



including for instance a statement in a telephone discussion between Mr Mizoguchi and Mr Boniface in which the former apparently accepted liability for the total amount but in effect sought time to pay.

[3] It is important for the Authority to observe in a case such as this that there are very real challenges in dealing with parties for whom English is a second language, both for the Authority in conducting its investigations and for the Labour Inspectorate in its important work in the community. This is a case where the Authority must conclude that the language issue has played a significant role in both the conduct of the claim when in the hands of the Labour Inspectorate and subsequently when before the Authority, and also in the very understanding that JTC has of the applicable New Zealand law.

[4] The essence of Mr Boniface's claim is that JTC failed to pay the subject employee wages in accordance with the Minimum Wage Act 1983 at the adult minimum wage rate and holiday pay pursuant to the Holidays Act 2003.

[5] In the careful and detailed work which Mr Boniface undertook to try to reach a satisfactory conclusion with JTC, he was able to obtain a commitment from JTC that it accepted that the various sums he had calculated as being due and owing in respect to holiday pay were, in the main, owing by JTC to the subject employee. On Mr Boniface's calculation (which the Authority accepts) the total amount owing under this generic head is \$8,904.50. Looked at in the round, in effect this amount has been paid by the \$10,000 payment on account and it is the balance sum of \$15,765.43 (or the bulk of it) which remains in dispute. That latter sum represents Mr Boniface's calculation in respect to the Minimum Wage Act entitlement of the subject employee.

[6] JTC dispute the Minimum Wage Act claim first because they do not appear to understand the requirement of New Zealand law (although as a consequence of Mr Boniface's efforts it seems that issue has been clarified at least for the future) and because they dispute the hours claimed to have been worked by the subject employee, specifically overtime hours.

[7] The contention by JTC that the subject employee's overtime was not approved and therefore not to be paid is not accepted by the Authority. The evidence is clear that the Head Office of JTC in Auckland knew perfectly well that Ms Iio was working very long hours because the Auckland Head Office was also working those long hours

and Ms Iio's evidence is that she regularly talked to one of the Directors of JTC Ms Hiromi Muroki later in the evening so Ms Muroki would know perfectly well that overtime hours were being worked. Furthermore, from 2008 onwards, JTC paid the subject employee an additional \$20 per day as a flat payment to compensate her for overtime hours worked on each and every day on which she worked overtime. The evidence of those payments is clear on the documentation before the Authority and in those circumstances it seems implausible for JTC to maintain that they did not know the overtime was being worked.

[8] It was also contended on behalf of JTC that they provided certain other benefits to the subject employee including funding of her Immigration Visa issues and the provision of a motor car. Ms Iio responds to those allegations directly in an email to Mr Boniface dated 22 March 2010 in which she says amongst other things *the support with both of these things were never discussed as being provided in substitution of wages or overtime pay*. I accept that evidence at face value.

[9] JTC call in aid of their position a written statement from Kei Ando who it was contended effectively replaced the subject employee in the Christchurch office of JTC. However, that is not what the statement from Kei Ando says. That statement makes it clear that in fact the new employee did not take over all of Ms Iio's duties and the evidence offered by Kei Ando that no overtime was ever worked by the new staff member is not persuasive evidence for the hours actually worked by Ms Iio because the positions are not analogous and Ms Iio's own evidence given to the Labour Inspector Mr Boniface is compelling and straightforward.

[10] JTC also maintain that the subject employee was effectively in a management role at their Christchurch office and therefore if her work routines were too onerous and particularly if she was working too many overtime hours, she had it within her own power to remedy that situation. That may well be true but it does not alter the fact that the evidence seems to clearly disclose that the subject employee did work extended overtime hours, that the employer knew those extended hours were being worked and even paid for them albeit on a minimalist basis.

[11] Finally, I refer to the contention that, because Ms Iio was employed on a salaried basis (the letter of offer makes that clear) there was no legal entitlement to overtime because the salary was supposed to encompass all the hours worked. There are two difficulties with that argument. The first is that the letter of offer makes clear

that overtime will be paid for (although it does not say how) so the principle is established that overtime is remunerated for, and is not subsumed with the salary. The second of the difficulties is that having already established that overtime is to be remunerated, it clearly must be remunerated within the terms of the law, that is, in terms of the Minimum Wage Act. I am satisfied Mr Boniface's calculations accurately establish what is owed in this particular regard.

### **Issues**

[12] In effect, by the time the investigation meeting conducted by the Authority was convened, the good work of the Labour Inspector Mr Boniface had narrowed the issues in contention significantly. At the investigation meeting, JTC committed to accepting most of the claim (including the Minimum Wage Act claim for the ordinary 40 hour week) so that really the only two issues that remained for determination were:

- (a) The payment due for overtime hours; and
- (b) Part of the annual holiday entitlement calculated by Mr Boniface.

### **Determination**

[13] For reasons which I have already advanced, I am satisfied that JTC owe Mr Boniface on behalf of the subject employee the net amount \$14,669.93 being the total claim originally filed by Mr Boniface but less the \$10,000 payment already made on account.

[14] For reasons that I have already made clear, I do not accept JTC's argument about the subject employee's overtime; I am satisfied that overtime was worked, that JTC knew overtime was being worked and that JTC paid something towards that overtime albeit, as I say, on a very minimalist basis. I accept that the correct rate of pay for this period of employment must conform to New Zealand's minimum wage legislation.

[15] Furthermore, I do not accept the qualification made by JTC in respect to annual holiday pay. In effect, JTC agree with the calculation of annual holidays made by Mr Boniface for the years 2007 and 2008 but not the subsequent years. All of Mr Boniface's calculations are based on Ms Iio's own records (which in all practical respects are superior to JTC's records) and I am satisfied that Ms Iio's records can be

relied upon. The very fact that the employer's records are completely deficient and do not comply with New Zealand law (or more accurately did not comply with New Zealand law at the relevant time) makes it difficult to prefer their calculation of holiday pay entitlement to that of the employee.

[16] Finally, Mr Boniface seeks interest and a penalty in respect to each and every one of the breaches. I am satisfied it is appropriate to award interest so that the subject employee does not miss out on the use of the money to which she is legally entitled. I determine that interest is to be paid on the total amount outstanding at the rate of 4.56%pa calculated down to the date at which payment is finally made, both in respect to the \$10,000 payment on account and in respect to the balance sum still due and owing.

[17] As to penalty, I agree that the breaches in the present case are egregious but I incline to the view that they are brought about by ignorance and language deficits rather than by deliberate wrongdoing. I defer consideration of penalty to enable JTC to pay what it owes promptly. If the total amount owing in respect of this determination is paid within 30 days of the date of the determination, time being of the essence, then no penalties will apply, but if that sum remains outstanding or any part of it remains outstanding including the payment of the interest due on the principal amounts, then I reserve leave for Mr Boniface to revert to the Authority for the consideration of penalties against JTC.

### **Costs**

[18] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority