

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 426
3074412

BETWEEN SHELLEY STENHOUSE
Applicant

A N D TOWMAN TOWING GROUP
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
Peter Cahill, advocate for the Respondent

Investigation Meeting: 16 July 2020

Submissions Received: 16 July 2020 from the Applicant
16 July 2020 from the Respondent

Date of Determination: 15 October 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shelley Stenhouse began working for Towman Towing Group Limited in July 2017. Ms Stenhouse began on a part-time basis, which Towman described as casual employment. Whatever the status or description, Ms Stenhouse was working around 10 hours per week for Towman doing administrative and clerical tasks, with this work being conducted from her home.

[2] In 2018 as Towman obtained further work, Ms Stenhouse began working longer and more consistent hours; Towman says at this stage it formalised the employment arrangement,

with Ms Stenhouse working 20 hours per week, 9:00 am – 1:00 pm Monday to Friday with her work transitioning to become based in the Towman office. An employment agreement recording this arrangement was signed on 15 May 2018.

[3] It was also in May 2018 that difficulties arose with Ms Stenhouse's work; these difficulties coincided with the increased work and a new employee starting. The difficulties appeared in two main issues. From Towman's perspective it discovered that Ms Stenhouse had forwarded business sensitive and confidential information to her own personal email address and from Ms Stenhouse's perspective she felt she was being bullied by the new employee.

[4] Ms Stenhouse was unhappy with the way both of these issues were resolved and raised a personal grievance for unjustified action causing disadvantage. It appears that matters between Ms Stenhouse and Towman did not improve from there. By the end of August 2018 Ms Stenhouse was working from home but had been locked out of the Towman accounts and payroll system so she was unable to complete her administrative role; Ms Stenhouse carried out no work for Towman through to December 2018.

[5] Then in December 2018, Towman commenced a disciplinary process with Ms Stenhouse and in January 2019 this concluded with Towman dismissing Ms Stenhouse.

[6] As a result of the events from August 2018, Ms Stenhouse raised two further personal grievances, one for unjustified action causing disadvantage and one for unjustified dismissal.

[7] None of Ms Stenhouse's three personal grievances were resolved between the parties and Ms Stenhouse lodged her statement of problem with the Authority based on these grievances and additional claims for penalties based on alleged breaches of good faith and a failure to provide wage and time records when requested.

[8] Towman denies any liability for these claims, saying it acted as a fair and reasonable employer could throughout its interactions with Ms Stenhouse and it denies the allegations of breaches of good faith and failure to provide wage and time records. Towman also raises an issue for the unjustified dismissal grievance. It says this grievance was not raised within the

90 day period prescribed in the Employment Relations Act 2000 (the Act) and therefore I do not have jurisdiction to hear that part of the claim.¹

[9] So in my investigation I considered Ms Stenhouse's personal grievances and claims for penalties. This determination resolves each of those grievances and claims in turn.

Unjustified action causing disadvantage

[10] Section 103(1)(b) of the Act provides that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[11] Based on section 103(1)(b), the questions to be addressed in respect of Ms Stenhouse's alleged personal grievance for unjustified action causing disadvantage are:

- (a) Did Towman act in the way Ms Stenhouse complains of?
- (b) If so, did the actions cause any disadvantage to Ms Stenhouse's employment or a condition of employment?
- (c) If so, were Towman's actions justifiable?

Did Towman act as alleged?

[12] Ms Stenhouse claims that Towman:

- (a) Did not act fairly and/or properly in dealing with the complaints she made about bullying and harassment by a colleague.
- (b) Unilaterally changed her place of work, when it required her to work from home rather than completing the transition to working in the Towman office.
- (c) Prevented her from carrying out work for it by restricting her access to Towman email, stopping her access to relevant accounting, invoicing and

¹ Section 114 of the Employment Relations Act 2000 requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

payroll systems and information and not providing her with the necessary equipment to conduct her work.

(d) Revisited issues that had been resolved in June 2018 in a disciplinary meeting in January 2019.

[13] The events that inform Ms Stenhouse's allegations commenced in May 2018, shortly after Ms Stenhouse had signed the employment agreement reflecting her permanent and increased role with Towman.

[14] On 25 May 2018, Stephen Saul, the director and sole shareholder of Towman who was essentially the manager of the Towman business, discovered that Ms Stenhouse had sent confidential business documents to her personal email. In response he changed the password required to access the Towman email and documents system, thereby shutting Ms Stenhouse out of the Towman system.

[15] Ms Stenhouse became aware of this when she tried to log into the Towman email account and she emailed Mr Saul from her personal email asking why her access had been cut off. Mr Saul responded by email explaining what he had discovered and asking Ms Stenhouse to clarify why she had forwarded Towman documents to her personal email.

[16] Ms Stenhouse did not respond to Mr Saul's email rather she sent a second email to Mr Saul setting out a complaint of bullying and harassment by a colleague and a complaint that this colleague was also taking over her work and taking credit for some of the work she did. Ms Stenhouse stated further that she felt Mr Saul had not responded appropriately to her when she had raised these concerns previously. And the email concluded with advice that Ms Stenhouse's doctor had signed a medical certificate giving her two weeks leave as a result of the stress she was suffering at Towman.

[17] Mr Saul responded to this complaint by obtaining legal advice on Towman's obligations and then he investigated the complaint by interviewing various employees. As a result of Mr Saul's investigation Towman determined the allegations in Ms Stenhouse's complaint were not established and Towman's lawyers advised Ms Stenhouse of this outcome in a letter dated 6 June 2018.

[18] In the course of interviewing Towman employees, Mr Saul was advised that employees had heard Ms Stenhouse speaking badly about Mr Saul and Towman. Mr Saul was concerned about this, so in the 6 June 2018 letter Ms Stenhouse was invited to a meeting to discuss this concern.

[19] The meeting was held on 13 June 2018. From Towman's perspective it believed the issue about Ms Stenhouse's disparaging comments and her complaint were resolved in this meeting. It says they reached an agreement that Ms Stenhouse would work from home, with her access to Towman email and documents being restored and that no disciplinary steps or sanction would be taken over the alleged comments and no further action would be required in respect of Ms Stenhouse's complaints. Ms Stenhouse accepts this was the outcome but says she did not agree to it.

[20] Ms Stenhouse returned to work after the 13 June 2018 meeting but the work she was given was limited as she was not given access to the necessary documents or equipment, for example the netguard card in order to undertake online banking.

[21] Then in July 2018 further restrictions were imposed on Ms Stenhouse such as removal of her access to the Towman email account and Towman documents.

[22] On 19 July 2018 Ms Stenhouse raised a personal grievance alleging that Towman had made unilateral changes to her work and the way in which she worked preventing her from undertaking her role and alleging that Towman had failed to deal with her bullying and harassment complaint appropriately.

[23] Throughout June and July 2018 Ms Stenhouse tried to undertake her work but because of her limited access to systems, documents and equipment she was unable to do so. It is clear that Ms Stenhouse became frustrated with this and expressed this frustration by sending various emails raising issues with the way administrative functions were being carried out. Mr Saul describes this as being bombarded with questions and issues, which was impacting on the work being done. He says Ms Stenhouse also inflamed matters with the colleague she had complained about by being rude and aggressive toward her.

[24] So both Mr Saul and Ms Stenhouse were unhappy with the other and exasperated and frustrated at the behaviour they were experiencing. However, they were unable to discuss this

– in fact there was no credible evidence to suggest they discussed any of the concerns each of them had about the deteriorating relationship.

[25] Mr Saul's solution was to simply remove all access for Ms Stenhouse to Towman systems, documents and equipment from 21 August 2018. This did not change the dynamic between Ms Stenhouse and Mr Saul and they both continued to ignore the issues between them. From this date, Ms Stenhouse remained an employee and was paid for 20 hours work each week but she did not do any work for Towman. Ms Stenhouse says she was ready and willing to work but was unable to carry out her role because her access to Towman systems, documents and equipment had been removed. Towman says Ms Stenhouse simply chose not to do anything or even try to make a contribution to the business and simply collected her wages for doing nothing.

[26] This impasse came to a head in December 2018 when Towman instigated a disciplinary process with Ms Stenhouse. Towman sent Ms Stenhouse a letter dated 13 December 2018 setting out concerns it has about Ms Stenhouse's conduct and performance at work. The concerns were based on allegations that Ms Stenhouse:

- (a) Had been acting negatively since May 2018, particularly toward other employees.
- (b) Had forwarded Towman work related documents and emails to her personal email account.
- (c) Had been disrespectful and unprofessional toward the colleague she had complained about previously, including making accusations about her work.
- (d) Had inappropriately recorded additional work and therefore attempted to get paid wages for time not spent on Towman work.
- (e) Had interacted with Towman's accountant in an unprofessional manner, undermining Towman and disclosing confidential information and she had engaged the accountant in issues which were not appropriate.
- (f) Had not performed any work for several months and had not made any effort to find or get work to do.

(g) Had allowed her personal dispute with Mr Saul to impact on her work.

[27] These allegations and concerns were the subject of the disciplinary meeting in January 2019 and Towman's findings on them were the basis for it deciding to terminate Ms Stenhouse's employment.

[28] I will deal with the disciplinary process and the outcome in more detail in my analysis of the unjustified dismissal grievance.

[29] For now I will analyse this factual account to decide if Ms Stenhouse's allegations of conduct informing her personal grievance for unjustified action causing disadvantage have been established.

[30] So firstly, did Towman fail to act fairly and/or properly in dealing with the complaints Ms Stenhouse made about bullying and harassment by a colleague? No; based on my assessment, Towman conducted an appropriate review and investigation of Ms Stenhouse's complaint and then dealt with its findings appropriately.

[31] Second, did Towman unilaterally change Ms Stenhouse's place of work, when it required her to work from home rather than completing the transition to working in the Towman office? Yes; I accept Ms Stenhouse's evidence that she did not agree to stop her transition to working at the Towman office in the meeting on 13 June 2018.

[32] Third, did Towman prevent Ms Stenhouse from carrying out work for it by restricting her access to Towman email, stopping her access to relevant accounting, invoicing and payroll systems, and not providing her with equipment she needed to fulfil some tasks? Yes; it made this decision unilaterally without consulting Ms Stenhouse.

[33] And, fourth, did Towman revisit issues that had been resolved in June 2018 in a disciplinary meeting in January 2019? No; the 13 June 2018 meeting dealt with concerns over Ms Stenhouse disparaging Mr Saul and Towman and Ms Stenhouse's bullying and harassment complaint. These were not issues raised in the subsequent disciplinary process.

[34] Overall, in terms of conduct Ms Stenhouse complains of in her unjustified action causing disadvantage grievances, my conclusion is that Towman acted unilaterally to change

Ms Stenhouse's work conditions and her ability to work, when it made her work from home and restricted her access to Towman systems, documents and equipment.

Did Towman's actions cause any disadvantage to Ms Stenhouse's employment or a condition of employment?

[35] By implementing the changes and restrictions that it did, Towman caused disadvantage to Ms Stenhouse's employment.

Were Towman's actions justifiable?

[36] Towman's actions in implementing the changes and restrictions that it did were not justified.

[37] Whilst Towman may have had concerns about Ms Stenhouse's conduct and performance at work it could not respond to those concerns by making unilateral decisions. Sections 4 and 103A of the Act impose on an employer an obligation to act fairly and in good faith when taking steps which may impact on an employee; those obligations at their simplest mean Towman should have provided Ms Stenhouse with information about its concerns, given her an opportunity to respond to them and then considered her response before deciding on what to do to resolve the concern (if anything was required). Towman failed to take these steps and therefore its actions were not justified.

Conclusion on unjustified action causing disadvantage grievance

[38] By varying Ms Stenhouse's work conditions and restricting her access to Towman's systems, documents and equipment, Towman acted in an unjustified manner which caused disadvantage to Ms Stenhouse's employment. Therefore, Ms Stenhouse has a personal grievance for unjustified action causing disadvantage.

Unjustified dismissal

[39] There are two parts to the unjustified dismissal personal grievance that I must determine. First did Ms Stenhouse raise her grievance within the 90-day time frame? And second, if so, was Towman's dismissal of Ms Stenhouse justified considering the procedural and substantive obligations impose on it.

Was Ms Stenhouse's grievance raised within 90 days of the event giving rise to it?

[40] The starting point for the question of whether Ms Stenhouse's personal grievance was raised in time is sections 114(1) and 114(2) of the Act:

(a) Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

(b) Section 114(2) sets out what constitutes the raising of a personal grievance. It provides that a grievance is raised when the employee has taken reasonable steps to make the employer or a representative of the employer aware that the employee alleges a personal grievance.

[41] Ms Stenhouse engaged an advocate to assist her with her unjustified dismissal personal grievance in March 2019. The advocate worked with Ms Stenhouse and drafted a letter dated 18 April 2019 which set out Ms Stenhouse's grievance for unjustified dismissal and restated Ms Stenhouse's grievances for unjustified action causing disadvantage.

[42] Towman does not dispute that the 18 April 2019 letter set out a personal grievance for unjustified dismissal. The issue for Towman with the 18 April letter is it was sent to Mr Saul's personal email and not to Towman's registered office or even its general Towman email. Towman says Mr Saul was no longer using that personal email so the grievance did not come to its attention until it was resent by Ms Stenhouse's advocate after the expiry of 90 days from dismissal.

[43] The question I must resolve is whether by sending the 18 April 2019 letter to Mr Saul's personal email address, Ms Stenhouse has taken reasonable steps to raise the personal grievance.

[44] Ms Stenhouse says she instructed her advocate to use Mr Saul's personal email address because when issues first arose between Mr Saul and her relating to her work in May 2018, Mr Saul told her to send her response to his personal email rather than using the Towman email – it appears this was in order to maintain confidentiality around personal employment issues as other employees had access to all emails sent and received using the Towman email addresses.

[45] Ms Stenhouse then used Mr Saul's private email address to raise her complaint about bullying and harassment, and that complaint was received and actioned by Towman through Mr Saul. This however appears to be the only email exchanges using this personal email address as after this the correspondence about Ms Stenhouse's employment issues were sent through lawyers so Mr Saul's personal email address was not used. And during her ongoing employment, Ms Stenhouse continued to use the Towman email for work issues such as the queries she raised about accounts and other administrative matters.

[46] Then when Towman commenced the disciplinary process with Ms Stenhouse it sent the disciplinary letter of 13 December 2018 to Ms Stenhouse's personal email address.

[47] So, from Ms Stenhouse's perspective the indications were that any personal employment issues, such as performance and conduct issues, or in her case a personal grievance, were to be sent either through lawyers or representatives who were engaged at the time – noting here that Towman changed its legal representation at least three times in the period it dealt with the employment issues with Ms Stenhouse – or to personal email addresses and not to any email addresses using the Towman email account. And, neither Towman, Mr Saul or any of Towman's lawyers advised her at any stage that Mr Saul's email address was not being used or that it was not an appropriate email address to use for personal employment issues.

[48] In the circumstances, I accept that Ms Stenhouse was right to think that a personal grievance should be raised through Mr Saul's personal email address because she did not know if Towman's lawyers were still acting for it on employment matters and previous correspondence on such issues, which were not sent through lawyers, had been sent through private email addresses.

[49] So, it follows that I accept that in sending the 18 April 2019 letter containing a personal grievance for unjustified dismissal to Mr Saul's personal email address, Ms Stenhouse had taken reasonable steps to make Towman aware of her grievance. And it also follows therefore that I find that Ms Stenhouse's grievance for unjustified dismissal was raised within the requisite 90-day period.

Issues for unjustified dismissal claim

[50] There are two questions for Ms Stenhouse's unjustified dismissal personal grievance:

- (a) Did Towman conduct a fair process before it dismissed Ms Stenhouse i.e. did it act as a fair and reasonable employer could in the course of the disciplinary process, particularly in light of its obligations under the Act?
- (b) Was the decision to dismiss substantively justified i.e. were Towman's decisions on what occurred and that this warranted dismissal ones that a fair and reasonable employer could have reached in all of the circumstances?

Did Towman follow a fair disciplinary process?

[51] As set out above, the first issue on the justification is whether in coming to the decision to dismiss, Towman followed a fair process. This is informed by ss 4(1A) and 103A of the Act. In summary Towman needs to show that:

- (a) It investigated the allegations against Ms Stenhouse sufficiently.
- (b) It set out the allegations, provided relevant information and explained the possible implications of a finding of misconduct, so that Ms Stenhouse could consider all of this and respond.
- (c) It gave Ms Stenhouse a reasonable opportunity to respond to the allegations, before it made its decision on what had occurred, whether this amounted to misconduct and what the appropriate sanction was (if required).
- (d) It properly considered the explanations given by Ms Stenhouse before it made any of these decisions.

[52] Based on the evidence I heard in my investigation I am satisfied that Towman met all of the requirements set out above. In particular the letter of 13 December 2018, which set out Towman's concerns together with the additional information, was comprehensive and was the product of a full investigation. It left Ms Stenhouse with no doubt or confusion about what the allegations were that she needed to answer and the possible consequences of any adverse findings in relation to those allegations. Ms Stenhouse then had a full opportunity to respond

including time to take legal advice and prepare for the disciplinary meeting, as well as being given time to explain herself fully in the disciplinary meeting. The conclusions drawn by Towman set out in a letter of 31 January 2019 showed careful consideration of the information and explanations provided by Ms Stenhouse and credible conclusion drawn as a result – it is clear that Towman properly considered the explanations and information provided by Ms Stenhouse before it reached conclusions on what had occurred and what sanction should be imposed.

[53] I am satisfied that Towman acted as a fair and reasonable employer could act in all the circumstances. It met its obligations under the Act and therefore it did carry out a fair disciplinary process.

Was Towman's decision to dismiss Ms Stenhouse substantively justified?

[54] After it had held the disciplinary meeting on 25 January 2019, Towman concluded that Ms Stenhouse:

- (a) Had been acting negatively towards other employees since May 2018.
- (b) Had forwarded Towman work related documents and emails to her personal email account and as this had not been authorised by Towman nor was it for a work-related reason, so it was a breach of the confidentiality requirements in Ms Stenhouse's employment agreement.
- (c) Had been disrespectful and unprofessional toward the colleague she had complained about previously - including making accusations about her work. Whilst there had been a mutual dislike and deterioration of that work relationship this did not excuse the behaviour.
- (d) Had inappropriately claimed for pay for additional work and attempted to get Towman to pay for expenses that she was not entitled to – noting that Ms Stenhouse had not been paid for these amounts.
- (e) Had interacted with Towman's accountant in an unprofessional manner, undermining Towman and the accountant. In the process she had also

disclosed confidential information and she had engaged the accountant in issues which were not appropriate, incurring costs for Towman.

(f) Had not performed any work for several months and had not made any effort to find or get work to do.

(g) Had allowed her personal dispute with Mr Saul to impact on her work.

[55] On the basis of the information provided at the time, that is the information produced by Towman's investigation and from Ms Stenhouse's explanations and responses, I am satisfied that a fair and reasonable employer could have reached these conclusions.

[56] On the basis of these conclusions Towman then decided that the behaviour amounted to serious misconduct, that there had been a fundamental breakdown in the employment relationship and it no longer had trust and confidence in Ms Stenhouse. For these reasons it decided to terminate Ms Stenhouse's employment with immediate effect.

[57] I am satisfied that based on the conclusions reached by Towman set out in paragraph [54], a fair and reasonable employer could conclude that it had lost all trust and confidence in Ms Stenhouse and there was a breakdown in the relationship such that immediate termination of Ms Stenhouse's employment was appropriate.

[58] In the circumstances I am satisfied that dismissal was a conclusion a fair and reasonable employer could have come to and therefore dismissal was substantively justified.

Conclusion on personal grievance for unjustified dismissal

[59] Towman's dismissal of Ms Stenhouse was justified from both a procedural and substantive perspective and therefore Ms Stenhouse does not have a personal grievance for unjustified dismissal.

Remedies for personal grievance

[60] As Ms Stenhouse has been successful with her personal grievance for unjustified action causing disadvantage I can award her any of the remedies provided for under s 123 of the Act.

Reimbursement

[61] I will not award any amount for reimbursement of lost wages as Ms Stenhouse did not lose any wages as a result of Towman's unilateral changes to her work – she continued to be paid throughout the period.

Compensation

[62] Pursuant to s 123(1)(c) of the Act I can award compensation to Ms Stenhouse for the humiliation, loss of dignity and injury to feelings that she suffered because of Towman's unjustified actions.

[63] Assessing this compensation involves assessing the harm caused to Ms Stenhouse by the unjustified actions and the loss she suffered as a result, which I must then quantify.²

[64] In assessing Ms Stenhouse's evidence about the impact of Towman's actions I have been careful to only include the impacts on her of the unilateral variations Towman made to her working conditions – so the requirement that she work from home from June 2018 and the removal of her access to Towman systems, documents and equipment. Ms Stenhouse's evidence was that as a result of these actions by Towman she:

- (a) Was humiliated by how she was treated.
- (b) Felt as if Towman wanted her to resign and was forcing her into a situation where she would have to resign.
- (c) Became stressed and anxious about how she was treated, which led to her seeking medical assistance and being prescribed antidepressants – noting here there was no medical evidence to support this and based on Ms Stenhouse's verbal evidence I conclude that part of this stress and anxiety for which she received medical assistance was caused by her dismissal, so I do not put full weight on this harm when assessing Ms Stenhouse's loss.

² *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[65] I have considered the recent decisions of the Employment Court³, which provide guidance on quantifying this loss and harm and with this guidance I have assessed the level of harm and loss to Ms Stenhouse to be \$14,000.00.

Contribution

[66] As I have awarded remedies to Ms Stenhouse, I must now consider whether she contributed to the situation that gave rise to her personal grievance.⁴

[67] The approach to assessing contribution including quantifying this has been addressed by the Employment in *Xtreme Dining Ltd v Dewar* and more recently in *Maddigan v Director-General of Conservation*.⁵

[68] In *Maddigan*, Chief Judge Inglis stated:⁶

[73] The approach to contribution which emerges from recent judgments of the Court can be summarised as follows:

- (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- (c) Third, what is a fair assessment of the extent of the contribution?
- (d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[69] So, applying these four steps I must first consider whether Ms Stenhouse behaved in a manner that was culpable or blameworthy. The behaviour in question includes Ms Stenhouse's conduct at work from May 2018 through until August 2018, being the period in which Towman required Ms Stenhouse to work from home and reduced her access to systems, documents and equipment. Much of this behaviour is outlined and addressed above in my analysis of the unjustified dismissal personal grievance. Given my findings in respect of that grievance it follows that I find that Ms Stenhouse's behaviour was culpable and blameworthy.

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁴ Section 124 of the Employment Relations Act 2000.

⁵ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136; *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

⁶ *Maddigan v Director-General of Conservation*, above n5 at [73].

[70] The next step is to assess if Ms Stenhouse's actions contributed to the situation that gave rise to her personal grievance, i.e. is there a causal link between her actions and the situation that gave rise to Towman's actions? The answer to this is yes; Towman reacted to Ms Stenhouse's behaviour in unilaterally changing her working conditions in response to the behaviour.

[71] Applying the third and fourth steps, I am guided by Chief Judge Inglis assessment of appropriate rates of reduction in *Maddigan*⁷ and conclude that a 25% reduction to the amount of compensation I have awarded is the appropriate reduction.

Breach of good faith

[72] Whilst Towman's actions in unilaterally changing Ms Stenhouse's working conditions were undoubtedly a breach of the duty of good faith⁸ I am not satisfied that the breaches were sufficient to meet the high standard required for a penalty to be imposed.⁹ I will not award a penalty for the breaches of good faith.

Failure to provide wage and time records

[73] I am satisfied that Towman failed to provide Ms Stenhouse with wage and time records when requested. This failing is a breach of the Act.¹⁰ And I am satisfied that it is appropriate to impose a penalty for these breaches.

[74] In *Nicholson v Ford*¹¹ Chief Judge Inglis provided guidance on the inter-relationship between: (a) *Preet*, which sets out a four step process for assessing penalties for breaches of minimum standards; (b) s 133A of the Act, which relates to the imposition of penalties by the Court and the Authority; and (c) the other relevant factors to be taken into account, when imposing penalties.

[75] Taking this guidance and all of the factors outlined by the Chief Judge into account and after considering the parties' submissions and assessing the circumstances of the omissions, I find that \$1,500.00 is an appropriate penalty to impose in all the circumstances of

⁷ *Maddigan v Director-General of Conservation*, above n5 at [75] – [77].

⁸ Section 4 of the Employment Relations Act 2000.

⁹ Section 4A of the Employment Relations Act 2000.

¹⁰ Section 64 of the Employment Relations Act 2000.

¹¹ *Nicholson v Ford* [2018] NZEmpC 132

the case. Having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award 75% of the penalty to Ms Stenhouse.

Outcome

[76] Towman acted in an unjustified manner causing disadvantage to Ms Stenhouse. Ms Stenhouse has a personal grievance for unjustified action causing disadvantage. In satisfaction of this grievance Towman must pay Ms Stenhouse \$10,500.00,¹² without any further deductions, for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[77] Towman's dismissal of Ms Stenhouse was justified. Ms Stenhouse does not have a personal grievance for unjustified dismissal.

[78] Within 28 days of the date of this determination, Towman must pay to Ms Stenhouse the sum of \$1,125.00 as part payment of the penalty imposed.

[79] Within 28 days of the date of this determination, Towman must pay to the Authority for transfer to a Crown Bank account the balance of the penalty imposed being \$375.00.

Costs

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

[81] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority

¹² Being my award of \$14,000.00 reduced by 25% for contribution.