

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** BVR Operations Limited trading as Brinkley Village (Applicant)  
**AND** Labour Inspector (Antoinette Baker) (Respondent)  
**REPRESENTATIVES** David and Julie-Mary Boles de Boer, advocates for the applicant  
Labour Inspector in person  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 21 September 2006  
**DATE OF DETERMINATION** 20 October 2006

DETERMINATION OF THE AUTHORITY

*The Employment Relationship Problem*

[1] On 29 May 2006 B V R Operations Limited trading as Brinkley Village (“B V R Operations”) lodged an objection with the Authority to the demand notice served on the company on 4 May 2006 under section 224 of the Employment Relations Act 2000.

[2] B V R Operations owns and operates Brinkley Village which is an international ski and country club resort in Methven.

[3] The demand notice was for a gross amount payable to a previous employee of B V R Operations, Melany Sandys, of \$617.07 for holiday pay and public holiday entitlements under the Holidays Act 2003.

[4] The Labour Inspector, Ms Baker, in the statement in reply, says after examination of the documentary evidence the obligations relating to the annual holiday pay and public holiday entitlements were calculated in accordance with the requirements in the Holidays Act 2003.

[5] Ms Baker has also asked in the statement in reply that, in the event the objection by B V R Operations is not sustained, the Authority order that the company comply with and pay the amount in terms of the demand notice.

*Grounds for the objection to the demand notice*

[6] The grounds relied on by B V R Operations were not set out in the objection lodged with the Authority. The directors of B V R Operations, David Henry Boles de Boer and Julie-Mary Boles de Boer confirmed at the investigation meeting that they were the same grounds on which they had advised Ms Baker payment was disputed.

[7] The grounds relied on are:

- (i) That for holiday pay purposes Ms Sandys' employment was intermittent and irregular.
- (ii) That holiday pay for Ms Sandys was therefore included in her hourly rate of \$12.00 per hour which was higher than would normally be paid and Ms Sandys knew about, and agreed to, payment in this manner.
- (iii) That Ms Baker incorrectly determined six public holidays were otherwise working days for Ms Sandys for the purpose of public holiday entitlements. This was because the resort restaurant does not open on public holidays and does not open on Sunday or Monday. Further Ms Sandys had no expectation of regular work and she was aware of the operational arrangements of the restaurant.

***The role of the Authority in respect of an objection***

[8] The role of the Authority in respect of an objection is set out in section 226 (1) of the Employment Relations Act 2000 which provides:

*(1) The function of the Authority in respect of an objection is to determine whether or not the whole or part of the wages or holiday pay or other money specified in the notice is due to the employee by the employer and, if so, the amount payable.*

***The issues***

[9] The issues for determination are the following:

- Is there an amount due to Ms Sandys by B V R Operations for holiday pay and public holiday entitlements?
- If so what is the amount?
- If there is an amount due to Ms Sandys as set out in the demand notice then should an order be made that B V R Operations comply with and pay the sum in terms of demand notice?

***Is there an amount due to Ms Sandys for holiday pay?***

[10] Ms Sandys did not have a written employment agreement when she was employed by B V R Operations. Her understanding was that she was required to work as a waitress in the restaurant from Tuesday to Saturday each week usually commencing work at between 5.00 – 5.30pm. Mr and Mrs Boles de Boer accepted that Ms Sandys could have normally worked on these days because that was when the restaurant usually opened but said that her hours would vary each evening. There was no official roster system in operation.

[11] Ms Sandys first day of work with B V R Operations was 26 October 2004 and her last day was 20 April 2005.

[12] Ms Sandys was told her pay rate was \$12.00 per hour. She did not accept that she was advised that rate included annual holiday pay. Mr Boles de Boer said that he felt he probably would have discussed the fact that holiday pay was included with Ms Sandys when she was appointed. He said that the hourly rate paid to Ms Sandys was higher than would usually be paid.

[13] Ms Sandys recorded her hours of work in a diary and her pay was then direct credited. She did not receive pay slips.

[14] Agreement to annual holiday pay being included with an employee's pay is only one factor to be considered under section 28 of the Holidays Act 2003 which provides the circumstances when an employer may pay holiday pay with the employee's pay. Importantly payment in such a manner is only permitted in two circumstances.

[15] The first is where employees are on a fixed term agreement of less than 12 months duration. Ms Sandys was not employed on the basis of a fixed term agreement.

[16] The second is where employees work for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 3 weeks' annual holiday.

[17] I have considered Ms Sandys pattern of work over a period of almost six months. The diary entries recording hours worked by Ms Sandys were provided to Ms Baker by B V R Operations and to the Authority for the purpose of investigating and determining the objection.

[18] I have set out the days worked by Ms Sandys in a schedule at the end of this determination. I have considered the pattern of days to determine whether Ms Sandys' employment was intermittent and irregular.

[19] The schedule shows that Ms Sandys regularly worked Tuesdays to Saturdays. Ms Sandys arrived for work on those days between 5.00 to 5.30 pm without being telephoned. I accept that when Ms Sandys worked on days other than Tuesday to Saturday and/or when she was required to commence work earlier than her usual 5.00 – 5.30pm shift Tuesday to Saturday this would have been specifically arranged with her. I accept that the number of hours Ms Sandys worked each shift varied.

[20] On occasions Ms Sandys did not work. It appears that the majority of these occasions were because Ms Sandys had time off work for various reasons rather than because there was no work available. For example Ms Sandys said that she had trouble with her wisdom teeth for much of April 2005. The restaurant was also closed for public holidays and over the Christmas holiday period.

[21] The schedule does not support that Ms Sandys employment was intermittent but indicates that there were features of regularity and predictability about Ms Sandys work patterns. She usually worked Tuesday to Saturday.

[22] On that basis I find that it would have been practicable for B V R Operations to provide Ms Sandys with 3 weeks holiday.

[23] Although it is not necessary for me to consider the other requirements in section 28 of the Holidays Act 2003 for holiday pay to be paid with regular pay it is helpful to set out what is required.

[24] Ms Sandys agreement to be paid in this way was required. The evidence does not satisfy me that there was on the balance of probabilities such an agreement. There is also a requirement that the holiday pay paid in this manner must be an identifiable component of the pay. That is not evident in this case from the wage and time records and there were no payslips issued to Ms Sandys which showed holiday pay as an identifiable component of Ms Sandys pay.

[25] Ms Sandys is therefore entitled to be paid holiday pay in accordance with section 23 of the Holidays Act 2003 of 6% of her gross earnings since the commencement of her employment. There

is to be no deduction from that amount in terms of section 23(2) (b) of the Holidays Act 2003 because B V R Operations was not entitled to pay Ms Sandys annual holiday pay in advance with each pay.

***Is there an amount due to Ms Sandys for public holiday entitlements?***

[26] Ms Baker found that days from Tuesday to Saturday were otherwise working days for Ms Sandys entitling her to be paid for public holidays that fall on those days or were transferred under section 45 of the Holidays Act 2003 during her period of employment with B V R Operations.

[27] The public holidays that Ms Baker found were otherwise working days under section 12 of the Holidays Act 2003 that Ms Sandys was entitled to be paid for were:

Canterbury Anniversary day	Friday 12 November 2004
Christmas Day	Saturday 25 December 2004
Tuesday 28 December 2004	(transferred under section 45 of the Holidays Act 2003 because Sunday 26 December 2004, Boxing Day, was not an otherwise working day for Ms Sandys).
New Year's Day	Saturday 1 January 2005
Tuesday 4 January 2005	(transferred under section 45 of the Holidays Act 2003 because Sunday 2 January 2005 was not an otherwise working day for Ms Sandys)
Good Friday	25 March 2005

[28] I have to consider whether each of the above public holidays fell on, or was transferred under section 45 of the Holidays Act 2003, a day that would otherwise be a working day for Ms Sandys.

[29] In doing so I have had regard to Ms Sandys' employment agreement and her work patterns and features of regularity as to days worked from the schedule. I conclude that there was a reasonable expectation that Ms Sandys would work when the restaurant was open from Tuesdays to Saturdays. I find that these days would, if it were not for a public holiday, have otherwise been working days for Ms Sandys. The schedule confirms that each of the public holidays above fell on or were transferred to days from Tuesday to Saturday that were otherwise working days for Ms Sandys.

[30] I do not find that the fact the restaurant was closed for Christmas and Easter periods to be a relevant consideration for determining what would otherwise be a working day for the purposes of an entitlement under section 49 of the Holidays Act 2003.

[31] Ms Sandys is entitled under section 49 of the Holidays Act 2003 to payment for the six public holidays set out in paragraph 27 above.

***What is the amount owed to Ms Sandys in light of the findings above?***

[32] The appropriate method of calculation of a relevant daily rate for the public holidays, where there is such variance in the hours Ms Sandys worked and no other rate specified in an employment agreement, should be that under section 9(3) of the Holidays Act 2003.

[33] Section 9(3) provides a formula whereby the total gross earnings for the previous 4 pay periods back from the public holiday is divided by the actual number of days worked in the period.

[34] I agree with Ms Baker's calculations as set out in the arrears schedule sent to B V R Operations for their consideration and comment.

[35] I find that on the basis of the calculations set out below there is an amount owing to Ms Sandys of \$319.62 gross.

Canterbury Anniversary	(6.7 hrs)	\$80.50
Christmas Day	(3.9 hrs)	\$46.88
Boxing Day as transferred	(3.9 hrs)	\$46.88
New Years Day	(3.9 hrs)	\$46.88
4 January as transferred	(3.9 hrs)	\$46.88
Good Friday	(4.3 hrs)	<u>\$51.60</u>

\$319.62

[36] Ms Sandys' total gross pay including the above public holiday entitlements was \$4957.62. Calculated on the basis of \$4957.62 x 6% the total owing to Ms Sandys for annual holiday pay is \$297.45.

[37] When the amounts owing for public holiday entitlements and annual holiday pay are added together there is a total amount owing to Ms Sandys of \$617.07 gross.

[38] I find that annual holiday pay and public holiday entitlements as specified in the demand notice in the sum of \$617.07 are due and owing to Ms Sandys.

### ***Compliance order***

[39] I have not upheld the objection by B V R Operations to payment to Ms Sandys of public holiday entitlements and annual holiday pay. I have found Ms Sandys is entitled to the sum of \$617.07 specified in the demand notice.

[40] It is appropriate that I order that B V R Operations comply with the demand notice and pay the sum of \$617.07.

[41] I now make a compliance order requiring B V R Operations Limited trading as Brinkleys Village to pay the sum of \$617.07 gross in terms of the demand notice served on the company on 4 May 2006. The sum is payable to Melany Sandys.

[42] This order is to be complied with by 3 November 2006.

### ***Costs***

[43] I reserve the issue of costs.

Helen Doyle  
Member of Employment Relations Authority

### Schedule

Day	Date	Worked = W Did not work = DW Public Holiday = PH
Tuesday	26 October 2004	W
Wednesday	27 October 2004	W
Thursday	28 October 2004	W
Friday	29 October 2004	W
Saturday	30 October 2004	W
Tuesday	2 November 2004	W
Wednesday	3 November 2004	W
Thursday	4 November 2004	W
Friday	5 November 2004	W
Saturday	6 November 2004	W
Tuesday	9 November 2004	W
Wednesday	10 November 2004	W
Thursday	11 November 2004	W
Friday	12 November 2004	PH
Saturday	13 November 2004	W
Tuesday	16 November 2004	DW
Wednesday	17 November 2004	DW
Thursday	18 November 2004	DW
Friday	19 November 2004	DW
Saturday	20 November 2004	DW
Tuesday	23 November 2004	W
Wednesday	24 November 2004	W
Thursday	25 November 2004	W
Friday	26 November 2004	W
Saturday	27 November 2004	W
Tuesday	30 November 2004	W
Wednesday	1 December 2004	W
Thursday	2 December 2004	W
Friday	3 December 2004	W
Saturday	4 December 2004	W
Tuesday	7 December 2004	DW
Wednesday	8 December 2004	DW
Thursday	9 December 2004	DW
Friday	10 December 2004	W
Saturday	11 December 2004	W

Tuesday	14 December 2004	W
Wednesday	15 December 2004	DW
Thursday	16 December 2004	W
Friday	17 December 2004	W
Saturday	18 December 2004	W

Tuesday	21 December 2004	W
Wednesday	22 December 2004	W
Thursday	23 December 2004	W

Restaurant closed over Christmas period  
Ms Sandys next day of work was 7 January 2005

#### January 2005

Friday	7 January 2005	W
Saturday	8 January 2005	W

Tuesday	11 January 2005	W
Wednesday	12 January 2005	W
Thursday	13 January 2005	W
Friday	14 January 2005	W
Saturday	15 January 2005	W

Tuesday	18 January 2005	W
Wednesday	19 January 2005	W
Thursday	20 January 2005	W
Friday	21 January 2005	W
Saturday	22 January 2005	W

Tuesday	25 January 2005	W
Wednesday	26 January 2005	W
Thursday	27 January 2005	W
Friday	28 January 2005	W
Saturday	29 January 2005	W

Tuesday	1 February 2005	W
Wednesday	2 February 2005	W
Thursday	3 February 2005	W
Friday	4 February 2005	W
Saturday	5 February 2005	W

Tuesday	8 February 2005	DW
Wednesday	9 February 2005	W
Thursday	10 February 2005	W
Friday	11 February 2005	W
Saturday	12 February 2005	W

Tuesday	15 February 2005	W
Wednesday	16 February 2005	W
Thursday	17 February 2005	W

Friday	18 February 2005	W
Saturday	19 February 2005	W
Tuesday	22 February 2005	W
Wednesday	23 February 2005	W
Thursday	24 February 2005	W
Friday	25 February 2005	W
Saturday	26 February 2005	W
Tuesday	1 March 2005	DW
Wednesday	2 March 2005	DW
Thursday	3 March 2005	W
Friday	4 March 2005	W
Saturday	5 March 2005	W
Tuesday	8 March 2005	W
Wednesday	9 March 2005	W
Thursday	10 March 2005	W
Friday	11 March 2005	W
Saturday	12 March 2005	W
Tuesday	15 March 2005	W
Wednesday	16 March 2005	W
Thursday	17 March 2005	W
Friday	18 March 2005	W
Saturday	19 March 2005	W
Tuesday	22 March 2005	DW
Wednesday	23 March 2005	W
Thursday	24 March 2005	DW
Friday	25 March 2005	PH
Saturday	26 March 2005	W
Tuesday	29 March 2005	W
Wednesday	30 March 2005	W
Thursday	31 March 2005	W
Friday	1 April 2005	W
Saturday	2 April 2005	DW
Sunday	3 April 2005	W
Monday	4 April 2005	W
Tuesday	5 April 2005	DW
Wednesday	6 April 2005	DW
Thursday	7 April 2005	DW
Friday	8 April 2005	DW
Saturday	9 April 2005	DW
Tuesday	12 April 2005	DW
Wednesday	13 April 2005	DW
Thursday	14 April 2005	DW
Friday	5 April 2005	DW
Saturday	16 April 2005	DW
Tuesday	19 April 2005	W

Wednesday 20 April 2005

W