

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 133
5575900

BETWEEN RYAN KIMI-CROSS
Applicant
AND KNOWEAR LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: Andrea Kelleher, Advocate for the Applicant
Tim Oldfield, Counsel for the Respondent
Investigation Meeting: 28 April 2016
Determination: 2 May 2016

DETERMINATION OF THE AUTHORITY

- A. Ryan Kimi-Cross was not dismissed by Knowear Limited. His employment ended at his volition.**
- B. Knowear Limited must pay to the Authority for transfer to the Crown account a penalty of \$1000 for failing to provide Mr Kimi-Cross with a written employment agreement that complied with the requirements of s 65 of the Employment Relations Act 2000.**
- C. Mr Kimi-Cross must pay Knowear Limited \$249.95 for a pair of shoes that he took and kept without permission.**
- D. Costs are reserved, with a timetable for memoranda to be lodged and served if necessary.**

Employment Relationship Problem

[1] Ryan Kimi-Cross worked from 17 March 2015 to 14 July 2015 for Knowear Limited (KL), a retail business selling footwear and apparel.

[2] In a personal grievance application to the Authority Mr Kimi-Cross said he was dismissed on 14 July 2015 at a meeting with KL's director and owner Brad Plamus and its retail manager Enu Sirikige. The meeting was held to review his first three months' work for the company. KL denied Mr Kimi-Cross was dismissed. Instead Mr Plamus and Mr Sirikige said Mr Kimi-Cross walked out after he became upset at comments made about his performance by Mr Plamus and then rebuffed efforts by Mr Sirikige to get him to come back to work.

[3] Mr Kimi-Cross sought remedies of lost wages and compensation for distress and an order for KL to pay a penalty for failing to provide him with a written employment agreement and, when requested, wage and time records.

[4] KL denied Mr Kimi-Cross had any grounds for his grievance or the award of remedies. It sought an order requiring Mr Kimi-Cross to pay KL \$249.95 for a pair of shoes it said he took but for which he had not paid.

[5] By the end of the investigation meeting, and from my assessment of the evidence, the following six issues required determination:

- (i) Did KL dismiss Mr Kimi-Cross on 14 July 2015 or did he resign or abandon his employment from that date?
- (ii) In light of my determination, for reasons given below, that the end of employment was more likely than not a resignation, had KL acted reasonably in holding the review of his performance at which he resigned?
- (iii) Should KL have done more to check Mr Kimi-Cross' intentions after he left the meeting on 14 July, including after allowing a 'cooling off' period?
- (iv) Should penalties be awarded against KL for:
 - (a) Failure to provide an employment agreement; and/or
 - (b) Delay in providing requested wage and time records?
- (v) Should Mr Kimi-Cross be ordered to reimburse KL \$249.95 for the shoes?
- (vi) Should either party contribute to costs of representation of the other party?

The Authority's investigation

[6] Five people provided written witness statements for the Authority investigation: Mr Kimi-Cross; Mr Plamus; Mr Sirikige; Krisanta Atilano, the partner of Mr Kimi-Cross; and Marina Sergacheva, a manager at Ms Atilano's work. They

each attended the investigation meeting and, under oath or affirmation, confirmed their written statements and answered questions from me and the parties' representatives.

[7] A further witness, Ben McLellan, attended under summons issued at the Authority's volition. Mr McLellan works for another business owned by Mr Plamus that operates from the same warehouse premises in Kingsland at which Mr Kimi-Cross carried out some of his work for KL. Mr McLellan also answered questions from me and the parties' representatives.

[8] The investigation meeting concluded with submissions from the parties' representatives.

[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. It has not recorded all evidence and submissions received.

[10] Conclusions reached were based on an assessment of the evidence to the civil standard of the balance of probabilities, that is what was more likely than not to have been the case.

The end of the employment – a resignation or a dismissal?

[11] Mr Kimi-Cross was employed on terms set out in a letter of offer of employment given to him on 10 March 2015. He had countersigned the letter and started work on 17 March 2015. As provided by that letter he usually worked two days a week at KL's retail store in Ponsonby and three days of the week at KL's offices and warehouse in Kingsland.

[12] Mr Kimi-Cross was offered the job by Mr Plamus on the recommendation of Mr Sirikige. Mr Sirikige had known Mr Kimi-Cross socially for eight or more years and regarded him as a good friend.

[13] During the following months Mr Kimi-Cross became dissatisfied with the work arrangements and the range of work he was asked to do. It included more

routine store and warehouse work, including tasks such as stocktaking, than he had expected. He had understood the job would include more work preparing social media material to mark the range of products sold through the business. He was also unhappy about having to check with Mr Plamus about whether he was paid correctly for work on the Easter, Anzac Day and Queen's Birthday public holidays. He was also annoyed by Mr Sirikige, who was his manager, asking at short notice to swap work days due to Mr Sirikige or one of his five children being sick.

[14] By July 2015 Mr Plamus had developed concerns, based on his own experience and from comments made by Mr Sirikige, about how Mr Kimi-Cross carried out his work. Mr Plamus considered Mr Kimi-Cross was not leaving the retail store tidy enough when he finished work. He also thought Mr Kimi-Cross had lost enthusiasm for other work he was required to do at the warehouse.

[15] By email on 12 July Mr Plamus arranged for him and Mr Sirikige to meet with Mr Kimi-Cross at KL's store on the morning of 14 July. The email had the subject heading "Ryan's 90 day review" and referred to the meeting as his performance review because his 90 day trial period was up.

[16] The evidence of Mr Kimi-Cross and Mr Plamus was largely in accord on how their meeting started out. Mr Plamus said he referred to the attitude and enthusiasm of Mr Kimi-Cross as really positive in the first month but was "lacking recently", both in his work at the store and at the warehouse. He said he then asked Mr Kimi-Cross how he felt about the first three months. Mr Kimi-Cross said he was asked to explain why he "seemed to have a low morale and took my own time to do things". From that point the account of the meeting given by Mr Kimi-Cross differed markedly from that of Mr Plamus and Mr Sirikige.

[17] Mr Kimi-Cross said he had only managed to refer to having to chase Mr Plamus up for his pay before Mr Plamus then cut in. He said Mr Plamus had said it was clearly all about money, that "clearly things aren't working out" and then that "this meeting is over" and "thank you for your time". Mr Kimi-Cross said he asked if Mr Plamus would let him voice his concerns but Mr Plamus said "no, it's not working out". Mr Kimi-Cross said he told Mr Plamus that he "couldn't just drop me" because he had worked for the company for 123 days. He said he told Mr Plamus that he would seek legal advice about filing a personal grievance and Mr Plamus had replied

that Mr Kimi-Cross should “do what he had to do” and to leave the keys. However Mr Kimi-Cross said he left the store with the keys because they included a security fob he needed to exit the car park. He drove to KL’s Kingsland warehouse, where he left the keys, and then drove to the workplace of his partner, Ms Atilano. After talking with Ms Atilano he contacted an employment advocate. By email at 1.30pm that day the advocate raised a personal grievance with KL on behalf of Mr Kimi-Cross. The grievance letter alleged Mr Kimi-Cross was unjustifiably dismissed and disadvantaged.

[18] The account of the meeting given by Mr Plamus was that “the switch flipped” when he asked Mr Kimi-Cross to comment about his first three months. He said Mr Kimi-Cross called him “Bradley” in a sarcastic way and was agitated. Mr Kimi-Cross said he was not paid on time, was given a laptop computer that did not work properly and was not paid time and a half for work on the Queen’s Birthday public holiday. Mr Plamus said Mr Kimi-Cross mimicked him when he tried to respond to those concerns, repeating what he said.

[19] He said Mr Kimi-Cross also referred to him as a “fucking joke”, said “the fucking place was a joke”, said he could outsell Mr Plamus and Mr Sirikige and that he “was over it”. Both Mr Plamus and Mr Sirikige denied Mr Plamus had referred to things not working out of the meeting being over. They both agreed Mr Kimi-Cross had referred to raising a personal grievance before he left the store.

[20] Mr Kimi-Cross denied swearing in the meeting but accepted he had asked if the meeting was a joke.

[21] On considering those conflicting accounts I concluded that of Mr Plamus and Mr Sirikige was more likely than to be correct than that of Mr Kimi-Cross. I did so because a close reading of the evidence available about subsequent communication between some of the various witnesses during the remainder of 14 July – including some texts and emails – was more consistent with the evidence of Mr Plamus and Mr Sirikige. It supported a conclusion Mr Kimi-Cross had walked out and refused to come back rather than being sent away by his employer in an act of dismissal.

[22] Immediately after Mr Kimi-Cross left the store Mr Sirikige followed him into the carpark and tried to stop him and to talk to him. Mr Kimi-Cross did not stop but drove past.

[23] Phone records showed two phone calls between Mr Kimi-Cross and Mr Sirikige following the meeting. One at 10:29am lasting 13 minutes. Another at 10:43am was recorded as lasting two minutes and sixteen seconds. Mr Kimi-Cross said he had talked to Mr Sirikige at 10:29 but Mr Sirikige said, although he had tried to contact Mr Kimi-Cross then, no conversation occurred then. They both agreed there was a brief conversation at 10:43am. Mr Sirikige said he asked Mr Kimi-Cross to come back to work. Mr Kimi-Cross denied that request was made. However he agreed, in his oral evidence, that Mr Sirikige had, as he said, asked what he could do to “make it better”. The relevant point from that evidence was that Mr Sirikige made efforts to contact Mr Kimi-Cross after he left the meeting.

[24] The following text exchange (as written) then occurred:

Mr Sirikige to Mr Kimi-Cross at 11:28am:

Hey man. Call me when yr free. This is fucked. I’m sorry from what’s come of this. What can I do to make this better. Please holla.

Mr Kimi-Cross to Mr Sirikige at 11:31am:

Theres nothing man. I believe its in my best interest if we cease to contact each other and our friendship cut. Just something I need to do.

Mr Sirikige to Mr Kimi-Cross at 11:40am:

What!!!! Bro. That’s fucked up. I got you this job. I fought for you. I gave u props. I encouraged you to do what u do well. I gave u credit in yr work. I had yr back when you didn’t even know in many situations. I stood up for you and vouched for you, and you do this. Fuck man. Fucken hell. All I fucken wanted was to be able to do this with someone I trusted and was my boy, thas why I handpick u. But now it’s all gone. Fuck it all then and Fuck our friendship. Fuck man. What a fucken waste of my time an energy. I loved u brah and respected u. But nah not good enough. Later then g.

[25] While Mr Sirikige’s last text was strongly expressed, its tone was clearly a response to what Mr Kimi-Cross said about the end of their long-standing friendship. What was relevant from the exchange was Mr Sirikige’s attempt at 11:28am to establish further contact with Mr Kimi-Cross and to resolve his concerns.

[26] The disappointment expressed in Mr Sirikige’s sentence in his 11:40am text, “I stood up for you and vouched for you, and you do this”, was more consistent with Mr Kimi-Cross having make angry comments and left the meeting rather than a scenario of him having been dismissed by Mr Plamus.

[27] The wording of an email Mr Kimi- Cross sent to Mr McLellan at 3.37pm appeared to support the same conclusion. The email was a reply to one sent by Mr McLellan at 12:20pm. Mr McLellan sent his email after having heard from Mr Plamus about the meeting with Mr Kimi-Cross earlier in the day and after Mr Kimi-Cross had come to the Kingsland office, left the keys on the desk of Mr Plamus and left without speaking to Mr McLellan. Mr McLellan's email apologised for "the unhealthy environment" and said that it "can't have been a very positive or productive outlet for you to try and feel comfortable in". Mr McLellan also offered to provide Mr Kimi-Cross with a reference if he needed one.

[28] The reply from Mr Kimi-Cross said he learnt more from Mr McLellan and another worker than from Mr Plamus and referred to what he called "the breakdown in motivation for me" of being "called upon to do a million and one things but when I asked for something to be done it wasn't". He described "feeling like the warehouse bitch or bum boy". The following passage (as written) was also significant:

I surprised you haven't lost it! It is what it is now I guess no use crying over spilt milk. Its just unfortunate that how things have panned out because of his stubbornness and reluctance to recognise that he has faults and isn't perfect. It even fucks me off more that you're having to apologise on his behalf which is stupid.

[29] The comments Mr Kimi-Cross made in this email, timed at 3:37pm, made no reference to or any suggestion of him being dismissed that day. Given Mr Kimi-Cross' advocate had formally raised a grievance on those grounds by 1.30pm, it was a surprising omission in what appeared to be a frank account to someone Mr Kimi-Cross had regarded as an ally in his workplace. It was likely Mr Kimi-Cross, if he truly believed he was dismissed by Mr Plamus, would have said so in his email to Mr McLellan. The language Mr Kimi-Cross used in the email was, however, consistent with the notion that he had resigned because he was dissatisfied with the job and had not wanted to stay in it. The use of the phrase "lost it" was also consistent with the description from Mr Plamus and Mr Sirikige of how Mr Kimi-Cross had behaved in their meeting earlier that day. Its use was followed by another colloquial phrase indicating Mr Kimi-Cross was resigned to the outcome: "it is what it is now I guess ...". The context suggested he was referring to himself as having "lost it" earlier in the day and being prepared to live with the consequences.

[30] Two other facts were relevant to the likelihood Mr Kimi-Cross would have chosen to end his employment that day. One favouring that likelihood was that he had, a month earlier, told Mr Sirikige by text that he was thinking of resubmitting an apprenticeship application, and by implication leaving the job with KL. He said he had turned down an interview about an apprenticeship before starting work for KL because he thought “this would be it”. However one factor against that likelihood was that Ms Atilano was pregnant at the time. With increased family and financial obligations looming, it was less likely Mr Kimi-Cross would choose to leave the job that provided his income. Ultimately however neither factor was of sufficient weight to change my conclusion based an assessment of all the evidence.

[31] Overall, it was more likely than not that Mr Kimi-Cross had behaved in the meeting as Mr Plamus and Mr Sirikige said he did. This was likely to have been the result of a misunderstanding by Mr Kimi-Cross of the intention of Mr Plamus is opening the meeting with criticism of his performance. Mr Kimi-Cross said he had, before the meeting, calculated the length of his employment as totalling 123 days and knew he could not lawfully be dismissed under a 90-day trial at that point. However, as Mr Kimi-Cross said in his oral evidence, he saw the reference to “90 days” in the 12 July email from Mr Plamus, “put one or two things together and [thought] maybe they don’t want me”, and “I felt like they were trying to get rid of me”.

[32] In that context, when Mr Plamus began with comments on his attitude and enthusiasm, it was likely Mr Kimi-Cross interpreted what Mr Plamus said as first steps in a conversation that would end in his dismissal. He reacted forcefully to those comments to pre-empt what he anticipated would be an announcement that his employment was to be terminated. Asked in the investigation meeting about that scenario as an explanation of what had happened, Mr Kimi-Cross accepted that “it could be interpreted that way”.

[33] However the evidence, assessed overall, did not disclose any intention by Mr Plamus or Mr Sirikige to dismiss Mr Kimi-Cross that day. In the days before the meeting Mr Plamus had canvassed the opinion of Mr Sirikige, Mr McLellan and two other workers at the warehouse about the work of Mr Kimi-Cross. He also made notes of points he wanted to discuss with Mr Kimi-Cross during the meeting. Those notes showed there were aspects that Mr Plamus wanted Mr Kimi-Cross to improve on but no suggestion dismissal was an option he contemplated before the meeting.

[34] The subsequent attempts of Mr Sirikige to contact Mr Kimi-Cross, made at the request of Mr Plamus, and to discuss how to “make this better” also indicated that no spontaneous decision to dismiss Mr Kimi-Cross was made in the meeting. Rather, both Mr Sirikige and Mr Plamus appeared open to the prospect of the employment of Mr Kimi-Cross continuing, despite his comments and his actions in leaving the meeting. The text from Mr Kimi-Cross to Mr Sirikige at 11:28am stating he believed it was best to “cease to contact each other” clearly indicated Mr Kimi-Cross was not open to that prospect.

[35] On that basis I concluded Mr Kimi-Cross effectively resigned from his employment by leaving the meeting on 14 July. The meeting had ended before 10.30am. By his text sent at 11.28am, Mr Kimi-Cross confirmed he regarded the employment relationship as at an end.

[36] However that was not the end of the necessary analysis of what happened that day. Two further points required consideration to satisfy the test of justification set by s 103A of the Act. Firstly, had KL done what a fair and reasonable employer could have done in calling and holding the meeting to review the performance of Mr Kimi-Cross when it did? Secondly, should KL have done more to check on the intentions of Mr Kimi-Cross and to establish if he truly wished to end the employment relationship?

Was holding the review reasonable?

[37] At first blush the reference to a ‘90 day review’ in the email to Mr Kimi-Cross on 12 July could seem misleading as to the intention of KL, particularly in light of his evidence about the apprehension that caused him. This then probably contributed to his strong reaction to criticism made of his work at the start of the meeting.

[38] However the letter which set out the terms on which he was employed by KL said there would be a 90 day trial period “after which” his performance would be assessed and his suitability for the position confirmed. It was not a provision consistent with the statutory 90 day trial periods that allow for dismissal *within* the 90 days for any reason and without the right to then raise a personal grievance.¹ But the term did not suggest that it was. Rather it was a probationary arrangement permitted

¹ Employment Relations Act 2000, s 67A and s 67B.

under s 67 of the Act specifically on the basis that such a provision does *not* displace the law relating to unjustified dismissal. Neither did the terms on which Mr Kimi-Cross was employed require the performance assessment to be done within 90 days of the employment starting. Instead it said the review would be done after that period. The email sent to Mr Kimi-Cross on 12 July was consistent with that provision.

[39] Holding a meeting to discuss such a performance assessment was an action that a fair and reasonable employer could have done in all the circumstances at the time. It was not a disciplinary meeting so there was no need for advice on the opportunity to attend with a representative. Neither was there any suggestion that, if further opportunity was needed to consider any points raised in the meeting, Mr Plamus would not have agreed to and make arrangements for Mr Kimi-Cross to have such time.

Should KL have checked again with Mr Kimi-Cross after a ‘cooling off’ period?

[40] There is a broad principle of employment law that an employer should not seize on words uttered in the heat of the moment, including an apparent resignation by a worker, to then treat the employment relationship as truly at an end without first allowing a suitable ‘cooling off’ period and checking with the worker as to her or his soberly considered intentions. Such an inquiry should be relied on rather than a sudden flare up, an emotional outburst or an outburst of frustration.²

[41] Similarly, if an employer believes a worker has walked away from the job, abandoning the employment, but has not clearly indicated an intention to finally end his or her employment, the employer should be cautious in drawing that inference and make further inquiries of the worker.³

[42] As the decisions of the courts over the years have made clear, the application of those principles turn on the facts of each case. In the case of Mr Kimi-Cross two particular facts were relevant – firstly, the efforts of Mr Sirikige to speak to him later on the morning of 14 July and, secondly, the early involvement of an employment advocate being known to the company from 1.30pm on the same day.

² *Boobyer v Good Health Wanganui* (unreported, EC Wellington, WEC 3/94, 24 February 1994).

³ *E M Ramsbottom Limited v Chambers* [2000] 1 ERNZ 387 (CA) at [26].

[43] The evidence of Mr Sirikige, corroborated by the text communication, confirmed appropriate efforts were made to contact Mr Kimi-Cross, check his intentions and to seek to engage him in further discussion about the future of his employment. Mr Kimi-Cross clearly indicated his intention by his text of 11:28am to ‘cease contact’. Read objectively the text referred, separately, to both the work relationship and their personal friendship.

[44] And from 1.30pm at the latest KL knew Mr Kimi-Cross asserted the employment relationship had ended by dismissal, although Mr Plamus and Mr Sirikige did not agree that was so. The personal grievance submitted by his representative, Ms Kelleher, by email at that time alleged Mr Kimi-Cross was “summarily dismissed” at the 14 July meeting and the dismissal was unjustified because it relied on a 90 day trial period that had expired.

[45] In the facts of this particular case such prompt involvement of the representative – with an allegation of dismissal – changed the usual expectation that the employer would seek to check directly with the worker about his intentions, after allowing a suitable ‘cooling off’ period, either later that day or at least in the following day or so. Rather, now that KL knew that, contrary to what it said was its understanding, Mr Kimi-Cross claimed he had been dismissed, the principle described by the Employment Court in *New Zealand Cards Limited v Ramsay* applied:⁴

If the mistake is about dismissal rather than resignation, the ... scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer’s intention but does nothing within a reasonable time to correct the employee’s false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

A fair and reasonable employer in [the employer]’s position would have communicated directly with [the worker] without delay and, in any case, within a day or so. As I have already found, [the employer] could easily have done that. He chose not to and the Company must now accept responsibility for the consequences of his inaction.

[46] The facts on how KL responded the allegation of dismissal from Mr Kimi-Cross differed in some important respects from that of the employer in the *Ramsay* case. In the *Ramsay* case the parties were dealing (or not dealing) with one another directly, rather than through a representative, and the employer took more than ten

⁴ [2012] NZEmpC 51 at [51] and [52].

days to send the worker a letter after finding out that the worker believed, mistakenly in the employer's view, that he had been dismissed.

[47] By contrast Mr Sirikige responded to the personal grievance email the next morning (a Wednesday) and advised that Mr Plamus was away until Friday and would respond then. Mr Plamus was in Australia on business. He could not easily have responded sooner. His response to the dismissal allegation, was sent by email on Friday 17 July, three working days after the grievance letter was sent to KL. Mr Plamus' email clearly identified that KL had a different view of events. He wrote that Mr Kimi-Cross "was never dismissed but in fact has absented himself from work". He also advised that the company had referred to the personal grievance letter to its lawyers and said they would be in touch. The representatives did then communicate in subsequent weeks, although the difference of view was obviously not resolved.

[48] Against that background what KL did, both through Mr Sirikige's efforts to contact Mr Kimi-Cross on 14 July and in responding to the personal grievance letter by 17 July, did not fall below the standard of what a fair and reasonable employer could have done in all the circumstances at the time. Overall it had, in the language used by the Court in the *Ramsay* case, done something within a reasonable time to correct what it regarded as the false impression held by Mr Kimi-Cross. It had not passively stood by and let him think a dismissal had taken place.

[49] Accordingly the actions of KL were not, in all the circumstances, unjustified. Mr Kimi-Cross had not established that he had a personal grievance.

Penalties

No written employment agreement

[50] In its closing submissions KL accepted its letter of offer of employment to Mr Kimi-Cross, which set out his terms of employment and he countersigned, did not fulfil all the statutory requirements of providing him with a written employment agreement.⁵ The letter had not set out any provisions for the resolution of employment relationship problems. It did not include the mandatory employee

⁵ Employment Relations Act 2000, s 65.

protection clause.⁶ It did not state that public holidays would be paid at time-and-a-half.⁷ It stated the number of days a week he was expected to work but nothing about the times.

[51] The letter did meet the requirements of naming both employee and employer, describing the work, indicating where the work was to be performed, and stating the salary.

[52] I was not persuaded by KL's submission that the letter amounted to substantial compliance with the statutory requirements and the omissions were technical non-compliance. Two of the omitted provisions had real relevance to the situation that arose on 14 July. If the provision regarding public holiday pay was set out in a properly prepared employment agreement, Mr Kimi-Cross would not have any concerns about whether he would be paid correctly. Clear provisions about how employment relationship problems would be resolved may have avoided any misapprehension or misconception about the performance assessment meeting.

[53] The rules KL failed to follow, about providing a written employment agreement and what should be in it, have been in place for more than a decade. Ample assistance is available to help employers, small and large, comply. In an era where employment standards are expected to be enforced, as apparent from Parliament's recent amendments to the Act, compliance is a price of doing business and fair competition.

[54] In setting an appropriate penalty there was a legal issue as to whether the relevant factors for the assessment were those set by one of those recent amendments, at s 133A of the Act, or a similar (but non-exclusive) range of factors identified in earlier case law.⁸ However, as submitted by KL, the tests were "roughly similar" so that on the particular facts and evidence in the present case nothing really turned on the point. Applying either set of factors to the particular circumstances of this case would produce the same amount.

[55] Failure to follow a standard procedure in a decade-old law, applicable to all employers, was a serious breach in itself. Mr Plamus said he had now used the

⁶ Employment Relations Act 2000, 69OJ.

⁷ Holidays Act 2003, s 52.

⁸ See, for example, *Tan v Yang & Zhang* [2014] NZEmpC 65 at [32].

Ministry of Business employment agreement builder to create agreements for employees and would do so in future.⁹ While that was submitted to be evidence of remorse, I was not persuaded by the notion that KL was not a “repeat offender”. While there was no specific evidence about its previous practice with other employees, neither could it reasonably be inferred that it had previously provided written employment agreements to everyone but Mr Kimi-Cross or would have done so now if things had not gone awry with his employment.

[56] A penalty of \$1000 was appropriate as a deterrent to other employers who might fail to properly complete the mandatory requirement to provide workers with a written employment agreement covering at least all the elements required by s 63A and s 65 of the Act. It was a penalty within the range imposed in comparable cases but still very much at the lower end of the levels of penalty that may be awarded against a company.

[57] Mr Kimi-Cross did not apply for any penalty imposed on KL to be paid to him under s 136(2) of the Act. KL must pay the penalty of \$1000 to the Authority for transfer to a Crown bank account.

Failure to provide wage and time records

[58] I was not persuaded a penalty was warranted in respect of the provision by KL of wage and time records requested by the representative for Mr Kimi-Cross.

[59] The personal grievance letter on 14 July asked KL to provide “the reasons for Mr Kimi-Cross’ dismissal ... along with the time and wage records”. Delay in responding properly to the latter part of the request in part related to disagreement between the parties about the notion there had been a dismissal. However there were other relevant reasons. On 29 July the lawyer then acting for KL acknowledged the request for wage records but explained the business was diverted by its premises having twice been subject to ‘ram raids’ and ransacking of stock. The raids occurred on 21 and 27 July and included significant physical damage to the premises, resulting in general disruption to the business. On 7 August Ms Kelleher asked Mr Plamus directly for the records after KL’s lawyer advised he no longer had instructions on the

⁹ <http://employment.govt.nz/er/starting/relationships/agreements/builder.asp>

matter. The records were provided on 13 August, that is one month after first being requested.

[60] Factually it was clear breach of the obligation under s 130(2) of the Act. An employer “must”, on request of a worker or the worker’s authorised representative, “immediately” provide access to or a copy of the wage and time records. While liable to a penalty for failure to comply with such a request, the ‘ram raids’ on the business premises and the communication between the representatives in the intervening period, did not warrant a penalty in the particular circumstances. Although an outstanding wage arrears matter (to do with some pay for work on at least one public holiday) appeared not to have been resolved, no wage arrears claim was made in the statement of problem lodged by Mr Kimi-Cross. Neither was it identified as an issue for investigation and determination in the case management conference held with the representatives to prepare for the investigation meeting.

Payment for the shoes

[61] KL sought the order for Mr Kimi-Cross to pay \$249.95 for a particular pair of designer sneakers because it said there was clear evidence he had taken them. It produced a photo posted on the Instagram social media site by Mr Kimi-Cross in the week after he stopped working for KL. The photograph appeared to show him wearing the particular shoes, which I need only refer to as ‘the Ransom sneakers’. The pair was a sample KL had for publicity purposes. At the time the particular design was not available for purchase elsewhere in the country. Mr Plamus gave evidence that, prior to the end of his employment, Mr Kimi-Cross had asked for the sneakers but Mr Plamus had said he could not have them. KL had a policy that staff could not purchase product until one month after its release.

[62] In his written evidence Mr Kimi-Cross said the shoes in the photo might look the same from a distance but were actually a different brand. He said the shoes he was wearing in the photo, which I need only refer to as ‘the Visvim sneakers’, were a present from Ms Atilano at Christmas 2014. He said he had added blue fringing to those Visvim sneakers, copying the style from the Ransom sneakers to which Mr Plamus had referred.

[63] During the investigation meeting Mr Kimi-Cross and Mr Plamus both answered questions about the details of the sneakers and whether the ones in the photo

could be KL's Ransom sneakers or were the Visvim sneakers as Mr Kimi-Cross suggested. On the balance of probabilities the evidence of Mr Plamus was correct and the evidence of Mr Kimi-Cross was not correct. I reached that conclusion for five reasons.

[64] Firstly, the shoes in the photo posted by Mr Kimi-Cross clearly showed a black rubber wedge that ran back from the toe kick piece at the front of the shoe along the side edge of the front part of the sole. The Ransom sneakers had such a wedge along the front of the sole. The Visvim sneakers, as Mr Kimi-Cross accepted in his oral evidence, did not have a wedge of that kind running back from the toe piece.

[65] Secondly, the Visvim sneakers were a considerably more expensive item than the Ransom sneakers. As submitted by KL it seemed unlikely Mr Kimi-Cross would alter the more expensive sneakers to look like the cheaper sneakers. Mr Kimi-Cross said he did it because he liked the look.

[66] Thirdly, near the conclusion of the meeting and in response to a question from me, Mr Kimi-Cross conceded the shoes in the photo were Ransom sneakers.

[67] Fourthly, it was unlikely Mr Kimi-Cross had obtained such a pair of Ransom sneakers from somewhere else. If he had, he would have said so in his written or oral evidence.

[68] Fifthly, there was no evidence suggesting someone else may have taken the missing Ransom sneakers. Mr Plamus gave evidence those sneakers were not in an area of the warehouse where stock was taken from during the July ram raids of the premises.

[69] Accordingly, it was more than likely that Mr Kimi-Cross did take the Ransom sneakers. He did not have permission to do so. He had not paid for them. KL was entitled to an order requiring him to pay \$249.95. It was the retail price and the amount KL could reasonably have expected to receive for them had Mr Kimi-Cross not taken the shoes.

[70] The conclusion on the evidence of Mr Kimi-Cross about the sneakers undermined his credibility in respect of other evidence he had given. He told a story about the sneakers that did not match the available, visible facts. What he conceded

in his oral evidence was different from the prepared written witness statement he had earlier, under oath, confirmed was true and correct to the best of his knowledge.

[71] I did not directly take account of that credibility issue in reaching the conclusions made about what had happened in the 14 July meeting. They were reached for other reasons already given. However, as a matter of ‘cross checking’, it made it more likely than not that the evidence of Mr Kimi-Cross was less reliable overall than that of Mr Plamus and Mr Sirikige.

Costs

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

[73] If they are not able to do so and an Authority determination on costs is needed KL may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Kimi-Cross would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[74] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰ In relation to one such factor, concerning the principle that ‘costs follow the event’, there are two such events. One, of greater magnitude, comprises KL’s success in responding to the personal grievance application. The other, a much smaller event, was the successful application for an order requiring KL to pay the Crown a penalty for failure to provide Mr Kimi-Cross with a written employment agreement.

Robin Arthur
Member of the Employment Relations Authority

¹⁰ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].