

ii. \$7,500 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

D. Bela Limited has breached its statutory obligations of good faith, has breached the employment agreement and has breached the Employment Relations Act 2000.

E. Bela Limited is ordered to pay penalties of \$9,000 into the Authority within 28 days of the date of this determination.

F. Costs are reserved.

Employment relationship problem

[1] Mr Stojan Stojkov has a number of claims which this determination deals with. Those claims are that he is owed wage arrears, was constructively dismissed, and that the employer breached its obligations of good faith, the terms of the employment agreement and the Employment Relations Act 2000 (the Act).

[2] For its part Bela Limited (Bela Ltd) largely denies the claims but accepts unpaid holiday pay and payment for public holidays for the period 17 July 2013 to 4 February 2014 are owed to Mr Stojkov.

[3] When this matter was lodged in the Authority Bela Ltd was legally represented and through the representative had agreed to provide witness statements for each of its witnesses by 27 March 2015. On 24 March 2015 the Authority was formally advised that the representative acting for Bela Ltd no longer had instructions to act and was withdrawing.

[4] The respondent did not lodge any witness statements despite follow up email communications with the sole Director of Bela Ltd, Mr Ace Sterjov.

[5] On the morning of the investigation meeting telephone contact was made with Mr Sterjov who told the Authority Officer he was confused about the intended start time of the investigation meeting but was aware the investigation meeting was to take place that day.

[6] Mr Sterjov was provided with additional time to attend the investigation meeting. Despite advising the Authority that he would attend he did not turn up at the appointed time and neither did he turn up at the time he thought the investigation meeting was to commence. There has been no good cause for the failure to attend the investigation meeting so I have proceeded under clause 12 of Schedule 2 of the Act to fully act in the matter as if the respondent was present or represented.

[7] The Authority was assisted in its investigation by an interpreter of the Serbian language.

[8] As permitted by s 174 of the Act this determination has not recorded all the evidence and submissions received from Mr Stojkov 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.

Background

[9] The applicant is originally from Macedonia. In early 2013 Mr Stojkov decided to immigrate to New Zealand. Mr Stojkov answered an advertisement from the Herald on Sunday for a chef's position.

[10] On 20 May 2013 Mr Stojkov entered into an employment agreement with Bela Ltd with the view to applying for a work visa. The work visa was approved on 27 June 2013 and Mr Stojkov moved to New Zealand and commenced his new employment on 17 July 2013 as a Chef, working at the respondent's restaurant in Whangaparaoa. On his arrival and for a short period after that Mr Stojkov was accommodated at Mr Sterjov's home.

[11] In early September 2013 Mr Sterjov opened a new restaurant in Birkenhead. Mr Stojkov was asked to work at the new restaurant while still covering shifts at the Whangaparaoa restaurant as needed.

[12] In the statement in reply Mr Sterjov says that on 22 November 2013 he handed Mr Stojkov a letter explaining that business in the restaurant was slow and it was unable to offer him the hours set out in the employment agreement. The letter requests Mr Stojkov to advise Mr Sterjov if he was willing to work for less hours and if so, this would correspond in a reduction of the weekly wages. Mr Stojkov denies

he ever received this letter and that he saw it for the first time when Bela Ltd lodged and served its statement in reply.

[13] There is no evidence that Mr Stojkov agreed to work lesser hours or that he did in fact work lesser hours.

[14] On 4 February 2014 Mr Stojkov says he and Mr Sterjov had a heated discussion regarding the state of the respondent's equipment. Mr Stojkov tendered his resignation with immediate effect.

Issues

[15] The issues for determination are whether:

- a) Mr Stojkov received all wages and holiday pay owed to him;
- b) Mr Stojkov was unjustifiably constructively dismissed and if so what, if any remedies, should be awarded.
- c) Bela Ltd breached its obligations of good faith toward Mr Stojkov and if so whether a penalty should be awarded;
- d) Bela Ltd breached the employment agreement and if so whether a penalty should be awarded;
- e) Bela Ltd breached the Act and if so whether a penalty should be awarded.

Arrears of wages

[16] For the period 17 July 2013 to 4 February 2014 Mr Stojkov claims payment for unpaid wages, public holidays and annual leave in the amount of \$17,868.40.

Wages

[17] Mr Stojkov claims Bela Ltd failed to pay his wages in accordance with this employment agreement. The employment agreement provides for Mr Stojkov to work 36 hours per week at the rate of \$20.00 gross per hour. For the ease of establishing the amounts owed to Mr Stojkov, with the exception of the 8% calculations in paragraph 27, the Authority has used nett figures and not gross figures.

Bela Ltd must calculate the PAYE amounts payable on all amounts set out in this determination for arrears of wages, unpaid public and annual holidays and lost wages ordered pursuant to section 123(1)(b) and remit that amount to the IRD on behalf of Mr Stojkov.

[18] Mr Stojkov says he worked between the hours of 3.00pm and 10.30pm every day for seven days of the week every week. This equates to 7.5 hours per day and 52.50 hours each week. Evidence from other employees who worked with Mr Stojkov confirmed his evidence that he worked longer hours than that specified in the employment agreement.

[19] For the period 17 July 2013 to 23 October 2013 Mr Stojkov says he should have been paid \$12,040.94 but received only \$5,880.00 leaving an outstanding amount of \$6,160.94 nett.

[20] Mr Stojkov says that for the period 24 October 2013 to 4 February 2014 he received \$4,033.25 instead of \$12,527.42 leaving an outstanding balance of \$8,494.17 nett.

[21] For its part, Bela Ltd has provided the Authority with copies of handwritten pay slips. The pay slips were not dated at the time they were produced to the Authority but further copies have now been produced with dates being added to the top of each pay slip.

[22] I have not had the benefit of viewing the originals of these documents and as Bela Ltd did not attend the investigation meeting I have been unable to question Mr Stojkov about the authenticity of them. Mr Stojkov says he never received a payslip at all while he was employed. Further, the amounts specified in the payslips does not accord with Mr Stojkov's evidence that he received \$420.00 nett cash each week.

[23] I find on balance it is more likely than not, Mr Stojkov was not paid for all hours worked by him and that he is owed wages for those unpaid hours. In the absence of any evidence to the contrary I find Mr Stojkov is owed the sum of \$14,655.11 nett as arrears of wages. Accordingly, Bela Limited is ordered to pay the arrears of wages without deduction within 28 days of the date of this determination.

Unpaid Public Holiday pay

[24] Mr Stojkov claims Bela Ltd failed to pay his holiday pay and payment for public holidays in accordance with the Holidays Act 2003 (the Holidays Act).

[25] Mr Stojkov says he worked Labour Day 2013, New Years' Day 2014 and 2 January 2014 and did not work Christmas Day 2013 and Boxing Day 2013 but these days were days he would otherwise have worked, but for the public holiday.

[26] Mr Stojkov claims, and I find proven, that Bela Ltd owes him the nett sum of \$1,155.39 for payment for public holidays plus alternative holidays which he had not taken at the date his employment terminated and is ordered to pay that amount accordingly without deduction and within 28 days of the date of this determination.

Unpaid Annual Holiday pay

[27] Mr Stojkov has not received any payments for annual holidays as required by the Holidays Act. Mr Stojkov has calculated that his total gross earnings (adding together the payments he has received plus the payments ordered pursuant to this determination) amounts to \$31,725.00. Mr Stojkov has calculated the nett amount of 8% as being \$2,538.00. Bela Limited is order to pay \$2,538.00 without deduction within 28 days of the date of this determination.

Constructive Dismissal

[28] At the investigation meeting I raised with Mr Stojkov my concern that his personal grievance was raised outside the statutory 90 day period and that the Authority may lack jurisdiction to consider his claim for constructive dismissal.

[29] Mr Stojkov accepts that he did not raise his personal grievance within the 90 day period but submits that Bela Ltd has impliedly consented to the claim being raised outside the 90 days.

[30] The test for implied consent is whether it can be said that Bela Ltd so conducted itself that it can reasonably be taken to have consented to an extension of time.¹

¹ *Commissioner of Police v Hawkins* [2009] NZCA 2009 at [24].

[31] As previously noted in this determination up until the investigation meeting Bela Ltd was legally represented. There is no evidence in any of the written responses including the statement in reply or when the parties agreed to attend mediation that Bela Ltd objected to the raising of the grievance outside the 90 day period.

[32] I find that through its conduct Bela Ltd impliedly consented to the grievance being raised after the expiry of the 90 day period.

[33] Mr Stojkov says he had no option but to resign because he was paid for less hours than he worked, he was required to work on public holidays but was not paid the minimum entitlements set out in the Holidays Act, he was required to work continuously from October 2013 to 4 February 2014 with only Christmas Day and Boxing Day off, he was subject to abuse from Mr Sterjov and he was not provided with his statutory entitlement to rest and meal breaks.

[34] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[35] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*³ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed.
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[36] There must also be a tendering of the resignation.⁴

[37] I have concluded that Mr Stojkov's complaint falls into the third category set out in the *Woolworths (NZ) Ltd* case, in that Mr Stojkov alleges Bela Ltd has breached duties owed to him which caused him to resign. The two relevant questions for the Authority are:

² (1983) ERNZ Sel Cas 95; [1983] ACJ 965.

³ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA).

⁴ *Z v A* [1993] 2 ERNZ 469.

- (a) was there a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation; and
- (b) if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.⁵

[38] Williamson J in *Wellington Clerical Workers IUOW v Greenwich* observed in describing this type of constructive dismissal:⁶

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Breach of duty

[39] Mr Stojkov says he resigned on 4 February 2014 when he became dissatisfied with the quality of the pots he was required to use. He argued with Mr Sterjov and tendered his resignation which was effective immediately. The pots issue was the last straw for Mr Stojkov. In his oral evidence Mr Stojkov says he was constantly undermined and verbally abused by Mr Sterjov. On top of that Mr Stojkov was not being paid for all of the hours he worked, was not remunerated correctly for public holidays, was not allowed any rest or meal breaks and was working seven days a week.

[40] Mr Stojkov also gave compelling evidence of abusive behaviour he was subject to during his employment.

[41] I am satisfied that the way Mr Sterjov conducted himself toward Mr Stojkov, the failure to pay Mr Stojkov correctly, the failure to pay public holidays in accordance with the Holidays Act, the failure to provide statutory rest and meal breaks, and the requirement to work seven days every week (with the exception of Christmas Day and Boxing Day) without rest and meal breaks amount to a breach of

⁵ *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

⁶ *Supra* n 2 at [975].

duty on the part of Bela Ltd which may give rise to a claim that the contract has been repudiated.

Was a resignation reasonably foreseeable

[42] In his oral evidence Mr Stojkov told the Authority Mr Sterjov did not seem surprised when he resigned. Mr Stojkov says that when he resigned Mr Sterjov literally showed him the door.

[43] I find the breaches of duty I have found earlier in this determination were sufficiently serious to make it reasonably foreseeable that Mr Stojkov would not wish to continue in his employment.

[44] Mr Stojkov's resignation was, in reality, a dismissal which was unjustified. Mr Stojkov is entitled to a consideration of remedies.

Remedies

[45] Mr Stojkov seeks payment of lost wages and compensation for hurt and humiliation as a result of his unjustified constructive dismissal.

Lost wages

[46] Where the Authority determines an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration pursuant to section 128 of the Act.

[47] In considering an order for remuneration under section 128, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.⁷

[48] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.⁸

⁷ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05).

⁸ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977.

[49] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like⁹.

[50] Mr Stojkov found alternative employment which he commenced on 6 May 2014. He seeks payment of lost wages for the period 4 February to 6 May 2014 a period of 13 weeks.

[51] I am satisfied Mr Stojkov was diligent in the steps he took to mitigate his loss. The evidence shows he made substantial efforts to find alternative employment. The fact that his visa was bound into the employment relationship with Bela Ltd became a barrier for him and made it more difficult to find alternative employment.

[52] Bela Limited is ordered to pay to Mr Stojkov lost wages in the amount of \$11,067.94 without deduction within 28 days of the date of this determination.

Compensation

[53] Mr Stojkov seeks the payment of \$20,000 pursuant to section 123(1)(c)(i) of the Act. In support of his claim Mr Stojkov gave compelling evidence to the Authority of the distress his dismissal has caused.

[54] After he left his employment Mr Stojkov says he felt used, taken advantage of and utterly humiliated. He was forced to go door to door in order to obtain alternative employment. Being unsuccessful in obtaining new employment also left him anxious about his ability to find work.

[55] I am satisfied Mr Stojkov has suffered humiliation, loss of dignity and hurt feelings. In all the circumstances I am of the view that an appropriate award for compensation is \$7,500.

[56] Pursuant to section 123(1)(c)(i) of the Act Bela Limited is ordered to pay to Mr Stojkov the sum of \$7,500 without deduction within 28 days of the date of this determination.

⁹ *Allen v Transpacific Industries Group Ltd t/a Media Smart Ltd* [2009] 6 NZELR 530 at [78].

Contribution

[57] Having determined that Mr Stojkov has a personal grievance I am required to assess the extent to which he contributed to the situation which gave rise to his grievance and reduce any remedies accordingly. Contribution denotes blameworthy conduct. In this case I find no such conduct established and therefore the remedies will not be reduced to reflect any contribution.

Application for penalties

[58] Mr Stojkov claims Bela Ltd breached its statutory obligations of good faith, the express terms of the employment agreement and the Act for which he seeks the imposition of penalties.

Breach of good faith

[59] Mr Stojkov claims Bela Ltd breached its obligations of good faith by failing to be active and constructive in maintaining a productive employment relationship with him and by failing to ensure the mutual obligation of trust and confidence remained intact between the parties for the duration of the employment relationship.

[60] In his written evidence and at the investigation meeting Mr Stojkov told the Authority that Mr Sterjov repeatedly swore at him and treated him poorly. Mr Stojkov says that when he made enquiries about the wages he was receiving Mr Sterjov would not address his concerns and simply stated that “...*that is how it is*”.

[61] These failures combined with the breaches of the employment agreement and the Act all combine to demonstrate that Bela Ltd did not act in good faith towards Mr Stojkov. I find Bela Ltd was not constructive or active in maintaining a productive employment relationship with Mr Stojkov and through Mr Sterjov, Bela Ltd was in breach of its obligations of good faith.

Breach of employment agreement

[62] Mr Stojkov claims Bela Ltd breached the express and implied terms of the employment agreement by failing to treat him fairly and by failing to adhere to clauses 2(a), 3(a), 4(a), 4(b) and 5(a).

[63] Clause 2(a) of the employment agreement requires Bela Ltd to adhere to all of the terms set out in the employment agreement. Bela Ltd has breached the express terms of the agreement by failing to pay public holidays in accordance with the Holidays Act which is specifically referred to in clause 5 of the agreement. This is a serious breach of the employment agreement.

[64] Clause 3(a) states that the employment relationship is for a fixed term of 3 years. The clause does not meet the requirements set out in section 66 of the Act which requires the employment agreement to not only specify the date on which the agreement will end but also the way in which the employment will end and the reasons for the employment ending in that way.

[65] I find that while the agreement purports to be a fixed term agreement for a period of three years, the clause is invalid and therefore Bela Ltd has not breached that clause of the agreement.

[66] Clauses 4(a) and 4(b) sets the rate of pay for each hour worked as \$20.00 per hour and states that wages will be paid either by direct credit or by cheque. All calculations of the arrears of wages have been based on an assumption that Mr Stojkov was paid on the basis set out in the employment agreement. I have already found Mr Stojkov did not receive that rate for every hour he worked as required by that clause.

[67] The requirement to pay by direct credit or by cheque was not adhered to. Instead Mr Stojkov received a cash payment each week. The Wages Protection Act 1983 requires that wages be paid in money except where there is written consent.¹⁰ In this case Mr Stojkov gave his written consent to receiving the payment of his wages by direct credit into a bank account or by cheque.

[68] If Bela Ltd wished to vary this arrangement it needed to seek Mr Stojkov's agreement. Given that Mr Stojkov received his wages in money I do not consider the breach to be particularly serious. The failure to pay \$20.00 per hour for every hour worked, however, is a serious breach of the employment agreement.

¹⁰ Wages Protection Act 1983, sections 7 and 9.

[69] Clause 5(a) incorporates the wording from the Holidays Act with respect to payment for public holidays. The failure to adhere to this requirement is a serious breach of the employment agreement.

[70] I find Bela Ltd has breached clauses 2(a), 4(a), 4(b) and 5(a) of the employment agreement.

Breach of Employment Relations Act 2000

[71] At the investigation meeting Mr Bryant attempted to extend Mr Stojkov's claims under this heading to include a breach of section 130 in that Bela Ltd failed to keep and maintain a wages and time record for Mr Stojkov. I declined to investigate this additional claim as the respondent was not on notice of the claim and has had no opportunity to respond to it.

[72] In his submissions Mr Bryant urged the Authority to use the discretion conferred by section 160(3) of the Act to allow it to investigate and determine this claim. Mr Bryant's submissions are misconceived. Section 160(3) allows the Authority to treat a matter as a different type than described in the statement of problem. In this case, Mr Bryant has attempted to raise a completely new claim. I confirm my notification to Mr Bryant that this new claim has not been investigated and will not be addressed in this determination.

[73] Mr Stojkov claims Bela Ltd breached the Act by failing to provide the rest and meal breaks pursuant to section 69ZD. Mr Stojkov seeks the imposition of a penalty pursuant to section 69ZF of the Act.

[74] As stated in *Greenslade v Jetstar Airways Limited*¹¹ the provisions set out in section 69ZD impose a floor beneath which employers cannot go in terms of minimum working conditions.

[75] Bela Ltd has provided no evidence that would justify a departure from the minimum statutory requirements.

¹¹ [2014] NZEmpC 23.

[76] I find Bela Ltd has breached section 69ZD by failing to provide rest and meal breaks to Mr Stojkov during his employment.

Penalties

[77] Mr Stojkov has applied to the Authority for the imposition of penalties for the breaches of good faith, the breaches of the employment agreement, and breach of section 69ZD of the Act. Mr Stojkov asks that the recovered penalties be paid to him pursuant to section 136(2).

[78] Section 135 of the Act allows for the recovery of a penalty where a party breaches an employment agreement, or where the Act has been breached and the provision which has been breached provides for a penalty. In the case of a company, the maximum penalty is \$20,000.00.

[79] A penalty will apply to breaches of good faith where those breaches were deliberate and sustained or are intended to undermine the individual employment agreement or the employment relationship. I am satisfied the breaches of good faith by Bela Ltd were deliberate. It is difficult to see how the way in which Mr Sterjov conducted himself was anything other than deliberate. The conduct was sustained throughout the period of the employment relationship and from the evidence before the Authority had the intention of undermining the employment relationship.

[80] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*¹² the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

¹² [2014] NZEmpC 65.

[81] Mr Stojkov is a recent migrant to New Zealand. Mr Stojkov's work visa was directly related to his employment at Bela Ltd. When Mr Stojkov resigned from his employment he was unable to legally work in New Zealand until he could pay for a change to his visa requirements. With no job that became difficult.

[82] Mr Stojkov was from Macedonia. Mr Stojkov trusted that when he moved to New Zealand he would be treated properly and paid according to the employment agreement and in accordance with the law. The failure by Bela Ltd to pay Mr Stojkov for all hours he worked, for failure to pay correctly for public holidays and annual holidays are serious breaches.

[83] The breaches were repeated throughout Mr Stojkov's employment and when he raised questions about his pay Mr Stojkov failed to address his concerns.

[84] The impact on Mr Stojkov was such that he resigned from his employment. As an immigrant working pursuant to a visa which was related directly to his employment at Bela Ltd Mr Stojkov was in a vulnerable position.

[85] I find that this case warrants the imposition of penalties. I consider a penalty of \$3,000 for the breach of good faith to be justifiable. I have taken a global approach to the breaches of the employment agreement and consider a penalty of \$3,000 to be justifiable. I consider a penalty of \$3,000 for the breach of the Employment Relations Act 2000 to be justifiable.

[86] Bela Limited is ordered to pay penalties of \$9,000 into the Authority within 28 days of the date of this determination. Pursuant to section 136(2) of the Employment Relations Act 2000, 50% of the penalty is to be paid to Mr Stojkov. The remaining 50% is to be paid to the Crown.

Costs

[87] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Stojkov shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Bela Ltd shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority