

Jun and the balance of \$500 transferred to the Crown account.

D. Costs are reserved.

Employment relationship problem

[1] Mr Jun and his wife Ms Mikyung Kim started working for Dollar King Limited at its Tokoroa store in 2015. Mr Jun was the store manager and Ms Kim his assistant. Between them Mr Jun and Ms Kim worked six days each week. They had one day off work each week which they co-ordinated so that one of them was available to work and the shop could open for business seven days a week.

[2] In or about May 2018 Mr Jun joined the Unite Union. Before joining the union Mr Jun had become aware for the first time that he and his wife were entitled to payment for work carried out on a public holiday at time and a half together with an alternative holiday to be provided.

[3] Mr Jun sought clarification from Dollar King about his and Ms Kim's entitlement to payment for public holidays. Mr Jun says that soon after raising questions about their entitlements he and Ms Kim were subjected to a multitude of allegations of misconduct and serious misconduct.

[4] The allegations resulted in disciplinary processes which in turn resulted in a final written warning and ultimately Mr Jun's dismissal. Mr Jun challenges his dismissal which he says was unjustified. Mr Jun also claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Dollar King, that it breached its statutory obligations of good faith and breached his minimum statutory entitlements.

[5] In addition to his personal grievance claims Mr Jun has asked the Authority to impose penalties for breaches of his statutory entitlements.

[6] In his statement of problem Mr Jun claims payment for alternative holidays however this claim was withdrawn at the investigation meeting.

[7] Dollar King denies the claims and says the Authority lacks jurisdiction to investigate and determine Mr Jun's disadvantage grievances because he failed to raise them within the requisite 90 days and Dollar King does not consent to them being raised outside the statutory timeframe.

Issues

[8] In order to resolve Mr Jun's applications I must determine the following issues:

- a) Did Mr Jun raise his unjustified disadvantage personal grievances within the statutory 90 day period?
- b) If the personal grievances were raised in time were one or more conditions of Mr Jun's employment affected to his disadvantage by the unjustified actions of Dollar King and if so what if any remedies should be awarded?
- c) Was Mr Jun unjustifiably dismissed and if so what if any remedies should be awarded?
- d) Should penalties be imposed for statutory breaches?

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received although all evidence and submissions have been carefully considered.

[10] The managers of Dollar King and Mr Jun all have English as a second language. For that reason I was assisted by the services of an interpreter in the Korean language during the investigation meeting and all documents produced in the Korean language were translated into English.

Background

[11] In April 2018 Mr Jun was offered a new employment agreement for signing. From 30 April to 3 May Mr Jun raised questions about aspects of the new employment agreement and the new Workplace Policy rules.

[12] In particular the new employment agreement required Mr Jun to take Sunday's as his day off. Since 2015 Ms Kim had taken Sundays off and Mr Jun took Monday's off, for religious reasons. Mr Jun asked that their days of work remain the same.

[13] In response Dollar King withdrew the offer of the new employment agreement which included an increased salary for Mr Jun. Mr Jun asked Dollar King to reconsider the salary increases citing an increase in sales for 2017, the profits made for the company and exceeding the goals set by the company as reasons to increase his salary level to those promised in the new employment agreement.

[14] New rules set out in a Workplace Policy contained a requirement that any alternative holidays (for working a public holiday) be taken within 14 days of the public holiday. Mr Jun requested information relating to his and Ms Kim's alternative holidays including the number of alternative holidays available as neither he nor Ms Kim had taken alternative holidays during their employment.

[15] In response Dollar King told Mr Jun to check his payslip because it recorded the number of alternative holidays available. After checking his payslips Mr Jun disputed the number alternative holidays recorded on them and asked Dollar King to recalculate his and Ms Kim's entitlements.

[16] On 7 May 2018 Mr Jun requested information pertaining to alternative holidays and annual leave and asked when his next salary review would be. In relation to his request for information about alternative and annual holidays Mr Jun was again referred to his payslips and was asked to revert to the HR Manager if his records were different to those held by the company. In response to his request about when a salary review would take place he was told there would not be a review.

[17] On 24 May 2018 Mr Jun joined the Unite Union. This came to the attention of Dollar King when it received a form giving authority to deduct union membership fees from Mr Jun's wages.

[18] On 26 May 2018 Mr Jun questioned the treatment of Waitangi Day, 6 February 2018, a public holiday on which he worked. Mr Jun asked why his salary payments in February did not reflect payment of time and a half for having worked on the public holiday. In response Dollar King acknowledged that public holidays had not been treated correctly in the past and that those mistakes were being rectified.

[19] Mr Changyun Kim, the HR Manager, told Mr Jun he did not understand why he was seeking his entitlements when Dollar King did not take any issue with Mr Jun and Ms Kim occasionally not fulfilling their contracted hours of work.

[20] Mr Jun was shocked at the reference to him and Ms Kim not fulfilling their hours and requested further information about the statement made by Mr Kim.

[21] On 28 May 2018 Mr Kim raised concerns about Mr Jun's conduct including that he was leaving the store for personal reasons without reporting, not working the contracted hours by arriving to work late and leaving early. On 29 May 2018 Mr Jun asked Dollar King for evidence to support the allegations made by Mr Kim.

[22] Without addressing Mr Jun's request, Dollar King wrote to Ms Kim and set out a number of concerns it held about her conduct. On behalf of his wife, Mr Jun advised Dollar King that they were feeling threatened by the email sent to Ms Kim and asked for evidence to support the concerns raised in the letter.

[23] Dissatisfied with receiving no responses to his emails Mr Jun wrote to Dollar King on 2 June 2018 requesting information regarding the calculation for the payment of annual holidays; information about an investigation being undertaken by Dollar King regarding the treatment of public holidays and reiterating his request for information relating to the concerns raised about his and Ms Kim's conduct.

[24] Mr Kim emailed Mr Jun on 5 June 2018 on behalf of Dollar King. In response to his request for evidence relating to the claims against himself regarding his time management and the allegations set out in the letter of concern to Ms Kim, Mr Kim

advised Mr Jun that Dollar King had no obligation to show him the evidence. Mr Kim advised Mr Jun that Dollar King was not intending to take disciplinary action against Ms Kim. He assured Mr Jun the letter to Ms Kim was simply to set out Dollar King's concerns about her conduct.

[25] In his letter Mr Kim instructed Mr Jun to meet his working hours and raised concerns that Ms Kim was not reporting the actual hours she worked and requested a response from Ms Kim to the letter of concern despite her being on sick leave at that time.

[26] Mr Kim advised there may be other concerns to be addressed and invited Mr Jun and Ms Kim to attend an informal meeting in Auckland on 20 June 2018 to discuss how the issues between them could be resolved.

[27] Mr Jun and Ms Kim attended the meeting on 20 June. However, the meeting was unexpectedly cut short when Ms Kim became very ill and had to leave to attend her doctor.

[28] Before Ms Kim became ill Mr Jun was asked about his recent union membership. There is considerable dispute between the parties about the union membership discussion. I have carefully considered the evidence I heard from all witnesses about the discussion and after reviewing emails written shortly after the meeting I have concluded that Mr Jun was asked about and alluded to the benefits of union membership.

[29] I have concluded it is more likely than not that union membership was not contemplated by Mr Lee, Managing Director, as being a positive move for the business. Mr Kim in his email to Mr Jun on 22 June refers to Mr Jun being asked if he was unwilling to discuss matters openly with management. Mr Kim alludes to this question being asked because of Mr Jun's repeated requests for evidence of the allegations made about him and Ms Kim and Mr Jun's actions in joining the union.

[30] Mr Jun says Mr Andy Yoo, Chief Financial Officer (who was also present at the meeting) told him and Ms Kim that the good faith relationship between them was soon to be over. This is denied by Dollar King.

[31] I have concluded on the balance of probabilities that Mr Yoo told Mr Jun during the meeting that because of his actions he [Mr Yoo] questioned whether the good faith relationship could be maintained. In an email dated 22 June Mr Kim reminded Mr Jun that for their part, and to maintain the good faith relationship, Dollar King had asked Mr Jun "...to correct your disrespectful behaviour...". Mr Kim accused Mr Jun of distorting facts, raising his voice during the meeting, pointing at individuals and making "foul" comments about members of the team. Mr Kim did not provide any examples of how and when the behaviour he complains of occurred during the meeting.

[32] Mr Jun responded to this email while he was on sick leave (something he reminded Mr Kim about in his response). Mr Jun accused Mr Kim of being "creative [fictional]" and disputed much of what he had said. Mr Kim emailed Mr Jun in reply and asked him not to read or respond to emails while he was on sick leave.

[33] On 2 July Mr Kim asked Mr Jun and Ms Kim to report on an hourly timesheet each day. Mr Jun has been critical of Dollar King for making this request of him. I have concluded this request arose in the context of Mr Jun making a formal request on 28 June 2018 for additional staff resources. Mr Kim advised Mr Jun that in order for him to consider his request he needed a detailed report of how Mr Jun and Ms Kim spent their time during their work days.

[34] Mr Kim asked for the report to be based on the four weeks leading up to Mr Jun's absence the previous week. Mr Jun questioned the validity of this request given that he would now struggle to remember hour by hour, what work he undertook.

[35] Mr Kim told Mr Jun that if he could not recall all of the details it would suffice if he sent in a general schedule of how he usually spent his days for a normal working month. Mr Kim told Mr Jun it was reasonable to expect him to provide a precise report of how he and Ms Kim worked, how much time they allocated to each task, and the type of tasks. Mr Kim told Mr Jun he should be able to complete the information based on his memory.

[36] In line with Mr Kim's request, on 30 June Mr Jun provided Mr Kim with an excel spreadsheet showing the number of hours allocated to various tasks. On 2 July 2018 Mr Kim asked Mr Jun to report daily for the next two weeks on how Mr Jun and Ms Kim spent their working hours. Mr Kim advised that the two week report would be compared to the four week spreadsheet information to determine whether additional staff were necessary. Mr Jun agreed to comply with the request while at the same time challenging the request on the basis that he had not heard of other store managers having to complete the same or similar process.

[37] On 3 July Mr Lee and another manager and employee attended the Tokoroa store. Mr Jun was taken out for coffee for over three hours and was questioned again about his union membership. That same day Dollar King had a replacement CCTV surveillance system installed into the store. Mr Lee told me the old system needed to be replaced because when reviewing the footage the detail on the footage was not clear enough.

First disciplinary process

[38] On 9 July Mr Lee emailed Mr Jun requesting a disciplinary meeting regarding allegations of serious misconduct and misconduct. Mr Lee alleged CCTV footage showed Mr Jun using a USB memory device from the shop without paying for it, that he was not devoting all his efforts to carrying out the tasks for which he was employed by spending too much time on the computer and that Mr Jun was in breach of company policy by providing only 15 minutes notice that he was unable to attend work on 6 July.

[39] A further letter containing additional allegations was sent to Mr Jun on 20 July. In this letter Mr Lee set out the following allegations:

- a) On 4 June Mr Jun had removed the store's cash change and banking without authorisation when he was on leave and did not deposit the money into the bank until after he returned from leave;
- b) On 28 June Mr Jun had transferred data from the company laptop onto a personal USB device;

- c) On 4-5 July Mr Jun had submitted incorrect timesheets by not recording extended lunch breaks of 58 minutes on 4 July and 46 minutes on 5 July instead recording that he had taken a 30-minute break on each day;
- d) On 1 July Mr Jun closed the store prior to the scheduled closing time when he closed the store at 2.45 pm when the scheduled closing time was 3 pm;
- e) On 13 July Mr Jun failed to attend his scheduled shift and did not notify the company of his absence and no formal leave application had been submitted.

[40] Mr Jun attended a disciplinary meeting on 24 July. Mr Jun was assisted in the meeting by his union organiser. The meeting was conducted in Koren and the union organiser was assisted by an interpreter.

[41] On 28 July 2018 Mr Lee wrote to Mr Jun setting out Mr Jun's explanations from the 24 July meeting and requested Mr Jun to raise anything that had been missed. Generally the explanations provided by Mr Jun on 24 July were not accepted by Mr Lee.

[42] In his letter Mr Lee set out a further 14 allegations. Most of the allegations dispute the tasks Mr Jun has recorded in his timesheets. All of the allegations were raised as a result of observations made after reviewing CCTV footage. Mr Jun was invited to respond to the allegations in writing. The allegations included:

- a) On 5 July Mr Jun reported a slip accident involving Ms Kim which Mr Jun claimed happened in the morning while Ms Kim was outside looking at a mural. It is alleged Mr Jun changed his explanation of the incident to say that the accident occurred while Ms Kim was picking up rubbish between 12 pm and 1 pm. Mr Lee advised Mr Jun that a review of the CCTV footage showed Ms Kim had not left the store with a rubbish bag or other paraphernalia usually associated with collecting rubbish;
- b) No formal record of the incident had been made to the company;

- c) On 5 July Ms Kim had left the store at 3.33pm but was recorded as being at the store until her usual finish time;
- d) When Mr Jun returned from a period of leave on 28 June he moved the CCTV camera so that it only covered an area of wall space and on other dates Mr Jun had turned off the CCTV unit;
- e) On 28 June Mr Jun left the counter to go to the toilet leaving the store unmanned and unwatched for 1 minute and 20 seconds.

[43] In his letter Mr Lee is critical of Mr Jun for asking for an increase in the number of work hours for the store. Mr Lee suggested that after reviewing the CCTV footage it appears a cut in the hours would be preferable as neither Mr Jun nor Ms Kim look like they were kept busy.

[44] The 28 July letter was followed by a further letter from Mr Kim on 31 July accusing Mr Jun of failing to follow company instructions and in particular for a failure to complete timesheets for the period 9 to 15 July.

[45] On 1 August 2018 Mr Lee wrote to Mr Jun setting out a proposal that Mr Jun be issued with a first and final written warning. Mr Jun was invited to comment on this proposal. He did not take up that opportunity and on 6 August 2018 Mr Jun was issued with a first and final written warning.

[46] In the letter of warning Mr Lee confirmed his findings that for each of the allegations Mr Jun was found to have breached company policy and clause 16 of the employment agreement. Clause 16 deals with summary dismissal and sets out examples of actions that may constitute serious misconduct. Mr Lee concluded that for each breach Mr Jun's actions had the potential to undermine the trust and confidence essential to the employment relationship and had the potential to cause serious risk to the reputation, viability and profitability of the company.

[47] Specifically Mr Lee concluded:

- a) Taking of cash change without authorisation – Mr Jun had taken cash change from the store while he was on holiday instead of leaving it in the store.
- b) Use of USB and transfer of data – Mr Lee held that Mr Jun had transferred company information and data from the company laptop to a personal USB device.
- c) Stolen property – Mr Jun used a USB device from the store to transfer the company handbook and data from the company laptop. Mr Lee concluded and Mr Jun did not deny that he had not paid for the USB device. Mr Jun was of the view that he was using the USB device for the storage of company information and not personal information.
- d) Submission of incorrect time sheets – Mr Lee did not accept Mr Jun's explanation that on 4 and 5 July he had been too busy to take his paid breaks earlier in the day and so he took them as part of his meal breaks.
- e) Failure to devote all time to work tasks – it was common ground that Mr Jun wrote emails to Dollar King regarding the treatment of public holidays during work time. Mr Jun considered the issue to be work related. Mr Lee considered the emails regarding his leave and pay queries to be personal matters and not work matters. Mr Lee was also concerned with the amount of time the CCTV footage indicated Mr Jun spent on his computer and concluded it was excessive.
- f) Closing the store early – Mr Jun closed the store 15 minutes early on Sunday, 1 July 2018. He told Mr Lee he did so because he felt under pressure, he was working on his own and he had not been able to take any breaks.
- g) Failure to give adequate notice of sick leave – Mr Jun took a day's sick leave on 6 July 2018. He notified the company 15 minutes prior to his usual start time that he was unable to work. Mr Lee was concerned that this did not allow adequate time for a replacement to be found. Mr Jun

explained he was getting ready for work when he needed to take his wife to Auckland so that she could be cared for following her accident the previous day. As events transpired Mr Jun was driving toward Auckland when he received a call from Mr Lee who required Mr Jun to return to Tokoroa to meet with him;

- h) Failure to attend work – on 13 July 2018 Mr Jun took a day’s leave. He had applied for the leave the previous day but the application had been declined. Mr Lee did not accept Mr Jun’s explanation that he believed his leave had been approved.

[48] Mr Jun was warned that future failures to adhere to company policies may result in further disciplinary action including dismissal.

Performance management meeting

[49] On 4 August Mr Lee, Mr Kim and Mr Yoo attended the Tokoroa store and met with Mr Jun. Mr Jun recorded the meeting.

[50] During the meeting a number of management issues were raised with Mr Jun regarding sales, stock ordering, display, staff management, management reporting and health and safety compliance. Mr Jun was asked to develop a plan to address the issues raised with him. Mr Jun was told that after they had heard from him management would prepare an improvement plan for Mr Jun to help him improve his performance as manager of the store.

[51] During the meeting Mr Jun raised again, the option of having additional staffing resource. Mr Jun was no longer completing the daily task sheets and so Mr Lee assumed Mr Jun no longer saw the need for additional staff.

[52] Mr Jun explained that he was not completing the daily task reports because he believed they were being used to monitor his every action and not to review whether more staff were needed.

[53] Mr Jun was advised that having additional staffing resources meant sales would need to be increased to cover the additional costs. Mr Jun offered to provide a

sales projection showing the effect of having another staff member. He offered to provide an indication of his plan by the following Tuesday. This was not acceptable to Mr Lee and Mr Yoo. Mr Jun was instructed to provide the plan and budget information by the following Wednesday. Mr Jun maintained the timeframe was too tight but undertook to do his best.

[54] Near the end of the meeting Mr Jun advised Mr Lee that he would need to listen to the recording of the meeting as he had been given a number of instructions about tasks he was to complete and he did not want to miss any. Mr Lee instructed Mr Jun that his time spent listening to the recording and making his report were not to be recorded as work time.

[55] Mr Jun says that as he was leaving the meeting Mr Yoo asked to see him privately which Mr Jun declined. Mr Jun says Mr Yoo followed him out to his car, grabbed him by his arm and verbally abused him. This event was denied by Mr Yoo.

[56] I have concluded it is more likely than not that Mr Yoo did confront Mr Jun in a threatening manner about his consistent requests for information relating to the payment for public holidays and that the confrontation was extremely upsetting for Mr Jun.

Facebook posts

[57] On 2, 3 and 4 August 2018 Mr Jun submitted posts to a public Facebook page called “New Zealand Story”. The Facebook page is a Korean based page with over 15,000 members. Mr Jun made it known that he worked for a two dollar shop located in a small city on the way to Taupo from Auckland.

[58] Mr Lee was concerned at some of the information posted by Mr Jun. In particular Mr Lee was concerned that Mr Jun had accused the company of exploiting workers, that he [Mr Jun] was being persecuted and that other employees had been harassed.

[59] Mr Jun told me he was posting about the benefits of joining the union and that was all he intended the post to do. I have not accepted that evidence as being plausible. I have been provided with English translations of the posts and have

concluded that the posts discredited Dollar King and that while there was reference to him joining the union and the assistance he would receive from the union it was not apparent from the posts that he was encouraging others to join and nor did he extoll the virtues of being a union member.

[60] I have accepted the evidence from Dollar King that the business was recognisable through the information Mr Jun posted on the Facebook page. Mr Lee came to learn about the posts from those who had seen them and who recognised Dollar King as the subject of the posts. Also, Mr Jun's name was associated with the posts so anyone who knew where he worked would have known it was Dollar King he was referring to.

Second disciplinary process

[61] On the same day as he was issued the final written warning (6 August) Mr Jun received a second letter inviting him to attend a further disciplinary meeting to address the following allegations:

- a) On 2 and 3 August Mr Jun submitted incorrect timesheets after he took extended lunch breaks of 54 minutes on 2 August and 45 minutes on 3 August and entered the break time as being 30 minutes;
- b) On 2, 3 and 4 August Mr Jun posted confidential and disparaging information about the company on a public Facebook page;
- c) On 31 July Mr Jun did not follow instructions when he failed to upload invoices for payment in a timely manner.

[62] Mr Jun attended a disciplinary meeting on 10 August where he denied each of the allegations and provided an explanation for what had occurred.

[63] On 17 August Mr Jun received written notification from Mr Lee that he was proposing to terminate his employment for serious misconduct. Mr Lee concluded that each of the allegations was proven, that they all breached clause 16 of the employment agreement, that the conduct had the potential to cause serious risk to the reputation, viability and profitability of the company and that the conduct complained

of had the potential to undermine the trust and confidence essential to the employment relationship.

[64] Mr Lee set out each of the allegations raised on 6 August and Mr Jun's responses:

- a) Incorrect timesheets – Mr Lee alleged Mr Jun had taken extended lunch breaks of 54 minutes on 2 August and 45 minutes on 3 August while only accounting for 30 minutes in the time sheet. Mr Jun's explanation was that he had had to take a call from Mr Kim during his lunch break on 2 August and had advised Mr Kim that he would treat the time as work time. Mr Jun believed he had only taken 30 minutes on 3 August.
- b) Facebook posts – Mr Lee was concerned about the public nature of the posts. He did not accept Mr Jun's explanation that the posts were personal and that he was simply recommending others to join the union or his explanation that the 4 August post was about what Mr Yoo had said to him after the meeting that day and was not about the company.
- c) Failure to upload invoices – Mr Lee was concerned that Mr Jun had failed to follow a reasonable request to upload invoices for payment in a timely manner. Mr Jun's explanation was that he was having difficulty getting PDF copies of invoices and that he was on sick leave when they were to be uploaded was unable complete the task.

[65] Mr Lee advised Mr Jun that he did not accept his explanations regarding the Facebook posts and that these allegations were being treated as serious. Mr Lee advised Mr Jun that after considering his explanations and the written warning issued to him earlier, he was proposing to terminate his employment. Mr Jun was invited to provide a response to Mr Lee's proposal to terminate his employment. Mr Jun did not take up that opportunity and the decision to dismiss Mr Jun was confirmed in writing to him on 21 August.

[66] Mr Jun was given notice of two weeks with a finish date of 3 September 2018.

Did Mr Jun raise his grievances within the statutory 90 day period?

[67] Mr Jun claims he has a personal grievance for unjustified actions leading to his disadvantage. There are two main elements to Mr Jun's claim for unjustified disadvantage:

- a) That he was bullied by his managers; and
- b) Dollar King breached its statutory obligations of good faith.

[68] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[69] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[70] What s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.¹

[71] Mr Jun claims the conduct of Dollar King's managers throughout a period of time from May 2018 through to 3 September 2018 amounted to bullying and breaches of good faith which led to him being disadvantaged in his employment.

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[72] On 7 September 2018 Mr Jun raised a personal grievance relating to his dismissal. In his letter raising the grievance Mr Jun refers to the conduct of Dollar King's managers as contributing to the unfairness of the decision to dismiss but he does not raise a separate personal grievance for disadvantage based on bullying and breaches of good faith.

[73] The focus of the letter was the raising of a personal grievance for unjustified dismissal. It was not until Mr Jun lodged his statement of problem that he claimed, in addition to his unjustified dismissal claim, that his employment had been affected to his disadvantage.

[74] The statement of problem was served on the respondent on 9 October 2018. The Act does not prescribe the form in which a personal grievance must be raised with an employer.² The employee needs to have conveyed to the employer enough information, so that the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.³

[75] Provided the statement makes the employer aware of the grievance that the employee wants the employer to address, it is sufficient.⁴

[76] I am satisfied the statement of problem served on the respondent on 9 October 2018 satisfied the requirement of s 114(2) of the Act for making the employer aware of the grievances Mr Jun wanted addressed. I am however, limited to investigating the conduct of the respondent for the period of 90 days prior to the statement of problem being served on Dollar King. For this reason my investigation has focussed on events and conduct covering the period of 90 days from 12 July to 9 October 2018 inclusive.

Unjustified disadvantage

[77] As already stated Mr Jun claims Dollar King's managers bullied him between July and the ending of the employment relationship on 3 September 2018. He says the conduct occurred only after he raised questions about his entitlements to payment

² *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

⁴ *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139 at [44] – [50].

for public holidays and joined the union. He says following these two events he was subjected to a multitude of disciplinary and performance meetings that affected his employment to his disadvantage and the conduct of Dollar King was unjustified.

[78] The onus of establishing whether one or more conditions of his employment were affected to his disadvantaged lies with Mr Jun in the first instance. If he establishes disadvantage the burden moves to Dollar King to establish on the balance of probabilities that the disadvantage Mr Jun suffered was justified.

[79] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Dollar King's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Bullying

[80] For the sake of completeness I note that Mr Jun has not raised a personal grievance over the final written warning issued to him on 6 August 2019. His complaints have focussed on other areas of conduct by the managers of Dollar King.

[81] In his statement of problem Mr Jun has identified the following conduct as bullying conduct by the managers of Dollar King:

- a) The use of timesheets for disciplinary action
- b) Intimidation
- c) Threatening behaviour

Timesheets

[82] In July 2018 Mr Jun was required to complete daily timesheets at a time when no other store manager was required to do so. I have concluded that at its inception the request for Mr Jun to complete the timesheets was to enable a review of tasks and

time taken to complete tasks each day as a check to see whether an additional staff resource was necessary.

[83] But the timesheets were not used for that purpose. Instead the timesheets were used as a comparison against what was recorded on the timesheets and the movements of Mr Jun during the working day which were viewed on CCTV footage. This information then formed part and parcel of the disciplinary process which resulted in a final written warning being issued and ultimately Mr Jun's dismissal.

[84] I have concluded on the balance of probabilities that the motivation for the requirement for Mr Jun to complete daily timesheets was not to consider whether additional resources were necessary but was to scrutinise Mr Jun's movements. The CCTV footage was reviewed weekly, there can be no other explanation for this other than the managers of Dollar King were seeking to find information which could be used to exit Mr Jun from the business.

[85] The managers were not supportive of Mr Jun's decision to join the union and the correspondence between Mr Kim and Mr Jun demonstrates Mr Kim's dissatisfaction with Mr Jun questioning his entitlements for working on public holidays.

[86] The timesheet recordings were not for the purpose of payment of wages. If Mr Jun was an hourly paid worker it would be expected that he would complete accurate timesheets recording start and finish and break times. Mr Jun was paid by way of salary. The employment agreement states at clause 6.3 that Mr Jun would not receive any additional payment for any overtime worked. This implies that the salary was payment for all hours worked by Mr Jun. On this basis it did not matter when Mr Jun took his paid breaks during his working day provided he worked 44 hours or more each week.

[87] The employment agreement provides for Mr Jun to have two 10 minute paid breaks each day and one 30 minute unpaid lunch break. The employment agreement does not specify when these breaks should be taken. At times Mr Jun worked on his own in the store. This means it is unlikely he would have taken his breaks at the same time each day because he would have needed to ensure he was present in the store

when customers needed assistance. Mr Jun provided reasonable explanations as to why he may have recorded his lunch break as 30 minutes but appeared to take longer breaks.

[88] Further, it is not apparent whether and to what extent Dollar King took into account that Ms Kim was absent in July and August on ACC when addressing its concerns about Mr Jun's timesheet records. It is not clear whether Ms Kim was replaced during her absence or whether Mr Jun was working in the store on his own.

Intimidation

[89] Mr Jun says he was intimidated during meetings conducted by Dollar King in August 2018.

[90] Mr Jun was subjected to a performance management meeting on Saturday, 4 August without any prior notification. The meeting was led by Mr Yoo with interventions by Mr Lee.

[91] Mr Jun was given a performance management form at the meeting and was asked to answer questions and discuss the form without having the benefit of taking the form away and considering how he might respond to the issues and concerns raised in the form.

[92] When Mr Jun asked for time to take the form away this was declined out of hand. Later in the meeting Mr Jun was advised that he should provide a plan to address the issues raised with him and that this plan should be submitted by Wednesday 9 August 2018.

[93] During the meeting Mr Jun was also given instructions to prepare a report and budget to support his request for an additional staffing resource.

[94] Mr Jun suggested he provide an outline of a plan by the following Tuesday, however this was not acceptable to Dollar King and Mr Jun was directed to complete the full report and budget by the following Wednesday. This equated to three working days. Mr Jun was the sole worker at the store on Sundays and he had Monday off. This left him only Tuesday and Wednesday to complete a report and

budget. It is not clear whether, while Ms Kim was absent on ACC, Mr Jun had assistance in the store during those two working days.

[95] Further, when Mr Jun suggested he review the recording of the meeting to ensure he had the complete list of tasks he needed to undertake, he was directed to do so on his own time and not during working hours.

Threatening behaviour

[96] This allegation relates to the incident in the car park on 4 August 2018. As set out earlier in this determination I have concluded Mr Yoo confronted Mr Jun in the car park after the meeting and was threatening in his approach.

Breach of good faith

[97] Section 4(1A) of the Act requires parties to an employment relationship to deal with each other in good faith. Amongst other things, the duty of good faith requires parties to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.⁵

[98] Mr Jun says the actions of Dollar King as set out earlier are also examples of Dollar King's failure to act in good faith towards him. I agree.

[99] Mr Jun requested information regarding allegations made about him and his wife but this was refused by Dollar King with no explanation. The number and frequency of meetings and allegations being levelled at Mr Jun and the way the 4 August 2018 meeting was conducted did not meet Dollar King's obligation to be constructive in maintaining the employment relationship.

Conclusion

[100] Mr Jun has established to my satisfaction that one or more conditions of his employment were affected to his disadvantage. Dollar King has not established that its actions were justified. Mr Jun was unjustifiably disadvantaged in his employment and he is entitled to a consideration of remedies.

⁵ Employment Relations Act 2000, s 4(1A)(b).

Dismissal

[101] Mr Jun was dismissed as a result of the Facebook posts he made on 2, 3 and 4 August 2018. He claims the dismissal was unjustified.

[102] There is no dispute Mr Jun was dismissed. Under s 103A of the Act I must objectively determine whether Dollar King's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[103] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, Dollar King sufficiently investigated issues, raised its concerns with Mr Jun, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to making the decision to dismiss him.

[104] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Jun being treated unfairly.⁶ A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[105] Mr Jun has not denied he made the posts on Facebook. His explanation is that he wanted to convince others in the Korean community to join the union. I have not accepted this explanation as being plausible. The comments Mr Jun made about Dollar King were negative and highly discrediting of the company particularly in relation to its employment of employees subject to work visas.

[106] I have concluded Mr Jun made his facebook posts to express his dissatisfaction with his employer. When he made the posts Mr Jun was aware it was a public page and not private. It was targeted specifically at the Korean community where Dollar King is well known as being the operator of a number of two dollar shops.

[107] Dollar King undertook a thorough process of investigating its concerns and put all of its information to Mr Jun for his explanation and response. Dollar King advised

⁶ Employment Relations Act 2000 (the Act), s 103A(5).

Mr Jun of its proposal to terminate his employment and set out the reasons why it had reached these conclusions. Despite being provided with an opportunity to respond to the proposal Mr Jun did not take up the opportunity.

[108] I have concluded that a fair and reasonable employer could have formed the view that Mr Jun's actions in posting his messages on Facebook amounted to serious misconduct justifying dismissal in all the circumstances.

Remedies

[109] Mr Jun has been successful in his claim that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Dollar King.

[110] Mr Jun has given evidence about the affect the conduct of the managers from Dollar King had on him during his employment. This included that Mr Jun considered resigning from his employment such was the effect the constant allegations being levelled at him and the treatment he received from the managers had on him.

[111] In all of the circumstances of this case an appropriate award for compensation for loss of dignity and injury to feelings is \$7,000.

[112] Mr Jun has established a personal grievance for unjustified disadvantage. Section 124 of the Act requires me to consider the extent to which Mr Jun's actions contributed towards the situation giving rise to the grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[113] I am not satisfied Mr Jun's behaviour was culpable or blameworthy and his conduct did not create the situation giving rise to his disadvantage. There will be no reduction to the remedies ordered.

[114] Dollar King Limited is ordered to pay to Mr Jun the sum of \$7,000 under s 123(1)(c)(i) within 28 days of the date of this determination.

Penalties

[115] In his statement or problem Mr Jun has asked the Authority to impose penalties on Dollar King for breaches of good faith and breaches of the Holidays Act 2003 (the Holidays Act).

Breaches of good faith

[116] It is apparent that the facts relied on for the allegations of breaches of good faith are the same facts relied on for the unjustified disadvantage claim.

[117] The Employment Court has held that where remedies have been awarded for a successful grievance claim then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.⁷

[118] Separate remedies have been awarded to compensate Mr Jun for his grievance, so the imposition of penalties on Dollar King for any breach would amount to double dipping. Mr Jun has not established there are any special facets of any breaches which call for a punishment to be imposed on top of the remedies already awarded. Accordingly the application for a penalty is declined.

Breaches of the Holidays Act

[119] In his statement of problem Mr Jun claimed he did not receive his minimum entitlements for working on public holidays and asked the Authority to impose a penalty for the breach. The payment for public holidays was resolved between the parties and was withdrawn at the beginning of the investigation meeting.

[120] It is clear Dollar King was not paying for public holidays in accordance with the Holidays Act 2003. This was acknowledged by Dollar King in May 2018 when Mr Jun began raising questions about his and Ms Kim's entitlements. Such a failure constitutes a breach of the Holidays Act and a penalty is appropriate in these circumstances.

⁷ *Xu v McIntosh* [2004] ERNZ 448.

[121] Dollar King did little to assist Mr Jun to clarify his entitlements and then penalised him for spending time during his working day when he wrote emails seeking clarification.

[122] The maximum penalty for this breach is \$20,000. It seems to me that after Mr Jun legitimately sought clarification as to his entitlement, Dollar King embarked on a process which, for all intents and purposes was designed to stop Mr Jun from seeking answers to his questions. No payments were made in resolution of Mr Jun's entitlement until just prior to the investigation meeting.

[123] There is no indication of any previous proceedings for breaches of minimum standards against Dollar King, although there is currently one proceeding awaiting determination relating to the ending of Ms Kim's employment relationship. Ms Kim is not seeking penalties for any breaches in that proceeding.

[124] I have not received any evidence of Dollar Kings financial position or its ability to pay any penalty imposed.

[125] Taking into account proportionality an appropriate penalty in all of the circumstances of this case is \$2,000. It is appropriate that a portion of the penalty be paid to Mr Jun.

[126] Dollar King Limited is ordered to pay a penalty of \$2,000 to the Employment Relations Authority. On receipt of the penalty \$1,500 is to be paid to Mr Jun and the balance of \$500 transferred to the Crown account.

Costs

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

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

Vicki Campbell
Member of the Employment Relations Authority