IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 41
5643526

	BETWEEN	JOHANNA VAN DER LEE Applicant
	AND	BELLA VITA DAY SPA LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Philip Southwell and Charlotte Bruce, Advocates for Applicant Mingfei He, for Respondent
Investigation Meeting:	14 March 2017 at Palmerston North
Submissions received:	24 March and 7 April 2017 from Applicant 30 March 2017 from Respondent
Determination:	24 May 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Johanna van der Lee was employed by Bella Vita Day Spa Limited (Bella Vita) from January 2015 until she resigned on two weeks' notice on 22 March 2016. Ms van der Lee claims she is owed holiday pay, wages, unpaid commission and unpaid KiwiSaver contributions. She seeks penalties against Bella Vita for breaches of her employment agreement.

[2] She also claims to have been bullied and sexually harassed during her employment. Some claims, including a breach of good faith relating to events after the termination of the employment relationship, were withdrawn at the outset of the Authority's investigation.

[3] Bella Vita denies all Ms van Lee claims. It says she was employed on a casual employee basis and her holiday pay was included in her hourly rate. It says Ms van der Lee was aware from the outset of her employment this would happen.

Issues

[4] The issues for determination are whether:

a. Ms van der Lee was a part-time or a casual employee;

b. there are any wage arrears and commission owing and KiwiSaver contributions unpaid;

c. she is owed holiday pay or whether it was lawfully paid as part of her hourly rate;

d. she was bullied in the course of her employment;

e. she was sexually harassed in the course of her employment;

f. Bella Vita breached its employment agreement with her and, if so, whether a penalty is appropriate

Was Ms van der Lee a casual employee?

[5] Ms van der Lee was employed as a junior beauty therapist. She provided evidence of having approached Bella Vita by email on 21 December 2014 seeking work experience or training for any upcoming employment vacancies the Day Spa may have. She explained she had just completed her diploma in beauty therapy at UCOL and was seeking her first position in the beauty industry.

[6] Following discussions the sole director of the respondent company, Mingfei (known as Lily) He, offered Ms van der Lee an individual employment agreement in January 2015 after she had commenced work at Bella Vita. Ms He was also the manager of Bella Vita and the person to whom Ms van der Lee reported. Ms van der Lee signed the agreement on 13 January 2015. A wage summary provided in respect of Ms van der Lee by the employer at my request notes her first day of work as 6 January 2015.

[7] It was Ms He's evidence that the employment agreement was for a three month period only and was for a part-time position. Ms van der Lee acknowledged her position was part-time but rejected that it was only for three months. I agree with Ms

van der Lee. The "Duration" clause of the employment agreement, on which Ms He relied, provided:

> "This contract shall come into effect on the employee passing a trial period or granted work visa/permit by NZ Immigration Service, and remain in force for a period of 3 months/years, with the right of further extension, being subject to the outcomes of the employment reviewing."

[8] As Ms van der Lee had already commenced work before she received the employment agreement, the trial period provision was of no effect. Neither "months" nor "years" had been highlighted or crossed out in the Duration clause and there was therefore no certainty over which period was intended. There were no issues around Ms van der Lee's right to work in New Zealand so visa or work permit requirements were not relevant.

[9] Section 66 of the Employment Relations Act 2000 (the Act) provides there must be genuine reasons based on reasonable grounds for specifying an employee's employment will end at the close of a particular date or period, or at the occurrence of a specified event or at the conclusion of a specified project. Ms van der Lee's employment agreement did not meet the requirements for fixed term employment as there were no reasons specified other than those I have referred to which were not applicable to her employment.

[10] In any event it was in May 2015, after Ms van der Lee had been working for four months, that Ms He provided Ms van der Lee with another employment agreement which she says Ms van der Lee did not ever sign or return to her. By that time, even if a genuine fixed term agreement had initially been in place for three months as the employer asserts, Ms van der Lee's continued employment after the expiry of the fixed term would have resulted in that employment becoming employment of indeterminate duration.[1]

[11] Ms He's evidence was that, while Ms van der Lee had started her employment as a part-time employee, that changed from May 2015 when she became a casual employee. She said she had decided to change Ms van der Lee to a casual basis as she was unwilling to work the hours Ms He required. Ms van der Lee said she had not agreed at any time to become a casual employee.

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[1] *Varney v Tasman Regional Sports Trust* EmpC Christchurch CC15/04, 23 July 2004

[12] In the absence of a signed agreement from Ms van der Lee to a change to her status from part-time to casual, I reject Bella Vita's evidence on this matter. It is well-established that an employer cannot unilaterally impose changes to an employee's terms and conditions of employment without the employee's agreement.[2] Apart from Ms He's assertion that she had offered Ms van der Lee a new employment agreement, no evidence was proffered of any other attempts the employer made to obtain her agreement to new employment arrangements.

[13] Ms van der Lee was very clear in her evidence that she did not at any time agree to change her employment status. Accordingly I find she started as a part-time employee and retained that status throughout her employment.

Are wage arrears and commission owing and KiwiSaver contributions unpaid?

[14] There is disagreement between the parties over the hours Ms van der Lee worked and the hours for which she was paid. Ms van der Lee believed she was consistently paid for fewer hours than she actually worked which was a cause of discontent for her throughout her employment. She disputed the authenticity of the timesheets provided, at my request, by Ms He.

[15] Those timesheets had been completed by Ms He and contained comments and calculations she had made. Ms van der Lee's evidence was that she had written down her hours in the clinic's daily diary and completed her own timesheets throughout her employment. Ms He said the diary for 2015 had gone missing and was therefore unable to be produced to the Authority.

[16] Ms van der Lee said that, with one exception, the 20 timesheets produced by Ms He were not timesheets she had completed or signed. The exception was the timesheet for the period ending 9 May 2015 which Ms van der Lee acknowledged she had signed. However, she said that, although she had written her hours on that timesheet, Ms He had overwritten the sheet with comments and had crossed out some of the original recorded hours substituting other hours or leaving blank the hours Ms van der Lee had recorded for the days. Having examined the timesheet I accept that evidence.

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2 *Grant v Superstrike Bowling Centres Ltd* [1992] 1 ERNZ 727 (NZEmpC)

[17] When I questioned Ms He she agreed that Ms van der Lee had filled out "some" timesheets but said she (Ms van der Lee) had often filled them out wrongly. They were also were messy and she believed Ms van der Lee had incorrectly recorded her hours so Ms He had "assisted" her. Ms He's assistance appears to have comprised altering Ms van der Lee's timesheets without discussion, or substituting them for timesheets she compiled herself.

[18] In light of this it is unsurprising that Ms van der Lee was dissatisfied throughout her employment that the remuneration she was receiving did not match the hours she actually worked. Ms van der Lee had no control over the changes her manager made to the hours of work she had recorded on her timesheets, or to the record she had kept on those timesheets of products she had sold for which she was entitled to commission under the terms of her employment agreement.

[19] Ms van der Lee did not retain copies of her own timesheets except for one. That was in September 2015 when Ms He was overseas and Ms van der Lee emailed her timesheet for the fortnight ending 12 September 2015 to her. She provided the Authority with a copy of the email and timesheet. I accept that evidence as an accurate record of the hours she worked in that period.

[20] From the starting and finishing times Ms van der Lee recorded in the timesheet I calculated she had worked 43 hours 45 minutes in that period, exclusive of lunch breaks. That accords with Ms van der Lee's recollection of the period. It also accords with evidence given by her sister, Ms Penelope van der Lee, whose evidence was that she frequently dropped Ms van der Lee to work and picked her up from the workplace later to take her home.

[21] Ms He provided the Authority a timesheet in respect of Ms van der Lee for the same fortnightly period ending 12 September 2015. That timesheet showed Ms van der Lee had worked 22 hours 45 minutes. The timesheet omitted two days on which Ms van der Lee had recorded she had worked, respectively, 5 hours 30 minutes and 4 hours 45 minutes. It also reduced the hours Ms van der Lee had worked by between 1 hour 30 minutes and 3 hours on the other days.

[22] The employer's summary of wages paid to Ms van der Lee show that the wages she received for that fortnight were based on Ms He's timesheet and not on Ms van der Lee's recording of the hours she had worked. The pay summary also shows

that Ms van der Lee was paid commission of $0.65 for the period. Under the terms of her employment agreement she was entitled to receive 10% commission on sales of product. Ms van der Lee recorded on her timesheet that she had sold two items in that period, one at $45 and the other at $56.90. I accept Ms van der Lee's timesheet as more likely to be an accurate reflection of the hours she actually worked, and the product she sold, and find she is owed wages for 21 hours and commission of $9.54 (being the difference between commission earned and commission paid) for that pay period.

[23] By Ms He's own evidence she was overseas at the time and was therefore not in a position to monitor Ms van der Lee's hours of work or the sales she made. As a result of my findings in respect of the two timesheets referred to above, and the evidence of the parties, I have no confidence in the authenticity or accuracy of the timesheets provided by Bella Vita to the Authority in respect of Ms van der Lee.

[24] The timesheets Ms He completed for Ms van der Lee show that in the nine pay periods between 18 January and 9 May 2015 Ms van der Lee worked on 49 days and her hours totalled 215.5. By Ms van der Lee's evidence this was less than she actually worked by at least one to one and a half hours per day. She said she was paid only for the hours she spent attending to clients. She was not paid for the times she was required to sit at the reception desk, undertake cleaning or perform other duties in the Bella Vita clinic. Ms He denied this and said Ms van der Lee was paid for the times between her client bookings.

[25] On the basis of the findings I have made in relation to Ms He's treatment of Ms van der Lee's timesheets, I prefer Ms van der Lee's evidence of being underpaid by one to one and a half hours per day. Taking the midpoint of her estimate of daily lost hours, I find she was underpaid in that period by 61.25 hours.

[26] In the period from the pay fortnight ending 24 May to the fortnight ending 16 August 2015 the timesheets provided by Ms He show Ms van der Lee worked 54.75 hours. Ms van der Lee told me her hours during this period were very similar to those she had worked up to 9 May 2015 but, instead of being remunerated fully by money paid into her bank account, part of her remuneration was paid in vouchers.

[27] She said these were for petrol, groceries or for redemption at The Warehouse. Ms van der Lee said she was not happy about being paid in this way and believed she

was being short-changed by her employer. However, she said she accepted vouchers because the alternatives put to her by Ms He were not receiving any remuneration or losing her employment. Ms van der Lee did not keep a note of the number or amounts of the vouchers she received from in lieu of wages.

[28] Bella Vita denied Ms van der Lee was ever paid in vouchers although it claimed Ms van der Lee had asked to be paid that way. In its submissions the company said vouchers were sometimes given to staff but never as wages. Under questioning Ms He said that Ms van der Lee was sometimes given petrol vouchers as a travel subsidy. It was also her evidence that Ms van der Lee's hours reduced from May 2015 following an argument she had with her over the hours she was willing to work.

[29] I prefer Ms van der Lee's evidence regarding the payment by vouchers. Her mother, Miriam van der Lee, gave evidence of having taken her daughter shopping on numerous occasions to spend the vouchers. I found Ms van der Lee's mother to be an honest and credible witness. I did not find Ms He's evidence as compelling. In reaching that view I have taken into account the discrepancies between the timesheet she presented for Ms van der Lee for the fortnight ending 12 September 2015, and the timesheet Ms van der Lee emailed to her for that period. I have also taken into account Ms He's unilateral alteration of the hours Ms van der Lee recorded she had worked as evidenced by the timesheet for the period ending 9 May 2015.

[30] For the same reasons I also prefer Ms van der Lee's evidence of the discrepancies between the hours she worked and the wages she received. I find it is more likely than not that many of the time records presented by the respondent were formulated after the event to reflect the wages paid to Ms van der Lee, rather than being genuine documents formulated contemporaneously and reflecting the hours Ms van der Lee actually worked.

[31] From 11 May to 30 August 2015 I find she was not paid the wages to which she was entitled for all the hours she worked. I accept Ms van der Lee's estimate of having worked similar hours to those she had worked from January to 13 May 2015. In that 17 week period I have calculated she worked 276.75 hours or an average of 16.28 hours per week. Applying those average weekly hours to the 16 weeks between May and August in which she was paid mainly by vouchers, I find she would have

worked 260.48 hours. During that period her employer paid her wages for 54.75 hours, leaving a deficit of 205.73 hours either unpaid or paid by voucher.

[32] Any payment by way of voucher is unlawful under the Wages Protection Act 1983 and Ms van der Lee is entitled to be paid wage arrears for the difference of 205.73 hours between the hours she worked and those for which wages were paid during that period. She is entitled to have KiwiSaver contributions calculated and paid into her KiwiSaver account in respect of all arrears owing. There was insufficient evidence for me to determine whether Ms van der was underpaid for the period from 1 October 2015 to the termination of her employment in March 2016 and I make no findings in respect of that period.

Is Ms van der Lee entitled to holiday pay?

[33] Ms van der Lee's employment agreement with Bella Vita contained provisions regarding payment of holidays which are replicated below:

> **6 Rates of Pay and Allowance**
> 6.1 The wage rate offered by the employer and accepted by the employee is specified in **Schedule A**.
>
> **Waged employee:**
> All hours worked shall be paid at the rate agreed upon this includes any holiday pay, irrespective of the day of the week or time of the day on which the work is performed, with the exception of payment for working on a public holiday.
>
> 7 **Leave**
> 7.2 In the case of casual or part-time employment, employees are paid each pay period inclusive of any annual leave.

[34] Bella Vita relies on the provisions at clause 6 of the employment agreement for its assertion that it does not owe Ms van der Lee any holiday pay as, in its view, she received it throughout her employment as part of her hourly rate. Ms He's evidence was that she recalled having a discussion with Ms van der Lee at the outset of her employment in which she made this clear. Ms He said she had other discussions during Ms van der Lee's employment in which she reiterated that holiday pay was paid as part of the hourly rate.

[35] Ms van der Lee disputed having an initial discussion with Ms He over payment of her holiday pay in her hourly rate. She said she frequently raised the issue

of holiday pay during her employment, but said she did not ever agree to receiving holiday pay as part of her pay rate.

[36] Clause 6 of Ms van der Lee's employment agreement referred to a wage rate that was specified in Schedule A to the agreement. That schedule provided for an hourly rate of $15.50 and $18 for massages. It did not identify any component of the hourly rate as being for holiday pay.

[37] Section 28 of the Holidays Act 2003 provides that an employer may regularly pay annual holiday pay with the employees pay if –

> (a) The employee –
>
> (i) is employed in accordance with s.66 of the Employment Relations Act 2000 on a fixed term agreement to work for less that twelve months; or
>
> (ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks annual holiday under s.16; and
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> (b) The employee agrees in his or her employment agreement; and
>
> (c) the annual holiday is paid as an identifiable component of the employees pay; and
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> (d) the annual holiday pay is paid at a rate not less than 8% of the employees gross earnings.

[38] Subsection 4 of s.28 provides:

> If an employer has incorrectly paid annual holiday pay within and employees pay in circumstances subsection (1) does not apply and the employment has continued for twelve months or more then, despite those payments, the employee becomes entitled to annual holidays in accordance with s.16 and paid in accordance with this subpart.

[39] Ms van der Lee acknowledged signing the employment agreement. It was her evidence that, as this was the first time she had received such a document, she skimmed the agreement rather than examining it carefully. She said she assumed the provisions were all legally correct and did not notice the holiday pay provision. There was no suggestion that her employer did not provide her with the time to take advice on the employment agreement if she had been so minded. I am satisfied she did have that opportunity but chose not to take it.

[40] However, I am not persuaded Ms van der Lee's employment fell within the statutorily prescribed situations for which holiday pay could be paid as part of her hourly rate. I have already found her to have been a part-time employee, and not a casual employee as Ms He claimed to have been her status from May 2015.

[41] I have also found her employment to have been of indeterminate duration and not for a fixed term under s. 66 of the Act. I do not find her work patterns to have been so intermittent or irregular that it was impossible for the employer to provide her with four weeks annual holidays. An examination of Ms van der Lee's work patterns shows that between January and May 2015 she regularly worked between Tuesday and Saturday. I have accepted her evidence of having worked similar days and hours between until the end of August 2015. There appears to be no good reason for the employer to have decided she should be paid a rate that incorporated holiday pay.

[42] In any event I am not satisfied from the payslips produced in my investigation that the provisions of s.28 (1)(c) of the Holidays Act were complied with during Ms van der Lee's employment. I do not accept Ms He's evidence that annual holiday pay was paid as an identifiable component of Ms van der Lee's pay. Of the few pay slips Ms van der Lee was able to provide to the Authority, none identified a holiday pay component.

[43] Some of the timesheets Ms He presented as purportedly Ms van der Lee's included hand written notes from Ms He to the effect that the pay included holiday pay at 8%. However, as I have already rejected the authenticity of those timesheets, I do not consider Ms He's annotations on them to be of any evidential value.

[44] Bella Vita's submissions, which were received after the investigation meeting, included a copy of one hand written payslip for Ms van der Lee. This had been photocopied into a page of submissions. According to Mr Clive Dorn, the author of the submissions and the owner of Bella Vita, it was the only payslip for Ms van der Lee the respondent had retained as the rest were in a file that had gone missing. Mr Dorn said the one payslip Bella Vita was able to retrieve had "slipped down behind the printer/copier".

[45] The original was not produced and the very small reproduction incorporated into the submissions was difficult to read. Beside it on the page was a table, under the heading "Make sure you can read my writing", that seemed to itemise the figures and

notes on the hand written pay slip, including a line reading "HP (Holiday pay) 8%=30.99".

[46] I am not persuaded of either the authenticity or evidential value of the photocopied document and find the requirements of s. 28 of the Holidays Act have not been met. Accordingly Bella Vita must pay holiday pay to Ms van der Lee calculated at 8% of the remuneration she received during her employment. Holiday pay will also be ordered on the wage arrears Bella Vita must pay Ms van der Lee as a result of its failure to pay her all wages due during her employment.

Was Ms van der Lee bullied during her employment?

[47] WorkSafe defines bullying as repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.[3] Ms van der Lee felt she was not treated fairly by her employer for various reasons, including not having certainty over her hours of work, and over wages and holiday pay issues. It was clear her dissatisfaction over these matters adversely affected the employment relationship. Ms van der Lee's lack of clarity over the role of a former owner of the business who was often referred, and deferred, to by Ms He was also unsettling to her. It was not clear to me, however, that Ms van der Lee had ever asked Ms He directly about that person's role in the current business operation.

[48] When I questioned her about being bullied by Ms He, Ms van der Lee referred to being upset over personal comments made by Ms He to her including, for example, suggestions that she needed to go for a run, with the implication being that she needed to lose weight. Ms He denied making comments that could be construed as offensive and said she treated Ms van der Lee like a sister when she needed cheering up. She suggested Ms van der Lee was difficult to manage.

[49] Ms van der Lee also referred to having numerous meetings with Ms He over the manner in which she performed her work. I infer from the evidence of both Ms van der Lee and Ms He that Bella Vita had particular practices and methods of working, and that Ms van der Lee, as a newly qualified therapist, did not always agree that these accorded with best practice. This led to Ms He having frequent meetings with her over those matters. After considering the evidence of the parties I conclude

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[3] WorkSafe New Zealand *Good Practice Guidelines: Preventing and Responding to Bullying at Work* (March 2017)

those meetings were informal rather than disciplinary in nature and were for the purpose of guidance and instruction in the employer's practices and methodology. I do not find those meetings indicated an intent by the employer to bully Ms van der Lee and I find they did not amount to bullying.

[50] Ms van der Lee referred to one particular email sent to her and another junior therapist by Ms He in September 2015. The email conveyed Ms He's instructions regarding her expectations of the two employees with regard to certain matters during Ms He's absence overseas. It was direct in tone and Ms van der Lee interpreted one particular sentence as a threat to reduce her hourly rate.

[51] When questioned about it, Ms He said that was not what she meant. I understood from her answer she was intending to convey that, if customers were not satisfied with the treatment they received at Bella Vita, they would be unlikely to return for other treatments. This could result in hours of work being reduced. English is not Ms He's first language and I accept she may not have conveyed her message exactly as intended. However, I do not consider her email to constitute bullying or to be indicative of repeated and unreasonable behaviour towards Ms van der Lee.

[52] Overall I am not persuaded the evidence reveals bullying by the employer and I dismiss this claim.

Was Ms van der Lee sexually harassed in her employment?

[53] Section 108 (1) of the Act provides that, for personal grievance purposes:

> an employee is sexually harassed in their employment if the employee's employer or a representative of the employer –
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> (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains-
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> (i) an implied or overt promise of preferential treatment in that employee's employment; or
>
> (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
>
> (iii) an implied or overt threat about the present or future employment status of that employee; or
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> (b) by-

> (i) the use of language (whether written or spoken) of a sexual nature; or
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> (ii) the use of visual material of a sexual nature; or
>
> (iii) physical behaviour of a sexual nature,-
>
> directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance or job satisfaction.

[54] Section 108 (2) provides that, for personal grievance purposes:

> an employee is sexually harassed in that employee's employment (whether by a co-employee or by a client or customer of the employer), if the circumstances described in section 117 have occurred.

[55] Section 117 provides for situations where the employee has been subject to requests or behaviour described in s. 108(1)(a) or 108(1)(b) above by a person who is not a representative of the employer but who is employed by the employer or is a client or customer of the employer. If the employee complains to the employer or a representative of the employer in such situations, the employer or representative must inquire into the facts. Where the employer or representative is satisfied the request was made or the behaviour took place, they must take whatever steps are practicable to prevent any repetition of such a request or such behaviour.

[56] Ms van der Lee said she had not been informed of the convictions of a male client whom she was asked to massage on several occasions. She referred to being asked to perform a waxing treatment known as a manzilian on that person who was related to the owner of the business and was also the landlord of the premises from which the business operated. The treatment Ms van der Lee was asked to perform on the client is one that is included in the list of treatments offered by Bella Vita on its website.

[57] Ms van der Lee said it was her understanding the client was also the Marketing Manager for the business. She said she felt uncomfortable at having to perform the waxing treatment on him but agreed to do it "to keep (Ms He) happy". The treatment entailed handling the client's genitalia and afterwards she said he exposed himself to her when pointing out redness that had resulted from the waxing treatment she had performed. Ms van der Lee also referred to that person

"propositioning" her in the course of a massage by inviting her to work directly for him in a separate venture he intended to develop on the premises separate from Bella Vita. She said she found the invitation inappropriate and was uncomfortable about it.

[58] Ms He said the person was not an employee but a regular client whom all the staff massaged on many occasions. She had asked Ms van der Lee to undertake the manzilian on him as part of her training. Ms He said Ms van der Lee had expressed no concerns to her about doing the waxing treatment on him, or subsequently when asked to undertake it on another client. Nor had she expressed concerns about massaging the client. Ms He said she had no knowledge of the work proposition the client had made to the employee.

[59] It was not my understanding from the evidence before me that the client had a formal role in Bella Vita although he clearly was interested in the business as the landlord of its business premises and as a relative of the business owner. He was not Ms van der Lee's employer and there was insufficient evidence for me to find he was a representative of the employer.

[60] The client therefore comes within the category of person covered by s. 117 of the Act as "a person other than employer". Ms He, as Ms van der Lee's manager, was the person to whom she should have reported the client's behaviour if she had concerns about it. Ms van der Lee acknowledged she had not raised any concerns about the client's behaviour with Ms He. She said she had not done so because she did not think Ms He would be sympathetic and would probably tell her that if she was unwilling to massage the client she would lose her employment.

[61] In remaining silent about her concerns, however, Ms van der Lee gave her manager no opportunity to address them by making inquiry and taking steps to avoid a repetition of the behaviour that made her uncomfortable. For this reason I am not persuaded that Ms van der Lee was sexually harassed in her employment by being asked to perform a waxing treatment or massages on the client when asked by her employer to do so. I dismiss this claim.

Is a penalty warranted?

[62] Every party to an employment agreement who breaches the agreement is liable to a penalty under the Act.[4] Ms van der Lee seeks the imposition of a penalty on her employer for its breaches of her employment agreement. One reason she cites is the employer's failure to give her 24 hours' notice of changes to work times, and another is its lack of good faith towards her in relation to her remuneration.

[63] The 24 hours' notice is referred to in clause 5 of Ms van der Lee's employment agreement. It provides that the employer will, where practicable, give 24 hours' notice of any change to the advised hours of work. I do not interpret this clause to mean that the employer will always, or even necessarily in the majority of times, provide that amount of notice to the employee. I do not find this constitutes a breach of the employment agreement on the part of the employer such that a penalty is warranted.

[64] The employer's treatment of Ms van der Lee in respect of her timesheets, as referred to earlier in this determination, and its failure to pay her all remuneration due to her is a different matter. Such actions were not in accordance with the employer's contractual duty at clause 4.1 of its employment agreement with Ms van der Lee act as a good employer in all its dealings with her. The employment agreement defines a good employer as one who treats employees fairly and properly in all aspects of their employment. It was clear to me Bella Vita had not fulfilled its duty to Ms van der Lee in the fundamental matter of her remuneration and I find the failure to do so was deliberate and sustained over several months.

[65] A penalty may be imposed at the discretion of the Authority and is generally imposed for the purpose of punishment as well as discouragement to others. In determining whether a penalty is appropriate I will take into account the factors specified in a non-exhaustive list in s.133A of the Act. They are:

> (a) the object stated in section 3; and
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> (b) the nature and extent of the breach or involvement in the breach; and
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> (c) whether the breach was intentional, inadvertent, or negligent; and
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> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person

[4] Section 134 of the Act

involved in the breach, because of the breach or involvement in the breach; and

(e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and

(f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and

(g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[66] Section 133A was inserted into the Act on 1 April 2016 and was therefore not in place at the time of Ms van der Lee's employment. However, I will follow the recent approach of the Employment Court in *Lumsden v Skycity Management Limited*[5] and apply the list of factors as a useful guide, given that s. 133 A confirms earlier case law.

[67] Section 3 of the Act specifies as its first object the promotion of productive employment relationships through the requirement for good faith behaviour in all aspects of the employment environment and the employment relationship. I have found Bella Vita breached its contractual duty of good faith towards Ms van der Lee in respect of her remuneration. It also breached its statutory duty under the Wages Protection Act 1983 to pay all remuneration, in money, when it fell due.[6] The breach was sustained over several months of her employment and was deliberate, in that the employer altered timesheets without consultation or discussion with the employee.

[68] Ms van der Lee lost remuneration as a result and her evidence was that she was constantly anxious about money. This adversely affected her ability to enjoy her first job in the beauty industry after obtaining her qualifications. I regard Ms van der Lee as a vulnerable employee because of her relative naivety and inexperience in employment matters. I am unaware of any previous finding by the Authority or Court of conduct of a similar nature on the part of the employer.

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5 *Lumsden v Skycity Management Limited* [2017] NZEmpC 30

6 Sections 4 and 7

[69] The Employment Court has adopted a four-step process for the assessment of penalties[7] which I shall follow. The first step consists of identifying the nature and number of statutory breaches. The breach I have identified is under s. 134 of the Act and comprises a breach of the employer's contractual (and statutory) obligation to treat her in good faith. I consider this to be one sustained breach rather than separate breaches each time Bella Vita underpaid Ms van der Lee. The maximum penalty available for a breach is $20,000.

[70] The second step entails assessing the severity of the breach to establish a provisional penalties starting point, and includes a consideration of aggravating and mitigating factors. Remuneration is a basic component of an employment relationship and any breach is serious. In this instance Ms van der Lee was deprived of the enjoyment of wages she had earned which, as earlier noted, caused her anxiety. There was no attempt by the employer to mitigate or compensate Ms van der Lee, whose requests to be paid for all the hours she worked were not heeded. I find a provisional starting point to be $15,000.

[71] The next step is to consider the means and ability of the person in breach to pay the provisional penalty. I have no evidence of Bella Vita's financial capability. However, taking into account that it is one small business among many others operating in the beauty industry in a provincial centre, I would assume it to operate on slim margins and not to have the means of a large corporate undertaking. I would reduce the penalty by 75% from the provisional amount, taking it to $5,000.

[72] The final step consists of an application of the proportionality or totality test to ensure the amount of a penalty is just in all the circumstances and is proportional to the severity of the breach and the harm it occasioned. I am satisfied $5,000 is an appropriate penalty in the circumstances. Half of that amount is to be paid to Ms van der Lee to acknowledge the anxiety and loss of enjoyment she sustained from not having the use of money at the times it was payable to her.

Determination

[73] Bella Vita did not pay Ms van der Lee for all hours she worked and owes her wage arrears. It also owes her holiday pay under s. 28 (4) of the Holidays Act. Its

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[7] *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Tobacco Ltd* [2016] NZEmpC 143 at [139] to [151]

breach of the good employer and good faith undertakings of Ms van der Lee's employment agreement by not treating her fairly and properly in respect of her remuneration results in the imposition of a penalty.

[74] Ms van der Lee's claims to have been bullied and sexually harassed in her employment are dismissed.

Orders

[75] Bella Vita is ordered to pay Ms van der Lee the following sums:

a. $325.50 gross in respect of underpaid hours for the pay period ending 12 September 2015;

b. $9.54 gross in respect of underpaid commission for the pay period ending 12 September 2015;

c. $945.50 gross in respect of underpaid wages for the period from 6 January to 9 May 2015;

d. $3,188.82 gross in respect of underpaid hours between 11 May and 30 August 2015;

e. $357.55 gross, being holiday pay on the amounts in (a) to (d) above;

f. $509.98 gross, being holiday pay on wages already paid in respect of the period from 6 January 2015 to 13 February 2016.

[76] As the above amounts are gross, Bella Vita must calculate and pay KiwiSaver contributions and any statutorily required deductions with respect to them.

[77] Bella Vita is further ordered to pay, within 28 days of the date of this determination, a penalty of $5,000 under s. 134 of the Employment Relations Act. Half of that amount, being $2,500, is to be paid to Ms van der Lee with the remaining $2,500 to be paid to the Authority for payment to the Crown account.

Costs

[78] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority