

Note: an order for the payment of a penalty appears at p 6 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 124
5322061

BETWEEN

MELISSA MACRURY
(LABOUR INSPECTOR)
Applicant

AND

THE NUTHATCH COTTAGE
(2001) LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: M MacRury (labour inspector) in person
W Pedersen, advocate for respondent

Investigation Meeting: 4 March 2011

Determination: 30 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector seeks payment of unpaid holiday pay on behalf of Sarah Loveridge, a former employee of the Nuthatch Cottage (2001) Limited (NCL).

[2] Penalties have also been sought under s 75(2)(a) and (e) of the Holidays Act 2003 for the failure to pay annual holiday pay and for the failure to produce wage, time and leave records respectively. There was a further request for a penalty under s 4A(b)(ii) of the Employment Relations Act 2000 for the failure to provide a written employment agreement.

[3] NCL did not file a statement in reply. Its director Wendy Pedersen attended the investigation meeting and asserted that payment of Ms Loveridge's holiday pay had been made.

The claim for holiday pay

[4] Ms Loveridge worked as a part time assistant in NCL's retail outlet from 2001 until she was made redundant in 2010.

[5] This claim was commenced by the filing of a statement of problem on 8 October 2010, so the claim cannot include entitlements existing before 8 October 2004¹. Even so, Ms Loveridge said she received all her annual leave for the years 2001-2002 and 2002-2003. However her claim in respect of the period to October 2004 is out of time and cannot proceed.

[6] The calculation of the amount owed was based on Ms Loveridge's total gross earnings as supplied by the IRD. Unless otherwise specified all figures are gross figures. On figures Ms Loveridge provided to the Labour Inspector the calculation was (excluding the year 2003-2004):

2004-2005	\$20,953 x 6% =	\$1,235.58
2005-2006	\$30,825 x 6% =	\$1,849.50
2006-2007	\$34,084 x 6% =	\$2,045.04
2007-2008	\$34,695 x 8% =	\$2,775.60
2008-2009	\$28,837 x 8% =	\$2,306.96
	(Less 100.5 hours taken at \$17/hour)	
2009-2010	\$29,011.72 x 8% =	\$2,320.92
	(Less 89.5 hours taken at \$17/hour)	
Total entitlement		\$12,533.60
Less leave taken and paid for		\$ 3,230.00
Total owed		\$ 9,303.60

[7] During the investigation meeting Ms Loveridge advised that upon her redundancy she had consulted a person said to be a union representative regarding a possible personal grievance, as well as her claim for holiday pay. The representative took the matter up with Ms Pedersen. It transpired that Ms Pedersen had presented a

¹ Employment Relations Act s 142.

calculation showing that, commencing with the year ending 31 March 2003, Ms Loveridge was owed a total of \$4,912.50. Over the period for which Ms Loveridge's claim is not time barred, the amount owed was \$4,080. The amount Ms Pedersen identified in her calculation was paid in full, although at the time Ms Loveridge did not agree it was the full amount owed. Ms Loveridge sought records confirming the calculation, which were not provided.

[8] Ms Loveridge said she diarised the dates on which she took leave. No dates were diarised in the period 2004 – 2008.

[9] However Ms Pedersen said leave was taken and paid for during the annual Christmas shutdown period of two weeks, with the untaken remainder being reflected in the calculation she had provided. Ms Loveridge accepted that there was a Christmas shutdown from the Christmas 2005-2006 period, and did not deny being paid during the shutdown. Accordingly allowance must be made for days paid for as annual leave (and excluding statutory holidays) over the shutdown periods.

[10] At the investigation meeting I directed Ms Pedersen to provide the records on which she based the calculations she presented in her earlier discussions with Ms Loveridge's then-representative. This would necessarily have included information about what leave had already been taken and paid for, and should have incorporated information about payment over the shutdown periods. In the light of Ms Pedersen's failure to file a statement in reply I had already warned of the consequences of failing to respond to the Authority. Ms Pedersen has not provided the records and has not responded to further approaches from the Authority regarding the matter.

[11] I am left with an acknowledgement that there were Christmas shutdowns and that at least some payment was made. The IRD records of Ms Loveridge's total annual earnings indicate she worked part time, although it also appears from such records as were available that by 2009 she worked near to full time hours. I reflect these matters by assessing the payments Ms Loveridge received in respect of the shutdown periods as two full days per period, paid at \$17 per hour. The calculation is $10 \times 8 \times \$17 = \$1,360$.

[12] The amount remaining is \$9,303.60 - \$4,080 - \$1,360 = \$3,863.60. NCL is therefore ordered to pay to Ms Loveridge the sum of \$3,863.60

Claims for penalties

1. Failure to pay holiday pay

[13] Section 75 of the Holidays Act provides for liability to the payment of a penalty when certain provisions of the Act are breached. Subsection (2)(a) lists the provisions relating to an employee's entitlement to and payment for annual holidays. I have assumed that the alleged failure to pay holiday pay was intended as a reference to breaches of ss 24 and 27, which are included in the sections identified in s 75(2)(a).

[14] Actions for the recovery of penalties under the Holidays Act must be commenced within 12 months after the earlier of when the cause of action became known or should reasonably have become known.² The present action was commenced on the filing of the statement of problem in the Authority 8 October 2010. The cause of action became known at the latest when Ms Loveridge did not receive holiday pay in her final pay, being the date on which she was made redundant. That appears to have been in November 2009, so that the action was commenced in time.

[15] Payment of what Ms Pedersen considered to be the outstanding amount was made. Had Ms Pedersen provided the records in support when Ms Loveridge first sought them it is possible this matter could have been resolved then. Unfortunately she did not do so. I weigh in her favour the efforts she made to effect payment, but the effect of my findings here is that she breached the Holidays Act by failing to make payment in full.

[16] I therefore order that NCL pay a single penalty in the sum of \$500.

2. Failure to provide wage time and leave records

² Holidays Act s 76(5)

[17] Section 75(2)(e) of the Holidays Act refers to s 83 of the Act. Section 83 refers in turn to compliance with ss 81 and 82. Section 82 sets out the obligation to provide access to the record by Labour Inspectors among others.

[18] By letter dated 26 May 2010 the Labour Inspector requested a copy of the wage, time and leave records for Ms Loveridge. The letter was sent to 197 Ranolf St Rotorua, the address from which NCL had been trading. However what remained of Ms Pedersen's business had moved to premises at 191 Ranolf St Rotorua.

[19] By notice dated 22 July 2010 the Labour Inspector required the production of all wage, time and holiday records, and warned of the possibility of a penalty in the event the records were not provided. The notice was sent by email and by post. Ms Pedersen said she had been experiencing difficulties downloading emailed material from the Labour Inspector, and had advised her of this. The Labour Inspector denied being given that advice. The notice was again posted to 197 Ranolf St.

[20] Although I find unsatisfactory Ms Pedersen's failure to produce records, a high standard of proof of breach must be met before a penalty is awarded. Regarding the failure in respect of which a penalty is sought I am not satisfied to a suitable standard that Ms Pedersen received the Labour Inspector's requests for the production of records, and no penalty is ordered.

3. Breach of s 4A of the Employment Relations Act

[21] It was submitted that NCL's failure to provide Ms Loveridge with a written employment was a breach of the good faith obligation in s 4 of the Employment Relations Act, and that a penalty was payable under s 4A.

[22] Section 4A provides for penalties for breaches of good faith that are:

- . deliberate, serious or sustained; or
- . intended to undermine bargaining; or
- . intended to undermine an employment relationship.

[23] There was no evidence that the failure to provide a written employment agreement reached the level required to warrant a penalty under s 4A. I make no order.

Summary of orders

[24] NCL is ordered to pay to the Labour Inspector for the use of Ms Loveridge the sum of \$3,863.60 (gross) as unpaid holiday pay.

[25] I further order that interest be paid on that amount calculated as 4.6% from the date of termination of Ms Loveridge's employment to the date of payment.

[26] NCL is ordered to pay a penalty to the crown in the sum of \$500.

Costs

[27] NCL is further ordered to reimburse the Department of Labour for the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority