

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 332
3310501

BETWEEN

KYLAH HARRIS
Applicant

AND

IAN DAVID WILLIAMS
Respondent

Member of Authority: Natasha Szeto

Representatives: Steph Dyhrberg, counsel for the Applicant
Keith Jeffries, counsel for the Respondent

Investigation Meeting: 18 March 2025 in Wellington

Submissions received: At the investigation meeting

Date of Determination: 13 June 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Kyla Harris was employed by Ian Williams to work at Relish café as a dishwasher and then kitchen-hand in September 2023. She resigned from her employment in November 2023. Ms Harris says she was not paid her notice period and holiday pay. She also says Mr Williams breached the Employment Relations Act 2000 (the Act) and the Holidays Act 2003 (the HA) by not giving her an employment agreement at the start of her employment, not giving her the opportunity to take independent advice before making her sign the agreement, not keeping wage and time and holiday and leave records, and paying her holiday pay incorrectly at the end of her employment.

[2] Mr Williams says Ms Harris was initially employed on a casual basis, and was paid in cash at her insistence. Mr Williams says Ms Harris was presented with an employment agreement when she became a full time employee but she elected not to take it with her or sign it until almost two weeks later. Mr Williams says Ms Harris did not give notice, and that she was paid correctly throughout her employment.

[3] This determination resolves issues around Ms Harris' pay, and whether Mr Williams breached employment legislation and should be ordered to pay a penalty.

The Authority's Investigation

[4] Written witness statements were lodged by Ms Harris, Ms Debbie Uren, and Mr Ian Williams. All witnesses attended the Investigation Meeting, and answered questions under affirmation.

[5] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been carefully considered.

Issues

[6] The issues the Authority is to investigate and determine are:

- (a) Whether Ms Harris is owed wages for an unpaid two week notice period.
- (b) Whether Ms Harris is owed unpaid accrued annual holiday entitlements.
- (c) Whether Mr Williams breached the Act by:
 - (i) Failing to provide Ms Harris a written IEA at the commencement of her employment (s 63A (2) and s 65 of the Act).
 - (ii) Failing to allow Ms Harris the opportunity to obtain independent advice before signing (s 63A (2) of the Act).
 - (iii) Failing to keep wage and time records and holiday and leave records (s 130 of the Act and s 81 of the HA).
 - (iv) Failing to pay Ms Harris the correct annual leave entitlement on termination (s 27 of the HA).
- (d) Penalties and apportionment of any penalties ordered.
- (e) Costs and disbursements.

Relevant background

[7] Kyla Harris moved to Wellington in early September 2023. Within a short time of her arrival, Ms Harris' boyfriend's mother, Debbie Uren, had introduced her to Ian Williams – the owner of the local café, Relish.

[8] Mr Williams did not have a job available for Ms Harris at the café, but agreed to give her work experience washing dishes. There is a dispute between the parties as to whether the work was going to be paid or unpaid. Ms Harris says she expected the work to be paid, but Mr Williams did not discuss pay with her before Ms Harris worked her first shift on Friday 8 September 2023. From that point, Ms Harris says she worked washing dishes at Relish in the busy lunch period from Tuesday to Sunday (the café being closed on Mondays) between the hours of 11:00 am to 2:00 pm.

[9] Mr Williams says he agreed to take Ms Harris on as a casual employee, and had prepared a casual employment agreement for her to sign on 12 September. However, on that day Ms Harris was dropped off at the café by her boyfriend's brother and following discussion between the three of them, Mr Williams gave Ms Harris \$50.00 cash for the work she had done on 8 September and agreed to pay her cash going forward at her request.

[10] Ms Harris says Mr Williams paid her \$50.00 cash at the end of every three hour shift until early October when she moved into a kitchen-hand role. While there is some dispute about whether Ms Harris was working in a casual role during the early days of her employment or was working regular shifts from 11:00 am until 2:00 pm from Tuesday to Sunday, nothing ultimately turns on this. For his part, Mr Williams says he was not comfortable paying Ms Harris in cash but he agreed to do so at her insistence.

[11] There is also a dispute about when exactly Ms Harris moved into the kitchen-hand role, but the parties agree that Ms Harris' hours changed to an earlier start of 8:30 am or 9:00 am, and a later finish of 3:00 pm. The work continued to be from Tuesday to Sunday every week. Ms Harris says Mr Williams gave her \$600.00 cash every week on a Thursday.

[12] Over the next few weeks from mid-October to early November, Mr Williams and Ms Harris discussed Ms Harris going onto a Youth Benefit which would enable Mr Williams to employ Ms Harris "on the books" and claim a WINZ subsidy for employing her.

[13] On 11 November Mr Williams says his café manager gave Ms Harris an individual employment agreement to consider and sign. Mr Williams was not at the café at the time. Ms Harris was at work in the morning but went home sick with Covid-19 and did not return to work until 17 November. She says she never saw, and was not given, an employment agreement until 22 November. Ms Harris did receive some forms to fill in and return regarding KiwiSaver and tax. Mr Williams says he “repeatedly” told Ms Harris to take the contract home once she returned to work on 17 November, but Ms Harris categorically denies this.

[14] On 21 or 22 November Mr Williams told Ms Harris she needed to sign an individual employment agreement. There is some dispute between the parties about when and how a meeting subsequently came about, but they agree they met in the café not long after Ms Harris had returned to work after her Covid-19 leave. Ms Harris says the meeting took place at 2:40 pm when her shift was due to finish at 3:00 pm. Mr Williams sat down with her and showed her an individual employment agreement. Her name was spelled incorrectly on the front page and throughout. Mr Williams “flicked” through the contract and told her she needed to sign it. The agreement had already been signed by the café manager and dated 11 November 2023. Ms Harris asked to take the agreement home to show Ms Uren but Mr Williams said it had to be signed and then she could take it home. Ms Harris signed the agreement. It was dated 11 November 2023, which was the same date the café manager had signed it. Ms Harris says the whole meeting only took about five minutes and she recalls this because her shift was due to end at 3:00 pm and she still had to clean the back kitchen before leaving.

[15] For his part, Mr Williams accepts he told Ms Harris she had to sign the agreement then and there at the meeting. However he says the meeting took place in the morning and was not rushed. Mr Williams says the meeting took around 10 minutes. Mr Williams said he went through the agreement with Ms Harris page by page, and paragraph by paragraph. Mr Williams said the agreement needed to be signed so he could return it to WINZ and claim the subsidy for Ms Harris’ wages. Mr Williams thought the agreement had been sitting around for too long because it had been on top of the computer in the café since 11 November waiting for Ms Harris to take it home. Mr Williams did not think there was anything wrong with back-dating the signatures on the agreement, given Ms Harris had already started working under the “new agreement”, the signatures needed to be dated prior to the commencement date on the agreement of 14 November, and from that date Ms Harris’ employment would be “on

the books” and she would no longer be paid in cash. Mr Williams says he advised Ms Harris she could take the agreement home after she signed it, discuss with Ms Uren and if there was anything she did not understand, he could go through it with her.

[16] On 22 November Mr Williams paid Ms Harris “through the books” for the period 13 to 19 November.

[17] Only two days later on 24 November 2023, Ms Harris resigned from her employment by way of a letter from her lawyer to Mr Williams. She asked to be paid two weeks’ pay in lieu of notice. That letter was not responded to.

[18] The only payslips Ms Harris received were for the final two weeks of her employment with Mr Williams. She received one final payslip that calculated and paid her annual holiday pay based on her “through the books” wages, and which amounted to \$57.65.

Is Ms Harris owed wages for an unpaid two week notice period?

[19] Ms Harris resigned by way of letter dated 24 November 2023. She requested two weeks’ notice to be paid in lieu because she was unable to come to work due to the unsafe environment which was making her ill. Ms Harris had raised a sexual harassment allegation, and following a meeting with management on 23 November she felt the issue was being minimized and nothing would be done. Ms Harris says this was a compelling and legitimate reason for being unable to work her notice period as her safety was not within her control, and her request to be paid two weeks wages in lieu of notice – which was not specifically responded to – was reasonable in the circumstances.

[20] Mr Williams says Ms Harris did not work out her two weeks’ notice and she should have. Mr Williams says if Ms Harris had worked her notice as required by her employment agreement, she would have been paid for it, but her resignation contained a ‘fait accompli’ that she would not be returning to work over matters that were in dispute at the time. Mr Williams had to organise other workers to cover her absence and it caused the business inconvenience and hardship. Mr Williams says it would be unfair to award Ms Harris two weeks’ paid notice in lieu when she is pursuing a claim through the Human Rights Commission, because he is unable to defend or respond to

the notice claim without raising issues that are ring-fenced to claims in another jurisdiction.

[21] I acknowledge the difficulties for both parties in both supporting and responding to the claim for lost wages in respect of notice. Ms Harris' employment agreement states that the employer may decide to pay the employee all or part of the notice period instead of the employee working out the notice period. It also states that if the employee does not give the agreed amount of notice, the employer may be able to claim a breach of the agreement. The employer's ability to pay notice in lieu is at their discretion and there is no expectation that notice will be paid in lieu if it is requested.

[22] For the reasons given above, Ms Harris did not have a contractual right to be paid two weeks' notice in lieu at the end of her employment and I am unable to award this as a remedy.

Is Ms Harris owed unpaid annual holiday entitlements?

[23] The law requires an employee to be paid 8% of their wages as annual holiday pay if their employment ends within 12 months.¹ Further, the Authority may accept an employee's claims about wages paid and hours, days and time worked unless the employer proves otherwise.²

[24] Ms Harris has calculated her annual holiday entitlements as being \$368.00 (gross) at the end of her employment on 24 November 2023. That amount is accepted by Mr Williams.

[25] The Authority also has discretion to order interest in any matter involving the recovery of any money, such interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.³ Interest is calculated using the civil enforcement debt calculator.⁴ Mr Williams accepts that interest should also be awarded.

[26] I order Mr Williams to pay Ms Harris the amount of \$368.00 (gross) plus interest from 24 November 2023 until the date the debt is paid.

¹ Section 23 of the HA.

² Section 132 of the Act.

³ Clause 11, Schedule 2 of the Act.

⁴ Civil Debt Interest Calculator at: <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

Should Mr Williams be ordered to pay penalties for breaches of the Act and the HA?

[27] Ms Harris claims four breaches of the Act and the HA. Each breach attracts a potential maximum penalty of \$10,000.00 against an individual. Ms Harris says a penalty of \$2,000.00 should be ordered for each breach with the whole amount or a portion to be paid to her.

[28] Mr Williams says that there was no suggestion the breaches were deliberate or that Ms Harris was exploited. While he accepts he should have kept better records, Mr Williams says he acted in good faith to accommodate Ms Harris' request to be paid in cash.

Did Mr Williams breach the Act by failing to provide Ms Harris with a written employment agreement at the commencement of her employment?

[29] Employers are required to provide employees with a copy of an intended employment agreement under discussion, advise them of their right to seek independent advice, give them a reasonable opportunity to seek that advice, and consider and respond to any issues raised by the employee.⁵ Failure to comply with these requirements makes an employer liable to a penalty imposed by the Authority.

[30] Mr Williams accepts he did not provide Ms Harris with a written individual employment agreement at the commencement of her employment. He has explained he considered Ms Harris to be on work experience, and then employed as a casual employee. However, Mr Williams acknowledges it was his obligation to ensure Ms Harris had a signed individual employment agreement in place before she started her employment. Mr Williams has breached the Act and is liable to a penalty.

Did Mr Williams breach the Act by failing to allow Ms Harris the opportunity to obtain independent advice before signing her employment agreement?

[31] Employers are required to advise employees of their right to seek independent advice and give them a reasonable opportunity to seek that advice.⁶ Failure to comply with these requirements makes an employer liable to a penalty imposed by the Authority.

⁵ Sections 63A(2)(a) and (3) and 65 of the Act.

⁶ Sections 63A(2)(b) and (c), 63A(3) and 65 of the Act.

[32] Mr Williams says he gave Ms Harris the opportunity to obtain independent advice before signing her employment agreement because the café manager provided the agreement to Ms Harris on 11 November. Ms Harris disputes she was given a written employment agreement, or even saw an agreement until 22 November. Mr Williams relies on what he was told by the former café manager who was not a witness at the Authority's investigation meeting.

[33] I am persuaded by Ms Harris' direct evidence on this matter rather than Mr Williams' indirect evidence of what he was told by the café manager. Based on the evidence before the Authority, I find Ms Harris did not see her individual employment agreement until 21 or 22 November when Mr Williams sat down with her to go through the agreement. While Mr Williams tried to take Ms Harris through the agreement, he was unable to give independent advice to her. Based on the evidence before the Authority, Mr Williams' clear priority was to get the agreement signed so that he could lodge the paperwork with WINZ in order to claim the employee subsidy. Whether the meeting took five minutes or ten minutes is inconsequential, because Ms Harris was made to sign the agreement before she left the café and did not have the opportunity to obtain independent advice before signing.

[34] Even if Mr Williams told Ms Harris that she could review the agreement at home with Ms Uren, this does not remedy the breach because signing the agreement was declaring acceptance of the terms and conditions of employment. Mr Williams did not give Ms Harris the opportunity to obtain any advice before requiring her to sign her individual employment agreement. He has breached the Act and is liable to a penalty.

Did Mr Williams fail to keep wage and time, and holiday and leave records?

[35] Employers are required to keep wage and time records for each employee.⁷ Employers are also required to keep holiday and leave records for each employee.⁸

[36] Mr Williams accepts he did not keep wage and time or holiday and leave records as required for the first nine weeks of Ms Harris' employment. His explanation was he did not consider Ms Harris to be "on the books" or employed because he was paying

⁷ Section 130 of the Act.

⁸ Section 81 of the HA.

her in cash at her request. This does not remove Mr Williams' obligation to keep appropriate records. He has breached the Act and the HA and is liable to a penalty.

Did Mr Williams fail to pay Ms Harris the correct annual holiday entitlement on termination?

[37] Employers must pay annual holiday pay in the pay that relates to the employee's final period of employment.⁹

[38] Mr Williams accepts that he failed to pay Ms Harris the correct amount of annual holiday entitlement on termination of her employment. I find Mr Williams breached the HA and is liable to a penalty.

Analysis – should penalties be ordered?

[39] I have found all breaches proven. The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties.¹⁰ Each breach attracts a maximum penalty of \$10,000.00 against an individual.

[40] Ms Harris says a penalty of \$2,000.00 should be ordered for each of the breaches, based on what she says were intentional or at least negligent actions by Mr Williams. She says Mr Williams has not paid any compensation or made any efforts to mitigate the impact of the breaches on her. Ms Harris says she was a particularly vulnerable employee because of her age (barely 16 years old at the time of her employment), she was isolated from her family given her relocation to Wellington, and this was her first job. Ms Harris says the breaches had an adverse impact on her and a significant portion of any penalties awarded should be paid to her given the deliberate breaches of Mr Williams' legal obligations.

[41] Mr Williams admits the breaches but says penalties should be minimal. Mr Williams accepts he should have provided Ms Harris with an individual employment agreement but says he did make efforts to give Ms Harris the chance to take independent advice. He created a position for her and his record-keeping was not satisfactory but it was not exploitative. Mr Williams says he was "distracted" by Ms Harris' insistence that she be paid in cash. Mr Williams says the situation has been a big learning curve for him that will not be repeated.

⁹ Section 27 of the HA.

¹⁰ Section 133 of the Act.

[42] Even if a penalty is technically available, I have to be satisfied that the imposition of any penalty would meet the purposes and principles of penalties. In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.¹¹ These principles have been elaborated on and followed since.

[43] The law in respect of quantification is well established given s 133A of the Act and requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

Object of the Act

[44] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour. Mr Williams' actions were inconsistent with several of the Act's objects, including acknowledging and addressing the inherent inequality of power in employment relationships, and promoting the effective enforcement of employment standards.

[45] In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom v Preet*.¹²

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[46] I start with an assessment of the nature and extent of the breaches. There are four breaches alleged. The maximum penalty for a single breach by an individual is \$10,000.00 which leads to a starting point of \$40,000.00.

¹¹ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

¹² *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [137] – [151].

Step 2: Assessment of the severity of the breaches

[47] Ms Harris says a penalty of \$2,000.00 (or 20% of the maximum) would be appropriate for each breach given her assessment of the severity of the breaches. Applying that rationale to the globalised figure of \$40,000.00 provides a starting point of \$8,000.00.

[48] In terms of aggravating factors, Mr Williams' breach of employment standards was negligent rather than intentional. He says he misapprehended his obligations and there was no deliberate attempt to take advantage of Ms Harris' vulnerability. He says the breaches have not caused her any undue prejudice. In terms of mitigating or ameliorating factors, there is no evidence before the Authority regarding previous conduct by Mr Williams.

[49] I consider the breaches relating to Ms Harris' individual employment agreement to be the most serious. Although Mr Williams has said the mistakes he made were inadvertent and will not be repeated, there is some need for specific deterrence to ensure Mr Williams appreciates the significance of his obligations to comply with basic legislative requirements. In terms of general deterrence, a message should be sent to other like-minded employers who might be tempted to treat legislative requirements as optional.

[50] For these reasons, I accept that \$2,000.00 is an appropriate starting point for a penalty in respect of three of the breaches. However, I consider \$2,000.000 would be a disproportionate penalty for the fourth breach – relating to failure to pay Ms Harris correct annual holiday pay of \$368.00 – and a more appropriate penalty for this breach would be \$200.00. The revised starting point for all breaches based on severity is therefore \$6,200.00.

Step 3: Financial circumstances of Mr Williams

[51] Mr Williams says his personal financial position would make it difficult to pay a penalty based on difficulties in the hospitality industry generally. There is no specific information before the Authority to support the submission that a reduction may be appropriate based on Mr Williams' ability to pay and I decline to do so.

Step 4: Proportionality or totality test

[52] Penalties should be set at a level which both punishes for breaches and deters from future non-compliance. The Authority must take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that a penalty could be of such magnitude as to create a significant risk of non-payment.¹³

[53] I have considered a penalty figure of \$6,200.00 in comparison to other cases – particularly relating to Mr Williams’ failures in respect of the individual employment agreement, and record-keeping. I have considered the severity of the breaches and the impact on Ms Harris. Standing back and looking at the matter in totality and taking a proportionate approach to the overall circumstances, I consider a fair penalty to be \$6,200.00.

Whether some of the penalty should be awarded to Ms Harris

[54] I have considered whether Ms Harris should receive some of the penalty. There is also a public interest element.

[55] In *Borsboom v Preet*¹⁴ the Court held that a decision under s 136(2) will be based on the facts, but where a breach has resulted in a non-compensable loss to the employee (that is where the breach claimed is in the nature of ‘performing a public duty’) it may be more appropriate to order some of the penalty be paid to the employee, especially to the extent that costs may not adequately compensate the employee. The breaches in this case are such breaches. Ms Harris has been directly affected by Mr Williams’ failures. On that basis, the full penalty is awarded to Ms Harris.

Orders

[56] Ms Harris has been successful on the majority of her claims. I order Ian David Williams to pay Kylah Harris, the following sums within 28 days of the date of this determination:

- (a) Annual holiday pay arrears of \$368.00 (gross) plus interest (to be calculated from 24 November 2023 to the time of payment in accordance

¹³ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [147].

¹⁴ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

with Schedule 2 of the Interest on Money Claims Act 2016¹⁵ using the civil enforcement debt calculator¹⁶).

(b) A penalty of \$6,200.00.

Costs

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

[58] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Harris may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Williams will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[59] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁷

Natasha Szeto
Member of the Employment Relations Authority

¹⁵ Clause 11, Schedule 2 of the Act.

¹⁶ Civil Debt Interest Calculator at: <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

¹⁷ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1