IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 256
3133015 & 3158966

	BETWEEN	CHLOE-JANE MACLEOD Applicant
	AND	JOHN EVERISS Respondent

Member of Authority:	Claire English
Representatives:	Applicant in person Graeme Ogilvie, advocate for the Respondent
Investigation Meeting:	23 March 2022 at Wellington
Submissions received:	28 April 2022 from Applicant 12 April 2022 from Respondent
Determination:	20 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms MacLeod, was employed by the respondent, Mr Everiss, as a barista to run a small business known as the "Coffee Shack", making and serving coffee and associated cold snack food.

[2] Mr Everiss became concerned that Ms MacLeod was misusing the business bank card. Mr Everiss' son texted Ms MacLeod suspending her, and Mr Everiss instructed a lawyer to write to Ms MacLeod inviting her to a disciplinary meeting. The letter did not specify when or where the meeting was to take place. Ms MacLeod did not attend the meeting, and Mr Everiss dismissed her.

[3] When Ms MacLeod raised a personal grievance for unjustified dismissal, Mr Everiss instructed a lawyer to respond confirming the dismissal and stating it was substantively and procedurally justified.

[4] Mr Everiss contacted the police, who laid criminal charges against Ms MacLeod. These were withdrawn, due to the failure of Mr Everiss' witness to attend the hearing.

[5] Ms MacLeod now challenges her dismissal as being unjustified, and seeks remedies of lost wages in respect of a partially unpaid suspension, unpaid annual leave, compensation for lost wages as a result of her dismissal, compensation for hurt and humiliation, and costs.

[6] Mr Everiss denies that Ms MacLeod's dismissal was unjustified, and states that he had "such clear evidence" that he had to dismiss Ms MacLeod.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Ms MacLeod, Mr Everiss, Mr Antony Furze, Mr Brent Evreiss, and Ms Marie Everiss.

[8] Ms MacLeod, Mr Everis, and Mr Antony Furze answered questions under affirmation from me and the parties' representative. Subsequent closing submissions were provided.

[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.

The issues

[10] The issues requiring investigation and determination were:

(a) Was Ms MacLeod unjustifiably dismissed?

(b) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

- Lost wages; and
- Compensation under s123(1)(c)(i) of the Act

(c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to the grievance?

(d) Should either party contribute to the costs of representation of the other party.

Background

[11] Ms MacLeod was employed to work at Mr Everiss' business, the Coffee Shack, on about 10 December 2018.

[12] The Coffee Shack was a small trailer which was in essence a semi-mobile coffee cart, customarily parked in a carpark in Te Horo, north of Wellington. Ms MacLeod was employed to make and sell coffees, and accompanying other cold small food items, including milkshakes, icecreams, lollies, sandwiches, scones, and muffins. She worked 50 hours per week, from 6.00 am to 4.00 pm, Monday to Friday.

[13] No cooked food was served from the coffee cart. Mr Everiss also had a food truck, which was a larger caravan parked in the same carpark, which was staffed by Mr Tony Furze. Mr Furze prepared and sold hot food, including burgers and hot chips.

[14] Supplies of coffee and milk were arranged on account. Part of Ms MacLeod's role was to purchase other items for sale from the local supermarket.

[15] For this purpose, she was given access to an EFTPOS bank card. Both Ms MacLeod and Mr Furze explained how this card was managed. The card was kept in the Coffee Shack, attached to a hook near the door. Ms MacLeod explained that she was given the PIN number to the bank card by way of the PIN number being written down on a post-it note kept near the card. In the evenings, when she left for the day, Ms MacLeod would take the bank card home with her. She would purchase the supplies needed for the following day, and return with the card and supplies at 6.00 am each morning. She would then return the card to its usual place by the door. Mr Furze would arrive around 7.00 am, and would take the card. He would use it during the day to buy any supplies he needed for the food truck, and would return the card to its usual place by the door late in the afternoon ready for Ms MacLeod to use.

[16] Previous employees of the coffee cart had also had access to the card in a similar manner. Ms MacLeod also gave evidence to the effect that if she was not able to personally man the coffee cart on any given day, she was responsible for arranging a replacement person to staff the cart in her absence, which she did on occasion.

[17] At the end of each day, Ms MacLeod and Mr Furze would cash up and Mr Furze would record this in a balance book. There was only one book for both the coffee cart and the food truck. The recording was done by Mr Furze. Ms MacLeod gave evidence she never wrote in the balance book.

[18] Mr Everiss provided bank statements showing purchases made with the card. As there was only one card drawing on the account, it was not possible to tell from the bank records who was responsible for various purchases.

[19] The coffee cart was closed on the public holidays over the Christmas and New Year break. Ms MacLeod arranged to be away between 1 and 9 January 2019, as she needed to travel to Auckland to take her son to see various medical specialists in early January.

[20] In Ms MacLeod's absence, Mr Everiss checked the bank account, and found that there were more purchases being made on the card than he had expected.

[21] He asked Mr Furze about these purchases, and showed Mr Furze the relevant bank statements. Mr Furze went through the bank statements for the month of December 2018. He advised Mr Everiss that some of the charges had been made by him, and were valid expenses for the food truck. Mr Everiss accepted this.

[22] Mr Furze took the view that the remaining charges were the responsibility of Ms MacLeod. Mr Everiss and Mr Furze discussed this and reached the conclusion that Ms MacLeod was responsible for the remaining charges, and that some of them were valid expenses, and some of them were not. In evidence, it became clear that Mr Everiss relied almost entirely on Mr Furze's accounting in deciding what charges were valid business expenses, and what charges were invalid. He also accepted Mr Furze's view that all invalid charges were the responsibility of Ms MacLeod.

[23] On about 9 January, when Ms MacLeod was due to come back to work, Mr Everiss' son, Mr Brent Everiss, texted Ms MacLeod and told her "No work tomorrow

you are suspended to further notice". He did this because his father did not customarily text. Ms MacLeod texted back, asking "under what grounds and why? Can u get John to contact me…"

[24] On 10 January 2022, Mr John Everiss wrote a letter to Ms MacLeod. It was signed by him, and he accepted that this was his signature. The letter stated:

> We have commenced an investigation into dishonesty within the business – in particular missuse of a business bank card.
>
> Preliminary inquiries suggest that you may become an important part of our investigation. While we investigate, in fairness to you and to the investigation process, we'd like to stand you down from your duties, on full pay until the Tuesday 22th of January 2019. On Tuesday 22th January 2019 (Which we will contact you with the appointment time) we intend to meet with you to discuss our findings and allow you to provide further comments.

[25] The letter went on to refer to the prospect of "instant dismissal".

[26] Also on 10 January, an advert was posted on the Coffee Shack's facebook page, seeking a "talented coffee maker" to make coffees, ice-creams, and milkshakes.

[27] It was about this time that Mr Everiss contacted the local police, and laid charges. Ms MacLeod recalls that she was visited at her home by a police officer prior to receiving the 10 January 2019 letter. It was from this visit that she first understood why she had been suspended.

[28] The 10 January 2019 letter was sent to Ms MacLeod's residential address by post. She recalls that she received it on about 14 January 2022.

[29] After receiving this letter, Ms MacLeod called Mr John Everiss several times, but was unable to get hold of him. She also called Mr Furze to ask that Mr Everiss contact her.

[30] Although the letter states that Ms MacLeod would receive her full pay, she was only paid 40 hours per week for the week ending 13 January 2019, and no ordinary hours for the week ending 20 January 2019, rather than her usual 50 hours per week during this time. When she contacted the accountant who was responsible for payroll, she was told that this was the number of hours that the accountant had been instructed to pay, and that Ms MacLeod should contact "John or Tony" to discuss.

[31] On 21 January 2019, Ms MacLeod emailed Ms Marie Everiss, Mr Brent Everiss' wife, using the email address provided on the letter of 10 January, stating that she had not received any contact about the meeting mentioned in the letter, or an appointment time to allow her to provide further comment. She received no response.

[32] On 22 January 2019, Ms MacLeod attempted to call Mr Furze. She received no response.

[33] Mr Everiss and Mr Furze gave evidence that, on the afternoon of 22 January 2019, they waited at the Coffee Shack for Ms MacLeod. Mr Everiss was unable to explain how Ms MacLeod would know to meet with him, as he had not advised her of the time or place of this meeting. He suggested that Mr Furze was there for support. Mr Furze then attempted to call Ms MacLeod, but phone records show that he called an incorrect number. Ms MacLeod expressed surprise at this, as she explained at the investigation meeting that her mobile phone number was written down and posted on the fridge inside the Coffee Shack for ease of reference.

[34] Mr Everiss expressed disappointment that Ms MacLeod did not attend the meeting, and said that in her absence he discussed matters with Mr Furze. He said he did not expect her to attend work again. The last payslip for Ms MacLeod is for the week ending 20 January 2019. No ordinary hours were paid to Ms MacLeod for this week, but she was paid out her holiday pay.

[35] On 23 January 2019, Ms MacLeod tried again to call Mr Everiss, and could not contact him.

[36] On 24 January, Ms MacLeod sought legal representation. There is some dispute as to what occurred next, although the relevant persons did not attend the investigation meeting. Ms MacLeod states that her representative contacted Marie Everiss, and was told that Ms MacLeod had been dismissed. Her representative conveyed the dismissal to her.

[37] Email correspondence from Ms MacLeod's representative on 24 January 2019 to Marie Everis states that he was told by Brent Everiss and Marie Everiss that Ms MacLeod had been dismissed from her employment. Brent and Marie Everiss deny having said this. In any event, on 1 February 2019, Mr Bill Bevan, the Managing

Director of Kapimana Legal Services Limited, emailed Ms MacLeod's representative. His email began:

> Your email of 24/1/19 has been forwarded to me by the employer John Everiss….
>
> My client instructs…two messages were then left on your client's phone [number redacted] on 22/1/19 advising her of the time and place of the meeting.
>
> No requests for postponement or indeed any response was received prior to or after the meeting being held.
>
> At the meeting my client believed he had sufficient evidence of dishonesty to justify summary termination of your client's contract.
>
> That decision was advised to you her representative and on that basis communicated to the employee. My client says the dismissal was both procedurally and substantively justified.

[38] At the investigation meeting, Mr Everiss denied that Ms MacLeod had been dismissed by him.

[39] When this email was put to him, Mr Everiss acknowledged that Mr Bill Bevan was his lawyer and he had instructed his lawyer, but stated that he had no knowledge of this email. Upon further questioning, it was suggested to me that Mr Everiss simply could not recall giving these instructions, and his memory was faulty.

[40] Ms MacLeod then raised personal grievance claims for unjustified disadvantage in relation to her suspension, unjustified dismissal, and lost wages and compensation.

[41] I record that 3 criminal charges were laid against Ms MacLeod in the District Court, relating to entering a building and use of the Coffee Shack EFTPOS card. Ms MacLeod plead "not guilty" to all 3 charges. Two of these charges were withdrawn, and the remaining charge was dismissed as the police offered no evidence.

Findings

[42] I must first consider if Ms MacLeod was unjustifiably dismissed.

[43] At the investigation meeting, Mr Everiss attempted to deny that Ms MacLeod had been dismissed, and in particular, to distance himself from the correspondence sent

on his behalf by his lawyer/s. Mr Everiss' current representative then suggested that this was a result of Mr Everiss having a poor memory.

[44] In my view, it is more likely than not that Ms MacLeod is correct when she recalls being told by her then representative on 24 January 2019, that she had been dismissed. This is confirmed by the email of that date from her representative, and is again confirmed by the reply email sent on behalf of Mr Everiss on 1 February 2019. Most importantly, the Statement in Reply filed on behalf of Mr Everiss states that the respondent "had no option but to dismiss the Applicant", as a result of the meeting on 22 January 2019[1]. Having consistently made these statements, it does Mr Everiss no credit to attempt to resile from his consistently expressed position at such a late stage.

[45] Ms MacLeod was dismissed by Mr Everiss, on 24 January 2019.

[46] I must then consider whether the dismissal was justified. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred[2].

[47] In considering whether Ms MacLeod's summary dismissal was justifiable[3], I must consider:

a. Whether the employer sufficiently investigated the allegations against Ms MacLeod;
b. Whether the employer raised the concerns it had with Ms MacLeod;
c. Whether Ms MacLeod was given a reasonable opportunity to respond;
d. Whether the employer genuinely considered Ms MacLeod' explanation; and
e. Any other factors I think appropriate.

[48] Mr Everiss gave evidence that he did take steps to investigate the allegations against Ms MacLeod, namely, his concerns that the business bank card was being used to purchase items that were not for business use. In terms of the investigation done by Mr Everiss, he printed out the bank statements for the month of December 2018, and

[1] Paragraph 1(j) of the Statement in Reply.
[2] Section 103A(2) of the Employment Relations Act 2000.
[3] Section 103A(1) of the Employment Relations Act 2000.

asked Mr Furze about them. Mr Everiss then accepted fully Mr Furze's statements as to the purchases made by Mr Furze, the appropriateness of the purchases Mr Furze accepted responsibility for, Mr Furze's assessment of which of the remaining purchases were inappropriate or not for business use, and Mr Furze's assumption that Ms MacLeod alone was responsible for these purchases that Mr Furze considered inappropriate.

[49] Mr Everiss did not consider that other persons had access to the bank card, or could have had access to the bank card. This is concerning, as all parties agreed that the bank card was stored in a freely accessible fashion, simply hanging up in the Coffee Shack. It could have been taken and used by not only Ms MacLeod and Mr Furze, but by any of the other people who occasionally assisted in the business, and had used it in the past. It could also have been taken and used by an opportunistic member of the public, given Ms MacLeod's evidence that the PIN number was written on a note kept near the card.

[50] Mr Everiss formed the view that Ms MacLeod and Mr Furze were the only persons who had used the card. In evidence, he accepted that he could not in fact know or tell from the bank records who had used the card to make which specific purchases, as there was only one card and one PIN number for shared use. In addition, the bank statements did not show what goods had actually been purchased in any given transaction. Mr Everiss' investigation was not sufficient in that the information he had available to him – namely, the bank statements, and the assumptions made about purchases shown on those statements by Mr Furze – did not demonstrate which purchases were made by Ms MacLeod, and did not demonstrate what the purchases were for, and which purchases were not for business use.

[51] In addition to the bank statements, Mr Everiss provided the underlying bank records for the card. These records contained the "real time" date stamp for each transaction made, whereas the bank statements contained only the date on which each transaction was processed by the bank. The bank records show that some purchases were made on a public holiday when the Coffee Shack was closed. They do not show who was using the card, or what was purchased, but Mr Everiss' position was that the use of the card on a public holiday demonstrated the purchases were not genuine business purchases.

[52] Mr Everiss also provided two poor quality photos showing a blonde woman taken from the CCTV camera of a BP Service Station shop, on the date of the public holiday in question. It was submitted that these photos showed Ms MacLeod at the till, and the date and time stamp showing in the photos matched the date and time stamp of a purchase made on the business card.

[53] Ms MacLeod accepted that the photos might have shown her, and pointed out that this was a service station near both her house and the Coffee Shack, and she probably did stop there on the date of the public holiday, as she was driving to Auckland for a pre-arranged medical appointment with her son, as she had said previously. She did not accept that she had used the bank card on this occasion. I note that there was a time-stamp visible on only one of these photos, being the photo that showed a woman entering the store. Her facial features were not able to be made out in either photo. The date and time stamp on this photo is 2 January 2019, at 12.38.35 pm. The date and time stamp on the relevant bank records show a cash withdrawal and a purchase made on 2 January 2019, at 12.30 and 12.33 pm.

[54] I was invited to conclude that the woman shown entering the store was Ms MacLeod, and that her presence in the store at around the time the business card was used meant that she had used the business card at the store for her personal use.

[55] Again, the bank records do not show who used the business card, or what each purchase was for. Even though Ms MacLeod accepted that the photos may have shown her, the photos do not show that Ms MacLeod was using the business card, or that she was making purchases, and the time stamp on the photos is not the same as the time stamps on the bank records. I note that, if Mr Everiss had wanted to track the use of the business card, it would have been open to him to arrange for separate cards for the different people who were authorised to use the business account. He did not do this. In addition, Mr Everiss admits that these photos and the underlying bank records were not available to him at the time he dismissed Ms MacLeod, and were never shown to Ms MacLeod[4]. Instead, Mr Everiss relied on the bank statements and Mr Furze's interpretation of them.

[4] It is a "well established principle that dismissal can only be justified on the basis of information known to the employer at the time the decision to dismiss was made." *Salt v Fell,* [2006] ERNZ 499, at [77].

[56] The investigation that Mr Everiss carried out was entirely inadequate, and did not demonstrate that Ms MacLeod misused the business bank card.

[57] Mr Everiss did not discuss his concerns with Ms MacLeod at any point. He invited her to a meeting on the date of 22 January 2019, but the relevant letter did not inform her of the time or place of the meeting. Mr Everiss then failed to provide those details to her, effectively ensuring that she had no way of attending the meeting. Mr Everiss stated, and Mr Furze confirmed, that Mr Furze had called Ms MacLeod on the afternoon of 22 January 2019, to invite her to attend. However, Mr Furze called an incorrect number and it was not his responsibility to make this contact in any event. In addition, Ms MacLeod's other attempts to contact Mr Everiss prior to 22 January's 2019 (including calling him, calling Mr Furze, contacting Mr Everiss' accountant and asking if the accountant could get Mr Everiss to contact her, and emailing Ms Marie Everiss using the email address provided on the letter that was sent to her) all met with no response, and Mr Everiss could not explain why.

[58] Mr Everiss simply said he had called Ms MacLeod on the day and time he had expected the meeting to take place, and when there was no answer, he went ahead with the meeting in Ms MacLeod's absence. This is not enough for Mr Everiss to discharge his obligations as an employer, including his obligations to be active, constructive, responsive, and communicative[5].

[59] Instead, Mr Everiss went ahead with the meeting in Ms MacLeod's absence, resulting in the somewhat farcical situation where the meeting to discuss allegations against Ms MacLeod raised by Mr Everiss and Mr Furze, proceeded with Mr Everiss and Mr Furze discussing matters with each other and concluding that they had been correct in their own assumptions, and then dismissing Ms MacLeod as a result.

[60] Ms MacLeod was not given an opportunity to respond during this process. Nor did Mr Everiss genuinely consider Ms MacLeod's explanations, as she was not given the opportunity to speak with him at all.

[61] Finally, in considering other information that might be relevant, I am of the view that it is relevant that Mr Everiss did not turn his mind to the fact that the security around the bank card and its PIN number was very lax, creating a situation where the bank card

[5] See the duties of good faith set out at section 4 of the Employment Relations Act 2000.

could have been taken and used by others, not just Ms MacLeod and Mr Furze, and had been used by others in the past.

[62] In a partial response, Mr Everiss referred to the purchase of a Greek salad using the business card, which he was very concerned about and said could only have been for personal consumption, as in his view salad was not one of the cold food offerings sold in the Coffee Shack, despite Ms MacLeod saying she would purchase various small cold food stuffs at the local supermarket and combine and present them for sale. Mr Everiss said that he knew about the purchase of the Greek salad because he saw reference to this item on a receipt he saw one day at the Coffee Shack. He did not present the receipt in evidence, and was unable to advise further details of the purchase or to show by reference to the bank statements where and when this purchase was supposedly made drawing from the business account. Notwithstanding this, he formed the view that Ms MacLeod had used the business card for the purchase of a Greek salad for her personal consumption some time in December 2019.

[63] Ms MacLeod denied purchasing a Greek salad for her personal consumption with the business card, and said simply that she could not recall any of this.

[64] This example does not assist Mr Everiss. In fact, further consideration should have alerted him to the fact that he could not demonstrate whether a Greek salad had been purchased using the business card, when that purchase had been made, whether that purchase had been made by Ms MacLeod, and whether Ms MacLeod might even have been using the salad ingredients to make up the sandwiches and rolls she said she sometimes made up and sold from the Coffee Shack in the mornings. Instead, he relied entirely on his initial assumptions, without considering alternatives or discussing them with Ms MacLeod.

[65] Finally, I note a concern raised by Mr Everiss that Ms MacLeod had spent $60 purchasing a battery for an alarm system on the business account, and had then never installed that battery. This was not a matter that was mentioned in the letter of 10 January 2019. Ms MacLeod agreed that she had purchased a battery for an alarm system using the business card, and she had taken the battery home as she had intended to ask her partner, who was an electrician, to install the battery for her. However, she was then suspended from work, and told not to return, so the battery remained at her home and was never returned to Mr Everiss as he never contacted her again following

the 10 January 2019 letter. I have no reason to doubt Ms MacLeod's admissions on this point.

[66] Standing back and considering the situation overall, Ms MacLeod's dismissal was not justified. Mr Everiss simply did not have a sufficient evidential foundation to reach the conclusions he did about her alleged mis-use of the bank card. Mr Furze's involvement in the process is irregular as he was not the employer but was simply a fellow employee, and given he also had access to the business card without oversight, potentially self-serving. Mr Everiss did not consider what limited evidence was available to him critically or with an open mind.

[67] In addition, the process followed by Mr Everiss to dismiss Ms MacLeod fell far short of meeting the tests required by the Act. The onus was on Mr Everiss to ensure that Ms MacLeod knew when and how to meet with him. His failure to include these details in the letter he did send to her ensured that she was never given an opportunity to properly understand Mr Everiss' concerns or to put her side of the story, despite making efforts to reach out to Mr Everiss using the contact details for himself and others that were available to her. Fundamentally, Mr Everiss did not disclose to Ms MacLeod which purchases from the business account he was concerned by, until the filing of his amended statement of reply in this matter. The process followed by Mr Everiss was so flawed, Ms MacLeod's dismissal was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Remedies

[68] Having found Ms MacLeod's dismissal was unjustified, I must now consider remedies.

[69] Ms MacLeod has claimed for lost wages, compensation for hurt and humiliation in the sum of $25,000, wages and holiday pay owed (in an unspecified amount), interest, penalties pursuant to section 64, 130 and 134 of the Act, and sections 4 and 13 of the Wages Protection Act 1983, and costs.

[70] I will deal with these various claims in turn.

[71] Ms MacLeod accepts that she found new employment some time in late January 2019. She could not recall the exact date, but thinks it might have taken her 2 to 3 weeks to find part time work.

[72] I have found that Ms MacLeod was dismissed on 24 January 2019. She has given evidence that she found new employment in "late January", but in the absence of a firm date or any supporting contemporaneous documentation, she cannot demonstrate how long she was out of work or that she actually lost remuneration as a result. I note the comments of the court that:

> In no circumstances should an award be made which exceeds the properly assessed loss of the employee[6].

[73] Accordingly, as I cannot be satisfied on the evidence before me as to the extent of Ms MacLeod's actual loss, I am unable to make any award for lost remuneration.

[74] Ms MacLeod has also claimed for wages and holiday pay owed. It is clear from the statement of problem and pay records that this claim is in relation to the short pay that was paid to her during the period she was suspended immediately prior to her dismissal.

[75] Ms MacLeod was employed to work 50 hours per week, over 5 days per week. The pay records show that these were her usual hours, and her usual weekly pay was $925.00 gross.

[76] Ms MacLeod was suspended by way of text message on Wednesday 9 January 2019. The letter of 10 January 2019 confirmed that Ms MacLeod had been "stood down" and that this would be on full pay until 22 January 2019. Accordingly Ms MacLeod should have received her normal pay from 9 January 2019, up until she was dismissed on 24 January 2019.

[77] The pay records show that, for the week ending 13 January 2019, Ms MacLeod was paid for 40 hours ordinary time, which is consistent with her normal hours of work (50 per week), less 1 day to account for her being on agreed annual leave up to Friday 7 January 2019. I consider this to be correct. Ms MacLeod should also have received her normal pay for the following week she was suspended, up to 20 January 2019. She did not receive any pay for this week. Finally, Ms MacLeod should have continued to receive her normal pay during her suspension and up to her dismissal on 24 January, being a further 4 days pay.

---

[6] *Trotter v Telecom Corporation of New Zealand Limited*, [1993] 2 ERNZ 659, at para [81].

[78] Ms MacLeod is entitled to receive the full pay that she was promised during the period she was suspended up to the ending of her employment. Ms MacLeod has been short-paid by 1 week and 4 days, or 90 hours at her hourly rate of $18.50 gross. This amounts to a short payment of $1,665.00 gross. Holiday pay is payable on this sum at the rate of 8%[7], being $133.20 gross. Accordingly, I award Ms MacLeod the sum of $1,665.00 gross in short pay, plus $133.20 gross in holiday pay.

[79] Ms MacLeod has claimed for interest on outstanding monies.

[80] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[81] The amount of interest owing is to be calculated in accordance with that Act[8], and an interest site calculator is provided for the purposes of calculation[9], known as the Civil Debt Interest Calculator.

[82] The sum of $1,665.00 in wages was outstanding as of 24 January 2019. The sum of $60.00 must be deducted from this, to account for the price of the battery that was purchased by Ms MacLeod but never returned to Mr Everiss, leaving a net sum of $1,605.00 in outstanding wages, and $133.20 in outstanding holiday pay.

[83] Outstanding wages and holiday pay attract interest until paid. In the present case, I find that it would be appropriate to award interest on the sums that should have been paid to Ms MacLeod on the ending of employment, being outstanding wages and holiday pay of $1,738.20. Ms MacLeod could reasonably have expected to be paid this sum on the ending of her employment on 24 January 2029, leaving aside her personal grievance claims.

[84] The amount of interest owing up to the date of this determination is $129.41. This sum is also to be paid to Ms MacLeod in recognition of her loss of the use of the monies that should have been paid to her.

[85] Ms MacLeod has claimed the sum of $25,000 in compensation for hurt and humiliation. She said that she was professionally embarrassed by the allegation of theft

---

[7] See *Lawton v Steel Pencil Holdings Limited (in Liq)*, [2021] NZEmpC 199.
[8] See section 12 of the Interest on Money Claims Act 2016.
[9] See section 13 of the Interest on Money Claims Act 2016.

and the charges laid against her, as she had always worked in "Front of House" roles with money-handling responsibilities, and this harmed her reptation. She said that she had lost her confidence, and this was part of the reason why she had at one point accepted a job doing dishes rather than a front of house role which required a "bubbly personality". In addition, she also said that she had secured a new job that "suited her well". I must also weigh the fact that Ms MacLeod secured further employment after a very short amount of time, and that I can only consider the impacts of the dismissal, rather than the impact of the separate criminal charges laid by the police, not the respondent.

[86] The respondent has submitted that no compensation should be paid to Ms MacLeod, on the grounds that there was "clear evidence of theft".

[87] I note that:

> A finding of contributory fault relies on proven blameworthy behaviour on [the employee's] part[10].

[88] I have already found that the respondent's position over-states the evidence actually available to Mr Everiss at the time of dismissal, and indeed, afterwards (as the photos of a woman in the BP shop do not show what Mr Everiss suggests they show). In my view, Ms MacLeod is entitled to advance an argument for compensation in the normal way, and no reduction in compensation can properly be made.

[89] Although I accept that there was some negative impact on Ms MacLeod's confidence as a result of her dismissal, I am not persuaded that this was sufficiently severe to warrant an award in the high amount that she claims, especially in light of her description of her experiences at the investigation meeting and her acceptance that she had promptly found a new role that "suited her well".

[90] Weighing these matters, I consider compensation in the sum of $4,000 appropriate.

Penalties

[91] Ms MacLeod claims for penalties for the following breaches, as set out in her statement of problem:

---

[10] *Xu v McIntosh*, [2004] 2 ERNZ 448, at [93].

a. section 64, 130 and 134 of the Act, and
b. sections 4 and 13 of the Wages Protection Act 1983.

[92] Section 64 of the Act provides that an Employer must retain a copy of any individual employment agreement.

[93] The respondent accepts that, although an employment agreement was prepared, it was never finalised. The respondent says that this has had no impact, as there was no dispute over terms. This is not quite correct, as the respondent has also submitted that Ms MacLeod's normal hours of work were less than was shown in either its own pay records, or in the initiating text messages at the beginning of employment[11].

[94] The respondent is in breach of section 64(2) of the Act, as it has not retained a copy of the intended employment agreement. If one was retained, it has not been provided to the Authority, despite the respondent being aware of the penalty claim against it, as demonstrated by the respondent's legal submissions on that point.

[95] Section 130 of the Act provides that an employer must keep a wage and time record. The respondent has provided pay records, showing a range of information consistent with the requirements of section 130 of the Act. It might be said that the pay records do not show explicitly the kind of work on which Ms MacLeod was usually employed, or whether she was on an individual or a collective agreement, however, given that there was no suggestion that the respondent was in a position to offer a collective agreement and only offered one type of work, it is hard to see how these items had any direct applicability to the parties. After considering the pay records, I find that there has been no breach of section 130 of the Act by the respondent.

[96] Section 134 of the Act provides that a party to an employment agreement who breaches that agreement is liable to a penalty under this Act. The Statement of Problem indicated that this claim for a penalty is in relation to a failure to correctly pay Ms MacLeod's final pay, and this failure is said to be in breach of the employment agreement.

[11] In considering Ms MacLeod's normal hours of work, I have preferred the respondent's pay roll records, which accord with Ms MacLeod's own evidence.

[97] In addition, Ms MacLeod has claimed for penalties for breaches of section 4 of the Wages Protection Act 1983, in that Mr Everiss failed to pay the entire amount of wages to Ms MacLeod when due, again in relation to her final 2 weeks of employment. Breaches of the Wages Protection Act may attract a penalty, as set out in section 13 of that Act.

[98] I have already found that the respondent failed to pay Ms MacLeod correctly for her final week and 4 days of employment, leading to an award of wages. The respondent has made no submissions on these penalty claims.

[99] The failure to pay Ms MacLeod her usual pay while she was suspended, and up to the ending of her employment, is a breach of the provisions of section 4 of the Wages Protection Act 1983, which provides that wages are to be paid in full and without deduction, when they are due. This renders the respondent liable for a penalty for this breach. In my view, the claim for a penalty for breach of the employment agreement in relation to the failure to make these same payments is a "double" claim for more than one penalty for the same conduct, and I consider it should only attract liability for a single penalty.

[100] The respondent has provided no explanation as to why Ms MacLeod was not paid in full up to the ending of her employment, apart from Mr Everiss' attempt at the investigation meeting to suggest that Ms MacLeod was not dismissed, but had simply stopped attending work after she was suspended, in contrast to the documentary evidence that he had dismissed her.

[101] These conclusions mean that there are two breaches to which a penalty might apply, a breach of section 64 of the Act in respect of a failure to retain an intended employment agreement, and a breach of section 4 of the Wages Protection Act 1983 in respect of a failure to pay 1 week and 4 days wages when due.

[102] Section 135(2)(a) provides that Mr Everiss, as an individual, is liable for penalties of up to $10,000 for each breach. In the present case, there are two breaches to which a penalty might apply, meaning that there is a total maximum liability of $20,000.

[103] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited*

and *Warrington Discount Tobacco Limited*,[12] *A Labour Inspector v Prabh*[13] and *A Labour Inspector v Daleson Investment*.[14] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[104] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances involving a distinct power imbalance.[15] That would appear the case here. Mr Everiss was at all times in control of the situation. He suspended Ms MacLeod. He wrote to her reassuring her she would receive her full pay and an invite to attend a meeting with him at a time and place to be specified. He then did neither, did not respond to her attempts at contact, and is now attempting to suggest that Ms MacLeod is somehow to blame for obeying his instructions not to attend work. Mr Everiss could have arranged for Ms MacLeod to receive her full pay up until the date he considered her employment at an end. He did not, and Ms MacLeod has provided a text from the payroll provider, confirming that the lack of pay was something ordered by Mr Everiss.

[105] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[16], or failed to take reasonable steps to fulfil their legal obligations.[17] Here the evidence leads to a conclusion the failure to pay wages when due is deliberate given the evidence that Mr Everiss gave instructions to the payroll accountant regarding her short pay.

[106] With respect to the breaches' severity I note the judgement of the Court in Preet suggests failures to pay proper entitlements should be assessed at 80%.[18] That said, the relatively short-term nature of this financial loss to the applicant suggests a reduction should be applied, as does the fact that the failure to provide an employment agreement

---

[12] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[13] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[14] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12
[15] *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].
[16] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[17] *El-Agez v Comprede Limited*, TT 4121553, at para 18
[18] See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

is of a different nature, being one which arguably has not caused direct loss to the applicant.

[107] There is evidence of similar previous conduct by the respondent in that he has been found to have failed to provide employment agreements to other staff previously[19].

[108] There is no indication that Mr Everiss has taken any steps to mitigate the breach. There is no indication that there are any additional surrounding circumstances which need to be taken into account other than the circumstances surrounding the dismissal as set out above.

[109] I also have to consider the issues of consistency and proportionality. That, when combined with a perusal of recent penalties would also suggest 80% would lead to an improperly high figure, and 50% would be a more appropriate starting point.

[110] I also note that Mr Everiss has submitted that the coffee cart is not profitable.

[111] Having weighed these factors I conclude the respondent should be required to pay a penalty of $1,000 in respect of the failure to retain the employment agreement, and a penalty of $2,000 for the failure to pay wages in full when they became due. Neither of these failures is in any way explained, and the obligations to provide an employment agreement and pay wages are fundamental obligations on any employer.

[112] The final issue is then to whom the penalty should be paid and here I note Ms MacLeod has been required to bring these proceedings to obtain her final wages, which are not a significant amount. She should therefore share in the penalty for the failure to pay wages, and I consider half would be appropriate.

[113] Finally, I note that Mr Everiss has claimed against Ms MacLeod, seeking a direction that Ms MacLeod pay to Mr Everiss the sum of $1,956.00 "in reimbursement for the mis-use of the bank card"; plus costs on this application.

[114] The difficulty with this claim is that Mr Everiss has not been able to demonstrate on the balance of probabilities that Ms MacLeod mis-used the bank card or in this amount. Ms MacLeod has freely admitted that she retained a battery purchased with the bank card costing $60.00.

---

[19] See *Jones v Everiss*, [2021] NZERA 157, also involving the employment of a person at the coffee cart.

[115] Accordingly, Mr Everiss is awarded the sum of $60.00 in recognition of the cost of the battery.

[116] The sum of $60.00 will be deducted from the amount of wages already awarded to Ms MacLeod.

Orders

[117] Mr John Everiss is ordered to pay to Ms Chloe-Jane MacLeod:

a. 1 week and 4 days short pay, being $1,605.00 (that is, $1,665.00 gross less the sum of $60.00 in respect of cost of the battery not returned);
b. Holiday pay on this sum, being $133.20 gross;
c. Compensation for hurt and humiliation, being $4,000 without deduction;
d. Interest, being $129.41 gross; and
e. Penalties totalling $4,000 without deduction, with $3,000 to be paid to the Crown account and $1,000 to be paid to Ms MacLeod.

Costs

[118] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves, taking into account that Ms Everiss has been the successful party, and was not legally represented.

[119] If they are not able to do so and an Authority determination on costs is needed either party may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party 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.

[120] 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.[20]

Claire English
Member of the Employment Relations Authority

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