

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 294
5647112

BETWEEN JOHNNY PETER KYLE
 WOODS
 Applicant

AND LIFESTYLE PROJECTS
 CONSULTING LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: S Austin, Advocate for Applicant
 P Vermaak, Agent for Respondent

Investigation Meeting: 30 August 2017 at Whakatane

Submissions received: 6 September 2017 from Applicant
 21 September 2017 from Respondent

Determination: 22 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. Mr Woods was unjustifiably dismissed by Lifestyle Projects Consulting Limited.**
- B. Lifestyle Projects Consulting Limited is ordered to pay Mr Woods the following amounts within 14 days of the date of this determination:**
- a. The sum of \$6,932.25 gross, equating to 13 weeks' wages and holiday pay under s 123(1)(b) of the Employment Relations Act 2000;**
 - b. The sum of \$6,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000;**

c. The sum of \$8,376.65 under s131 of the Employment Relations Act 2000

d. Interest on the sum of \$8,376.65 from 4 July 2016 at the applicable rate of 5% per annum continuing until payment.

C. Lifestyle Projects Consulting Limited is ordered to comply with the attachment orders made by the Ministry of Justice by paying the Ministry of Justice the sum of \$70.00 for deductions made from Mr Woods' wages. Payment must be made within 14 days of the date of this determination.

D. Lifestyle Projects Consulting Limited is ordered to pay the sum of \$1,000.00 for breaching s 4 of the Employment Relations Act 2000. 75% of that amount (\$750.00) is to be paid to Mr Woods. The remaining 25% (\$250.00) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account. Payment of the penalty must be paid within 14 days of the date of this determination.

Employment Relationship Problem

[1] Mr Woods was engaged by Lifestyle Projects Consulting Limited on 10 July 2014. His role involved plastering/painting and redecorating works on Housing New Zealand homes. The parties' relationship was relatively amicable until early July 2016.

[2] On 4 July 2016, a series of events led to Mr Woods being summarily dismissed from his employment for "*gross misconduct and aggressive attitude and behaviour*". Mr Woods says his dismissal was unjustified. He further says Lifestyle Projects breached the Holidays Act 2003, failed to account for deductions made to his wages to the Ministry of Justice, and breached its duty of good faith contained in s 4 of the Employment Relations Act 2000 (the Act).

[3] As permitted by s 174E of the Act, this determination has not recorded all the evidence and submissions received from the applicant and respondent 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.

Issues

- [1] The issues to be determined are:
- a) Was Mr Woods unjustifiably dismissed?
 - b) If Mr Woods was unjustifiably dismissed what remedies should be awarded?
 - c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Woods that contributed to the situation giving rise to his grievance?
 - d) Did Lifestyle Projects fail to comply with the Holidays Act in relation to:
 - (a) Payments made for working public holidays
 - (b) Payment of holiday pay due at termination of the employment relationship;
 - e) If so, what monies are payable to Mr Woods?
 - f) Should interest be awarded on any monies found payable to Mr Woods?
 - g) Were monies deducted from Mr Woods' wages but not paid to the Ministry of Justice? If so, what amount was deducted and to whom is this sum payable?
 - h) Did Lifestyle Projects breach its duty of good faith?
 - i) If so, what penalty (if any) is payable?
 - j) Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

[2] There is no agreement between the parties on any of the key events which took place on 4 July 2016. Based on the evidence presented to me by Mr Woods, Mr Vermaak – Lifestyle Projects' Director – and the other witnesses who appeared

on behalf of Lifestyle Projects, the text messages exchanged between Mr Woods and Mr Vermaak, and the statements made to police on 6 and 7 July 2016, I find the following events took place on 4 July 2016.

[3] Mr Woods and Mr Vermaak were to meet at a café to discuss the day ahead. Mr Woods attended but Vermaak did not. Mr Woods and Mr Vermaak then exchanged text messages. These messages required Mr Woods to meet Mr Vermaak at a residential housing site at 8.30 am. Mr Woods was late. This prompted a text message from Mr Vermaak to Mr Woods advising him he needed to get into the property as he didn't have a key. This was followed by a text message from Mr Vermaak stating "*F U 2 it's passed (sic) 8.30*". Mr Vermaak had left the site by the time Mr Woods arrived. He returned later that morning and there was a brief discussion between the parties about the state of the work to be completed.

[4] Mr Vermaak returned to the site about 1 pm. He viewed Mr Woods working in the living room instead of the bedroom. He asked Mr Woods "*what the fuck are you doing?*" He then asked if the house would be ready by the following day. Mr Woods' response led to an argument between the two men.

[5] Mr Vermaak left the living room and proceeded down the hallway. Mr Woods followed him. Both men were swearing loudly at each other. Mr Woods approached Mr Vermaak. Mr Vermaak warned Mr Woods to stop and, when he didn't, he pushed him backwards. There was an exchange of words following which Mr Vermaak told Mr Woods he was fired.

Issue One: Was Mr Woods unjustifiably dismissed?

[6] There is no dispute that Mr Woods was dismissed, although there is an argument as to when that dismissal took place. Mr Vermaak said he did not fire Mr Woods on 4 July 2016 but rather asked him to "*please leave the site*". He explained that he wanted to talk with Mr Woods about the events of that day before making a decision whether or not to terminate. He said he did not make a decision to terminate until 7 July 2016.

[7] Regardless of when the dismissal took place, the onus falls upon Lifestyle Projects to justify whether its actions in dismissing Mr Woods were justified. Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine

whether Lifestyle Projects' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[8] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Lifestyle Projects sufficiently investigated the allegations, raised the concerns with Mr Woods, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[9] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Woods being treated unfairly.¹ A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

When was Mr Woods terminated?

[10] I find Mr Woods was terminated on 4 July 2016. In reaching this finding I have been influenced by the following factors:

- a) The text message exchange between the parties between 4 and 7 July 2016. On 4 July 2016 Mr Woods asked Mr Vermaak "*would you like to sit down and talk about things or leave it as is?*". No reply to this text was received. This prompted Mr Woods to send another text message on 5 July 2016 "*Okay I take that as a no so what shall we do with the loan for car and final pay*". Once again, no reply was received. This prompted a further text in which Mr Woods set out events including that he had been fired. The response from Mr Vermaak was "*nice shit hey*". A subsequent text message from Mr Woods to Mr Vermaak on 7 July 2016 asking for his final pay and a copy of his employment agreement was met with the reply "*F O*".
- b) The wage records for the week ending 6 July 2016 show no hours worked on 5 July 2016 with Mr Vermaak's handwritten comment "dismissed".
- c) Mr Vermaak visited Mr Woods' home on 6 July 2016 to retrieve Lifestyle Projects' tools.

¹ s.103A(5) .

- d) A Police statement made by Mr Vermaak on 7 July 2016 provides Mr Vermaak's account of the exchange between him and Mr Woods on 4 July 2016, stating:

He was right in front of me and was saying 'hit me hit me'.
That's when I told him "shut up, you're fired".

- e) The termination letter dated 7 July 2016 states:

"This serves to advise you that your employment was terminated on 4th July 2016 because of your gross misconduct and aggressive attitude and behaviour".

Was the decision to terminate justified?

[11] I find the process leading to Mr Wood's dismissal on 4 July 2016 was defective. Lifestyle Projects did not meet any of the mandatory considerations set out in s 103A (3). There was no investigation before dismissal. There was no raising of concerns before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of the explanation before dismissal. In effect, the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Woods being treated unfairly.

[12] I find the actions of Lifestyle Projects, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Mr Woods has a personal grievance that he was unjustifiably dismissed from his employment with Lifestyle Projects and is entitled to remedies.

Issue Two: If Mr Woods was unjustifiably dismissed what remedies should be awarded?

Lost Wages

[13] Section 123(1)(b) of the Act provides for the reimbursement by Lifestyle Projects of the whole or any part of wages lost by Mr Woods as a result of his grievance. Section 128(2) provides that I must order Lifestyle Projects to pay Mr Woods the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have a discretion to award greater compensation for remuneration lost than three months' equivalent (s 128(3)).

[14] In *Xtreme Dining v Dewar*² the full Court confirmed that where an employer puts mitigation in issue, an employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[15] Following Mr Woods's dismissal he applied for a Job Seeker benefit and said he began immediately looking for work. Despite WINZ providing him with assistance with his job search, he said finding alternative work was very difficult. He provided me with a list of companies where he applied to work. Many of these were for positions located in Rotorua and Tauranga, approximately 100 kilometres from his home. This included several recruitment companies. He obtained work on 26 April 2017.

[16] In an email dated 21 September 2017 Lifestyle Projects raised, for the first time, a concern with Mr Woods' attempts to find employment. It submitted that the Authority should not rely on what Mr Woods has said. It said a factor in him being unable to find a job, in a small town, was his reputation and his fines.

[17] I am not persuaded that Mr Woods has acted unreasonably in failing to mitigate the asserted loss. I have no evidence what Mr Woods' fines related to. Nor do I have any evidence as to Mr Woods' reputation. I am satisfied with the evidence provided by Mr Woods that he has lost 13 weeks' wages as a result of his unjustified dismissal.

[18] An individual employment agreement was signed by Mr Woods on 21 June 2016. This sets out Mr Woods' ordinary hours of work. These equate to 39.5 hours each week. At the time of his dismissal Mr Woods was paid an hourly rate of \$25.00 per hour. In total, Mr Woods' lost remuneration for 13 weeks at \$987.50 per week equals \$12,837.50 gross.

[19] Mr Woods submits the Authority should exercise its discretion to award lost remuneration for a period greater than three months, namely for a period of 6 months. However, I am not satisfied that this is just. Lifestyle Projects was clearly unhappy with Mr Woods' behaviour on 4 July 2016. It is likely Lifestyle Projects would have

² [2016]NZEmpC 136

dismissed Mr Woods even if a fair process had been followed. I therefore decline to exercise my discretion.

[20] For the reasons set out at Issue three below, I reduce lost remuneration by 50% for contributory behaviour. Mr Woods is entitled to recover holiday pay calculated at 8% on this sum.

[21] Lifestyle Projects is ordered to pay to Mr Woods the sum of \$6,418.75 gross for lost wages, together with the sum of \$513.50 gross for holiday pay, within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[22] Mr Woods claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[23] Mr Woods said it was 6 weeks before he received an unemployment benefit. During this period he said he had no income to buy groceries or to pay his rent. He had to borrow from friends to keep his head above water. His financial situation became so bad that he had to sell his vehicle and other personal effects. He also had to borrow money from his pregnant partner. His dismissal put a strain on their relationship.

[24] Mr Woods explained how he became very low. He started losing sleep and became very anxious. He felt like a failure. He consulted with his doctor and was prescribed anti-depression and anti-anxiety medication. I viewed this medication.

[25] I am satisfied Mr Woods has proven, on the balance of probabilities, that he has suffered humiliation, loss of dignity and injury to his feelings. I am also satisfied that Lifestyle Projects' unjustified dismissal of Mr Woods was material in the loss sustained by him.

[26] I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$12,000.00. When setting this sum I have been mindful of the need not to keep compensatory payments artificially low. Recent cases

reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).³

[27] For the reasons set out at Issue three I reduce the award of compensation by 50%.

[28] Lifestyle Projects is ordered to make payment to Mr Woods in the sum of \$6,000.00 under s 123(1)(c)(i) of the Act. Payment must be made within 14 days of the date of this determination.

Issue Three: If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Woods that contributed to the situation giving rise to his grievance?

[29] As I have determined that Mr Woods has a personal grievance, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, I must consider the extent to which Mr Woods' actions contributed towards the situation that gave rise to the personal grievance. If those actions so require, I must then reduce the remedies that would otherwise have been awarded.⁴

[30] I am satisfied, on a balance of probabilities, that Mr Woods conduct on 4 July 2016 did contribute to the situation which gave rise to the personal grievance. His response to Mr Vermaak's questions regarding when the work would be completed, and his questioning of Mr Vermaak's instructions, escalated the conversation between them into an argument. Mr Woods' decision to then follow Mr Vermaak up the hallway, continue to argue with him, to swear at him, and to generally act in a way which made Mr Vermaak, a 70-year-old man, feel threatened ultimately resulted in Mr Vermaak making the decision to terminate him immediately.

[31] In reaching this finding, I have preferred the evidence of Mr Morris. Mr Morris was employed by Lifestyle Projects in a similar role as that undertaken by Mr Woods and gave evidence at the investigation meeting. He was present at the housing site when the altercation took place between Mr Woods and Mr Vermaak. I find him to be a credible witness. The evidence Mr Morris gave was neutral, neither favouring

³ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [112]

⁴ s 124 Employment Relations Act 2000

one side or the other. Mr Morris said he heard Mr Woods and Mr Vermaak arguing in the living room. He said both men were swearing at each other. After the men entered the hallway he said he saw Mr Vermaak put his hand up to indicate he wanted Mr Woods to stop approaching him. Although Mr Morris' line of sight was partially impaired, he said he could see Mr Vermaak walking backwards down the hallway with his hand up and his arm stretched out. He heard Mr Vermaak tell Mr Woods not to come any closer. It was at shortly after this that Mr Vermaak fired Mr Woods.

[32] I accept in these circumstances that it is appropriate to reduce the remedies of lost wages and compensation to reflect Mr Woods' blameworthy actions in contributing to the situation that gave rise to his personal grievance. I consider a reduction of 50% is appropriate. This results in an award of lost wages in the sum of \$6,418.75 gross, holiday pay on this sum of \$513.50 gross, and compensation under s 123(1)(c)(i) of the Act of \$6,000.00.

Issue Four: Did Lifestyle Projects fail to comply with the Holidays Act?

[33] In order to answer this question, I must first determine the nature of the parties' relationship prior to the Individual Employment Agreement being signed on 21 June 2016.

[34] Lifestyle Property says Mr Woods was employed by it from March 2015. Before this, it says Mr Woods was an independent contractor. In support of this position it produced an undated one-page subcontractor's agreement. It says this agreement was signed by Mr Woods within 4-6 weeks of him starting with Lifestyle Projects. It says the subcontractor's agreement evidences the initial intention of the parties was that Mr Woods was a contractor.

[35] The material terms of the subcontractor's agreement were that Mr Woods would be liable for his own expenses, tools, tax and ACC contributions. In addition, he would work forty hours per week, supply tax invoices, and would be paid \$15.00 per hour. The parties to the subcontractor's agreement were recorded as Mr Vermaak and Mr Woods.

[36] The meaning of Employee is set out at s [6](#) of the Act. An "employee" is any person employed by an employer to do any work for hire or reward under a contract of service. In deciding whether Mr Woods was employed by Lifestyle Projects I must determine the real nature of the relationship between them. This assessment includes a

consideration of all relevant matters, including any matters that indicate the intention of the persons. I am not to treat as a determining matter any statement by the parties describing the nature of their relationship.

[37] In order to determine the real nature of the relationship the Authority must consider the following⁵:

- a) The written and oral terms of the contract between the parties. This will usually contain indications of common intention concerning the status of the relationship.
- b) Any divergences from those terms and conditions in practice;
- c) The way in which the parties have actually behaved in implementing their contract;
- d) The level of control or supervision exercised by Lifestyle Projects over Mr Woods' daily work (the Control Test);
- e) The work performed by Mr Woods and whether this was an integral part of Lifestyle Projects' business (the Integration Test);
- f) Whether Mr Woods was effectively working on his own account (the Fundamental or Economic Reality Test);
- g) Whether industry practice provides guidance.

[38] Having considered these factors I am satisfied, on the balance of probabilities, that the real nature of the relationship between Mr Woods and Lifestyle Projects from 10 July 2014 was one of a contract of services. Mr Woods was employed by Lifestyle Projects. In reaching this finding I have been influenced by the following factors:

- a) Lifestyle Projects was not a party to the subcontractor's agreement. The agreement is stated to be between Mr Woods and Mr Vermaak. There is no reference in the subcontractor's agreement to Lifestyle Projects. Mr Vermaak accepted during questioning that the agreement was with him personally. In any case, the terms did not accord in anyway with the parties' relationship in practice. Mr Woods did not pay for his own expenses, tools,

⁵ *Bryson v Three Foot Six Limited (No. 2)* [2005] ERNZ 372 (Supreme Court)

tax or ACC contributions. He did not supply invoices and was paid more than \$15.00 per hour.

b) Lifestyle Projects represented to third parties that it employed Mr Woods. For example,

i) It wrote letters to WINZ which referred to Mr Woods being an employee of Lifestyle Projects. When Mr Woods started working for Lifestyle Projects he was provided with a transition to work grant from WINZ. A prerequisite to the granting of this work grant was verification that Mr Woods was starting employment. In a letter to WINZ on 16 July 2014 Lifestyle Projects confirmed that Mr Woods *“will commence employment with us on 16 July 2014”*. In another letter to WINZ on 5 September 2014 it advised *“Johnny Woods has been working with us on a part time basis for the past two months on State Housing contracts as a painter”*. In a letter dated 1 September 2015 it advised WINZ *“This serves to advise that Mr J Woods resumed employment on 1/9/2015”*.

ii) It registered with the Inland Revenue Department as Mr Woods’ employer. It deducted PAYE from his weekly wages and accounted to IRD for these monies.

iii) It paid all ACC contributions.

c) Lifestyle Projects exercised full control over Mr Woods’ work. Mr Woods was told what work he needed to do and when. From July 2014 until 2016 Mr Woods was picked up and dropped off at his home daily by other team members.

d) Lifestyle Projects recorded all hours worked by Mr Woods on a weekly time sheet. The timesheets it provided were from 10 July 2014 until 4 July 2016. It then paid Mr Woods based on its records of his hours of work.

e) The timesheets I viewed showed PAYE was being deducted by Lifestyle Projects. I viewed IR34 Employer deduction forms which showed Lifestyle Projects accounted for the PAYE deductions to IRD on a monthly basis.

- f) Whilst Mr Woods' initial tax code was WT, Mr Vermaak acknowledged during questioning that this was a mistake. He said Mr Woods should have been on tax code M. The error was discovered when Mr Woods and other Lifestyle Projects' staff received invoices for ACC contributions. Mr Vermaak said he spoke with IRD and ACC to correct this. The IR34 records I viewed showed the tax code was changed to "M" in or about September 2014.
- g) Mr Woods was not in business on his own account. Before starting with Lifestyle Projects Mr Woods had no experience in the industry. Other than a few basic supplies provided by WINZ, all tools and equipment were provided by Lifestyle Projects. This included all ladders, paint brushes, rollers, blowers and so forth. Mr Woods did not work for anybody else during the period of time he worked for Lifestyle Projects.

[39] Having found Mr Woods was employed by Lifestyle Projects from 10 July 2014 until on 4 July 2016 I can now move on to consider Mr Woods' claims under the Holidays Act 2003.

[40] The uncontested evidence is that Mr Woods was not paid for public holidays on which he would otherwise have worked⁶. For those public holidays he worked, he was paid his ordinary hours but did not receive half that amount again⁷. In addition, he was not provided with an alternative holiday where he worked on a public holiday that would otherwise have been a working day for him.⁸

Issue Five: What monies are payable to Mr Woods' under the Holidays Act 2003?

Payment for Public Holidays (not worked)

[41] Section 49 of the Holidays Act 2003 provides that where an employee does not work on a public holidays, and that day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

⁶ s 49 Holidays Act 2003

⁷ s 50 Holidays Act 2003

⁸ S 56 Holidays Act 2003

[42] To calculate Mr Wood's average daily pay I have used the formula set out in s 9A of the Holidays Act 2003. The Wages records show Mr Woods' earnings for the 52 weeks ending 4 July 2016 amount to \$37,770.15. This sum must be divided by 287 being the number of days on which Mr Woods earned those earnings. The outcome is an average daily pay of \$131.60.

[43] Mr Woods says he did not work on the following 12 public holidays which would otherwise have been a working day: 25/12/14, 26/12/14, 01/01/15, 02/01/15, 26/01/15, 06/02/15, 03/04/15, 06/04/15, 25/12/15, 28/12/15, 01/01/16, 04/01/16.

[44] Multiplying Mr Wood's average daily pay of \$131.60 by these 12 public holidays comes to a sum of \$1,579.20. A sum of \$126.33, representing 8% holiday pay, must be added to this sum.

[45] Lifestyle Projects is ordered to pay Mr Woods the sum of \$1,705.53 under s 49 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Payment for Public Holidays (worked)

[46] Mr Woods submits, and the wage records show, he worked on four public holidays: 26/10/15, 28/03/16, 25/04/16 and 06/06/16. Mr Woods was paid for the hours he worked on these days at his ordinary rate of pay. However he did not receive half that amount again as required by s 50 of the Holidays Act.

[47] The wage records show:

Date	Hours Worked	0.5	Total Hours Due	Less Hours paid	Shortfall Hours	Hourly Rate	Gross Sum unpaid
26/10/15	5.5	2.75	8.25	12	Nil	\$18.50	Nil
28/03/16	8	4	12	9.5	2.5	\$18.50	\$46.25
25/04/16	8	4	12	8	4	\$18.50	\$74.00
06/06/16	7	3.5	10.5	7	3.5	\$25.00	\$87.50
							\$207.75

[48] Lifestyle Projects is ordered to pay Mr Woods the sum of \$224.37 under s 50 of the Holidays Act being the sum of \$207.75 plus a sum of \$16.62 representing 8%

holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Payment for Alternative Holidays

[49] I have already found Mr Woods worked on four public holidays. He did not receive alternative holidays for any of these days prior to his termination. Mr Woods is therefore entitled to receive payment for these days at the rate of his relevant daily pay or his average daily pay for his last day of employment⁹.

[50] Multiplying Mr Woods' average daily pay of \$131.60 by four comes to a sum of \$526.40. A sum of \$42.11, representing 8% holiday pay, must be added to this sum.

[51] Lifestyle Projects is ordered to pay Mr Woods the sum of \$568.51 under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Payment for annual leave due on termination

[52] The wage records produced by Lifestyle Projects to the Authority show holiday pay, at the rate of 8% per annum, was included in the hourly rate paid to Mr Woods from 10 July 2014 until 18 March 2015. However, during questioning at the investigation meeting, Mr Vermaak advised this was an error. He says he rewrote the wage records for this period for the purposes of the investigation meeting. He said he used a photocopy of a payslip which wrongly recorded 8% holiday pay as being included in the sum paid to Mr Woods.

[53] Upon becoming aware that some of the wage records had been recreated by Lifestyle Projects, I orally directed it to provide Mr Woods' Advocate (Mr Austin) with access to the original wage records from 10 July 2014 until Mr Woods' termination on 4 July 2016. Lifestyle Projects failed to do so. The only original records provided by Lifestyle Projects were for the period 10 July 2014 until 25 March 2015. This is despite my confirming my oral directions in writing on 4 September 2017.

⁹ Section 60(2), Holidays Act 2003

[54] Mr Austin reviewed the original handwritten records for the period 10 July 2014 until 25 March 2015. He submits that none of these records include a statement that holiday pay of 8% was included in the amount paid to Mr Woods. I was shown examples of the time-records. As Mr Austin's submission is consistent with Mr Vermaak's evidence I proceed on the basis that no holiday pay was paid with Mr Woods' wages.

[55] Mr Austin also points to another inconsistency between the wage records provided to the Authority and the original records produced by Lifestyle Projects. He says there is a difference in the daily hours recorded on the original timesheet for the week ended 11 March 2015 as opposed to the recreated copy provided to the Authority. However, upon my review of the original record I am not satisfied there has been any error. It appears Mr Austin has misread the timesheet as starting on a Monday whereas the week starts on a Thursday and concludes on a Tuesday.

[56] Mr Austin helpfully produced a summary of Mr Woods' wage records. The wage records show, and Mr Woods submits, that Mr Woods' employment ended on 5 November 2014. This was by agreement due to a lack of work. It is therefore appropriate that holiday pay be calculated for the period 10 July 2014 to 5 November 2014 at the rate of 8%¹⁰.

[57] Based on earnings of \$3,530.65 gross, I find the sum of \$282.45 is payable by Lifestyle Projects to Mr Woods for holiday pay during the period 10 July 2014 and 5 November 2014.

[58] Mr Woods was re-employed by Lifestyle Projects on 15 December 2014. His employment terminated on 4 July 2016. For the period 15 December 2014 to 15 December 2015, Mr Woods was entitled to receive 4 weeks' annual leave. To calculate the sum payable to Mr Woods I must use the greater of his ordinary weekly pay at the end of his employment or his average weekly earnings during the 12 months immediately before the termination of his employment.¹¹ The greater of these two options is Mr Woods' ordinary weekly pay.

¹⁰ Section 23 Holidays Act 2003

¹¹ Section 24(2) Holidays Act 2003

[59] Ordinary weekly pay is calculated using the formula set out in s 8 of the Holidays Act. Using this calculation Mr Woods' ordinary weekly pay is \$920.31 per week. Multiplied by 4 weeks is \$3,681.24.

[60] For the period 16 December 2015 to 4 July 2016 it is appropriate that holiday pay is calculated at the rate of 8%. Earnings during this period were \$23,931.88. 8% of this sum is \$1,914.55.

[61] Lifestyle Projects is ordered to pay Mr Woods the sum of \$5,595.79 for outstanding holiday pay due for the period 15 December 2014 to 4 July 2016 within 14 days of the date of this determination.

Issue Five: Interest

[62] Mr Woods claims interest on the amounts awarded by the Authority. In the circumstances I consider it appropriate to order interest is payable by Lifestyle Projects. The combined total of the holiday pay arrears awarded is \$8,376.65. Lifestyle Projects is ordered to pay interest on this sum from 4 July 2016 at the applicable rate of 5% per annum¹² continuing until payment. This must be paid within 14 days of the date of this determination.

Issue Six: Were monies deducted from Mr Woods' wages but not paid to the Ministry of Justice? If so what amount, if any, is payable by Lifestyle Projects and to whom?

[63] On three occasions between 9 December 2014 and 3 August 2015, attachment orders on Mr Woods' wages were made by the Ministry of Justice. These orders required Lifestyle Projects to make deductions in varying amounts from Mr Woods' wages for court fines. The deductions were ordered to be paid to the Court by the 20th of the month following the deductions.

[64] Lifestyle Projects ignored the Court orders until 17 February 2016. From this date, until 4 July 2016, Lifestyle Projects deducted differing amounts from Mr Woods' wages which combined totalled \$675.00. In particular:

Month	Monthly Total Deductions	Due Date
February 2016	\$50.00	20 March 2016
March 2016	\$175.00	20 April 2016

¹² Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4

April 2016	\$140.00	20 May 2016
May 2016	\$70.00	20 June 2016
June 2016	\$195.00	20 July 2016
July 2016	\$45.00	20 August 2016

[65] Aside from the March 2016 deductions, Lifestyle Projects did not pay the deductions to the Court on the due date. \$175.00 was paid to the Court on 11 April 2016. \$430.00 was paid on 12 May 2017. An amount of \$70.00 is yet to be paid to the Court.

[66] Lifestyle Projects was ordered by the Ministry of Justice to pay all deductions from Mr Woods' wages to the Court. Its failure to do so means it may be liable for the debt and the Court can take recovery action against it. It is accordingly appropriate that any orders I make concerning the \$70.00 require this payment to be made to the Ministry of Justice.

[67] Lifestyle Projects is ordered to comply with the Attachment Orders made by the Ministry of Justice by paying the Ministry of Justice the sum of \$70.00 for unaccounted for deductions made from Mr Woods' wages. Payment must be made within 14 days of the date of this determination.

Issue Seven: Did Lifestyle Projects breach its duty of good faith by failing to promptly pay the sums deducted from Mr Woods' wages to the Ministry of Justice?

[68] Mr Vermaak accepts that after payment of the sum of \$175.00, the remaining monies deducted from Mr Woods' wages were not immediately paid to the Ministry of Justice. He said this was because Lifestyle Project's wage records were with the Accountant for end of year processing. He said when Lifestyle Projects received the wage records back it immediately attended to payment. He said he was unaware there was still \$70.00 outstanding.

[69] I do not find Mr Vermaak's explanation for non-payment of the deductions to be credible. He could not explain why the Accountant required the weekly time-records to prepare the annual returns for the year ended 31 March 2016. He could also not explain why the Accountant required time-records for periods of time after the end of the financial year. In any case, even if Lifestyle Projects did not have the weekly time-records, it could have easily calculated the sums deducted from Mr

Woods' wages or asked Mr Woods for a copy of the timesheets it had provided to him which recorded the amounts deducted.

[70] I find Lifestyle Projects breached s 4 of the Act. It did not deal with Mr Woods in good faith. It directly misled or deceived Mr Woods in relation to the deductions it made.

[71] I find Lifestyle Projects' breach of s 4 was deliberate, serious, and sustained. As a result of Lifestyle Properties failure to account to the Court for the deductions made, the Court wrote to Lifestyle properties on 22 February 2016, 15 March 2016, 10 May 2016 and 7 June 2016 recording details of the attachment orders it had made. These letters included notes which advised Lifestyle Projects what was required to be done in order to comply with the attachment orders. It was advised that a failure to comply with the attachment orders without reasonable excuse was an offence under ss 106 and 106A of the Summary Proceedings Act 1957. Lifestyle Properties chose to ignore these letters. This was serious as it put Mr Woods at risk of an order being made by the Court for his arrest and his chattels being seized. It also resulted in the Court imposing additional fees although I am advised the Court has agreed to wipe these fees.

Issue Eight: Penalty for breach of the duty of good faith

[72] The quantum of any penalty is to be determined using the four-step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*¹³.

Step 1: Nature and number of breaches

[73] Step one is to identify the number of breaches and the maximum penalty applicable. In this case, during the employment relationship, Lifestyle Properties failed to account to the Court for deductions made from Mr Woods' wages during February, April, May, June and July 2016.

[74] I consider it appropriate that a global penalty is imposed for these breaches. This means Lifestyle Projects is liable to a maximum penalty of \$20,000.00.

¹³ [2016] NZEmpC 143

Step 2: Severity of the Breach

[75] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[76] Factors to be taken into account when considering the first part of Step 2, aggravating factors, include whether the breach or breaches were committed knowingly and/or calculatedly, the duration of the breach or breaches, the number of persons affected adversely, the extent of any departure from the statutory requirements and any history of previous breaches.

[77] I find the breach was committed knowingly. Mr Vermaak was the person who made the deductions from Mr Woods' wages. The letters from the Ministry of Justice were sent to Lifestyle Projects' address for service which was also Mr Vermaak's residential address. The letters were clear and unambiguous about the requirement to pay any deductions made to the Court.

[78] The deductions took place over six months. In large part, they were not paid to the Court until 12 months after their due date. \$70.00 still remains outstanding. The Court was entitled to receive these monies in a timely manner.

[79] I conclude that this stage has a neutral effect on my calculation.

[80] The second part of step 2 is to consider any mitigating circumstances, whether compensation has been paid and/or steps taken to mitigate the effect of the breach. In this case Lifestyle Projects has paid all but \$70.00 of the monies owing to the Court. It acknowledges that it should have paid all monies to the Court upon the deductions being made from Mr Woods' wages. Lifestyle Projects does not appear to have come before the Authority previously in relation to breaches of s 4 of the Act. In addition, Mr Woods' has not suffered any harm from the breach. I reduce the degree of severity to 40%, a potential penalty of \$8,000.00.

Step 3: Ability to pay penalty

[81] Step 3 is an assessment of Lifestyle Projects' ability to pay. Mr Vermaak said Lifestyle Projects has ceased trading and therefore has limited, if any, ability to pay a penalty. However, under questioning he clarified that the Housing New Zealand

contracts are in the process of being transferred to another company he operates. There may therefore be monies owing between these two entities which are sufficient to pay a penalty. I conclude that this stage has a neutral effect on my calculation.

Step 4: Proportionality of penalty

[82] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty I have arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances. Considering the circumstances of this case, and looking at recent Authority and Court imposed penalties, I conclude an appropriate penalty is \$1,000.00. This sum is proportionate to the breach and is sufficient to act as a deterrent to Lifestyle Projects.

Conclusion on Quantum

[83] Adopting the approach applied by Judge Inglis in *Lumsden v Skycity Management Limited*¹⁴ I consider it appropriate that part of the penalty be paid to Mr Woods as he has suffered the impact of the breach and has been obliged to take steps to enforce his rights. I apply the same ratio of payment as Judge Inglis to reflect this.

[84] Lifestyle Projects is ordered to pay \$1,000.00 by way of penalty for breach of s 4 of the Act. I direct that 75% of that amount (\$750.00) is to be paid to Mr Woods. The remaining 25% (\$250.00) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[85] Payment of the penalty is to be paid within 14 days of the date of this determination.

Issue Nine: Costs

[86] The parties are encouraged to resolve costs by agreement. If that is not possible, then Mr Woods has seven days to file a costs memorandum. Lifestyle Projects has a further seven days to file its costs memorandum. Mr Woods then has three working days to file and serve a reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

¹⁴ [2017] NZEmpC 30

[87] All submissions must include a breakdown of how and when costs were incurred and be accompanied by supporting evidence.

Jenni-Maree Trotman
Member of the Employment Relations Authority