assessing whether an employer's action causing disadvantage or a decision to dismiss was justified the Authority must use the following test and consider on an objective basis:

... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[47] In order to prove unjustified disadvantage Mr Gunning needs to prove that actions of BRSS disadvantaged him in his employment and that those actions were unjustified, that is not what a fair and reasonable employer could have done in all the circumstances.

[48] Mr Henderson says that Mr Caddick's dealings with Mr Gunning amounted to him being *bullied, intimidated, spoken to in an aggressive manner and humiliated.*

Lights for the forecourt

[49] Mr Gunning says that on about 7 August he and a workmate had been working outside. At about 7pm Mr Caddick came into the service station and asked if he knew where the forecourt lights were. Mr Gunning said he did not know and Mr Caddick told him he should have used his initiative and asked. Mr Gunning says Mr Caddick asked him how he would feel if it was his f***ing business and he looked and saw no lights on. Mr Gunning says Mr Caddick then said a named 16 year old female

employee could *run rings around you lot*. Mr Gunning says Mr Caddick also said that if he didn't want the job to let him know and that he was just like every other staff member and no-one wanted to work.

[50] Mr Gunning says this exchange was in front of customers and he was embarrassed and humiliated.

[51] Mr Caddick agrees that he asked Mr Gunning how he would feel if it was his business and he employed people who were not doing their job properly. However, there was no-one else in the shop at the time. Mr Caddick agrees he would have unfavourably compared Mr Gunning's initiative to that of the 16 year old female employee. However, he disagrees that the exchange was humiliating and embarrassing for Mr Gunning. Mr Caddick says Mr Gunning was unable to take criticism and would tell Mr Caddick that he was causing him stress if Mr Caddick directed any correction or criticism at him.

[52] Mr Gunning and Mr Caddick's evidence in relation to exactly what was said is conflicting. I have no objective evidence to support either memory of the events. However, even if Mr Caddick directed fairly robust criticism at Mr Gunning I do not consider that Mr Gunning has proved that apart from any embarrassment any employee might feel when corrected, particularly in front of others, that his employment or his terms and conditions of employment were affected to his disadvantage or that Mr Caddick's comments were not those that a fair and reasonable employer could make in all the circumstances at the time. I do not accept it is proved that Mr Caddick's words amounted to bullying.

Missing a customer

[53] Mr Gunning says that on 20 August the service station was very busy, he had been on the forecourt serving customers and thinking he had served everyone came back inside the service station. Mr Caddick said *somebody better get back out there and help these people before I fire someone*. Mr Gunning considered that Mr Caddick was talking to him.

[54] Mr Caddick says that he did say that but that there were three staff members inside the service station at the time and he was talking to all of them and did not single out Mr Gunning.

[55] In the circumstances I consider that Mr Gunning's employment was affected to his disadvantage. He thought he was on either a probation period or a 90-day trial period and he would have believed his employment was less secure as a result of Mr Caddick's comments. If Mr Caddick had refrained from adding *before I fire someone* I would not have found any disadvantage. I do not consider that Mr Caddick saying *before I fire someone* was justified. Those were not words a fair and reasonable employer could use in all the circumstances at the time.

Firewood

[56] On 21 August 2013 Mr Brown asked Mr Gunning to cover a pile of firewood to protect it from the rain. Mr Brown says he showed Mr Gunning how to do this. Mr Gunning denies he was shown how to do it and says he had never covered firewood up before and did the best he could.

[57] Mr Gunning says later that day Mr Caddick asked him to follow him to the woodpile where he told him he had covered the firewood wrongly and it was still getting wet. Mr Gunning says that when he tried to explain why he had done it that way Mr Caddick said that although he may not be right all the time he was the boss and that Mr Gunning was like every other employee and always had an excuse.

[58] Mr Gunning also said that Mr Caddick told him he needed someone who could open and close the service station but he did not think Mr Gunning could do that job. He mentioned the forecourt lighting event and the customer missed the previous day.

[59] Mr Caddick says he did tell Mr Gunning that he had put the cover on the firewood wrongly but denies the other comments.

[60] I do not consider that Mr Caddick's comments about the firewood amounted to any disadvantage to Mr Gunning in his employment or that the terms and conditions of his employment were affected to his disadvantage. Mr Caddick's comments were those that a fair and reasonable employer could make in all the circumstances at the time.

[61] Even if Mr Caddick did say that the firewood, the forecourt lights and the missing of a customer made him wonder if Mr Gunning was going to be suitable to open and close the service station I cannot find that to be an unjustified action leading to Mr Gunning's disadvantage. Mr Caddick's comments were his honestly held

opinion and every employee must expect his employer to give feedback, even if it is negative, and identify areas for improvement.

Allegedly incorrect sale

[62] Mr Gunning says that on 22 August immediately after he had processed a sale of petrol on the till he was told by his coworker, the aforementioned 16 year old female, that he had processed the wrong sale. He did not consider that he had done so. Mr Gunning says that his coworker told Mr Caddick about the transaction.

[63] Mr Gunning approached Mr Caddick about it to explain that he did not think he had missed a sale and says that Mr Caddick said *it just gets worse and worse with you*. Mr Gunning said that he told Mr Caddick he felt bullied by him and that *Mr Caddick simply denied the bullying*.

[64] Mr Gunning says he asked Mr Caddick to check the CCTV footage which Mr Gunning was sure would back up his understanding that he had not processed the wrong sale.

[65] Mr Caddick says that he was there when Mr Gunning's coworker pointed out the error and said *it just keeps getting worse we keep losing money and no-one knows what's going on*. He says the remark was not specifically directed at Mr Gunning and says Mr Gunning did not tell him he felt he was being bullied.

[66] However, Mr Caddick says that by that stage he had realised that *I have to back off this guy, he's trouble*. Mr Caddick says that every time he tried to correct or direct Mr Gunning he would tell him he was stressing him and he eventually decided not to do or say anything that would stress Mr Gunning.

[67] Mr Gunning says later that day Mr Caddick came back told him that *when I learn not to argue I would be good* and told him that he was *fluffing around a lot* such as washing too many car windows. Mr Gunning disagreed that he was *fluffing around*.

[68] Mr Caddick says that he did not check the video footage as he was too busy. I consider that Mr Caddick is more likely than not to have said *it gets worse and worse with you* directed at Mr Gunning. That was to Mr Gunning's disadvantage as it made him feel as if his employment was less secure. Mr Caddick was entitled to that view

but in all the circumstances voicing it out loud particularly in front of a coworker was not something a fair and reasonable employer could do. A fair and reasonable employer could have investigated the allegation by, for example, viewing the video footage and discussed the situation with Mr Gunning before reaching a conclusion.

Should BRSS pay Mr Gunning his unpaid wages and holiday pay?

[69] Mr Caddick says that clause 29.4 allows BRSS to withhold money from Mr Gunning because he did not work out his notice period.

[70] Mr Gunning was dismissed on the morning of 23 August 2013 by Mr Caddick. He was given one week's notice which Mr Caddick wrote would end on 28 August 2013. Immediately after he was handed the letter of dismissal by Mr Caddick Mr Gunning said that he did not consider he could be dismissed under the 90-day trial period and that he would take BRSS to the Authority. He then left and went home where he wrote a letter raising his personal grievances. He also wrote:

As the employment court has ruled that a resignation should not be taken in the heat of the moment I will work out until the 28/08/2013 as per the notice of termination. Need the shifts up until the 28/8/2013 e-mailed to be [sic] by 5pm on 23 08 2013 by phone or email ...

[71] Mr Gunning then hand delivered the letter to Mr Caddick and told him he would come back and work out his notice period. Mr Caddick said that he could not come back and told the Authority that it was unacceptable to have Mr Gunning back as he had *threatened me with legal action*.

[72] Clause 29.4 reads:

Should the Employee leave without the required notice period being given, the Employer may deduct pay for the period of notice not actually worked from the Employee's final pay (including holiday pay).

[73] Mr Caddick also submitted that Mr Gunning had abandoned his employment. Clause 31 of the intended employment agreement states that if an employee was absent from his place of work for a continuous period of 3 working days he shall be deemed to have abandoned his employment. However, Mr Gunning was only absent for a continuous period of two hours at most and so cannot be deemed to have abandoned his employment.

[74] BRSS was incorrect to withhold Mr Gunning's pay already earned and holiday pay as Mr Gunning did not *leave without the required notice period being given* and did not abandon his employment. He was dismissed, temporarily left and then agreed to come back and work out his notice. It was not reasonable for Mr Caddick to prevent Mr Gunning from working out his notice. BRSS was not entitled to withhold Mr Gunning's wages and holiday pay purely because Mr Gunning invoked procedures set out in the intended employment agreement provided to Mr Gunning at Schedule 1 and intended to assist in resolving employment relationship problems.

[75] BRSS must pay Mr Gunning the amounts already earned on 21 and 22 August and must pay wages for 23 August being the hours he was rostered less two hours to account for the period of time Mr Gunning left the job before offering to return to work out his notice. BRSS must also pay 8% holiday pay on those wages and the employer Kiwisaver contribution of 3%.

[76] BRSS must also pay Mr Gunning for the hours he was or would have been rostered to work from 24 to 29 August 2013, the employer Kiwisaver contribution of 3% and holiday pay of 8% on those wages.

[77] BRSS must also pay Mr Gunning holiday pay of 8% on all wages already paid up to 20 August 2013.

Failure to supply Mr Gunning with a copy of the employment agreement

[78] Mr Gunning says that on 23 August 2013 he asked for a copy of his employment agreement but did not receive one until BRSS filed its Statement in Reply on 4 September 2013.

[79] Section 64(3) of the Act requires an employer to give an employee a copy of their employment agreement as soon as reasonably practicable after the employee requests a copy.

[80] Mr Caddick says that Mr Gunning did not ask for a copy of his employment agreement on 23 August 2013. I do not find it proved that BRSS failed to provide a copy of Mr Gunning's employment agreement to him under s 64(3) as soon as reasonably practicable after his request.

[81] A document understood at the time by BRSS to be the employment agreement was originally supplied along with the Statement in Reply 11 days after it may have been requested and in all the circumstances that was within a reasonably practicable time.

[82] However, that document was not a copy of the original agreement signed by Mr Gunning which was only supplied after a direction by the Authority made on 13 September 2013.

[83] I consider that was due to a failure of BRSS to understand the importance of not altering the document after Mr Gunning signed it. I do not think this is a situation that requires a penalty being awarded.

Breach of Wages Protection Act 1983

[84] Mr Gunning submits that the Authority needs to consider whether a penalty should be paid for BRSS breaching the Wages Protection Act 1983 which provides at s 4 that except in exceptional circumstances, such as set out in s 5(2):

an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[85] Section 5(2) of the Wages Protection Act 1983 provides that an employer may with the employee's written consent make deductions from wages payable to that employee. Mr Caddick believed that clause 29.1 of the employment agreement allowed BRSS to withhold pay from Mr Gunning. However, that was clearly not the case. I find that BRSS was in breach of s 5 of the Wages Protection Act 1983 in that it made deductions from Mr Gunning's wages without his written consent.

[86] Section 13 of the Wages Protection Act 1983 makes an employer who contravenes any provision of that act liable, upon the application of the affected employee, to a penalty imposed under the Employment Relations Act.

[87] Section 135 of the Employment Relations Act makes a company liable for penalties not exceeding \$20,000. In the recent Employment Court case of *Tan v Yang*⁶ Judge Inglis wrote:

⁶ [2014] NZEmpC 65.

*It is ... generally accepted that a penalty should only be imposed for the purpose of punishment and should not be used as an alternative route for increasing compensation.*⁷

[88] BRSS deliberately withheld Mr Gunning's final pay.

[89] BRSS does not appear to have come before the Authority previously in relation to a breach of the Wages Protection Act. The breach was a one-off event. Although a relatively small amount of money was withheld from Mr Gunning it was a significant amount for him and he was entitled to receive it in a timely manner.

[90] In all the circumstances, I consider that a penalty is warranted to deter other employers from acting in this way. I take into account that this is not at the worst end of the type of breaches of the Wages Protection Act and consider a penalty of \$1,000 is warranted to be paid to the Crown.

Remedies

Lost remuneration

[91] Mr Gunning claims lost wages of \$13,091.12 up to the date of the investigation meeting on 25 March 2014 and further lost wages not yet quantified up to the date of this determination.

[92] Section 123(1)(b) of the Act allows me to provide for the reimbursement by BRSS of the whole or any part of wages or other money Mr Gunning lost as a result of his grievance. Section 128(2) of the Act provides that I must order BRSS to pay Mr Gunning the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.

[93] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than 3 months.

[94] Mr Gunning has had only part-time work as a driver for Pizza Hut since his dismissal and did not become employed in that role until December 2013, more than three months after his dismissal.

[95] I consider that BRSS must pay Mr Gunning for the period of 3 months after 29 August 2013 which is the date that Mr Gunning would have finished work if he had

⁷ Ibid at paragraph 31, and following *Xu v McIntosh* [2004] 2 ERNZ 448.

been allowed to work out the one week's notice period. Three months is equivalent to 13 weeks, which ends on 28 November 2013. Mr Gunning worked a little over 3 weeks for BRSS and by his evidence 30 hours was the shortest number of hours per week that he worked. I calculate that his lost remuneration for 13 weeks is \$14 per hour x 30 hours per week x 13, which is \$5,460 gross.

[96] Holiday pay and the employer contribution to Kiwisaver are amounts lost as a result of Mr Gunning's grievance and under s 123(1)(b) of the Act BRSS must pay Mr Gunning 8% of holiday pay on that amount being \$436.80 gross and the 3% employer KiwiSaver contribution being \$163.80 gross.

[97] I am satisfied that Mr Gunning mitigated his loss by applying for a number of jobs since his dismissal. However, I do not consider this an appropriate case to exercise my discretion to award more than 3 months lost remuneration. Simply put Mr Gunning and Mr Caddick did not get on well and I do not expect that the employment relationship would have lasted for more than 3 months after Mr Gunning's dismissal even if BRSS had followed a correct procedure in dealing with its concerns about Mr Gunning's performance.

Interest

[98] Mr Gunning has applied for interest to be paid on all amounts payable by BRSS. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum.

[99] From 30 August 2013 until paid interest of 5% is payable on the unpaid wages, holiday pay and Kiwisaver to 29 August 2013. That is because the money was due to be paid to Mr Gunning at that time and has not been the subject of a tenable dispute. I do not consider that any further amount of interest is due.

Compensation

[100] Mr Gunning claims compensation of \$6,000 for what he says was the combined effect of the unjustified disadvantage and dismissal on him. Mr Gunning says he felt *utterly useless and a waste of time* because of his dismissal. He says he *became very down and lost a lot of confidence. It has really taken a lot out of me.*

[101] In all the circumstances, including the fact that Mr Caddick refused to allow Mr Gunning to return and work out the 'notice period' merely because Mr Gunning invoked the possibility of going to the Authority, I consider \$6,000 is a reasonable amount of compensation for the two unjustified disadvantage grievances and the unjustified dismissal.

Contribution

[102] Having determined Mr Gunning has a personal grievance s 124 of the Act requires me to consider whether he contributed to the situation which gave rise to his disadvantage and dismissal and if so reduce remedies accordingly.

[103] BRSS reasons for Mr Gunning's dismissal were because of Mr Caddick's dissatisfaction with his performance. I accept that BRSS was dissatisfied with Mr Gunning's performance. However, an employee will not usually be found to have contributed to a dismissal for poor performance/incompetence without an earlier fair process. That is because the employer always has the ability to performance manage an employee with a proper process. Further there is always a possibility that improvement will occur if an employee is properly managed and is aware of the consequences for nonperformance. In the absence of a fair process I cannot conclude that Mr Gunning would not have improved. I do not find contribution by Mr Gunning as a result of issues about his performance. I cannot conclude that Mr Gunning processing the incorrect sale, which is disputed, contributed towards the situation that gave rise to his personal grievance. BRSS simply relied on its ability to dismiss Mr Gunning under a 90 day trial period which it was not entitled to do.

[104] In relation to the two instances of unjustified disadvantage I do not find contribution by Mr Gunning. He was in training and a fair and reasonable employer could expect a new employee in training to make some mistakes.

Christine Hickey
Member of the Employment Relations Authority