

Attention is drawn to the non-publication order set out in paragraph [1] under clause 10(1), Schedule 2, Employment Relations Act 2000.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 138
5395229

BETWEEN

MR Y
Applicant

A N D

KEVIN HYDE
ENGINEERING LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Moore for the Applicant
No appearance for the Respondent

Investigation meeting: 29 May 2013 at Christchurch
Submissions and further evidence received from
applicant 20 June 2013

Date of Determination: 9 July 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Y has two personal grievances of unjustified disadvantage in his employment by sexual harassment and one personal grievance of unjustified disadvantage by way of abuse directed at him.**
- B. Mr Y was constructively dismissed.**
- C. Kevin Hyde Engineering Limited to pay Mr Y within 28 days:**
- (i) \$7,528.48 in unpaid wages and unpaid holiday pay; and**
 - (ii) 5% interest on \$7,528.48 from 17 September 2012 until it is paid in full; and**

- (iii) **\$15,795.00 lost remuneration; and**
- (iv) **\$12,000.00 compensation for humiliation, loss of dignity and injury to feelings; and**
- (v) **\$3,500.00 costs; and**
- (vi) **\$71.56 for the filing fee.**

Employment relationship problem

[1] Mr Y was a 16 year old school leaver who was employed by Hyde Engineering as a labourer in his first full-time job. Hyde Engineering is a general engineering business. I have anonymised the applicant's name because of the sensitive nature of aspects of these proceedings. The letter Y bears no relation to his name. His actual name is not to be published.

[2] Mr Y was employed in February 2011 and made redundant in March 2012 because there were *not enough unskilled labouring jobs at our business for you to do*. However he was re-engaged in early May 2012 when Hyde Engineering gained more work.

[3] Mr Y says that during both periods of his employment he was subject to sexual harassment by the principal of the respondent, Kevin Hyde, and other employees of Hyde Engineering. He says that as a result of that behaviour he was unjustifiably constructively dismissed on 28 May 2012.

[4] Mr Y says that he was paid below legal minimum rates and was not paid all holiday pay owed. He says that he was not given an employment agreement, and that he was not advised that he could get independent advice on any employment agreement. He says that Hyde Engineering has failed to keep wages and time records, and failed to produce any wages and time records despite his requests. Mr Y also says he was not advised of his entitlements under the Holidays Act 1983.

[5] Mr Y initially claimed for unpaid Kiwisaver entitlements but withdrew this claim at the investigation meeting.

[6] He seeks remedies of:

- (a) Findings of unjustified constructive dismissal and of unjustified disadvantage on the grounds of sexual harassment;
- (b) Recommendations to the employer under s. 123(d) of the Employment Relations Act if the Authority finds that he was sexually harassed;
- (c) Compensation of \$20,000 for humiliation, loss of dignity and injury to his feelings for the unjustified dismissal;
- (d) Lost wages due to the unjustified dismissal;
- (e) Penalties of \$2,000 for each breach of ss.63A, 64 and 65 of the Employment Relations Act payable to him;
- (f) A penalty of \$2,000 for breach of s.130 of the Employment Relations Act payable to him;
- (g) A penalty of \$2,000, pursuant to s.75, for each breach of the Holidays Act 2003 payable to him;
- (h) An order for \$7,528.48 in unpaid wages and holiday plus interest of 5% per annum;
- (i) Legal costs.

[7] Hyde Engineering resists all the claims in its Statement in Reply, which was written and lodged by Mr Hyde. After the investigation meeting the Authority was informed that the respondent business is no longer trading.

[8] On 15 February 2013, the Authority held a telephone conference with Peter Moore, advocate for the applicant and John Angland, counsel for the respondent. At that telephone conference a date for the investigation meeting was set for 29 and 30 May 2013.

[9] The Authority issued a Notice of Direction on 15 February 2013 directing the applicant to lodge his statements of evidence by 23 April 2013. The respondent was directed to lodge its statements of evidence by 8 May 2013. The applicant lodged its statement of evidence in line with the directions. No statements of evidence were

lodged by the respondent. No documents supporting the respondent's position were provided to the Authority in advance of the investigation meeting.

[10] A Notice of Investigation Meeting was sent out on 27 February 2013. It notified the parties that the investigation meeting would begin on Wednesday, 29 May 2013 at 9.30am. The Notes to the Notice read:

... if the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant. ...

You are also advised that any legal costs incurred by the other party may be awarded should you not be successful in bringing or defending the claim.

[11] I am satisfied that the notice of direction was served on the respondent company via its counsel, Mr Angland.

[12] On Monday, 27 May 2013 Mr Angland contacted the Authority to say that he had been unable to contact Kevin Hyde and was unable to obtain any further instructions from Mr Hyde. His last contact with Mr Hyde had been 12 April 2013. He confirmed that he sent Mr Hyde notification of the hearing date on 27 February 2013. Mr Angland stated:

It is possible Mr Hyde is working in Australia and is unable to be contacted at this time. None of my emails or phone messages have been returned. In the circumstances I seek leave to withdraw as counsel on the record for Kevin Hyde Engineering Limited.

[13] The Authority's Support Officer sent an email to Mr Hyde on 27 May 2013 notifying him that Mr Angland had withdrawn as counsel for Hyde Engineering and that the Authority intended to proceed with the investigation meeting whether or not he attended. Mr Hyde's attention was drawn to the notes on the Notice of Investigation Meeting.

[14] The investigation meeting was set to begin at 9.30am. However, there was no representation for the respondent company. Therefore I delayed the beginning of the investigation meeting until 9.42am in case the respondent's representative was running late. However, when there was no representative present at 9.42am the investigation meeting began.

[15] I heard the affirmed evidence from Mr Y, Mrs Y, Mr Y's mother and Mr N, Mr Y's father. I also received some further documents, some of which had been supplied by the respondent company.

Issues

[16] The issues the Authority needs to determine are:

- (a) Whether Mr Y was sexually harassed;
- (b) Whether Mr Y is owed any wage arrears, and, if so, how much;
- (c) Whether Mr Y is owed any holiday pay, and, if so, how much;
- (d) Whether the respondent breached the Holidays Act 2003 by failing to tell Mr Y of his entitlements under that Act;
- (e) Whether Mr Y was constructively dismissed;
- (f) Whether the respondent kept adequate time and wage records;
- (g) Whether the respondent failed to produce wages and time records as requested;
- (h) Whether the respondent failed to provide an employment agreement or agreements;
- (i) Whether the respondent failed to advise Mr Y of his right to get independent advice on his employment agreement;
- (j) Whether the respondent should pay any penalties for proven breaches of the Employment Relations Act 2000 and/or the Holidays Act 2003;
- (k) What remedies, if any, is Mr Y entitled to?

Determination

[17] Under s.174 of the Employment Relations Act 2000 I do not need to set out a record of all the evidence or the findings on credibility of any evidence. Having said that, it is clear that because the respondent was not represented and presented no witness evidence at the investigation meeting my findings of fact are based on Mr Y's

evidence and that of his parents. All three witnesses gave affirmed evidence and I was able to test their evidence by questioning them. I have taken Hyde Engineering's statement in reply into account in that I questioned Mr Y about the allegations about him made by Mr Hyde in that document. I have also had access to documents about Mr Y's wages and holidays supplied by Hyde Engineering to Mr Moore in advance of and after the mediation. However, Mr Hyde was not available for me to test the respondent's evidence under oath so that has affected the weight I could give it.

[18] Mr Y was a school student when a family friend organised some work for him at Hyde Engineering. Mr Hyde was aware that the applicant had Attention Deficit Hyperactive Disorder (ADHD). Mr Y began part-time work at Hyde Engineering on about 14 February 2011 which quickly progressed to fulltime hours of 45.5 hours per week.

[19] Mr Y was not offered or shown a written employment agreement. From 14 February 2011 to 30 June 2011 he was paid \$10 per hour. No PAYE was paid on this amount. In the beginning Mr Y was paid for his weekly work in cash. After a few pays, his pay was paid directly into his bank account. He was paid fortnightly.

[20] On 1 July 2011 Mr Y was given a raise to \$10.50 per hour. At this point Mr Hyde told Mr Y and his parents that he was *on the books as a normal fulltime worker*. Mr Y was not presented with a written employment agreement at this point either. Mr Y remained on the rate of pay until 7 March 2012. At that point Mr Y ceased working for the respondent company; he was, in his words, *let go*.

[21] Mr Y was then unemployed for almost two months when Mr Hyde rang Mr Y on his personal cell phone and asked if he would be interested in coming back to work because the respondent had gained further work arising out of the Christchurch City rebuild. Mr Y:

...wasn't keen to go back. Actually, I was really keen not to go back at all. But my Mum pushed me to. She was really definite about it. So in the end I did.

[22] Mr Y's reluctance to return to Hyde Engineering was because within two weeks of his beginning employment there for the first time, he became the subject of sexual language and what Mr Hyde characterises as *banter*, which Mr Y characterises as sexual harassment. He says:

I got a lot of BS from the guys, including Kevin. Actually, I think the guys were just going along with Kevin and the sorts of stuff he would say to me.

Some of the things Kevin and the guys said to me were:

*“Have you f***ed your cat yet?”*

*“Would you like to see how long my d*ck is?” Kevin said this then actually got a ruler out. He then said, “would you like to suck my d*ck?”*

“Are you gay?” When I said no, he asked “are you sure? That’s not what your mother told me.”

“What’s your sister doing? Does she want a ride on the roller coaster?” (meant sexually)

“It’s Friday. Time for you to give us a blow job. That’s what Kev said.”

“Suck my cock”.

*“You are a f***ing lazy c*nt.”*

*“Useless c*nt”.*

[23] Mr Y says that the last two remarks were remarks made by Mr Hyde. Mr Y says he put up with that kind of language and harassment until he finished working there in May 2012:

Sometimes it would only be a couple of times a week. Other times it was more often – like a few times a day.

[24] Mr Y also says:

At times I told him to stop it, but he didn’t. I don’t think he realized how serious I was when I told him to stop it. I’m not that type of person to say stop it easily. Often I would just try to brush him off by saying pretty neutral things like “yep” or “righto” or “ok”. They were all small words. Occasionally I would turn to him and say ‘you too’ or “you’re the same” or things like that. Occasionally when he said rude things I told him he was being a dick, but I didn’t use language stronger than that. He was the boss, and you don’t really talk with that kind of stronger language to the boss.

Mainly I tried not to pay attend to what he was saying. I was just getting on with the work.

*When the other workers talked to me like that, I would use stronger language, because they weren’t my boss. So to them I would say things like, “f*** off” when they were harassing me.*

[25] In his statement in response Mr Hyde denies that Mr Y was harassed or treated maliciously by him or any of his other employees.

[26] Mr Hyde then listed a number of comments which he alleged that Mr Y made in front of him, his staff and others. Mr Y categorically denies having made a number of the statements which Mr Hyde accused him of in the statement in reply.

[27] Mr Hyde says that at many times during Mr Y's employment he asked him to leave his cell phone in his pocket or put it in his cubby hole. He said that there were many times when Mr Y would be texting or talking on his phone when he should have been working.

[28] Mr Hyde also says that Mr Y spent unnecessarily long periods of time in the toilet. Mr Hyde considered that was also in order to avoid work.

[29] Mr Y agrees that there were a number of conversations between him and Mr Hyde about his cell phone use. However, Mr Y says that when he was on his cell phone he was speaking with his mates and his sister about the situation he was facing at work and the sexual harassment which was occurring. He was seeking support and advice as to how to deal with the situation. He used to go into the toilet for periods of time when he was uncomfortable or upset about the harassment and because of gastrointestinal symptoms that he considers developed as a result of the harassment.

Was Mr Y sexually harassed?

[30] Section 103(1)(d) of the Employment Relations Act 2000 includes in the definition of a personal grievance a claim that an employee was sexually harassed.

[31] Section 108 of the Act defines sexual harassment for the purposes of s.103(1)(d):

- (1) ... an employee is **sexually harassed in that employee's employment** if that employee's employer or a representative of that employer—
- (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—
 - (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
 - (b) by—

- (i) *the use of language (whether written or spoken) of a sexual nature; or*
 - (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.*
- (2) *For the purposes of sections 103(1)(d) and 123(d), an employee is also **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.*

[32] Section 117 of the Act applies when the person engaging in the kind of behaviour described in section 108 is not the employer but a fellow employee.

[33] I consider that in line with the definition in s.108(b) of the Act there were repeated remarks which were language of a sexual nature and gestures of a sexual nature which amounted to physical behaviour of a sexual nature that subjected Mr Y to unwelcome behaviour which was also offensive to him. It had a detrimental effect on his job performance and his job satisfaction.

[34] Unwelcome and offensive language of a sexual nature was directed at Mr Y by Mr Hyde and by other employees of the respondent.

[35] Such language and behaviour of a sexual nature went beyond the bounds of reasonable banter that could be expected even in the all-male environment of an engineering workshop.

[36] Although it is not necessary for me to find that Mr Y made it known to Mr Hyde that such language and behaviour was unwelcome I find that he did so, although perhaps in a hesitant way given that he was addressing his boss. Mr Y made it more clearly known to his fellow employees that their language and behaviour was unwelcome to him.

[37] Therefore, I find that Mr Y has personal grievances that he was sexually harassed in his employment, in the first period of employment ending March 2012 and in the second period of employment in May 2012. That harassment was made up

of actions of other employees of the respondent employer that were unjustified and to Mr Y's disadvantage in his employment.

[38] Sections 122 and 160 of the Act allow the Authority to make finding that a personal grievance is of a type other than that alleged, and prevent the Authority being bound to treat the matter as if it is of the type described by the parties.

[39] Mr Hyde's use of the terms *you are a f***ing lazy c*nt* and *useless c*nt* can be characterised as sexual harassment because of the use of offensive language of a sexual nature. However, I consider that they are more in the nature of abusive language and behaviour that was to Mr Y's disadvantage in his employment coming as they did from Mr Hyde, the principal of his employer. The use of terms such as those to describe an employer's dissatisfaction with an employee's performance is not fair and reasonable particularly towards a young man in his first full-time job and especially when the employer knew of his ADHD condition prior to employing him.

Was Mr Y constructively dismissed?

[40] Up until Mr Hyde asked Mr Y to return to work Mr Y had not shared his problem about sexual harassment or abuse at work with any adult; only with his peers. Mr Y was unemployed since he had first been 'laid off' by the respondent. Mr Y was very reluctant to return to work for the respondent but was unable to adequately explain to his parents why he was so reluctant. Therefore, his parents naturally exerted some pressure on him to return to work. He did so reluctantly on 4 May 2012.

[41] Mr Y struck me as being relatively lacking in confidence, and in many ways, perhaps young for his age. It is impossible to know how much of that is as a result of the behaviour he was subjected to at Hyde Engineering. Mr Y did not confide in an adult about the sexual harassment until towards the end of May 2012 when he told a friend of his family who helped him explain the situation to his parents.

[42] On 28 May 2012, Mr Y's last day, there were two specific incidents that led to the end of the working relationship. Mr Y said that was the day when Mr Hyde questioned him about being gay. There is no doubt that the interrogation by Mr Hyde on that point was not neutral but very pointed and negative. Also at smoko Mr Hyde directed Mr Y to leave his cell phone on the coffee table in the smoko room. When Mr Y refused Mr Hyde said *if you don't like it here, piss off*. Mr Y walked out and left. He did not return.

[43] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[44] Therefore in examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation? Secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

[45] It may be argued that in staying employed during the first period of employment until he was made redundant Mr Y affirmed the contract despite the sexual harassment and led his employer to consider that there was not a risk of him resigning if subjected to language and behaviour of a sexual nature. It may also be considered that given the history of the first period of employment the respondent could not reasonably foresee that further conversations or interrogations of a sexual nature would cause a risk of Mr Y resigning. However, in *Z v A*¹ the Employment Court found:

...each new act of sexual harassment supplies a fresh breach and an additional repudiation of the contract, giving rise to a right to cancel it. Nor does it matter that the resignation has been triggered by some event other than behaviour of a sexual nature because, as the literature on the subject shows, sexual harassment is often reinforced by bullying of a general or neutral character.

[46] In this case Mr Hyde's remark that if Mr Y didn't like it there he could *piss off* when combined with the sexual harassment from Mr Hyde and other employees that occurred since Mr Y started his second period of employment and the inappropriate questioning about his sexuality that day by Mr Hyde led to a complete breakdown in the trust and confidence Mr Y should have been able to have in his employer. His employer breached its obligations to him and it was reasonably foreseeable that any employee would resign in such circumstances, let alone such a young and reasonably vulnerable employee. Therefore, I find that Mr Y has a personal grievance that he was unjustifiably constructively dismissed.

¹ 2 ERNZ 469, at page 483.

Was Mr Y underpaid?

[47] For the entire two periods of employment Mr Y was paid less than the applicable minimum wage. Mr Hyde's statement in reply stated that Mr Y generally worked 45.5 hours per week. That is consistent only to a limited extent with Mr Y's evidence and that of his mother. Mr Y's mother kept a record of her son's work hours in her diary which showed variations in hours. Mr Y's mother's record is a contemporaneous one that she wrote in her daily diaries.

[48] After mediation Mr Hyde provided a handwritten record setting out what he said were Mr Y's hours and gross weekly pay. The document does not record Mr Y's work before June 2011 or after 22 February 2012. Also, the detail on those records does not accord with Mr Y's mother's contemporaneous record. I prefer Mr Y's mother's record.

[49] PAYE was not paid on Mr Y's behalf for at least a part of his employment. Mr Hyde does not deny that Mr Y was paid less than the minimum wage and that the respondent did not pay PAYE for all the time Mr Y was employed by it. However, that is not something that I can remedy. The responsibility to pay the PAYE remains with the respondent.

[50] I accept the applicant's submission, which showed careful and detailed calculations, that the total of unpaid wages and holiday pay claimed of \$7,528.48 is the amount owed to Mr Y up to and including 28 May 2012.

Did the respondent comply with its obligations under the Employment Relations Act 2000 and the Holidays Act 2003?***Provision of an employment agreement***

[51] Mr Hyde says that he provided Mr Y with a draft employment agreement but that Mr Y never signed and returned it. Mr Y's evidence is that if he had been provided with one he would have taken it home to discuss it with his mother. Mr Y gave evidence that he had not seen a proposed written employment agreement. Therefore, I conclude that Mr Y was not provided with a written employment agreement for either period of employment. That is in breach of s.63A(2)(a) of the Act.

Was Mr Y advised that he could get independent advice on the proposed employment agreement?

[52] Section 63A(2)(b) of the Act provides that an employer must advise an employee that he is entitled to seek independent legal advice on the proposed agreement. Given that Mr Y was not provided with any written employment agreement it follows that he was not advised he could get independent legal advice.

Did the respondent breach s.73 of the Holidays Act 2003?

[53] Section 73 requires that at the time an employee enters into an employment agreement the employer is to inform the employee of his rights under the Holidays Act. I accept that the respondent did not do this.

Did the respondent supply wages and time records as requested?

[54] In the statement of problem the applicant alleged that the respondent had failed to supply Mr Y's wages and time records as required under s.130(1) of the Employment Relations Act. Mr Y's wages and time records were apparently requested but not supplied before the statement of problem was lodged on 17 September 2012.

[55] In the respondent's statement in reply, filed on 12 October 2012, Mr Hyde wrote that it was incorrect that the respondent had failed to supply wages and time records because if Mr Y asked for a pay slip the respondent had always supplied one. He also stated that he did not understand the allegation the respondent had not supplied wages and time records as he had supplied a final payslip to Mr Y.

[56] I consider it likely that the respondent misunderstood its responsibilities under s.130(2) to supply wages and time records to Mr Y after the request by Mr Moore.

[57] On 13 November 2012 through its representative the respondent supplied a summary of some hours and payments made to Mr Y. Then on 22 November 2012, again through its representative, the respondent supplied a record of dairy entries purporting to be a full record of Mr Y's wages and time as an employee. However, neither document recorded the applicant's time and wages for the periods before June 2011 or after 22 February 2012.

[58] I consider that the respondent did fail to supply time and wages records for the whole period of Mr Y's employment with it.

Did the respondent keep wages and time records as required?

[59] The applicant considers that the time and wages records produced in November 2012 are likely to have been created for the purpose of these proceedings and were not recorded at the relevant times as required by s.130(1) of the Act.

[60] As I set out above I have found that the respondent's records do not align with Mr Y's mother's records. The respondent does not appear to have kept wages and time records for the full period of Mr Y's employment with it. That was perhaps based on its understanding that if Mr Y was paid in cash the formalities of employment were not applicable. Unfortunately for the respondent that is incorrect. The respondent breached its responsibility to keep records in line with the requirements in s.130(1) of the Act.

Remedies

Unpaid wages

[61] I have found that the respondent owes Mr Y \$7,528.48 in unpaid wages and unpaid holiday pay.

[62] Mr Y has claimed interest on his unpaid wages and holiday pay. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum.

[63] Mr Hyde was aware from at least 17 September 2012, the date the statement of problem was lodged, that Mr Y claimed \$7,528.48 in unpaid wages and holiday pay. At the directions conference on 15 February 2013 Mr England advised the Authority that the respondent accepted that it owed arrears of wages and holiday pay. I accept that the amount was not necessarily agreed at that stage but the respondent could have paid Mr Y the undisputed portion of what it owed prior to the investigation meeting. The Authority encouraged it to do so. However, it failed to.

[64] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum.

[65] I consider that in all the circumstances it is reasonable that the respondent pay Mr Y 5% interest on \$7,528.48 from 17 September 2012 until the date it is paid in full.

Reimbursement of wages lost as a result of the personal grievances

[66] Section 123(1)(b) of the Act allows me to provide for the reimbursement by the respondent of the whole or any part of wages Mr Y lost as a result of his grievance. Section 128(2) of the Act provides that I must order the respondent to pay Mr Y the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.

[67] The principles outlined by the Court of Appeal in *Sam's Fukuyama Food Services v Zhang*² are applicable to my consideration of reimbursement of lost wages to Mr Y. The first principle is that an employee can only be reimbursed for actual lost income.

[68] Mr Y did not obtain work in the three months after his dismissal. He did not obtain any on-going work until March 2013. He has only worked part-time since then and is also on a sickness benefit as a result of the on-going effects of the personal grievance on him.

[69] Mr Y's ability to mitigate his loss and seek alternative employment was limited by the psychological and physical effects of the sexual harassment on him. Evidence of this was supplied by his general practitioner and is addressed in detail below under my consideration of compensation.

[70] Section 128(3) of the Act gives me the discretion to order an employer to pay an employee, by way of compensation for remuneration lost by an employee as a result of the personal grievance a sum greater than three months remuneration that is mandatory under s.128(2).

² [2011] NZCA 608

[71] Mr Y claims that if he had been paid the minimum wage that applied at the time he would have earned \$614.25 per week; being 45.5 hours x \$13.50 per hour. However, in his second period of employment Mr Y's hours were 45 hours per week. For the first 13 weeks of lost wages it is appropriate to calculate weekly lost wages at 45 hours per week, being $\$13.50 \times 45 \times 13 = \$7,897.50$.

[72] The respondent must reimburse Mr Y for \$7,897.50 being actual lost wages for the first 13 weeks after his dismissal.

[73] Mr Moore submits that because Mr Y remained unemployed for approximately a further 26 weeks the respondent should also reimburse him for a further 26 weeks' wages. At 45 hours per week paid at \$13.50 per hour that would be a further \$15,795.

[74] In the *Zhang* case the Court of Appeal considered that the Employment Court's award of 47.4 weeks lost wages³ was excessive in the circumstances. The Court considered that between 26 and 30 weeks would be a moderate award, based on the discretionary power under s.128(3) of the Act, for lost income.

[75] Mr Zhang had been employed for 10 months and the Court considered that as the employment relationship had broken down he was unlikely to have remained employed for the whole period up to 30 weeks. The Court awarded Mr Zhang 26 weeks of ordinary time remuneration in total.

[76] In this case the employment relationship had also broken down and it is unlikely that Mr Y would have remained employed by the respondent for 39 weeks after 28 May 2012. However, I consider that an award of a further 13 weeks, making a total of 26 weeks of lost remuneration, is reasonable in all the circumstances. Therefore, the respondent must pay Mr Y a further \$7,897.50 in lost remuneration. That means that the respondent must pay a total of \$15,795 to Mr Y as lost remuneration.

Compensation for personal grievance of sexual harassment and unjustified dismissal

[77] Mr Y and his mother gave evidence of the significant personal toll the sexual harassment in particular has taken on Mr Y's physical and mental health. Mr Y took

³ The whole period from the expiry of Mr Zhang's two weeks' notice until he began a new job.

three days sick leave in his second period of employment which he says was because of the stress he was under at work.

[78] Mr Y says that he also lost his appetite and had trouble sleeping. He says that during the first period of employment he was angry much of the time, which impacted on his relationship with his family and also that he developed his gastro-intestinal symptoms for the first time. His evidence was that these symptoms returned about 4 May 2012 when he returned for the second period of employment.

[79] Mr Y developed nausea, vomiting and diarrhoea during May 2012 and at times vomited before he went to work. Mr Y's doctor's evidence was that he was first consulted about work stress on 1 June 2012:

Chat re prev GI as a result of work stress - being abused/harassed re ?gay? [Mr Y's sister] need a "ride"? Do you want to suck my dick etc - note re stress leave ex Mon⁴

[80] Dr Wilkinson also wrote that Mr Y is on a sickness benefit and remains fit for part-time work only as a result of:

...persisting dysthymia⁵ since his work incident and a mild post-traumatic stress in large part due to the protracted nature of legal proceedings

[81] I cannot take into account the stressful effect these legal proceedings have had on Mr Y except to the extent that the respondent failed to settle the acknowledged debt of unpaid wages and holiday pay.

[82] I accept that the unjustified behaviour of the respondent has caused Mr Y significant humiliation, loss of dignity and injury to his feelings and on-going ill health. Under s.123(1)(c)(i) of the Act I order the respondent to pay Mr Y \$12,000 compensation.

Contribution

[83] Having established Mr Y has a personal grievance, s.124 of the Act requires me to consider whether he contributed to the situation which gave rise to his grievance, and if so reduce remedies accordingly.

⁴ Letter from Dr Wilkinson dated 18 June 2013

⁵ Chronic, low level depression.

[84] Mr Y contributed in no way to the situation giving rise to his personal grievance and I do not reduce the remedies I have awarded.

Any action to prevent harassment

[85] If the Authority finds an employee to have been sexually harassed s.123(1)(d) of the Employment Relations Act allows the Authority to make recommendations about any action necessary for the employer to take to prevent further harassment of any employee.

[86] I understand the respondent is no longer trading and no longer has any employees. Therefore, I do not consider it necessary or useful to make any such recommendations and decline to do so.

Penalties

[87] Section 133 of the Employment Relations Act gives the Authority jurisdiction to deal with all actions for recovery of penalties for a breach of any provision of the Act. Breaches of s.130 of the Act are capable of attracting penalties.

[88] Section 135 of the Act provides that a company that is liable to pay a penalty can be liable for an amount not exceeding \$20,000.

[89] The purpose of a penalty is to punish a party for breaching the Act or the employment agreement. I have found that the respondent failed to comply with s.130 of the Act in that it did not keep adequate wages and time records and so could not supply them when requested. It also breached its responsibilities under the Act in relation to provision of a written employment agreement and advising Mr Y of his rights under the Holidays Act.

[90] However, I consider that in all the circumstances penalties are not warranted as it is more likely that the breaches were not deliberate but inadvertent. In addition, it would serve very little purpose to order penalties against a company that is no longer trading.

Costs

[91] Mr Y has been successful in his claims. It is usual for reasonable costs to be paid to the successful party by the unsuccessful party. Mr Y submits that the

respondent should pay his full legal costs of \$7,020; that is he is seeking indemnity costs. I have seen the invoices tendered to Mr Y and a record of Mr Moore's time recording. I consider Mr Moore's hourly rate of \$180.00 per hour reasonable.

[92] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Act. Costs are at the discretion of the Authority.

[93] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party.

[94] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁶ a judgment of the Full Court of the Employment Court. The Court in the *Da Cruz* case also noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. That notional rate is currently \$3,500 per day.

[95] Costs must be reasonable and costs awards are generally modest.

[96] I do not consider that this is a case that requires indemnity costs to be awarded. It is the kind of case in which the starting point for exercising my discretion to award costs begins with the notional daily rate of \$3,500 per day.

[97] The investigation meeting took half a day which would normally attract a contribution to costs of \$1750. However, the meeting took half a day only because there was no appearance by the respondent. The applicant's advocate had prepared for an investigation that was set down for two days. If he had known that the respondent was not going to defend the matter beyond its statement in reply he would have put in significantly less time in preparation for the meeting.

[98] I have had regard to the key principles set out in *Da Cruz* when fixing costs in this matter. I consider it is reasonable that the respondent pay \$3,500 towards Mr Y's legal costs.

⁶ [2005] ERNZ 808

[99] It is also reasonable that the respondent reimburse Mr Y the \$71.56 it cost to file his claim with the Authority.

Christine Hickey
Member of the Employment Relations Authority