IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2025] NZERA 451
3313060

	BETWEEN	ANN SHEILA LEBRETON Applicant
	AND	DA HAI INVESTMENT LIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Regan Johnston, advocate for the Applicant Guoqi (aka Joe) Zhao for the Respondent	
Investigation Meeting:	27 May 2025 in Christchurch	
Submissions Received:	13 June 2025 from the Applicant 12 June 2025 from the Respondent	
Date of Determination:	25 July 2025	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ann LeBreton worked as a cleaner/housekeeper from 4 February 2022 for Da Hai Investment Limited (DHI) at their motel business in Kaikoura until the engagement ended in disputed circumstances in late May 2023. Ms LeBreton was not provided with an employment agreement.

[2] Ms LeBreton's representative raised a detailed personal grievance with DHI by letter of 12 July 2023, alleging Ms LeBreton had been unjustifiably dismissed and unjustifiably disadvantaged in the course of her employment after she received a payslip on 29 May 2023

entitled: “Final Pay”. The disadvantage allegedly related to the actions of DHI’s local manager leading up to the employment ending.

[3] On 6 August 2023, DHI’s sole director, Joe Zhao who is based in Whakatane, provided a detailed response to Ms LeBreton’s allegations in the form of a statement from DHI’s local manager that asserted Ms LeBreton was employed as “casual on call housekeeper”. The parties then attended an unsuccessful meditation on 5 February 2024, that Ms LeBreton says took some effort to schedule and was of the belief that Mr Zhao was obstructive on the timing.

[4] Ms LeBreton made an application to the Authority on 26 July 2024 and an initial directions teleconference was convened by the Authority on 17 October 2024. Unfortunately, the matter could not be set down for an investigation meeting due to a lack of identification of likely witnesses and remedies sought being not clearly articulated. Ms LeBreton’s representative was directed to file an amended statement of problem that was provided on 27 January 2025. A further directions teleconference was held on 14 March and witness evidence exchanges were timetabled and an investigation meeting was scheduled for 27 May 2025.

The Authority’s investigation

[5] At the one-day investigation meeting, Ms LeBreton attended together with an ex co-worker who gave evidence through an audio-visual link. Joe Zhao attended for DHI in his capacity as sole director and DHI’s local Kaikoura motel manager also attended. All provided written evidence and made themselves available for questioning.

[6] Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

Issues

[7] The issues I must decide upon are:

(a) The real nature of Ms LeBreton’s employment relationship – i.e. was it genuinely casual or permanent part time?

(b) Was Ms LeBreton unjustifiably dismissed or did she resign?

(c) The contextual factors leading up to the employment relationship ending.

(d) If Ms LeBreton is found not to have been a casual worker and an unjustified dismissal and/or unjustified disadvantage actions are established what, if any, remedies should be awarded considering Ms LeBreton's claims for:

i. Lost wages.

ii. Compensation under s 123(1)(c)(i) of the Act of $15,000 for hurt and humiliation flowing from the alleged unjustified dismissal and/or unjustified disadvantage.

iii. Arrears of wages, holiday pay and unpaid sick leave.

iv. A penalty for DHI's failure to provide an employment agreement.

(e) If Ms LeBreton is successful in all or any elements of her personal grievance claims should the Authority reduce any remedies granted as a result of any contributory conduct?

(f) If I consider a statutory breach is made out what is an appropriate level of penalty and should any portion of this be awarded to Ms LeBreton?

(g) An outline of how costs are to be determined.

What caused the employment relationship problem?

[8] DHI is a business owned and operated by Joe Zhao. Mr Zhao currently runs four motel accommodation sites, three of which are located in the North Island and owned by different entities he has a director role in and the one in Kaikoura owned by DHI. The latter operation was acquired in January 2022. Mr Zhao had at the time, over 4 and a half years' experience, living and site managing two of the North Island motels. Mr Zhao says he has experience employing a mix of workers and his motels accommodate a variety of guests including those with long term emergency housing needs.

[9] Upon acquiring the Kaikoura motel Mr Zhao, for continuity, employed a local couple as managers who had been in that role with the previous owners. Mr Zhao says initially

although Ms LeBreton was not working at the motel, recalled he had met her earlier when he scoped the business for potential purchase. The significant advantage to DHI was Ms LeBreton was a long-term Kaikoura resident.

[10] Ms LeBreton says she worked for the previous motel owners for around 18 months and was the subject of an individual employment agreement. Ms LeBreton recalled she was casual with fluctuating hours of work and her holiday pay was 'pay as you go' and paid at 8% of her hourly rate.

The engagement

[11] Mr Zhao expressed interest in employing Ms LeBreton who at the time was undertaking a casual cleaning job at another Kaikoura accommodation business. The initial contact from Mr Zhao was by text message of 17 January. After introducing himself as the new owner and inquiring if she was still working elsewhere, Joe Zhao asked:

> If you still have a couple of days vacant I am happy to offer the cleaners job and minder for Kaikoura Quality Suites. The new managers Shane and Sandie are lovely. They have been working for me for quite long time. If you are happy I will let Shane come to talk to you. Cheers Joe.

[12] Ms LeBreton recalled meeting Shane the next day to discuss the job and then getting a text from Mr Zhao on 19 January, that first referred to meeting Shane then said:

> We do need you to help us with cleaning for 3-4 days (3 weekends and Sundays) a week, to keep your hours between 15h and 25h. For minder, it's a two-day every month. If you can't make it overnight you may stay in the motel <u>from 7am till 8pm</u> and leave your mobile number on the entrance just in case and you are not far away. I am happy to discuss with you on phone if you are available. Thanks Joe.

[13] Mr Zhao then recalled meeting with Ms LeBreton on 1 February 2022 and offering her a job and that she filled in a new employee form. Ms LeBreton says she only partially completing the new employee form (the bottom portion headed "Personal Information") for Shane the previous manager and did not retain a copy. A colour copy of the form was provided to the Authority by Mr Zhao and the top section "Employment Details" is in a different colour ink. The top section records in handwriting Ms LeBreton's start date as 1 February 2022 a "Job Title" of "cleaner"; that the category of employment is "casual"; "Regular working hours" as "On call"; "Normal working days" as "4 d"; "Pay frequency" as "weekly" and the

hourly rate of pay to be $26. Ms LeBreton says she took on the job believing it to be a core guarantee of at least 15 hours per week with more hours available if she was willing to work them - a view she impliedly and I find reasonably, formed from the text exchanges with Mr Zhao.

[14] The employee form also had a note to increase Ms LeBreton's hourly rate to $29.50 from 27/11/2022 but text exchanges produced between Shane and Ms LeBreton suggest this arrangement was initiated later in November 2022, by Shane approaching Mr Zhao and then Shane confirming by text of 21 November 2022 that the increase had been approved.

[15] Mr Zhao was not sure when the top half of the new employees form was filled in but also recalls in August 2022 offering Ms LeBreton a permanent 30 hours per week role but she declined this.

[16] In any event, Ms LeBreton conceded she started work and was paid weekly with her holiday pay being paid as a separate regular amount and despite knowing the implication of that to her ongoing status, she did not raise it as an issue with Mr Zhao.

[17] Ms LeBreton says she recalled declining the 30 hours per week role in August 2022 (she recalled being offered 35 to 40 hours) and telling Mr Zhao this was not practicable due to seasonal fluctuations and she said her response at the time was she was just seeking a permanent part-time role and that she was happy to work any additional hours when required but then did not hear anything further form Mr Zhao.

[18] Mr Zhao produced an email of 21 August 2022 from the then managers partner (Sandie) that indicates the offer of "a contract for 30 hours a week" had been made to Ms LeBreton and they were awaiting her decision. It is apparent that although Ms LeBreton had turned down the offer of guaranteed hours of 30 plus per week, Mr Zhao wasted an opportunity to properly record the terms of employment and working hours by not providing a draft employment agreement for Ms LeBreton's consideration. In the interim, Ms LeBreton worked on and problems only emerged when in late March 2023 a new motel manager was appointed and she engaged other transient staff on a casual basis, which led to Ms LeBreton believing her hours of work and tasks were partially re-allocated.

Provision of employment agreements

[19] Mr Zhao suggested it was common practice to engage cleaners on a casual basis and he asserted Ms LeBreton was told this when she was engaged and he cited the evidence of the new employee form as confirming the role as "on-call/casual". Mr Zhao had asserted in his response to Ms LeBreton's application to the Authority that:

> I did not sign an agreement with every cleaner because it will cost me $800 each agreement for legal fees, and the cleaners working in the Kaikoura area are almost Working-Holiday-Visa people. [1]

[20] During the investigation meeting, Ms LeBreton's co-worker who was also a Kaikoura resident indicated she was also not supplied with an employment agreement and at times had problems clarifying her statutory entitlements. Mr Zhao, when pushed in questioning during the investigation meeting, says he had no employment agreements with any of his staff except managers and to date, had not rectified this issue but intended to do so. Following the investigation meeting Mr Zhao provided the Authority two June 2025 employment agreements covering casual cleaners employed in the Kaikoura motel business.

Ms LeBreton's hours worked

[21] In addition to supplying some wage records, Mr Zhao asserted in submissions that Ms LeBreton did not have a regular pattern of hours and that there were "week to week fluctuations – ranging from 2.5 to 47.5 hours per week". Further, Mr Zhao says each period of engagement was recorded in a weekly roster that was prepared the week before in consultation with all available cleaners. Ms LeBreton says the roster was not always provided and sometimes hours were set by oral agreement or texts.

[22] Mr Zhao reiterated Ms LeBreton had declined an invitation to guarantee her weekly hours and noted annual leave was never taken with holiday pay being paid on a weekly accrual basis.

[23] Based on a diary of the actual working hours Ms LeBreton kept, her advocate pointed to discrepancies in the hours presented by DHI in wage records, noting the times Ms LeBreton 'minded' the motel when the managers were absent are not recorded by DHI except to note a

[1] Joe Zhao, Form 3, Statement in Reply, 15 August 2024.

rounded amount was paid for such (usually $200) and five weeks are missing from the records. DHI for the period 4 February 2022 to 29 May 2023, record Ms LeBreton's hours as 1,856.

[24] In contrast, Ms LeBreton's records of daily start and finish times record 2,535.5 hours for the same period assessed by DHI and suggest the local manager's text records show she was paid on producing evidence of her hours worked beyond set rosters that could when Ms LeBreton worked on minding the motel, amount to between 70 hours plus per week at times.

[25] Ms LeBreton's advocate asserts using a pattern analysis that only six of the first 26 weeks of Ms LeBreton's employment fell within the suggested 15-25 hours envisaged in the offer of employment and weekly totals "averaged 31 hours, with four separate weeks exceeding 70 hours". In summary, in support of establishing that a regular mutual obligation of hours beyond 25 hours became evident, Ms LeBreton's advocate noted by her fourth week she had exceeded a 25 hours' expectation and by week eleven it had peaked at 89.75 hours for that week. I note the hours average was boosted by Ms LeBreton's minding duties that is consistent with the job being described as housekeeping/cleaning.

[26] Ms LeBreton gave unchallenged evidence that the former motel manager regarded her as occupying a supervisory role and used her to induct and oversee other cleaners. Ms LeBreton had a set of motel keys. However, Ms LeBreton did concede during winter months her daily hours dropped below 15 per week and although always working, they could drop to an hour and a half cleaning work per day but during peak summer months 4 to 5 hours per day would be worked.

[27] Ms LeBreton's former co-worker confirmed the number of hours worked and noted that at times when the former manager was ill, she kept the operation running and undertook additional tasks. She also described the motel at times being short staffed when busy and them working extra shifts and occasionally up to seven days a week.

Was the employment casual?

[28] I now assess whether the employment relationship was genuinely casual or otherwise from both the onset of the relationship and at the time it ended. This involves considering how the employment relationship functioned in practice, aided by extrinsic materials (predominantly the text exchanges) and, an assessment of the parties' evidence.

[29] In the absence of a job advert and written employment agreement at the onset of the relationship or notes of any interview, from the text exchanges I am satisfied that the relationship was intended and imposed by DHI as casual. Given the informal nature of the engagement, I do not think Ms LeBreton initially turned her mind to the nature of the employment relationship. Ms LeBreton was objectively aware of being paid holiday pay in her hourly rate and given her previous employment experiences (where employment agreements were provided) would know that was consistent with a casual arrangement.

[30] What was evidently different from a normal on call casual situation, was the job involved the provision of regular hours and it was acknowledged Ms LeBreton was reliable in making herself available at all times required. There was some evidence as above, that in August 2022, Ms LeBreton was seeking a guaranteed 'floor' of minimum hours but she inexplicably turned down a tentative offer to agree these and execute an employment agreement. I, however, am cautious about this evidence as no draft employment agreement was proffered by DHI and despite being objectively aware that this is a legal requirement, DHI continued to operate the relationship post August 2022 on what they considered to be a casual basis.

[31] Ms LeBreton says she had an expectation of regular hours and at times was willing to work extra hours and made it clear she was available to do more.

[32] The Act provides no definition or test to apply to determine 'casual employment' but useful guidance on determining what is or is not, a genuine casual employment relationship is found in one of the Employment Court decisions *Jinkinson v Oceania Gold (NZ) Ltd* [2] identifying the following relevant factors:

a) The number of hours worked each week.

[2] *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

b) Whether work is allocated in advance by a roster.

c) Whether there is a regular pattern of work.

d) Whether there is a mutual expectation of continuity of employment.

e) Whether the employer requires notice before an employee is absent or on leave.

f) Whether the employee works to consistent starting and finish times.

[33] Taking a broad view, DHI's needs flowed from seasonal visitor demand and in setting staffing levels the local managers had to balance such demand with the allocation of hours to workers available. I appreciate this is a very difficult exercise but could not comprehend why Ms LeBreton who had a proven track record of commitment, experience, reliability and availability, could not be provided core minimum hours based on her consistent pattern of work.

[34] I find the relationship was better described as permanent part-time and had an employment agreement been provided as it should have been, it could have detailed an agreed floor of guaranteed hours consistent with the terms of the original offer made by Mr Zhao. The new manager's evidence at the investigation meeting was she accepted Ms LeBreton was allocated most regular hours (as well as making herself available for extra work) and she accepted this was not employment on an "on call" basis.

[35] The relationship quickly operated differently to the casual 'label', which in the circumstances was not surprising given Ms LeBreton's capability was not at issue and the first motel manager she worked for had full trust and confidence in her from having previously employed her.

[36] Further, how the work was allocated over time, created a reasonable expectation of ongoing regular employment notwithstanding that at the time it ended a dispute ensued about the allocation of regular hours with Ms LeBreton perceiving her tasks and hours were being allocated elsewhere (discussed below).

[37] I find the employment of Ms LeBreton could be described as casual as evidenced by how her holiday pay was treated, but this label did not accurately describe the real nature of the employment relationship under s6 of the Act. [3]

Finding

[38] I find the relationship in its duration and nature, became permanent part-time and the attempt by DHI to reiterate their view it was a casual employment relationship was an attempt to legitimise what amounted to a flexible 'zero hours' arrangement unconnected to the nature of Ms LeBreton's pattern of working hours. I do however acknowledge this may be just 'post facto' justification as at least by August 2022 Mr Zhao seemed comfortable in offering a floor of guaranteed hours. It is trite to say that had Mr Zhao completed that negotiation or produced some documentation of a formal offer, this dispute may not have proceeded.

How the employment relationship ended

[39] How the employment relationship ended is a different issue and difficult to resolve where one party considers there was no obligation to offer ongoing employment. However, given my findings above, the circumstances of the employment ending needs scrutiny to determine on who's initiative it ended and if I find Ms LeBreton resigned, there is a question of whether she was constructively dismissed. If I am wrong in my analysis of the relationship being permanent, I observe that the Authority has previously held an unjustified dismissal can occur during an agreed period of casual employment. [4]

[40] The events that led to the breakdown of the employment relationship stemmed from the appointment of a new motel manager on 31 March 2023 and a different approach that manager brought to arranging cleaning staff and, the interrelationship between Ms LeBreton and the new manager. At the time, Ms LeBreton and her former co-worker who gave evidence were of the view that the team of four cleaners then available was sufficient to cope with the

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[3] An approach taken in *Jinkinson* above note 1, with Couch J indicating that an assessment of employment status (whether 'casual' or not) needs to examine the real nature of the relationship under s 6 Employment Relations Act 2000 with the parties' description of the relationship in an employment agreement not being determinative.

[4] *Ford v Haven Falls Funeral Home Ltd* [2024] NZERA 224.

anticipated winter downturn in guest numbers and the new manager's action of immediately advertising for new cleaners was ill advised.

[41] In contrast, the new manager's analysis of the available cleaning staff's likely availability, led her to a view that she needed to "find a few more cleaners" as they were still busy (coming to the end of peak season) and she had in mind trying to increase winter occupancy numbers. It was evident that initially the new manager sought Ms LeBreton's assistance in getting familiar with the motel's day to day operation. Ms LeBreton says initially everything was positive with the only change being that rostering was more informal and working hours were often allocated by text. Ms LeBreton says as had been her past practice, she accepted every shift offered.

[42] The new manager confirmed she assured Ms LeBreton that nothing would change but says that relationships between Ms LeBreton and other staff including the new workers, became problematic. The new manager acknowledged Ms LeBreton was a reliable and good cleaner who set high standards and was willing to respond to assist with non-cleaning tasks (including minding reception). From her observation the new manager says tension arose because Ms LeBreton naturally assumed a leadership role she had not been formally designated to undertake. This included inducting new staff and she says Ms LeBreton was at times abrasive with others and in particular did not get on well with a young couple, who commenced work on 7 April 2023.

[43] An issue of significance was work organisation. The new manager says she noticed after a few weeks that each cleaner was undertaking the same specific task and she implemented a change by encouraging cleaners to share duties while working together and to work more as a team. This new arrangement, said the new manager, did not sit well with Ms LeBreton and caused tension to the point where she had to counsel Ms LeBreton on her negative communication with others and over reliance on her perceived hierarchical status. The new manager says Ms LeBreton became increasingly difficult to communicate with.

[44] Ms LeBreton's view was she felt taken advantage of and would get more frequent 'out of hours' calls to assist the new manager in non-cleaning work, although she did acknowledge this was something she had willingly undertaken for the previous managers and described herself as being used to being 'on call 24 hours' when undertaking minding duties. Ms LeBreton says as more workers were added to the roster, shift allocations became

unpredictable and, in her opinion, there were too many people available to share the available work.

[45] The new manager says Ms LeBreton continued to be prioritised in the allocation of hours and provided a snapshot of hours Ms LeBreton worked since she commenced as the new manager. However, it shows Ms LeBreton's allocated cleaning hours dropped from an average of 26 hours per week in the 8 weeks preceding the new manager's appointment to 23.09 hours per week for the 8 weeks after the new manager took over. I caution that these figures cover a limited period.

[46] Disclosed texts between the new manager and Ms LeBreton (between 31 March 2023 to 26 May 2023) show an initial amicability. In a 7 April text the new manager advises of her decision to engage a couple who had experience housekeeping in a hotel and were looking for long term employment. Ms LeBreton responded: "Sounds good". A follow up text of the same date was an invite for Ms LeBreton to meet the new manager and "go through the rosters together" and explore what days she wanted to be allocated. Thereafter, frequent texts appear mutually cooperative and disclose that the arrangement of working hours was done on an amicable basis including a text exchange of Friday 14 April where Ms LeBreton is offered the Saturday off as three other cleaners were down to work – her response was "Ok thanks".

[47] However, by 16 May, Ms LeBreton says she was becoming concerned that her work was being given to others and her responsibilities reduced saying on that day (16 May) she was sent home while another worker undertook tasks she previously would have done. On 16 May, a text evidencing emerging tension on work allocations reads:

> Hi can u please ring me when you can. It only fair to give the others sone [sic] work as well. You do the most hours out of everyone each week. an everyone else has cut back . Your on call casual as well. I heard you saying you find another job so if that how you feel. Did you still want to keep coming until you do . if you can let me know.

[48] Ms LeBreton says she did not respond but was shocked at being described as casual and at the time she was not seeking work elsewhere and after ringing an Employment New Zealand hotline, she became concerned enough to resolve to seek legal advice perceiving she was being pressured to resign. I observe that read carefully, the new manager's text is ambiguous – it could also be read as recognising that Ms LeBreton had otherwise guaranteed ongoing work

but was on call or casual for extra hours. Ms LeBreton says she approached the new manager after getting initial legal advice and was reassured DHI was not seeking her resignation.

[49] In questioning, the new manager says she was told that Ms LeBreton had previously refused a full-time role but understood Ms LeBreton was primarily available for cleaning and other work but she says she needed other workers to cover for when existing part-timers took time off. The new manager says she employed an additional four casual workers and none of them were provided employment agreements. The new manager says she had previously managed a DHI accommodation site in the North Island since April 2022, reporting to Mr Zhao.

[50] For the week ending 21 May 2023, Ms LeBreton worked 18 &1/4 hours over 5 days. The texts between the parties disclose Ms LeBreton at 7:50 am on Thursday, 18 May was asked to come in that morning at 9 am which she agreed to. A further request at 2:49pm asked if Ms LeBreton would "motel sit" the next day so the new manager could attend a hair appointment. Ms LeBreton responded: "Yeah no worries". Ms LeBreton's evidence was that on 18 May she cleaned some units for about two and a half hours and was told to go home but observed that one of the new cleaners was still working on tasks she previously undertook.

[51] Ms LeBreton was then asked to work alone on the Saturday (20 May) in a text of 8:33 am (for 9:30 am start) - which she did so despite her feeling unwell and asserting the new manager knew this. Later in the afternoon of 20 May, the new manager texted to arrange for Ms LeBreton to work on the next day alongside the young couple who had recently been employed.

[52] Ms LeBreton's recollection was the day of 21 May did not go well as she was unwell and ended up cleaning alongside the young couple, but the new manager insisted she clean 12 bathrooms alone using a chemical spray. Ms LeBreton says she completed the task and when leaving asked when she was next rostered on and was told by the new manager as she looked unwell to take Monday and Tuesday off and return on Wednesday. Ms LeBreton says she concurred and said she would be in touch.

[53] The new manager also recalled the 21 May day did not go well and that Ms LeBreton was difficult but completed her work. She could not recall telling Ms LeBreton to take the

following days off but remembered her angrily saying she was finishing working for DHI. The new manager's evidence was:

> So as she left it – I thought Ann had decided to quit and not work at the Motel anymore. This impression was reinforced when my efforts to reach her and messages left weren't responded to.

[54] On the Monday (22 May) Ms LeBreton visited her GP and was provided with a medical certificate from that day until 2 June declaring her "medically unfit for work".

[55] Ms LeBreton says she dropped off the medical certificate to the new manager on the next day and was rudely challenged about the veracity of her medical condition. Ms LeBreton says she requested if she could use some of her 40 hours accumulated paid sick leave showing on her payslip.

[56] Later in the day Ms LeBreton was called to be told as a casual not rostered those days she would get no paid sick leave. Ms LeBreton says by this point in time she was quite distressed and then received the following text at 4:26pm:

> Hi I left a message on your phone. We still need to have a talk about your work an how you have been treating the other staff. When you left the other day you said you were leaving and finding another job an I've been trying to discuss it with you. If you could come in and see me I'm around tomorrow till Friday

[57] The new manager then texted Ms LeBreton on 24 May, suggesting she should email Mr Zhao about her holiday pay issue and on Friday 26 May, she asked Ms LeBreton to return the master key to the office (without an explanation as to why).

[58] Ms LeBreton sought the assistance of a local community trust advisory service (who have an alliance with the Marlborough Community Law Centre) who emailed Mr Zhao on 24 May at 11:13am raising the issue of unpaid sick leave and noting Ms LeBreton's payslip showed a 40-hour balance of sick leave and suggested it should be paid out in two weekly 20-hour amounts. Mr Zhao responded later on 24 May indicating no paid sick leave was due, suggesting this was because Ms LeBreton had not been asked to work that week.

[59] Ms LeBreton then obtained the assistance of a community law centre advocate who texted Mr Zhao on 25 May seeking to meet (via AVL) to sort the sick leave issue; the belief that Ms LeBreton's hours of work were being reduced and the lack of an employment

agreement set against the regularity of Ms LeBreton's working hours. The letter did not indicate Ms LeBreton wished to resign.

[60] Mr Zhao's response of 26 May by email was dismissive of Ms LeBreton's concerns. He referred to his earlier reply contesting the sick leave issue and no meeting was offered.

Issuing of final pay notice

[61] 21 May effectively became Ms LeBreton's last day of employment as she was provided with a pay slip on 29 May 2023 covering the period 22 May to 28 May headed: "Final Pay". I observe it showed Ms LeBreton's sick leave balance as 40 hours. Mr Zhao says he called Ms LeBreton a couple of times but got no response (Ms LeBreton says her advocate advised her not to respond).

[62] Neither Mr Zhao nor the new manager adequately addressed in written evidence why the final pay notice had been issued except to clarify it was Mr Zhao's decision. In giving evidence during the investigation meeting, Mr Zhao confirmed that once he received the letter from the community law centre, he rang the new manager and told her to make up Ms LeBreton's final pay as he just wanted to end the relationship as the new manager had identified the tension with other cleaners.

[63] Mr Zhao however, maintained a belief that Ms LeBreton had "chose to drop the job herself on 21 May 2023" and she was inappropriately trying to cash up her accumulated sick leave and, considered she had not been dismissed.

[64] In the period after receiving her final pay Ms LeBreton provided a further medical certificate for a further two weeks absence, to the new manager on 2 June. The response was I find, a somewhat disingenuous: "Hi did you send this to me by mistake? I'm a little confused why it was sent here". Ms LeBreton made no further contact preferring to advance a personal grievance through an advocate letter of 12 July 2023.

Was Ms LeBreton unjustifiably dismissed?

[65] The leading definition of "dismissal" is "termination of employment at the initiative of the employer", [5] whilst this must flow from an unequivocal act, this can include a "sending away" that is also considered an element of a constructive dismissal. [6]

[66] In assessing the situation and perception of Ms LeBreton that she was dismissed, a useful approach is the test described in the Employment Court decision *Cornish Trucks & Van Ltd* that:

> The test is an objective one; was it reasonable for somebody in Mr Gildenhuys' position to have considered that his or her employment had been terminated? [7]

[67] The question that follows is, was in all the circumstances, DHI's issuing of a final pay notice on 29 May 2023 an unequivocal act bringing the employment to an end?

Finding

[68] From the evidence I heard and documentation provided, I am satisfied that the issuing of a final pay notice summarily brought Ms LeBreton's employment to an end and that this was an unjustified action that no reasonable employer in the circumstances, could have engaged in. Ms LeBreton was unjustifiably dismissed.

[69] As an alternative, if I am wrong in my finding, I also consider DHI's actions and omissions in regard to not providing an employment agreement; reducing Ms LeBreton's hours of work and not at the time, addressing her legitimate claims for paid sick leave, were sufficient breaches to justify Ms LeBreton's resignation and I would have found she was otherwise constructively dismissed.

[70] It follows as Ms LeBreton was unjustifiably dismissed; she is entitled to a consideration of remedies discussed below.

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[5] *Wellington Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Assocs Employment Agency and Complete Fitness Centre* (1983) ERNZ Sel Cas 95 (AC) at 103.
[6] *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZILR 154, (1989) ERNZ Sel Cas 247 (CA).
[7] *Cornish Trucks & Van Ltd v Gildenhuys* [2019] NZEmpC 6 at [45].

Remedies

Lost remuneration

[71] Ms LeBreton claims three months lost wages (13 Weeks); arrears for 'minding' duties of $3,000 and $1,600 unpaid sick leave entitlements. Interest was claimed on the amounts allegedly owed.

[72] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms LeBreton should I find that she has established a personal grievance and, s 128(2) mandates that this sum be at least the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[73] Here I find Ms LeBreton's lost remuneration was attributed to her personal grievances.

[74] Ms LeBreton gave limited evidence that she had failed to secure alternative comparable employment and has been hampered by the reluctance of DHI to assist with a reference, her age, and other factors. However, Ms LeBreton provided evidence that after her employment ended, she commenced on call employment with another accommodation provider on 31 August 2023.

[75] On the first issue of wages lost in the interim, I consider it is appropriate to award Ms LeBreton eleven weeks lost wages (given a medical certificate provided to DHI showed she was unavailable for work for the first two weeks of June 2023). Ms LeBreton did not provide a basis for her calculation of lost wages so I have calculated her loss on an equitable basis in all the circumstances as being on the basis of a 25 hours week at $29.50 per hour, that amounts over eleven weeks to a sum of $8,112.50. In addition, I find that during her absence on sick leave Ms LeBreton should have been remunerated the accumulated sick leave she had earned of 40 hours, that at an hourly rate of $29.50 amounts to $1,180. As both amounts ($9,292.50) should attract a holiday pay loading of 8% - an additional $743.40 taking the total amount awarded to be $10,036.00. I find that given the length of time that has elapsed, interest should be paid on the awards made.

[76] I decline to award additional compensation for minding duties as the claim was based upon a notion that there should have been an agreed number of minding days per month paid. I have found Ms LeBreton was paid for the minding separately as agreed and the nature of

this work was occasional based upon the absence of the motel manager, no minimum number of days was agreed.

Compensation for distress, hurt and humiliation.

[77] Ms LeBreton impressed with evidence that this situation significantly dented her confidence and trust in employers that was made worse by it being a relationship where she felt that she had 'gone the extra mile' in assisting her employer. Ms LeBreton presented as genuinely hurt by the circumstances of the employment ending and I accept it also caused her unnecessary distress and humiliation.

[78] Ms LeBreton was afforded little agency in being able to resolve matters with DHI and felt communication was evasive and then became unconstructive. I consider that this caused Ms LeBreton additional humiliation.

Finding

[79] Considering the evidence proffered and awards made by the Authority and Court in similar circumstances and surveying cases, I consider Ms LeBreton's evidence warrants reasonable compensation of $13,000 under s 123(1)(c)(i) of the Act. [8]

Penalty for non-provision of employment agreement.

[80] This matter relates to a straightforward failure to provide a written employment agreement (a requirement under s 61A(2)(a) of the Act).

[81] The evidence showed that DHI's Mr Zhao was aware of his legal obligations to provide an employment agreement but chose not to do so on spurious grounds.

[82] In the circumstances, the Authority, pursuant to s 133 of the Act has authority to award a penalty for the identified statutory breach (up to a maximum of $20,000 per breach) and must consider matters outlined in s133A of the Act. In applying these factors including having regard to the Act's object including the need to address the inherent inequality of power in

[8] See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

employment relationships,[9] I find Ms LeBreton was objectively a vulnerable and powerless worker reliant on DHI for the allocation of her working hours. Thus, I find it appropriate to award a penalty for the identified breach.

[83] In considering the quantum of the penalty however, I consider it should be moderate given Mr Zhao provided evidence that he is taking steps to rectify matters.

Finding

[84] For the uncontested breach I award a penalty of $800 and find it appropriate that this amount be paid in full to Ms LeBreton.

Contribution

[85] Section 124 of the Act states that I must consider the extent to what, if any, Ms LeBreton's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. While I have considered evidence that Ms LeBreton may have been at times abrasive none of this was corroborated and could be attributed to defensiveness on her part.

[86] On balance, I consider no reduction in the remedies I have awarded is justified. Ms LeBreton did not contribute to the factors that gave rise to her personal grievance – the grievance arose from DHI's ongoing breaches of its obligations to treat her with fairness and respect.

Orders

[87] I have found that:

(a) Ann LeBreton was unjustifiably dismissed by Da Hai Investment Limited.

(b) Da Hai Investment Limited must pay Ann LeBreton:

[9] Employment Relations Act 2000, Section 3(a)(ii).

(i) $13,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.

(ii) $8,112.50 (gross) lost wages, pursuant to s 123(1)(b) Employment Relations Act 2000.

(iii) $1,180 (gross) unpaid sick leave.

(iv) $743.40 (gross) holiday pay.

(v) In addition, Da Hai Investment Limited to s 133 of the Employment Relations Act 2000, must within 28 days of the date of this determination, pay a penalty in the amount of $800 to Ann LeBreton.

(vi) Interest is to be paid on the arrears figures above ((ii) to (iv) in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a period commencing on 1 June 2023 and ending on 25 July 2025.

Costs

[88] Costs are reserved.

[89] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ann LeBreton may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Da Hai Investment Limited 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.

[90] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[10]

David G Beck
Member of the Employment Relations Authority

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