

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 420/10  
5300876

BETWEEN                      RENA KEIGHTLEY (Labour  
Inspector)  
Applicant

AND                              RADIATOR REPAIR  
SERVICES LIMITED  
Respondent

Member of Authority:      K J Anderson

Representatives:            R Keightley, Advocate for Applicant  
M Jenkins, Advocate for Respondent

Investigation:                On the papers

Submissions Received:      29 July 2010 from the Applicant  
Nil from the Respondent

Determination:               23 September 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Claim**

[1]     Via a *Statement of Problem* received by the Authority on 30<sup>th</sup> March 2010, the Labour Inspector, Ms Rena Keightley, claims on behalf of a former employee of Radiator Repair Services Limited (“RRS”), Mr Hugh Brimmer, the gross sum of \$11,420.52. This sum represents unpaid annual holiday pay that it is alleged has not been paid to Mr Brimmer for the identified period of his employment with RRS; from 6<sup>th</sup> April 2000 to 12<sup>th</sup> August 2008. The claim is made pursuant to the Holidays Act 2003 and its predecessor, the Holidays Act 1981. The Labour Inspector also seeks that a penalty for non-compliance with the Holidays Act 2003 be ordered in addition to an award of interest from 20<sup>th</sup> January 2009 until payment is made.

[2] The company, represented by Mr Mark Jenkins, the Managing Director, has been cooperative with the investigation of the Labour Inspector with the sum claimed being compiled from the wage and time records supplied by RRS. While RRS has not lodged a statement in reply it indicated via an email from its accountant, to Ms Keightley, on 24<sup>th</sup> February 2010, that the company has ceased trading and had commenced a process to place the company into voluntary liquidation. However, as of the date of this determination, there is nothing on the Companies Office records to suggest that RRS is in liquidation.

### **The investigation of the Authority**

[3] A conference call with the parties was convened on 1<sup>st</sup> July 2010. Mr Jenkins was most candid in that he acknowledges that annual holiday pay is owed to Mr Brimmer and he accepts the calculations of the Labour Inspector. Mr Jenkins also confirmed that RRS has ceased trading and he was anticipating that the company may be placed into liquidation by Inland Revenue. Mr Jenkins also indicated that the company has substantial liabilities, including to him personally, with very little in the way of assets that can be liquidated to off-set the liabilities. While the reality of the situation appears to be that Mr Brimmer will have some difficulty obtaining the annual holiday payments due to him, the Authority is obliged to fulfil its role and determine the matter. The parties have agreed that the matter should be determined on the papers. Written submissions have been received from the applicant with the respondent given an opportunity to respond but he has elected not to do so.

### **Determination**

[4] Given that Mr Jenkins (on behalf of RRS) accepts that the calculations of the Labour Inspector are correct, and I have no reason to doubt this is so, it seems that the claim advanced by the Labour Inspector must succeed. Given that the claim goes back to April 2000, I contemplated whether a portion of the claim may be time barred by section 4(1)(d) of the Limitation Act 1950 and/or section 142 of the Employment Relations Act 2000. However, I accept that the findings in *Napier Aero Club Inc v Tayler* [1998] 1 ERNZ 241, and *Burns v Radio Pacific Ltd* [1998] 3 ERNZ 559, apply to this case, in that the obligation to pay holiday pay arose only when Mr Brimmer's employment came to an end on or about 12<sup>th</sup> August 2008, and that this date is well

within the respective limitation periods set out in the two statutes mentioned above.

This is confirmed, in particular, by s 24 of the Holidays Act 2003:

**Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen**

- (1) Subsection (2) applies if –
  - (a) the employment of an employee comes to an end; and
  - (b) the employee has not taken annual holidays or has taken only some of them.
- (2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of –
  - (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
  - (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

## **Orders of the Authority**

1. Radiator Repair Services Ltd is ordered to pay to the Labour Inspector, for the use of Mr Hugh Brimmer, unpaid annual holiday pay, pursuant to the Holidays Act 2003, of the gross sum of \$11,420.52, within 28 days of the date of this determination. Interest is to be paid on this sum at the rate of 5% per annum from 20<sup>th</sup> January 2009 until payment is made.
2. Pursuant to clause 11 of Schedule 2 to the Employment Relations Act 2000, Radiator Repair Services Limited is ordered to pay to the Labour Inspector the sum of \$70.00 being the application fee paid to the Authority.
3. Given the overall circumstances pertaining to trading position of the company, it is not appropriate that a penalty be awarded for non-compliance with the Holidays Act 2003.

**K J Anderson**  
**Member of the Employment Relations Authority**