

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 608
3165841

BETWEEN SARAH TINDALL
Applicant

AND WINTERSET PROPRIETARY
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Ruth Pettengell, advocate for the Applicant
Fiona McMillan and Abby Shieh, counsel for the Respondent

Investigation Meeting: 22, 23, 24 November 2022 at Christchurch

Submissions received: 15 December 2022 from the Applicant
31 January 2023 from the Respondent

Information provided: 11 and 13 July 2023

Determination: 18 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Tindall was employed by the respondent (Winterset) in its holiday accommodation park (KP) from around March 2018 until November 2020 when she ended the relationship by resigning. The co-directors of Winterset are Mr and Mrs Winter (the Winters). KP is situated in a rural town on the way to other popular holiday areas and attracts passing through seasonal tourism as well as guests needing accommodation when they work in the area. The complex



includes cabins, campervan and caravan sites, communal amenities, and a petting zoo. Ms Tindall worked at KP for Winterset and also rented accommodation from the Winters that was a house next to KP. During her employment she moved into the house on the site of KP with her children and continued to rent this from the Winters or Winterset. There were no written terms and condition of employment and no written tenancy agreement.

[2] Ms Tindall claims she is owed wage arrears for unpaid time spent looking after or being available to look after the KP site when the Winters were increasingly absent from the property. She says this situation together with cash payments and incomplete documentation about her employment and how it interfaced with her accommodation both disadvantaged her in her employment and led to her resignation. She says she was ‘deliberately’ exploited and that during her employment she did not raise any issues because she was ‘stuck’ in the accommodation attached to her employment with the increasing stress of working more and more and not being able to spend time with her children. She says she felt intimidated by Mrs Winter.

[3] After her employment ended Ms Tindall through her representative raised grievances for both disadvantage and constructive dismissal. She raised a further ‘grievance’ for ‘breach of good faith’ due to claims about alleged director behaviour towards her after her employment ended.

[4] Ms Tindall claims wage and holiday entitlement arrears with interest, together with lost wages and compensation for the grievances. Her claims for various penalties for breach of statutory employment standards obligations were lodged on her behalf in the Authority outside of the 12-month time frame¹. These are now withdrawn.

[5] I asked questions at the investigation meeting about deductions from wages and relying on s 160(3) of the Employment Relations Act 2000 (‘the Act’). I will consider Winterset’s statutory obligations² in relation to these as well as whether Ms Tindall was likely paid minimum wage and associated holiday entitlements including the public holidays.

¹ Employment Relations Act 2000, s135,(5).

² Wages Protection Act 1983, ss 4,5 and 11.



[6] Winterset denies all claims. It says Ms Tindall was employed ‘as and when required’ throughout her employment, that she was being given support and the opportunity to gain new skills. It denies she worked or was ‘on call’ for the hours she claims were unpaid. The claims made about director behaviour after the employment ended are also denied and challenged based on the claimed breach of a duty of good faith not extending beyond the employment relationship ending.

[7] The Winters say that the informality of the relationship of employment and tenancy was in hindsight against their better judgment, but that it was arranged that way to assist Ms Tindall in her financial and domestic situation and to give her more money to hand for ‘necessities’ rather than to take advantage of, or to exploit her. The Winters say they thought Ms Tindall left for family reasons and that she had been happy throughout her employment working and living alongside them with her family at KP. They say they were keen to have her stay on and refute that Winterset could be blamed for her resignation.

The Authority’s investigation

[8] The Authority held an investigation meeting across two and a half days. Witnesses were heard both in person and remotely. The representatives provided written submissions after the investigation meeting.

[9] As permitted by s 174E of the Act this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It does not record all evidence and submissions received.

[10] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur, he decided, as he is permitted by s 174D(2) and (3) of the Act to allow the extension. Beyond the extension I further asked for more information from the parties which was helpfully provided.



My approach to the wage arrears and statutory entitlement claims

[11] My approach to the above is considered against a background of Winterset's inadequate employment records and a mixture of cash payments, and payments 'through the books' which are inconsistent with time records. Alongside of all of this are handwritten scraps of paper (provided by Winterset) showing tallied wages against accommodation costs which are either deducted from wages or a running tally of 'what Sarah owes'. My determination is also considered against a background of voluminous amounts of material produced by the parties which has impacted the length of time to deal with this problem.

[12] It was submitted for Ms Tindall (after the Investigation meeting) that I should allow more time for Ms Tindall to compile a more specific updated claim for wage arrears based on s 132 of the Act. I have declined this. That section has the effect that such a compilation could then (based on inadequate records but subject to a successful defence by the employer to show it is incorrect) be taken as proven.

[13] I am not satisfied the use of s132 of the Act would have been a useful exercise for Ms Tindall. The use of this provision is discretionary and could have been proposed earlier in the proceedings to give some fairness in process to Winterset. In my view the section's use is more suited to where an employee does have some semblance of their own records or contemporaneous evidence to support the specifics of hours worked. As will become evident below, Ms Tindall's evidence does not support specifics of actual time she would have worked (to allow quantification) in the 'extra' hours claimed. Her own evidence also includes that she took no notice of what she was paid in cash payments when the amounts were written on brown envelopes (none of which have been kept by either party). In her oral evidence she confirmed that she had no issues with the first year of her employment in 2018, this being inconsistent with the claimed wage arrears for that time in her Statement of Problem to which Winterset has produced considerable material to defend. In other words, the matter before me at least as far as the parties themselves are concerned has presented as hard fought and positional. Accordingly, I will continue to consider this issue based on what is before me.



[14] I cannot ignore the clear statutory requirements that exist for the Winterset as the employer. This is even though these may not have been presented by Ms Tindall. Accordingly, I will consider these under the relevant issues below.

[15] Overall, my approach to this investigation and the remedies I conclude relies on the following:

Section 157(1) of the Act:

The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

and

Section 160(3) of the Act:

The Authority is not bound to treat a matter as being of the type described by the parties, and may in investigating the matter, concentrate on resolving the employment relationship problem, however described.

The issues

[16] The issues are:

- a. Was Ms Tindall likely paid for all the hours she worked and if not how is this to be remedied?
- b. Is Ms Tindall entitled to statutory holiday and minimum wage entitlements and how is this to be remedied?
- c. Are there likely deductions from wages in breach of the Wages Protection Act 1983 (WPA) and if so, what is the remedy?
- d. What if any interest is to be ordered on any arrears found owing on the above?
- e. Has Ms Tindall raised claims relating to disadvantage within time and if so was she disadvantaged in her employment by unjust actions of her employer?



- f. Was Ms Tindall constructively dismissed and was the dismissal unjustified?
- g. Depending on the above, what remedies are to be awarded for either or both grievances?
- h. Is Ms Tindall able to claim a breach a duty of good faith based on alleged actions of the directors after Ms Tindall left her employment and if so, was there a breach and if so, what is the remedy?
- i. If remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Ms Tindall that contributed to the situation giving rise to her grievance(s)?
- j. Is either party to contribute to the costs of the other?

Was Ms Tindall likely paid for all the hours she worked and if not how is this to be remedied?

[17] The Act allows an employee to claim for unpaid wage arrears from their employer if during the time of their agreement to be an employee (expressed as a ‘contract of service’) there has been a default in the wages or other money payable for the ‘whole or any part, as the case may require, of any such wages or other money’.³ This recovery applies even if the employee has accepted payment at a lower rate or because of ‘any express or implied agreement to the contrary.’⁴

[18] Ms Tindall initially claimed a total of \$47,532.08 in gross wage arrears covering the whole period of her employment from 1 April 2018 to 8 November 2020. This appears to have been revised after the investigation meeting.

³ Employment Relations Act 2000, s 131(1).

⁴ As above at s131(2).



“On call”

[19] Part of Ms Tindall’s claim to be paid wage arrears is that she worked hours ‘on call.’ I will deal with this first and then consider whether she worked actual time that was unpaid during her employment.

[20] It has been submitted for Ms Tindall that I should consider the application of case law that is often referred to as the ‘sleepover’ cases where it has been found that employees in jobs where they are ‘on call’ are entitled to be paid for the hours (at minimum wage rates) where they remain available to work even if they don’t actually get called to work. The question has been described by the Court as one of ‘mixed fact and law’ as to whether employees on such sleepovers could be regarded as ‘working’.⁵

[21] The Court of Appeal⁶ considered three factors that apply in these types of cases:

- a. significant constraints on the employee’s freedoms
- b. employees had significant and extensive responsibilities (for example sleeping in a house where it was necessary to respond to those with disabilities or students to whom the employer had a high level of pastoral care and welfare responsibilities)
- c. the ‘sleep over’ role was beneficial to the employer because it met other obligations it had to meet such as care and welfare to live-in young students or disabled clients with high needs.

[22] The restrictions on the employee’s personal freedoms and whether the role to be responded to is one that is consistent with a type of ‘sleeping with one eye open’ do not easily relate to the situation before me. Ms Tindall was at all times of her employment living

⁵ *Victoria Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [5].

⁶ *Idea Services Ltd v Dickson* [2011] 2 NZLR 522 later applied in the above in the school boarding house context.



effectively in her own 'home' subject to a dispute about it not being private enough for her and her children, a matter best dealt with as part of that tenancy relationship.

[23] The response to KP guest demand is not in the category considered where that response relates to special needs of serious health or welfare. There are examples in messaging that show Mrs Winter when off site continued to check in about bookings, wanted sales to be picked up and any guest needs attended to. Many include making sure guests paid or were paid correctly. All of this either to her son Daniel (messages up to when he likely left the KP property in February 2019) and to Ms Tindall. These messages occur in the mornings and at night as late as about 11.00pm. Overall, these are understandable things for Winterset to be concerned about if the directors are not on site. However, even if Ms Tindall had clear evidence about the extent to which she was needing to remain available and when, that responsiveness is not of the type considered in the above 'on call' cases.

[24] Accordingly, I find this claim for unpaid wages is more appropriately considered by asking whether Ms Tindall was paid for all the work duties she completed for Winterset.

Unpaid wages for work done

[25] The Act allows an employee to claim for unpaid wage arrears from their employer if during the time of their agreement to be an employee (expressed as a 'contract of service') there has been a default in the wages or other money payable for the 'whole or any part, as the case may require, of any such wages or other money'.⁷ This recovery applies even if the employee has accepted payment at a lower rate or because of 'any express or implied agreement to the contrary.'⁸

[26] Ms Tindall initially claimed a total of \$47,532.08 in gross wage arrears covering the whole period of her employment from 1 April 2018 to 8 November 2020.

⁷ Employment Relations Act 2000, s 131(1).

⁸ As above at s 131(2).



[27] Ms Tindall acknowledged to me that at the start of her employment (I take it during 2018) she was doing extra things to have an opportunity to ‘upskill’ and that she had no issues with her employment during 2018. During the time she ‘looked after’ KP while the Winters were away overseas in August to September 2018, I accept things were quiet on the guest front. She was nominally paid cash (I will deal with deductions later) that covered considerably more at minimum wage than her timesheet recorded hours for this time. Her timesheets for that time recorded cleaning far fewer cabins than in the summer times, cleaning communal facilities, and general camp duties and some gardening. According to guest numbers I do not find ‘extra’ duties likely occurred to the extent that they may have done in the busier summer times.

[28] I note here the claim that Ms Tindall worked extra time looking after the animals in the petting zoo. I accept as likely the affirmed oral evidence of Mr Winter that the animals were easy maintenance, and that Ms Tindall chose to participate in their care because she enjoyed this. This is consistent with photos of her and messages about how much she enjoyed for example having a lamb with her in her home.

[29] Accordingly, I find I should consider the ‘extra’ duties as potential unpaid work more sensibly from the summer of 2018 to 2019. I accept the guest season then dropped off until the next summer of 2019 to 2020 and again followed an increase in guest numbers in the summer of 2019 to 2020. From approximately March 2020 to the end of the employment in November 2020 which started with KP closed during the Covid-19 lockdown when Ms Tindall moved into the Winters’ home at KP with her family, there are no timesheets to assist me. I accept in the pandemic environment of 2020 there would have been a downturn in guests. Guest diaries appear to support this.

[30] I further accept Winterset’s evidence that it used the government wage subsidy to pay Ms Tindall during the time she lived in their home. I find the Winters moved permanently to their other property when Ms Tindall moved into their KP home. While Mrs Winter gave oral evidence that they had not moved permanently (I accept they left their possessions and their main bedroom locked) the reality of the situation was that Ms Tindall and her family had vacated the adjacent house which was then advertised for rent and let to others. This was not a temporary ‘lockdown’ move for Ms Tindall.



[31] Considering the above and having considered what was likely here I find that Ms Tindall's claim to have worked extra hours was likely at its acute stage during the summer times.

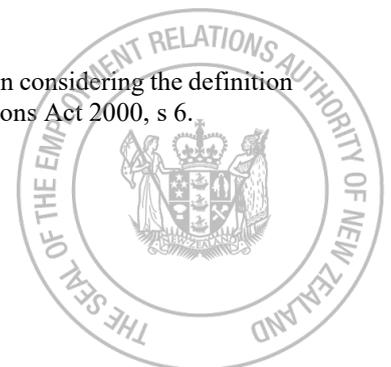
What unpaid extra duties if any did Ms Tindall likely perform in the summer months of 2018-19, 2019-2020?

[32] Firstly, when considering the two summers, I do not accept the Winterset position that Ms Tindall could be regarded as completing any extra reception type duties during the summer months on the basis of an exchange for unpaid 'upskilling.' The Employment Court has considered this type of situation in the campground context and found that a person cannot be regarded as a volunteer when their work benefits the business rather than it being towards a charitable type organisation.⁹

[33] Messaging between Mrs Winter and her son Daniel and later Ms Tindall support that Mrs Winter's approach was to ensure that the 'on site' person (when she was away from KP) knew about online bookings coming in, knew which cabins to have available and how to juggle any logistics of cabin availability ensuring that someone was going to clean the cabins each day. The messages are morning and evening and sometimes as late as about 11.00 pm. They are sometimes contemporaneous with guest check-ins happening. They show encouragement from Mrs Winter to Ms Tindall, and Ms Tindall saying how pleased she is with her own efforts. Mrs Winter's pattern of managing from afar is what I would expect from a person knowing how to run a holiday park and to be fleet of foot to the unpredictability of the busy season.

[34] I find Daniel Winter's evidence helpful to show me the sort of way Winterset likely operated at KP during these two summers of Ms Tindall's employment. The messaging between him and his mother up until February 2019 shows the busy nature of evening check ins when guest numbers rise. I find it likely this flurry of activity likely occurred for the 'on site' person between about 5.00pm and 8.00 pm when messages show (at times) Mrs Winter would then

⁹ *Kidd v Beaumont and ors* [2016] NZERA Auckland 64, 26 February 2016 at [45] when considering the definition of a 'volunteer' on no pay as an exception to an 'employee' under Employment Relations Act 2000, s 6.



tell the 'on site' person to close up the reception office and leave any late comers a key and instructions.

[35] Alongside this I find the messages help to show me that it was not uncommon for Mrs Winter to message Ms Tindall to say that they were staying away another night or so. I accept however that these messages do not fully support a clear view of how often this occurred. Ms Tindall also appears to have gone away, inconsistent with her position that this never occurred. Voluminous material from Winterset working out times that other family members were visiting or travelling (including GPS records) to KP also lacks the specifics of how often Ms Tindall in those summer months was the 'on site' person particularly in the evenings.

[36] Drawing on what is before me, including Ms Tindall's oral evidence that she could not face another summer,¹⁰ I accept she felt under pressure in the summer months working most days on cleaning considerably more cabins than in the off season and then responding in the evenings to guests when no one was in the home on the KP grounds. I find it likely the latter was paid for by Winterset in wages.

[37] Witnesses for Ms Tindall, her mother, daughter (at the time a child) and friend observed she had less time to spend with her children, one of whom particularly needed her support. The trouble is that Ms Tindall did not likely did not tell any of this to the Winters and more problematically has little evidence to show when she likely worked these hours.

[38] While Winterset's submission is that KP ran itself and guests could just self-check in, I find some likelihood this did not get put in place until after the lockdown was over and the Winters began commuting to and from the business from their property elsewhere.¹¹ There is evidence that Ms Tindall likely did have noted on 'scrap' paper 'wages' time as 'minding' to '31/10' "\$ 300.00" [I take it as 2019]. However, there is no other reference satisfying me that I can safely deduce what period this covers. It is also the only reference I can find for the hours likely to relate to looking after KP in the evenings that is acknowledged as a potential wages payment or payment due. It appears next to a tally for accommodation costs.

¹⁰ Given in the context of her reason for resigning that I return to later.

¹¹ The adjacent house was rented out, so this was not a temporary move for Ms Tindall.



[39] Standing back from the above while I find a likelihood that Ms Tindall did perform some duties over and above those recorded on her timesheets and most likely during the summer months, I do not find she has supported her wage arrears claim with sufficient evidence to now be able to ascertain the times and likely hours of work performed. For this reason, her claim is dismissed for wage arrears based on this extra work she says was performed and unpaid.

[40] Taking the pragmatic view that I indicated above, I will now deal with this matter by considering how Winterset's employer obligations in relation to employment standards have impacted on what Ms Tindall was likely paid or not paid.

Is Ms Tindall entitled to statutory holiday entitlements and how is this to be remedied?

Holiday pay – public holidays

[41] Ms Tindall has claimed she was not paid for the eight public holidays that fell during her employment. This is in the initial claim and is based on the associated wage arrears claim which I have dismissed above.

[42] Timesheets before me finish on 16 March 2020 before the final four public holidays that fell before the end of Ms Tindall's employment. The timesheets I have show that Ms Tindall worked a total of 27.85 of Public Holidays as set out below. There is nothing to show these days were recognised in payments to her¹² except across the Christmas New Year period of 2019 to 2020 after considering the Time, Pay and Wages records. Therefore, taking those four public holidays out and not including any time worked after March 2020 due to a lack of timesheets recording any time and a presumption of the likelihood of the down season, I find the following were public holidays worked.

¹² Holidays Act 2003, s 50



	2018	Hours on timesheets
Queen's Birthday	4 June	3.5
Labour Day	22 October	1
	2019	
Nelson anniversary	4 February	3 plus 40 minutes [3.6]
Waitangi Day	6 February	2
Good Friday	19 April	4
Anzac Day	25 April	5
Queen's Birthday	3 June	15 minutes [.25]
Labour Day	28 October	1.25
	2020	
Nelson Anniversary	3 February	3.25
Waitangi Day	6 February	4

[43] I find Winterset has breached its obligation to pay extra half time on the above days. I calculate this as follows:

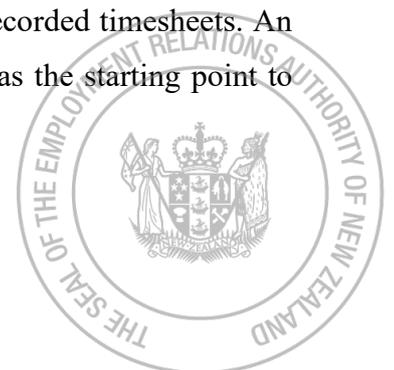
- a. Total of hours of 10.1 hours worked at minimum wage rate of \$17.70 gross = 178.77 half of which is \$89.39 gross.
- b. Total of 17.75 hours worked at minimum wage rate of \$18.90 gross = \$335.48 half of which is \$167.74 gross.

[44] Winterset is ordered to pay Ms Tindall a total of **\$257.13** due to its breach of s 50 of the Holidays Act 2003.

Minimum Wage Act 1983

[45] According to Winterset Wage, Pay and Time records it has paid the minimum wages for the hours worked from November 2018 at the respective minimum wage rates. That is what Winterset is statutorily obliged to do.

[46] The Wage, Pay and Time records do not reflect Ms Tindall's recorded timesheets. An example is fortnights from 20 January 2019 showing 10 hours worked as the starting point to



calculate 'ordinary' gross wages for each fortnight. The corresponding fortnights in the timesheets show: 29.50, 28.5, 41.25, 42.50, 34.45, 25, 27.25, 36.5, and 17.25 recorded as worked hours. In the fortnight ending 24 November 2019 Ms Tindall records a total of 29.5 hours but the corresponding Time, Wage, and Pay and Wages record shows gross earnings at the then minimum wage rate of 10 hours still. Bank transactions provided from Winterset show Ms Tindall was paid according to the Wage, Pay and Timesheets from November 2018 onwards.

[47] I find that have continued to be paid cash alongside the Time, Pay and Wages records. For the sake of bringing this problem to an end I accept the cash payments that have been summarised as paid to Ms Tindall.¹³ Winterset has breached its obligation to keep accurate records (s 131 of the Act) and the above anomalies indicate a breach of wages at the adult minimum wage rate on those records. I have not then assessed whether the cash payments remedy this on a fortnightly basis against timesheets. Winterset is to undertake this exercise and pay any amount short of the minimum wage rates at the time. This is to be for the whole period of employment.

[48] Accordingly, Winterset are now to remedy the above in the following way:

- a. For the whole period of Ms Tindall's employment Winterset is to calculate in gross and pay to Ms Tindall any unpaid wages under the applicable minimum adult wage rates¹⁴ during her employment. Sections 4 and 6 of the Minimum Wage Act 1983 apply.
- b. Winterset is to calculate the above on a fortnightly basis as pays were due and not by overall averaging. It is to use timesheets as provided in these proceedings, its stated record of cash payments as provided in these proceedings¹⁵, and the fortnightly gross wage figures recorded in the 'Time, Pay and Wages' record provided in these proceedings¹⁶. Those figures are not to include holiday pay inclusive rates or public holiday entitlements (on top of wage gross) recorded on the Time, Pay and Wages

¹³ Attached to Statement in Reply headed "Sarah Tindall Updated Earnings -Cash"

¹⁴ <https://www.employment.govt.nz/hours-and-wages/pay/mimimum-wage/previous-rates>

¹⁵ As above at note 13.

¹⁶ Common Bundle, volume 2, Tab 42.



records in the fortnights that included Christmas and New Year public holiday payments over 2019 to 2020. These entitlements are dealt with elsewhere in this determination. That is the only reliable record kept of public holiday entitlement kept and the only one I accept as likely assessed as due.

- c. For the sake of clarity, the payment resulting in this exercise not to have any deductions or set off for accommodation costs. Any issues relating to costs owing on the separate accommodation agreement are not things I can order in this jurisdiction.
- d. Time to complete the above exercise is referred to in the summary of orders below.

Holiday pay entitlements

[49] The obligation under s 28 of the Holidays Act 2003 that allows holiday pay to be paid as an inclusive 8% loading on regular wages is conditional on specific statutory conditions:

- a. The employee
 - (i) is employed ... [on a written fixed term contract] ... for less than 12 months; or
 - (ii) works for the employer on a basis that is so intermittent and irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays ... [paid annual leave time] ; and
- b. the employee agrees in his or her employment agreement ; and
- c. the ... rate is not less than 8% of the employee's gross earnings.

[50] The provision is strict in its wording, and it should be evident to the parties from the way that Winterset has arranged Ms Tindall's employment that there has been no record of the above agreement in writing in an employment agreement. Section 28(4) then applies in that despite any payments made as inclusive holiday pay throughout the employment 'the employee becomes entitled to annual holidays in accordance with payment for four weeks of annual holidays plus 8 % for any part year to termination.

[51] I therefore find that under s 28(4) Ms Tindall has become, at the end of her employment, entitled to payment for annual holiday pay in accordance with s 16 of the Holidays Act 2003. This is payment to Ms Tindall of four weeks per full year of her employment (8 weeks at the



greater of her average or ordinary earnings¹⁷) together with a payment of 8% gross for the remaining part year of earnings to the end of Ms Tindall's employment.¹⁸ Again Winterset are tasked with calculating what is now owed to Ms Tindall in a time frame given below under the summary of orders.

Are deductions from wages in breach of the Wages Protection Act 1983 (WPA) and if so, are these to be awarded back to Ms Tindall?

[52] There is a strict statutory obligation on an employer to pay an employee their wages when due in the 'entire amount,' without deductions, unless the employee has given written consent which can include consent in an individual employment agreement, or on the written request of the worker.¹⁹ No such written consent is before me. While Winterset's evidence includes that Ms Tindall wanted her earnings to be unrecorded this does not alter the clear obligations it has as an employer.

[53] The following are deductions I have identified across scrap paper evidence provided by Winterset.

[54] In calculating a total figure of deductions²⁰, I have done my best to identify amounts which seem more likely than not to indicate deductions made from Ms Tindall's wages due. These have generally been those that show a figure of wages due to Ms Tindall against an apparent reconciliation (all in handwriting that I accept is Mrs Winter's) with accommodation costs for the house owned not by the employer Winterset but by the Winters, as confirmed by them.

[55] For the sake of clarity, I do not find the rental situation at the adjacent house to which I find the deductions from pay likely mostly all apply was part of the employment package. Had this been the case, I may have entertained the statutory obligations on an employer to only

¹⁷ Holidays Act 2003 s 24(2).

¹⁸ Holidays Act 2003 s 23(2).

¹⁹ Wages Protection Act 1983, ss 4,5 and 11.

²⁰ Common Bundle, volume 2, Tab 43.



equate 5% or 15% to deductions from wages towards the cost of any accommodation situation subject to the minimum wage rate.²¹

Table of deductions

2018		
1 April	“power and internet”	158.45
23 April	“internet”	50.00
13 April	“power to 13 April”	153.18
13 May	“power to 13 May”	190.03
19 June	“power and internet”	150.00
14 May-13 June	“power”	201.94
17 July	“internet”	56.00
14 June – 13 July	“power”	211.93
June	“water and sup”	245.00
14 July-13 August		210.14
14 August -13 September		221.21
August	“balance of rent”	420.00
December	“Power”	140.33
	“Water”	528.56
2019		
20 January	“power /water”	150.00
To 13 January	“power and internet”	158.45
To 13 February	“internet”	127.15
To 13 March		113.85
To 13 April		140.00
13 May	“1/2 power a/c to 13/5”	77.00
13 December (presumed as 2019 given its position in evidence)	“power”	123.20
	Subtotal of deductions:	3826.42

[56] I find further likely deductions as follows:

²¹ Minimum Wage Act 1983, s7.



- a. "Hours 2019" note records "25 Hours worked across 23/6,22/7 and 4/8 and note cash payments adding to wages for these of \$180.00,\$100.00, \$80.00. The total wages due for this work is calculated as \$635.00. Then follows a calculation for "power and water to June" as being \$665.00. A zero balance then seems to set one off against the other. I find a deduction from wages of the whole wages of **\$635.00**.
- b. On the same note as directly referred to above, there is a record of hours worked as 14.25 to 29 August 2019 plus a further \$200 for cash due, a total of wages due \$400.00 from which \$200.00 was deducted. I find a deduction from wages of **\$200.00**.
- c. On a note headed with "Sarah owed at 29/8 140.51 a deduction of \$170.00 is taken for "Power to 13/9." I find a deduction from wages of **\$170.00**.
- d. On the same note directly referred to above there are a total of 18.75 hours recorded as due in wages with additional cash payments to a total of \$440. Deductions total 561.00 for "power to 13/10" "161.00" and "rent owed 1/10" "\$300.00". I find a deduction from wages of **\$561.00**.
- e. Note headed "Income Xmas 2020 as "\$1000.00 and "wages" and Cash" of \$770.00 leaving a balance of \$230.00. I find a deduction of wages of **\$230.00**.
- f. On the same note as referred to above "water \$392", "power Nov \$140.00" and "power Dec 120.00" totals **\$652.00** which I find was deducted from wages.

[57] I find a likelihood that a further two larger scrap notes contained in this evidence to be consistent with a form of reconciliation and do not show they are likely deducted from wages but are a type of running record. This is consistent with Winterset saying no deductions were made after Ms Tindall moved into the Winter's home in around March 2020. Again I will take this as likely based on the evidence being affirmed.

[58] I find the total of deductions is likely \$6,274.42. \$6,274.42 is ordered to be paid to Ms Tindall because Winterset has breached section 4 and 5 of the WPA.



What if any interest is to be ordered on any arrears found owing?

[59] An award of interest is discretionary. Guidance for this exercise of discretion is contained in the Act where long standing and repeated non-compliance with a demand notice must be considered.²² Based on the same principle, I have nothing before me to show a pattern of non-compliance with employment standards by Winterset. I find there is an individualised situation that has occurred in this employment relationship problem. Accordingly, I decline to award interest.

Was Ms Tindall disadvantaged in her employment by unjust actions of her employer and are there any claims not raised within time?

[60] I have considered the disadvantage grievance and accept the submission on behalf of Winterset that the matters raised were not raised within the 90 day period.²³ In any event the narrative put forward for her under this grievance appears to relate to the same things that support her claim that she was constructively dismissed. I will therefore deal with that now.

Was Ms Tindall constructively dismissed and was the dismissal unjustified?

[61] When considering whether there has been a constructive dismissal the Court of Appeal²⁴ has said 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.

[62] There are three non-exhaustive situations²⁵ where constructive dismissal might occur:

²² Employment Relations Act 2000, Schedule 2, section 11.

²³ Employment Relations Act 2000, s144.

²⁴ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

²⁵ *Cooke J in Auckland Shop Employees Union v Woolworths (New Zealand) Limited (1985) 2 NZLR372 (CA)* at 374 following an approach previously taken in the former Arbitration Court in NZ.



- a. The employee is given a choice of resignation or dismissal.
- b. The employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign.
- c. The employer has breached a duty serious enough that the employer ought to have reasonably foreseen that the employer would resign as a result.

[63] The Court of Appeal²⁶ has further explained the two-step approach to determining a constructive dismissal when it is based on employer breaches of duty. This is to ask whether the resignation was caused by an employer breach considering all the circumstances of the resignation. Secondly, to ask whether the breach of duty is of sufficient seriousness that a substantial risk of resignation was reasonably foreseeable.

Did Winterset breach duties owed to Ms Tindall?

[64] As I understand the submissions for Ms Tindall, it is the last category that is the basis for this part of Ms Tindall's claim. She lists in her submissions the breaches of employment standards, and that Winterset did not follow through and provide her with permanent employment to get her off the benefit she was on. I am not satisfied the latter was a breach. There is no evidence of an agreement. Evidence of the government agency file notes show discussions resulted in confirmation that Winterset could not offer permanent employment.

[65] I find the evidence before me is sufficient to show that Winterset has breached several employment standards duties owed to Ms Tindall. This includes not retaining a written employment agreement, wages not paid in full but with deductions without written consent, a significant failure to keep accurate time, wage, holiday records for the entire period of employment for all work likely done and breaches of the Holidays Act 2003.

²⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW Inc* (1994) 2 NZLR 415 (CA) at 419 later endorsed in *Business Distributors Ltd v Patel* (2001) 1 ERNZ 124 (CA).



[66] The above breaches were occurring throughout the employment and while some record keeping seems to have been rectified in records from November 2018, Winterset's evidence is that it continued to pay cash amounts to Ms Tindall and take deductions for accommodation costs from her wages.

[67] The next thing to consider is whether these breaches caused the resignation. To do this I will consider the circumstances of the resignation.

The circumstances and reason for Ms Tindall's resignation

[68] Ms Tindall's written evidence is that when she gave a 'written resignation letter' to Mrs Winter on 22 October 2020 she 'sat with Lyn Winter in the office as she read it. Lyn Winter talked about ways to get me to stay ...'. That letter has never been produced. In the Statement of Problem, it states that when Ms Tindall told Mrs Winter 'verbally' she would be leaving, 'Mrs Winter became very angry and said that [Ms Tindall] had not given enough notice. Mrs Winter also claimed that [Ms Tindall] owed rent and told her she would *have to stay*²⁷ and work through the upcoming busy [season] to pay off debt.' There is email evidence to show that Ms Tindall had then asked Mrs Winter what rent was still owed pending her leaving because she could get benefit help to pay this off. I find that this supports that there was no pressure on Ms Tindall to have to stay and work off debts and is inconsistent with her evidence that Mrs Winter was requiring her to stay.

[69] The Winters both say that Ms Tindall explained she resigned due to a serious diagnosis in her family causing her to need to take time to address this. Ms Tindall in her oral evidence to me said there had been this diagnosis. This supports Winterset's consistent evidence that it understood the reason for the resignation was the family situation.

[70] Mr Winter's evidence includes having seen Ms Tindall and Mrs Winter around the time of the resignation and that they hugged, and Ms Tindall was crying because he understood she

²⁷ My italics added for emphasis.



did not want to leave. I found Mr Winter's evidence straight forward and I accept this as his likely observation.

[71] Ms Tindall's oral evidence to me about the conversation she had with Mrs Winter when she told her she was leaving was that 'we had quite a good conversation' ... 'about a mix of things' and 'it was all quite hard.' Ms Tindall's oral evidence was that she did not want to stay and work another busy season. It is difficult to see how two women at the end of employment where the relationship has been described as 'toxic and abusive'²⁸ would likely have had this type of conversation. In cross-examination Ms Tindall said, 'I needed to leave because I needed to be a mother.' Mr Morris, a salesperson who visited KP selling cleaning products recalled Ms Tindall saying to him on a visit on 22 October 2020 (he provided his diary to support the visit timing) that she was leaving due to family reasons.

[72] Ms Tindall acknowledged she did not tell the Winters or Winterset she was leaving for reasons other than family. I asked Ms Tindall why she did not when she appeared to have been friends with Mrs Winter. Her response was, 'we were not exactly friends.' Ms Tindall says Ms Winter intimidated her and in her oral evidence seemed to struggle to explain what she meant. Of the many pages of messages I have read between Mrs Winter and Ms Tindall during the employment there are none that I could find supporting Ms Tindall's position that she could not tell Mrs Winter things because she intimidated her. They predominantly show Ms Tindall enthusiastic and upbeat and Mrs Winter encouraging. Those messages also include Mrs Winter messaging caring messages when Ms Tindall is sick and show a time when Mrs Winter continued contact with Ms Tindall when she had a car accident. They include talking about things they say they don't want others to know about. They have the tone of people living as close neighbours. I find none of this consistent with an intimidatory relationship. If it was of this sort, I have insufficient support to make such a finding.

[73] In summary and standing back from the above I find a likelihood that Ms Tindall resigned because she decided the situation of working and looking after her children was too much. I find this likely would have been the case with the working component even if she had

²⁸ Statement of Problem paragraph 2v.



been paid without the deductions that I have already above ordered a remedy for. Ms Tindall's daughter gave evidence about what it was like seeing her mother working more and more but I find a likelihood this was in the summer season and that Ms Tindall agreed to this at the time. As Ms Tindall herself acknowledged to me, she resigned because she could not go through another summer season. Ms Tindall took steps for this not to happen, chose to resign and had already found somewhere else to live, a likely challenge in the small town she had chosen to move back to but she managed to do this. She also secured a job soon after in the town.

[74] Accordingly, based on the above Ms Tindall's grievance claim for constructive dismissal is dismissed.

Is Ms Tindall able to claim a breach a duty of good faith based on alleged actions of the directors after Ms Tindall left her employment and if so, was there a breach and if so, what is the remedy?

[75] I accept the submission for Winterset that the claim for breach of good faith in relation to claims about director behaviour beyond the end of Ms Tindall's employment cannot succeed. A breach of good faith relates to the duty both parties have to each other for the purpose of continuing with a productive employment relationship. It also applies to 'any matter arising under or in relation to an individual employment agreement while the agreement is in force'.²⁹

[76] Accordingly, I have not considered the issues that Ms Tindall has raised in relation to matters after her employment ended.

Summary of Orders

[77] Winterset Proprietary Limited is to do the following within 28 days from the date of this determination:

- a. Pay Sarah Tindall \$6,274.42 as gross repayment for deductions from wages.
- b. Pay Sarah Tindall \$257.13 gross for public holiday entitlements.

²⁹ Employment Relations Act 2000, s4 1A and (4)(bb) respectively.



- c. Calculate in gross and pay to Sarah Tindall annual holiday pay under s 28(4) of the Holidays Act 2023 by applying sections 16, 24(2) and 23(2).
- d. For the whole period of employment calculate in gross and pay to Sarah Tindall any unpaid wages under the applicable minimum adult wage rates that applied during the employment. This order is made pursuant to section 4 and 5 of the Minimum Wage Act 1983, for the period of her employment finishing on 5 Nov 2020.
- e. The calculation at d. above is to be in accordance with the method at paragraph [48] above.

Is either party to contribute to the costs of the other?

[78] Costs are reserved. The outcome is one of mixed success and the parties are reminded that the Authority is able to consider that costs may lie where they fall. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed Ms Tindall 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 Winterset would then have 14 days to lodge any reply to memorandum.



Antoinette Baker
Member of the Employment Relations Authority

