

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 473  
3259139

BETWEEN

DAVID LITTLETON  
Applicant

AND

DISCOUNT TOBACCONIST  
NZ LIMITED  
Respondent

Member of Authority: Natasha Szeto

Representatives: Carleton Mateer, representative for the Applicant  
Phillip Drummond, counsel for the Respondent

Investigation Meeting: 18 April 2024 in Palmerston North

Submissions and  
information received: 3 May 2024 from the Applicant  
10 May 2024 from the Respondent

Date: 7 August 2024

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] David Littleton started working in sole-charge retail for Discount Tobacconist NZ Limited (Discount Tobacconist) in September 2021. He got the job through his mother, Joanne Stewart, who is the store manager.

[2] Mr Littleton suffered some tragedies in his personal life, culminating in his grandmother passing away in early June 2023. A conversation between Mr Littleton's partner and his employer led Mr Littleton to feel like he was no longer a valued employee and he could not continue working for Discount Tobacconist. He resigned shortly after.

[3] Mr Littleton says he was unjustifiably (constructively) dismissed, or he was disadvantaged and treated unfairly by Discount Tobacconist in relation to the circumstances at

the time of his grandmother's funeral. Mr Littleton says Discount Tobacconist did not act in good faith towards him. He was made to feel he could not take bereavement leave without organising coverage for his shift, he was undervalued by the business, and was bullied by the director of the company, Mr Green. Mr Littleton said Discount Tobacconist did not provide him with a safe working environment.

[4] Discount Tobacconist says Mr Littleton resigned, and he was not treated unfairly or disadvantaged in his employment. It says it has always acted in good faith towards Mr Littleton.

### **Procedural History**

[5] An investigation meeting was held with the parties on 18 April 2024 in Palmerston North.

[6] The Authority received statements from Mr Littleton and his partner, Cassandra Archer. Mr Littleton's sister had provided a statement but was not available as a witness, and her statement was withdrawn at the investigation meeting. For Discount Tobacconist, the Authority received witness statements from the company directors Richard Green and Angela Green, as well as Store Manager Joanne Stewart, Mr Littleton's mother. All witnesses attended the investigation meeting and answered questions under oath or affirmation.

[7] At the investigation meeting, Mr Littleton was provided with full records and accounting of his holiday balances, sick leave and payslips. Accordingly he withdrew a claim relating to two days' annual holiday pay, and the issue was not required to be determined.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

## **Issues**

[9] The issues for investigation and determination are:

- (a) Whether Mr Littleton was unjustifiably (constructively) dismissed from his employment with Discount Tobacconist or was unjustifiably disadvantaged by his employer.
- (b) Whether there have been other breaches of the Act, including good faith.
- (c) Whether there were breaches of s 63A(2) or s 64 of the Act, in relation to Mr Littleton's individual employment agreement.
- (d) If a penalty is to be awarded for the admitted breach of s 64 of the Act, what the quantum of the penalty should be, and whether any of the penalty should be ordered to be paid to Mr Littleton.

## **Relevant background**

[10] Discount Tobacconist operates two shops in Palmerston North. Richard Green and Angela Green are the directors of the company. One of the shops is managed by Joanne Stewart, Store Manager. Mr Green manages the shops if Ms Stewart is away and Ms Green handles the administration for the company.

[11] Mr Littleton started working for Discount Tobacconist on 13 September 2021. He found out about the job through his mother Ms Stewart, and Mr Green hired him. Mr Littleton worked 17.75 hours a week on Mondays, Wednesdays, Fridays and Saturdays. His role often involved taking over the sole-charge shift from his mother when she finished her shift. He rarely worked with Mr Green. On occasion, Mr Littleton would call in sick or show up to work with a migraine and Ms Stewart would send him home and then just extend her shift to cover for him. In those situations, Mr Littleton would be paid as normal, and Ms Stewart was not paid for the extra hours she worked. Mr Littleton was generally regarded by the directors as trustworthy and dependable.

[12] The sequence of events that ended Mr Littleton's employment began in early June 2023. Mr Littleton's grandmother passed away on 4 June, and her funeral was to take place in Rotorua on Friday 9 June which was a rostered working day for Mr Littleton. Mr Littleton did not plan to go to his grandmother's funeral in Rotorua, but would attend over Zoom.

[13] Mr Littleton was due to work on Wednesday 7 June, but was unwell with vomiting and diarrhoea. Ms Stewart covered Mr Littleton's Wednesday shift. On Thursday 8 June, Mr Littleton texted Mr Green saying he would be watching his grandmother's funeral late the next morning on Zoom. He assured Mr Green he would be at work for his rostered shift after the funeral. Ms Stewart, meanwhile, travelled to Rotorua on the afternoon of Thursday 8 June to attend the funeral the next day.

[14] Mr Littleton attended his grandmother's funeral on the morning of 9 June by Zoom. Later that morning, Mr Littleton's girlfriend Cassandra Archer texted one of Mr Littleton's colleagues to check whether she would be available to cover Mr Littleton's shift because Mr Littleton was upset after the funeral and "not in a good way". Ms Archer did not receive a response to the text. After getting Mr Littleton's permission, Ms Archer then rang Mr Green around 11:30 am to let Mr Green know Mr Littleton would not be coming into work at 1:00 pm for his afternoon shift.

[15] Mr Green got really angry when Ms Archer told him Mr Littleton would not be coming in. Ms Archer says Mr Green said Mr Littleton has been having too much time off work, and every time Mr Littleton gets a cough or sniffle he takes time off. Mr Green denies saying this. It is accepted, however, that Mr Green called Mr Littleton "unreliable". After hanging up, Ms Archer was upset about the phone call and she told Mr Littleton what Mr Green had said, including that he was unreliable.

[16] The day after the funeral was Saturday 10 June and Mr Littleton worked his usual shift. He told Ms Stewart that Mr Green had called him unreliable on the phone to Ms Archer. Ms Stewart told Mr Littleton Mr Green should apologise if he had said that, but that was a conversation best had between Mr Littleton and Mr Green. Ms Stewart spoke to Mr Green herself at some point following, and told Mr Green that Mr Littleton was upset about being called unreliable. She says she told Mr Green he should contact Mr Littleton, although Mr Green appears to have thought Mr Littleton was going to contact him. Ms Stewart then left matters for Mr Green and Mr Littleton to resolve between them.

[17] Over the following week, Mr Green did not contact Mr Littleton. Mr Littleton raised the 9 June phone call with Ms Stewart on multiple occasions throughout the week.

[18] On Monday 19 June shortly before his shift was due to start, Mr Littleton sent Mr Green an email to the shop's work email address, officially requesting a verbal and written apology

for how he was treated and spoken about concerning his grandmother's funeral and bereavement leave. He requested a genuine apology from Mr Green by Friday 23 June. When Mr Littleton arrived at work for his afternoon shift that day to take over from Ms Stewart, he took a phone call in private. He told Ms Stewart he was talking to a lawyer, and Ms Stewart became concerned about the way matters were escalating. She tried to talk to Mr Littleton and during the course of the conversation, Mr Littleton became so upset he began crying in the shop. He said he did not think he could keep working for Mr Green. Ms Stewart asked him if he wanted to quit and he said yes. Ms Stewart said she would let Mr Green know, and she sent Mr Littleton home for the afternoon. Later that night Ms Stewart called Mr Green to let him know Mr Littleton had resigned and it was to do with the 9 June phone call where Mr Green had told Ms Archer that Mr Littleton was unreliable. Mr Green did not immediately do anything in response to this phone call.

[19] The next day on 20 June, Mr Green read the 19 June email from Mr Littleton which he had not seen earlier. He emailed Mr Littleton back, asking what he had said to Ms Archer that warranted an apology as he was under stress and cannot recall the entire conversation. Mr Green said he had no intention of upsetting Mr Littleton and was extremely sorry Mr Littleton was upset. He said he would sort out Mr Littleton's bereavement leave. Mr Green declined to accept Mr Littleton's resignation, which had been passed on to him by Ms Stewart, and said he wanted Mr Littleton to take the rest of the week off on full pay to reconsider.

[20] On 26 June 2023, Mr Littleton responded to Mr Green's email saying his quitting still stands because he was unfairly treated and feels like he has not been provided a safe work environment. Mr Littleton said he had not received an apology for what Mr Green said, or how he was treated. Mr Green did not respond to this email. Three days later on 29 June 2023 Mr Littleton's representative wrote to Discount Tobacconist raising a personal grievance on his behalf.

### **Analysis of personal grievances**

#### ***Was Mr Littleton unjustifiably (constructively) dismissed?***

[21] In certain circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* stated:<sup>1</sup>

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<sup>1</sup> *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* [1983] ACJ 965.

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment.

[22] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited*<sup>2</sup> where a constructive dismissal might occur. These situations are not exhaustive:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[23] The conduct complained of must amount to a repudiation of the contract rather than just be unreasonable.

[24] The Court of Appeal<sup>3</sup> has stated the broad legal approach starts with the question of whether the resignation has been caused by a breach of duty on the part of the employer, by looking at all the circumstances of the resignation. If so, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under those conditions. The court has emphasised the focus of such claims is on the employee's motivation for their decision to leave, and whether that motivation arises from a breach of the employer's duty, or some other factor.<sup>4</sup>

[25] A lack of courtesy or even rudeness is not necessarily repudiatory conduct sufficient to cause or make an employee's resignation reasonably foreseeable. Something more, in the nature of abuse and malice, would be necessary.<sup>5</sup> The overriding test is whether the employer has treated the employee fairly, and whether a clear breach of duty has created the inevitable and foreseeable consequence the employee would resign.<sup>6</sup>

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<sup>2</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374.

<sup>3</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA) at 419.

<sup>4</sup> See for example, *Commissioner of Police v Hawkins* [2009] NZCA 209.

<sup>5</sup> *Bryant v Johnston McKeown Ltd* ERA Christchurch CA82/04, 2 August 2004; *Edmonds v Attorney-General* [1998] 1 ERNZ 1 (EmpC) and *Koning v Industrial Services Ltd* ERA Auckland AA24/10, 20 January 2010.

<sup>6</sup> *Thomson v Metros Publishing Group Ltd* ERA Christchurch CA145/08, 26 September 2008.

[26] Mr Littleton claims constructive dismissal on the third ground under *Woolworths*, on the basis Discount Tobacconist breached its duties to him including not acting towards him in good faith, and should have been able to reasonably foresee that rather than putting up with breaches, he would resign. In particular, Mr Littleton says Mr Green treated him unfairly in relation to the circumstances of his grandmother's funeral. He was made to feel he could not take bereavement leave without organising coverage for his shift, he was undervalued by the business, and was bullied by Mr Green. Overall, Mr Littleton said Discount Tobacconist did not provide him with a safe working environment.

[27] It is common ground between the parties the employment relationship issues that led to the end of Mr Littleton's employment started with the phone call between Mr Green and Ms Archer on 9 June 2023, during which Mr Green referred to Mr Littleton as "unreliable". Mr Green's and Ms Archer's recollections of what was said in the phone call differ. Mr Green denies saying anything about Mr Littleton taking too much time off every time he gets a cough or snuffle. Mr Green accepts he referred to Mr Littleton as "being unreliable" because he had said he was available for his shift and then cancelled through his girlfriend an hour and a half before his shift started. Mr Green says he did not think Mr Littleton "was unreliable" generally.

[28] From the point that Mr Littleton became aware of what Mr Green had said about him, events escalated. Mr Littleton discussed the matter multiple times with his mother over the next week, to the point where Ms Stewart described him as "badgering" her. This culminated in Mr Littleton sending an email to Mr Green on the morning of 19 June, and then verbally resigning to Ms Stewart as his manager later that day.

[29] I have considered the circumstances leading up to Mr Littleton's resignation, and I am not persuaded his resignation was caused by a breach of duty on the part of the employer or that Mr Littleton's resignation was foreseeable.

[30] It is not clear exactly what Mr Littleton says the breach of duty was. However, based on the timing of Mr Littleton's resignation, the operative breach would have to be Mr Green's conduct in the 9 June phone call to Ms Archer, and the subsequent events up to 19 June. Did Mr Green breach a duty to Mr Littleton because of what he said to Ms Archer in the phone call, and in particular that Mr Littleton was "unreliable"? Based on the evidence before the Authority, I conclude the tone and content of the phone call between Mr Green and Ms Archer on 9 June 2023 was discourteous, or even rude, but it was not abusive or malicious. Mr Green

gave evidence he was frustrated by the situation as a number of staff were away and Mr Littleton had assured Mr Green he would be at work. I am not persuaded that Mr Green's conduct in the phone call was evidence of bullying. Case law defines workplace bullying as repeated and unreasonable behaviour directed at an employee. It takes place over a period of time and can take various forms. I do not accept one instance of Mr Green calling Mr Littleton unreliable constitutes bullying.

[31] It is accepted Mr Green did not contact Mr Littleton promptly after learning from Ms Stewart that Mr Littleton was upset about the phone call. Based on the evidence before the Authority, there was some confusion between Mr Green and Ms Stewart about whether Mr Littleton was going to call Mr Green, or Mr Green was supposed to call Mr Littleton. Irrespective, Mr Green could have called Mr Littleton and he did not do so. However, I am not persuaded that any delay by Mr Green in contacting Mr Littleton was a breach of duty because Mr Littleton only formally raised the issue with Mr Green by email on 19 June (the day he resigned), and Mr Green formally responded by email the next day.

[32] Did Mr Green breach a duty to Mr Littleton by not giving him a verbal and written apology as Mr Littleton requested? Mr Littleton requested an apology on the morning of 19 June and resigned later that day. Mr Green responded to Mr Littleton's email the next day, offering an explanation and saying it had not been his intention to upset Mr Littleton. He acknowledged Mr Littleton was upset, but declined to accept his resignation and offered him the rest of the week on full pay to consider his options. Looking at the matter objectively, there were workplace and communication failings, but these issues could potentially have been resolved at this stage.

[33] Mr Green's response to Mr Littleton indicated he took the matter seriously and he wanted to resolve the issues with Mr Littleton so Mr Littleton could remain working at Discount Tobacconist. I take the response at face value as being genuine, especially because Discount Tobacconist offered Mr Littleton the week off on full pay to reconsider his resignation. Mr Littleton's resignation was premature because the issues were not properly and directly raised with Mr Green until the 19 June email and despite giving Mr Green until 23 June to apologise, Mr Littleton resigned the same day. Because I have found Mr Green's

conduct in the phone call was not abusive or malicious, the evidence does not support that Discount Tobacconist could have foreseen Mr Littleton's resignation.<sup>7</sup>

[34] I conclude Discount Tobacconist did not breach its duties to Mr Littleton, and it was not reasonably foreseeable to Discount Tobacconist that he would resign. Mr Littleton was not unjustifiably (constructively) dismissed.

**Was Mr Littleton unjustifiably disadvantaged or was there a breach of good faith?**

[35] Mr Littleton has claimed unjustified disadvantages as an alternative to a constructive dismissal claim.

[36] For disadvantage claims to succeed, Mr Littleton must establish that one or more conditions of his employment was affected to his disadvantage by an unjustified action by Discount Tobacconist.<sup>8</sup> This means I need to determine whether Mr Littleton suffered a disadvantage in his employment, and – if so – whether this was caused by an action by Discount Tobacconist and whether that action was unjustified.

[37] Discount Tobacconist's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[38] When I consider the events of 9 to 23 June 2023, I need to consider whether Mr Littleton's employment conditions were affected, whether there was good cause for his condition(s) of employment being affected, and whether Discount Tobacconist's actions were procedurally fair.

[39] The disadvantages claimed by Mr Littleton arise out of the same circumstances I have considered in relation to his constructive dismissal claim. Mr Littleton says he was treated unfairly over his grandmother's funeral and that Discount Tobacconist did not act in good faith towards him. He was made to feel he could not take bereavement leave without organising coverage for his shift, he was undervalued by the business, and was bullied by Mr Green. Mr Littleton said Discount Tobacconist did not provide him with a safe working environment.

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<sup>7</sup> *Harte v Te Whatu Ora — Health New Zealand* [2023] NZERA 421 at [147].

<sup>8</sup> *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

[40] Based on the evidence before the Authority, I am not persuaded the actions of Discount Tobacconist, through Mr Green, affected Mr Littleton's employment conditions to his disadvantage.

[41] Mr Littleton took bereavement leave on the day of his grandmother's funeral. Although Mr Littleton may have felt he could not take leave without arranging coverage for his shift, that perspective was disputed by both Ms Stewart and Mr Green and I find it was unsubstantiated on the facts. While it was custom and practice for staff to find coverage when they were unable to make their shifts, I am not persuaded on the evidence that management required them to do so. I prefer Mr Green's evidence he appreciated staff finding coverage, but - as he later communicated to Mr Littleton - if Mr Littleton had wanted to attend his grandmother's funeral, Mr Green would have found a way to make it happen. Following the funeral, Mr Green approved Mr Littleton taking bereavement leave for his shift, and Mr Littleton was paid accordingly. There was no evidence before the Authority there was any financial or other contractual disadvantage to Mr Littleton as a result of his late notice to his employer that he would be on leave for his grandmother's funeral.

[42] Mr Littleton relies on what was said in the phone call to allege bullying behaviour by Mr Green. Mr Green disputes he said Mr Littleton had been having too much time off work, but accepts that he used the word "unreliable". While Mr Green's words to Ms Archer about Mr Littleton may have been discourteous, again there is no evidence there was a breach of Mr Littleton's conditions of employment. As I have set out above, I do not accept one instance of Mr Green calling Mr Littleton unreliable constitutes bullying, or could lead an objective observer to the realistic conclusion that Mr Littleton's work was undervalued and Discount Tobacconist was failing to provide him with a safe working environment. Again, there was no evidence before the Authority there was any disadvantage to Mr Littleton in relation to specific terms and conditions of his employment.

[43] Mr Littleton's alleged breaches of good faith seem to arise out of the duty in s 4 (1A) which requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. The duty of good faith is a mutual obligation. Based on the evidence before the Authority, Mr Green was aware Mr Littleton was upset about the 9 June phone call some days before Mr Littleton sent the 19 June email because he had been told that by Ms Stewart. I am not convinced there was any genuine explanation

for why Mr Green did not contact Mr Littleton earlier and note that if there had been contact earlier, matters may not have escalated in the way they did.

[44] However, when considering whether Mr Green acted in good faith at the time, I also take into account Mr Littleton did not contact Mr Green directly himself until 19 June, choosing instead to discuss and raise issues with Ms Stewart in an informal and ad hoc way. On one view, it was appropriate for Mr Littleton to raise issues with Ms Stewart because she was Mr Littleton's manager and represented the employer. However the evidence before the Authority showed there was a blurring of the lines between Ms Stewart's roles as manager and mother. When Mr Littleton was "badgering" Ms Stewart about what Mr Green had said about him, I find it was more likely than not Mr Littleton was raising these concerns with his mother, rather than his manager. That being my conclusion on the evidence, I find Mr Littleton first formally raised his concerns about the 9 June phone call with Discount Tobacconist on 19 June when he sent the email to Mr Green via the shop's email address. Mr Littleton resigned that day without giving Discount Tobacconist the opportunity to respond. Mr Littleton has not acted in good faith towards Discount Tobacconist, and for that reason, Mr Littleton's claim that Discount Tobacconist has breached its obligation of good faith towards him cannot succeed.

[45] Mr Littleton also alleges Discount Tobacconist did not provide him with a safe working environment. The claims in relation to this alleged disadvantage were unsubstantiated on the evidence.

[46] I find Mr Littleton was not unjustifiably disadvantaged, and Discount Tobacconist did not breach its duty of good faith towards him. Mr Littleton's claims are not supported on the evidence and I find they cannot succeed.

### **Claimed breaches in relation to lack of employment agreement**

[47] Mr Littleton says he did not have a written employment agreement with Discount Tobacconist, and this is a breach of the employer's requirements under the Act.

[48] Employers are required to have a written individual employment agreement for their employees.<sup>9</sup> An employer is required to provide their employee with a copy of an intended employment agreement, advise the employee they are entitled to seek independent advice, give the employee a reasonable opportunity to seek that advice, and consider any issues the

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<sup>9</sup> Employment Relations Act 2000, s 65.

employee raises and respond to them.<sup>10</sup> An employer must also retain a copy of the employee's individual employment agreement and, if unsigned or not agreed, a copy of the intended agreement.<sup>11</sup>

[49] Ms Green, as co-director and co-owner of Discount Tobacconist, was responsible for the administration of the company including creating the individual employment agreements for employees. It is common ground between the parties Mr Littleton started his employment without a written employment agreement in place. During Mr Littleton's training, Ms Green came into the shop with an employment agreement for him, which she had adapted from a template on the Ministry of Business, Innovation and Employment website. Mr Littleton read it in the shop and pointed out an error in it. Ms Green said she would take the agreement away and amend it. Shortly after, a series of unfortunate computer malfunctions meant Ms Green lost access to the electronic version of the agreement. She also misplaced the hard copy version. It was accepted that both Ms Green and Mr Littleton then forgot about the employment agreement until after the end of Mr Littleton's employment.

[50] Mr Littleton says Discount Tobacconist breached the Act by not retaining or holding a written employment agreement for him and a penalty should be imposed because the lack of agreement has caused issues with the terms and conditions of the obligations of the employment relationship to the extent he felt he had no option other than to resign.

[51] Discount Tobacconist accepts it failed to have a signed employment agreement in place for Mr Littleton and this was the company's responsibility. Discount Tobacconist said it has changed its practices and now requires a written employment agreement to be in place before an employee starts working. It says it has likely breached s 63A(2)(d) of the Act, in terms of failure to respond to issues raised by Mr Littleton about his intended agreement, but says the Authority should not impose a penalty because there is no causative link between any breach and Mr Littleton's personal grievance. Discount Tobacconist also says Mr Littleton has not brought a claim under s 64 specifically and therefore there is no basis for the Authority to impose a penalty for its failure to retain a copy of Mr Littleton's intended employment agreement.<sup>12</sup>

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<sup>10</sup> Employment Relations Act 2000, s 63A(2).

<sup>11</sup> Employment Relations Act 2000, s 64(2).

<sup>12</sup> Employment Relations Act 2000, s 64(4).

[52] As the evidence unfolded, Mr Littleton's claims in relation to his employment agreement have evolved. However, I accept the substance of the claim has remained consistent – that Mr Littleton did not have a signed employment agreement.<sup>13</sup> That is the claim Discount Tobacconist responded and admitted to.<sup>14</sup> The claim is therefore a breach of s 64 in that Discount Tobacconist failed to retain a signed copy of Mr Littleton's individual employment agreement or intended individual employment agreement.

[53] The law is clear and unambiguous in that retaining or holding an employment agreement for each employee is the employer's responsibility. A breach may give rise to liability for a penalty, but whether a penalty is imposed and if so, the amount, is at the Authority's discretion.

[54] In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.<sup>15</sup>

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

[56] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour. The acknowledged breach by Discount Tobacconist is inconsistent with promoting the effective enforcement of employment standards because employers have a duty to keep compliant employment agreements.

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

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<sup>13</sup> Statement of problem, paragraph 2.1.2; Authority's Directions (8 December 2023).

<sup>14</sup> Statement in reply, paragraph 1.

<sup>15</sup> [2016] NZEmpC 143.

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

[58] I start with an assessment of the nature and extent of the breaches. The parties have identified two potential breaches of the Act under s 63A(2)(d) and s 64 of the Act, but as they are duplicitous, I find the breaches amount to one effective breach. The Act allows the maximum penalty for a breach by a company is \$20,000.00 and that is the starting point.

*Step 2: Assessment of the severity of the breaches*

[59] I am persuaded Discount Tobacconist's failure to comply with the Act was a relatively minor one. It provided an intended employment agreement to Mr Littleton, but then failed to follow up. The lack of follow-up was unintentional.

[60] I am not persuaded the lack of a written employment agreement in any way contributed to Mr Littleton's resignation. Based on the evidence before the Authority, there was a lack of evidential foundation for this submission and I conclude the impact of the breach on Mr Littleton was negligible.

[61] In terms of mitigating or ameliorating factors, there is no evidence of any previous conduct by Discount Tobacconist. The company also promptly accepted responsibility for the breach and I give it full credit for that. Discount Tobacconist says it has now changed its practices and employees do not start working without a signed individual employment agreement in place. Accordingly, I am not convinced specific deterrence is necessary.

[62] In terms of general deterrence, a message should be sent to other like-minded employers who may treat legislative requirements as unimportant or optional.

*Step 3: Financial circumstances of Discount Tobacconist*

[63] There is no evidence before the Authority about the company's financial position. Accordingly, there is no basis to reduce an otherwise appropriate penalty based on ability to pay.

*Step 4: Proportionality or totality test*

[64] Penalties should be set at a level which both punishes a party for its breach and deters it from future non-compliance. The Authority must take into account whether any penalty

would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk a penalty could be of such magnitude as to create a significant risk of non-payment.

[65] I have considered an appropriate figure in comparison to other cases. Standing back and looking at the matter in totality and taking a proportionate approach, I consider a fair penalty to be \$500.00.

*Should some of the penalty be awarded to Mr Littleton?*

[66] In *Borsboom v Preet* the Court held a decision under s 136(2) will be based on the facts, but where a breach has resulted in a non-compensable loss to the employee (that is where the breach claimed is in the nature of ‘performing a public duty’) it may be more appropriate to order some of the penalty be paid to the employee, especially to the extent that costs may not adequately compensate the employee. I consider it appropriate to award 50 per cent of the penalty to Mr Littleton.

### **Findings**

[67] Mr Littleton’s claims of unjustified dismissal and unjustified disadvantage do not succeed. There has been no breach of good faith by Discount Tobacconist. Mr Littleton is not entitled to remedies.

[68] Mr Littleton succeeds on his claim in relation to Discount Tobacconist’s failure to retain a copy of his intended individual employment agreement.

[69] Discount Tobacconist Limited must pay a total penalty of \$500.00 as follows:

- (a) \$250.00 is to be paid to the Employment Relations Authority within 14 days of the date of this determination. In accordance with s 136 of the Act, that amount will be paid to the Crown bank account.
- (b) \$250.00 is to be paid to Mr Littleton within 14 days of the date of this determination.

### **Costs**

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

[71] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party 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.

[72] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>16</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>16</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)